

THE INDIAN LAW REPORTS ALLAHABAD SERIES



सत्यमेव जयते

CONTAINING ALL A.F.R. DECISIONS OF THE
HIGH COURT OF JUDICATURE AT ALLAHABAD

2024 - VOL. IX
(SEPTEMBER)

PAGES 1 TO 1592

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF UTTAR PRADESH
COMPOSED AT INDIAN LAW REPORTER SECTION, HIGH COURT, ALLAHABAD.

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(2024) 9 ILRA 6
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2024

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Criminal Misc. Bail Cancellation Application No.
 69 of 2023

Farook **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Akash Dwivedi, Rajiv Lochan Shukla,
 Sanjay Shukla

Counsel for the Opposite Parties:

Ambikesh Kumar Sharma, G.A., Shashi
 Kant Shukla

Criminal Law - Indian Penal Code, 1860 - Sections 420, 406, 504 & 506 - Cancellation of Bail - Code of Criminal Procedure, 1973 - Section 82 - Informant challenged order passed by learned Additional District Judge granting bail to opposite party - Perusal of record indicates opposite party cleverly filed several legal proceedings with distinct names to evade his arrest/presence before Police/Court - Such conduct demonstrates he did not approach Court with clean hands. (Para 21, 32)

Criminal history and gravity of offence of opposite party was not considered by learned Court - Learned Court ignored fact that opposite party had duped informant for Rs.31,50,000/- . Even after receiving money, he did not execute sale deeds of flats in favour of informant - He violated undertaking given by him before Court - Despite his admission that he received Rs. 4,40,000/- from informant, he never offered to return money to him - He filed incorrect affidavit knowing that it was not a matrimonial dispute - To commit a

fraud, he gave two cheques of Rs.31,50,000/- to informant, dishonoured due to insufficiency of fund in his account. (Para 33, 34)

After granting bail, he visited house of informant, threatened informant and his father with life and asked them to withdraw present case and pressurised for amicable settlement - Captured in CCTV footage - Misuse of liberty of bail by opposite party - Impugned order set aside - Directed to surrender before Court concerned. (Para 37, 42)

Bail cancellation application allowed. (E-13)

List of Cases cited:

1. Satender Kumar Antil Vs Central Bureau of Investigation & anr., 2022 SCC OnLine SC 825
2. Abdul Basit Vs Abdul Kadir Choudhary, 2015 SCC (Cri) 257
3. Panchanan Mishra Vs Digambar Mishra passed in Criminal Appeal Nos.107108 of 2005 (Arising out of SLP (Crl.) Nos.33153316/2004)
4. Parul Tyagi Vs Guarav Tyagi, 2023 SCC OnLine All 2684
5. Smt. Pooja Pal Vs St. of U.P., (Criminal Misc. Bail Cancellation Application No.38904 of 2016)
6. Himanshu Sharma Vs St. of M.P. passed in Criminal Appeal No(S). Nil of 2024, arising out of SLP (Crl.) No (s). 786 of 2024, (Para 12)
7. Abdul Basit Vs Abdul Kadir Choudhary, 2015 1 SCC (Cri) 257, (Para 20 to 23)

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Heard Sri Rajeev Lochan Shukla, learned Counsel for the applicant/ informant, Sri Shashikant Shukla, learned Counsel for the opposite party No.2/accused and learned A.G.A. for the State.

2. The applicant Farook has filed the present Criminal Misc. Bail Cancellation Application seeking cancellation of bail granted to opposite party no.2 namely Zakir Ali @ Hazi Zakir (hereinafter referred to as the opposite party) vide order dated 21.09.2022 passed by learned Special Judge, SC/ST Act, Moradabad in Second Bail Application No.3413 of 2022 arising out of Case Crime No. 1166 of 2020, under Sections 420, 406, 504, 506 of IPC relating to Police Station Civil Line, District Moradabad.

3. It would be pertinent to summarise the case of the prosecution, unfolded in the First Information Report. The applicant Farook (hereinafter referred to as the informant) lodged a First Information Report against the opposite party and one Vimal with the following averments that:

3.1 The opposite party entered into an agreement with the informant for sale of three flats/houses ad-measuring 52-59 square meter situated at Sonakpur, Tehsil and District Moradabad @ Rs.8 lakhs per flat. Rs.4,40,000/- were transferred through RTGS to the bank account of the opposite party on 03.10.2019. Two cheques amounting to Rs.4,50,000 was given later which were duly encashed. Cash was also paid to the opposite party on different dates. In all, Rs.31,50,000/- was paid by the informant to the opposite party.

3.2 The informant repeatedly requested the opposite party to execute a sale deed. Based on the directions of the opposite party, he prepared three sale deeds. The opposite party signed and affixed his thumb impression only on one sale deed and said that remaining sale deeds would be signed at the registry

office. The informant waited at the registry office but the opposite party did not turn up.

3.3 Thereafter, the informant made regular requests with the opposite party to execute the sale deeds. The opposite party executed a document promising to return the entire amount of Rs. 31,50,000/- to the informant by 27.03.2020 but he failed to return the money.

3.4 The opposite party gave two cheques of Rs.15,00,000/- and 16,50,000/- respectively. These cheques were presented before the bank for payment but were dishonoured due to insufficient funds in the account of the opposite party. When the informant informed the opposite party about this, he promised to execute sale deed in his favour in the near future.

3.5 Upon inspection of relevant records in the registry office in relation to the disputed property, the informant came to know that the opposite party had already executed a registered agreement for sale on 07.11.2019 in favour of Amar Pal and Prem Pal, the real brothers of co-accused, Vimal, much before the transaction with the informant. When the informant confronted the opposite party and asked to return his money, he hurled abuses and threatened to life. Kamal Ahmad and Farjand were the witnesses before whom the money was paid to the opposite party. The opposite party and co-accused Vimal duped the informant for a huge amount of Rs.31,50,000/-.

4. Sri Rajeev Lochan Shukla, learned Counsel appearing on behalf of the informant submitted that even after receiving Rs.31,50,000/- from the informant, the opposite party neither executed a sale deed of the flats nor returned the money to the informant. The

opposite party committed fraud and cheated the informant.

5. He submitted that to evade his arrest and to avoid his appearance in the trial and with malafide intentions, the opposite party filed Criminal Misc. Writ Petition No. 11964/2020. False information was given to this Court that parties were at advanced stage of arriving at a compromise. Based on this information, the matter was adjourned. Since negotiations for arriving at compromise never took place, the said petition was dismissed on 25.11.2020. Thereafter, he filed a Criminal Misc. Anticipatory Bail Application No.11760/2021 (Hazi Zakir Vs.State of U.P.). An undertaking was given on behalf of the opposite party that he would fulfill his part of the contract provided the payment was made. On such undertaking, the opposite party was granted interim protection by this Court. Finally, the anticipatory bail application was dismissed for want of prosecution. While on one hand he misled the Court, on the other hand, he violated the undertaking given before this Court.

6. He further submitted that the opposite party then moved a second anticipatory bail application before the District Judge, Moradabad which was rejected vide order dated 28.03.2022. The opposite party preferred another Anticipatory Bail Application No.3956/2022 (Hazi Zakir @ Zakir Ali Vs. State) before this Court. During the pendency of aforesaid application, he filed an Application u/s 482 Cr.P.C. No.17053/2022 (Zakir Vs. State of U.P. and Another) for quashing the proceedings. This Court disposed off the said application and granted liberty to the opposite party to surrender before the trial Court within a

period of two weeks. The trial Court was directed to decide his bail application in view of the law laid down in the case of **Satender Kumar Antil vs. Central Bureau of Investigation and another, 2022 SCC OnLine SC 825**. He misused the liberty and did not surrender before the trial Court within the stipulated time.

7. He further contended that concealing all the aforesaid chain of litigation and the orders passed thereof, the opposite party moved second bail application before the District Judge, Moradabad. The opposite party obtained bail, concealing the material facts. The impugned order dated 21.09.2022, granting bail to the opposite party is challenged in the present application, seeking cancellation of bail to the opposite party.

8. It is further submitted that the learned Sessions Judge did not consider the criminal history of the opposite party in the correct perspective. Learned Sessions Judge erroneously passed the bail order without considering the material aspect of the matter. He completely lost sight of the facts that the opposite party had received Rs. 31,50,000 from the informant. The opposite party defrauded the informant and misrepresented that he had no criminal history to his credit. He repeatedly made false promises with the informant that he would execute the sale deeds in his favour, with malafide intentions and to not to return the hard-earned money of the informant. He intentionally gave two cheques to him knowing that sufficient funds were not available in his account to honour those cheques. The learned Court did not consider the conduct of the opposite party and ignored the documentary evidence about payment of Rs. 31,50,000 to him. The bail order has been passed in a

casual manner. The learned Court did not even consider the factual matrix of the matter.

9. It is also submitted that the opposite party was granted bail on 21.09.2022. Thereafter on 13.04.2023, at around 2.00 PM, he visited the informant and threatened him and his father to life, if they did not withdraw the proceedings instituted by them against him. On 15.04.2023, he again pressurised to withdraw the case. These incidents were captured in a CCTV footage. On 19.04.2023 at around 10.00 AM, he scolded the informant and said that if the case is not withdrawn, he would kill him. An FIR came to be registered against him as Case Crime Number 0387/2023 under Section 506 IPC at Police Station, Civil Lines Moradabad. The opposite party is making every effort to threaten and tamper the witnesses. Learned Counsel drew the attention of this Court to a letter sent by the Court concerned to the S.S.P., Moradabad to the effect that proper security be provided to the informant so that he may depose fearlessly before the trial Court.

10. It is also submitted by learned counsel for the informant that there is a history of Case Crime Number 252/2022, under Section 420, 406, 323, 307, 504, 506, 315 and 354 of IPC, Police Station Pakbada, District Moradabad. Charge sheet came to be filed against the opposite party after the investigation. In the present proceedings, before this Court, it is pleaded by the opposite party in his supplementary counter affidavit, that it is a matrimonial dispute. Perusal of the first information report of the said case discloses that one Mrs. Nazrana Khan is the informant of this case. The opposite party was chargesheeted under Section 406 of IPC. The facts of this

case are based on the transaction of money. Thus, the opposite party filed wrong affidavit and committed cheating with this Court also.

11. It is further submitted that the opposite party has admitted that he received Rs.4,40,000 from the informant but he never offered to return that amount to the informant. He is keeping this amount with him without any authority. The opposite party never had any intention to sell flats to the informant. The opposite party violated the undertaking given before this Court and obtained interim protection on the basis of false statement.

12. Sri Rajeev Lochan Shukla, learned Counsel made a straightforward argument that documents are brought on record to demonstrate the malpractices adopted by the opposite party to further deceive the informant by filing different proceedings before this Court with distinct names. It is argued that the opposite party has cleverly filed a Criminal Misc. Writ Petition No.11964/2020 as **“Zakir Ali”** as the petitioner. He filed a Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C. No.11760/2021 as applicant as **“Hazi Zakir”**. Thereafter, he filed Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C. No.3956/2022 as **‘Hazi Zakir @ Zakir Ali’**. Further, Application u/s 482 No.17053/2022 was filed as applicant **‘Zakir’**. Instituting these proceedings before this Court with distinct names demonstrates the malafides of the opposite party and indicates that he wanted to obtain relief from this Court any how. He did it deliberately so that the informant would not know about these proceedings and could not contest them. It is not controverted by the opposite party in his pleadings.

13. To buttress his argument, learned Counsel Sri learned counsel relied on the following judgments:

(i) Abdul Basit Vs. Abdul Kadir Choudhary, 2015 SCC (Cri) 257

(ii) Panchanan Mishra Vs. Digambar Mishra passed in Criminal Appeal Nos.107108 of 2005(arising out of Special Leave Petition (Crl.) Nos.33153316/2004)

Learned counsel also relied on the following judgments of this Court:

(i) Parul Tyagi Vs. Guarav Tyagi, 2023 SCC OnLine All 2684

14. Sri Rajeev Lochan Shukla, learned counsel referred the judgment of this Court passed in Smt. Pooja Pal Vs. State of U.P. in Criminal Misc. Bail Cancellation Application No.38904 of 2016 and submitted that the opposite party appears to be manifestation of the age old quote that ‘too err is human to repent is divine but to persist is devilish.’

15. Sri Shukla concluded his arguments that the impugned order dated 21.09.2022, granting bail to the opposite party, is liable to be cancelled because of his misconduct, and concealment and misrepresentation of the facts, before district Courts as well as before this Court. While enjoying the liberty of bail, he is threatening and tampering the witnesses. The opposite party has a criminal history of 11 cases that have not been properly considered by the learned Court granting him bail.

16. Sri Shashi Kant Shukla, learned Counsel for the opposite party, vehemently opposed the prayer for cancellation of bail application. It is submitted that the informant and the

opposite parties are neighbours. Therefore, no question arises for the opposite party to create a dispute with the informant. Due to ‘*parti bandi*’ of the village and at the instance of the persons having vested interest against the opposite party, false allegations have been made against him. Since the informant has already initiated criminal proceedings against the opposite party, therefore, he had no occasion to visit the house of the informant. The opposite party never threatened the applicant or his father. The first information report lodged by the informant under Section 506 IPC is based on concocted facts. It is also submitted that so far as the criminal history to the credit of the opposite party is concerned, most of the cases have been lodged against him after registering the present case. The criminal history is properly explained by the opposite party. Learned Court while granting bail to the opposite party has considered the criminal history to his credit. So far as the cases registered under the Negotiable Instrument Act are concerned, in some cases, the opposite party has been acquitted and some cases are still pending for consideration. The informant has paid Rs.4,40,000/-as advance to the opposite party through RTGS but the remaining amount as per agreement was not paid by him. The opposite party never denied to execute sale deeds in his favour.

17. It is submitted that so far as the receipt of Rs.31,50,000/- is concerned, it is a forged document prepared by the informant. Civil proceedings are also pending before the competent Court being the matter of civil nature. The opposite party is cooperating before the trial Court. He never misused the liberty of bail.

18. I have perused the record.

19. The Hon'ble Apex Court in ***Himanshu Sharma Vs. State of Madhya Pradesh passed in Criminal Appeal No(S). Nil of 2024*** arising out of SLP (Crl.) No (s). 786 of 2024 dealt with powers vested under Section 439(2) Cr.P.C. to cancel the bail of an accused. The Hon'ble Court observed that:

"12. Law is well settled by a catena of judgments rendered by this Court that the considerations for grant of bail and cancellation thereof are entirely different. Bail granted to an accused can only be cancelled if the Court is satisfied that after being released on bail, (a) the accused has misused the liberty granted to him; (b) flouted the conditions of bail order; (c) that the bail was granted in ignorance of statutory provisions restricting the powers of the Court to grant bail; (d) or that the bail was procured by misrepresentation or fraud."

20. In ***Abdul Basit Vs. Abdul Kadir Choudhary, 2015 1 SCC (Cri) 257***, the Hon'ble Apex Court further observed that:

"20. In Gurcharan Singh case (supra) this Court has succinctly explained the provision regarding cancellation of bail under the Code, culled out the differences from the Code of Criminal Procedure, 1898 (for short, "old Code") and elucidated the position of law vis-à-vis powers of the Courts granting and cancelling the bail. This Court observed as under:

"16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position under Section 498, Cr.P.C. of the old Code. That is to say, even if a Magistrate refuses to grant bail to

an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under Sub-section (1) to be arrested and may commit him to custody. In other words, under Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 489(2). Under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so, it must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused, person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to

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

21. In this context, it is profitable to render reliance upon the decision of this Court in *Puran v. Rambilas and Anr.*, (2001) 6 SCC 318. In the said case, this Court held that the concept of setting aside an unjustified, illegal or perverse order is absolutely different from the cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation. In *Dr. Narendra K. Amin v. State of Gujarat and Anr.*, (2008) 13 SCC 584, the three-Judge Bench of this Court has reiterated the aforesaid principle and further drawn the distinction between the two in respect of relief available in review or appeal. In this case, the High Court had cancelled the bail granted to the appellant in exercise of power under Section 439(2) of the Code. In appeal, it was contended before this Court that the High Court had erred by not appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench while affirming the principle laid down in *Puran* case (*supra*) has observed that when irrelevant materials have been taken into consideration by the Court granting order of bail, the same makes the said order vulnerable and subject to scrutiny by the appellate Court and that no review would lie under Section 362 of the Code. In essence, this Court has opined that if the

order of grant of bail is perverse, the same can be set at naught only by the superior Court and has left no room for a review by the same Court.

22. Reverberating the aforesaid principle, this Court in the recent decision in *Ranjit Singh v. State of M.P. and Ors.*, 2013 (12) SCALE 190 has observed that:

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

23. Therefore, the concept of setting aside an unjustified, illegal or perverse order is different from the concept of cancellation of a bail on the ground of accused's misconduct or new adverse facts having surfaced after the grant of bail which require such cancellation and a perusal of the aforesaid decisions would present before us that an order granting bail can only be set aside on grounds of being illegal or contrary to law by the Court superior to the Court which granted the bail and not by the same Court."

21. The informant is challenging the order dated 21.09.2022 passed by the learned Additional District Judge granting bail to the opposite party. After being released on bail the opposite party threatened the informant and his father to withdraw present proceedings otherwise they would be killed by him. Resultantly, an FIR under Section 506 IPC came to be registered against the opposite party. After the investigation, he was charge-sheeted.

22. The opposite party filed Criminal Miscellaneous Writ Petition No. 11964 of 2020 Zakir Ali vs State of U P and 2 others. Considering the arguments of the petitioner Counsel, the following order was passed on 10.11.2020 :-

“Learned Counsel for the petitioner states that parties are at an advance stage of arriving at a compromise, and, therefore, the matter be adjourned.

As prayed by him, put up as fresh on 25.11.2020.”

On 25.11.2020, in the aforesaid writ petition, following order was also passed:-

“Heard Sri Krishna Dutt Tiwari, learned Counsel for the petitioner, Shri Pawan Kumar Shukla & Shri Sanjay Shukla learned Counsel for the informant and the learned A.G.A.

This writ petition has been filed, seeking a writ of mandamus, directing the respondent concerned, not to arrest the petitioner, with a further prayer for quashing the impugned FIR dated 23.08.2020 registered as Case Crime No.1166 of 2020 under Sections 420, 406, 504 and 506 I.P.C., P.S. Civil Lines, district Moradabad.

Learned Counsel for the petitioner submits that FIR has been lodged on false / vexatious / mischievous allegations, no offences are made out, FIR be quashed.

Learned AGA has opposed the submission.

The correctness of the allegations would have to be tested on the basis of the materials collected during the course of investigation as by insertion of notification No.1058/79-V-1-19-1 (Ka)-20-2018 dated 6th June 2019, an alternate remedy is available to the petitioner to seek for an anticipatory bail/bail as he may be advised.

The writ petition is dismissed.”

23. Perusal of the aforesaid order discloses that wrong information was given to this Court that the parties were at an advanced stage of a compromise. On the next date of the hearing, the Court was not informed about the outcome of the alleged compromise proceedings. It is also to be noted that on 25. 11. 2020, the opposite party argued the Writ Petition on its merits.

24. After disposal of the aforesaid proceedings, the opposite party filed Criminal Misc. Anticipatory Bail Application u/s 438 Cr.PC No. 11760 of 2021 Hazi Zakir vs State of U P. The opposite party gave an undertaking, which is noted in the order dated 18.06.2021. It reads thus:-

“Learned Counsel for the applicant on behalf of the applicant on taking instructions undertakes that the applicant shall fulfil his part of the contract provided the payment is made. Counsel for the first informant also was present when the undertaking was given.

Place this case on 6.7.2021 as fresh. In the meantime, the parties may try to conclude the matter amicably.

In the meantime, it is provided that no coercive measures shall be taken against the applicant in the aforesaid case provided: (a) the applicant has already not been arrested; and (b) the applicant continues to cooperate with the Investigating Officer by presenting himself before him as and when required for the purpose of investigation.”

25. It appears that on the basis of the undertaking given by the opposite party, an interim protection was granted to him by this Court. On the next date of hearing, none appeared for the opposite party and on

30.07.2021 & 14.12.2021 following orders were passed:-

30.07.2021

“In spite of repeated calls, no one is present on behalf of the applicant to extend the argument. Sri Hari Om Sharan Tiwari, learned Counsel for the informant is present.

Since no one is present on behalf of the applicant, therefore, interim order granted by coordinate Bench of this Court dated 18.06.2021 comes to an end.

Put up this case on 30th August, 2021 as fresh.”

14.12.2021

“1. Case called out in revised list.

No one appears on behalf of applicant to press this application for anticipatory bail.

2. However, learned A.G.A. for State and Mr. Hari Om Sharn, learned Counsel representing first informant are present.

3. Record shows that applicant was not present on 03.07.2021 and 24.09.2021 when the matter was taken up.

4. In view of above, present application for anticipatory bail is dismissed for want of prosecution.”

26. Thereafter, the opposite party filed an Anticipatory Bail Application before learned Session Judge, Moradabad. It was dismissed on 28.03.2022.

27. Feeling aggrieved by the aforesaid order, the opposite party filed Criminal Misc. Anticipatory Bail Application u/s 438 Cr.PC No. 3956 of 2022 before this Court.

28. During the pendency of the aforesaid application, the opposite party filed another application under Section 482 No. 17053 of 2022, Zakir vs State of U P

and another. This application was disposed off vide order dated 06.07.2022 of this Court with the following observation:-

“On due consideration to the submissions of learned Counsel for the parties', it is provided that in case, the applicant appears before the trial Court within a period of two weeks from today and files bail application, the same shall be decided expeditiously in view of law laid down in the case of Satender Kumar Antil versus Central Bureau of Investigation and another (supra).

The application is disposed off accordingly.”

29. Pursuant to the aforesaid order of this Court, the opposite party did not surrender before the Court concerned. Process u/s 82 Cr.PC was issued by the Court to ensure his appearance. It appears that the opposite party moved second bail application before the court concerned after the expiry of the period of two weeks granted by this Court. The learned Special Judge (SC/ST Act), Moradabad, by the impugned order dated 21.09.2022, allowed the application with the following observation:-

“प्रस्तुत मामले में प्रार्थी/अभियुक्त व अन्य सह अभियुक्त विमल के विरुद्ध प्रथम सूचना रिपोर्ट दर्ज करायी गयी थी, किन्तु दोराने विवेचना कथित विमल के विरुद्ध कोई साक्ष्य न पाते हुये उसका नाम विवेचना से पृथक कर दिया गया है। प्रस्तुत मामले में आरोप पत्र न्यायालय में प्रस्तुत किया जा चुका है। मामले में अब कोई विवेचना शेष नहीं है। प्रार्थी/ अभियुक्त के विरुद्ध धारा 138 एन०आई० एक्ट से सम्बन्धित नौ प्रकरण तथा उक्त प्रकरण के अतिरिक्त एक अन्य आपराधिक प्रकरण पंजीकृत होने का आपराधिक इतिहास अभियोजन की ओर से प्रस्तुत किया गया है, किन्तु अभियोजन द्वारा किसी भी मामले में दोषसिद्ध होना नहीं बताया गया है। मामला मजिस्ट्रेट न्यायालय द्वारा विचारणीय है। प्रार्थी/ अभियुक्त दिनांक 21-7-2022 से न्यायिक अभिरक्षा में

कारागार में निरुद्ध है। अतः अभियुक्त के कारागार में निरुद्ध होने तथा मामले के समस्त तथ्यों परिस्थितियों को दृष्टिगत रखते हुए केस के गुण-दोष पर कोई टिप्पणी किये बिना मेरा राय में आवेदक/अभियुक्त को निम्न शर्तों के अधीन जमानत पर छोड़े जाने का पर्याप्त आधार है।”

30. It is pertinent to mention here that it was averred by the opposite party in his bail application that he had no criminal history to his credit. Perusal of the record, it emerges that the opposite party had criminal history of as many as 11 cases to his credit. He misrepresented his criminal history in his bail application.

31. Another aspect about the conduct of the opposite party is brought to the notice of this Court by Sri Rajiv Lochan Shukla, learned Counsel for the informant that the opposite party filed a Criminal Misc. Writ Petition No.11964/2020 as **“Zakir Ali”** (as petitioner). He filed a Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C. No.11760/2021 as applicant as **“Hazi Zakir”**, thereafter, he filed Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C. No.3956/2022 as **‘Hazi Zakir @ Zakir Ali’**. another Application u/s 482 No.17053/2022 was filed by him as **‘Zakir’**.(applicant)

32. Perusal of the relevant record of aforesaid proceedings indicates that the opposite party very cleverly filed several legal proceedings before this Court with distinct names to mislead not only the informant but also this Court. It seems that he did so for two reasons. Firstly, to anyhow obtain relief from this Court and secondly, to prevent the informant from contesting those proceedings. Such conduct of the opposite party demonstrates that he did not approach this Court with clean hands.

33. So far as the impugned order dated 22.09.2022 is concerned, it reflects that the criminal history of the opposite party was not duly considered by the learned Court. Besides, learned Court did not express any opinion that it has duly considered the merits of the case. Learned Court completely lost sight that the opposite party had duped the informant for Rs.31,50,000/-. The opposite party, even after receiving the aforesaid money, did not execute the sale deeds of flats in favour of the informant. The opposite party violated the undertaking given by him before this Court. He filed several petitions just to evade his arrest during the investigation and the trial. Despite his admission that he received Rs. 4,40,000/- from the informant, he never offered to return the said money to him. He continued to enjoy the fruits of this money and continues to do so till today. The intention of the opposite party was clearly apparent to not return the money to the informant.

34. Further, the opposite party referred to the criminal case registered against him as a matrimonial dispute. Perusal of the record goes to show that it was an incorrect pleading. It was a dispute based on a money transaction. A charge-sheet under Section 406 of IPC came to be filed against him. The opposite party filed an incorrect affidavit before this Court knowing that it was not a matrimonial dispute.

35. In view of the above, the entire conduct of the opposite party shows about his modus operandi to dupe innocent persons and to obtain the favourable orders from the Court concerned, either by hook or by crook.

36. On behalf of the informant, a document executed on a stamp of Rs.100/-

is brought on record. It is submitted that this document is the receipt of Rs.31,50,000/- given by the opposite party. This document bears the signatures of the informant and the opposite party. The learned trial Court completely ignored this document and the fact that in this matter, the transaction of Rs.31,50,000/- was involved. It was a specific allegation of the informant that even after receiving Rs.31,50,000/- the opposite party did not execute sale deed of flats in favour of the informant. He did not return the money to the informant. To commit a fraud, he gave two cheques of Rs.31,50,000/- to the informant which were dishonoured due to insufficiency of fund in the account of the opposite party. This conduct also indicates the intention of the opposite party that he never wanted to repay the amount of Rs.31,50,000/- to the informant.

37. Vide the impugned order, the opposite party was granted bail on 21.09.2022. An FIR relating to Crime No.387/2023 is brought on record. Perusal of this FIR goes to show that on 13.04.2023, at around 2.00 pm, the opposite party visited the house of the informant. He threatened the informant and his father with life and asked them to withdraw the present case. Further, on 15.04.2023 at around 8.30 hours he pressurised the informant for amicable settlement. The visit of the opposite party to the house of informant was captured in CCTV footage. After the investigation, a charge sheet came to be filed against the opposite party. This conduct shows that the opposite party has misused the liberty of the bail and he is repeatedly trying to tamper the witnesses so that they cannot depose before the Court against him.

38. It is also submitted on behalf of the informant that the opposite party has

criminal history of 11 cases. Perusal of the impugned order dated 21.09.2022 goes to show the Court was informed that there was no criminal history to the credit of the opposite party. The learned trial Court while passing the impugned order, merely on the basis that although opposite party has criminal history to his credit but he was not convicted so far in any case, granted bail to the opposite party. The learned trial Court did not even consider the gravity of the offence.

39. So far as the argument advanced by the learned Counsel for the opposite party that opposite party had not misused the liberty of the bail is concerned, it is apparent that charge sheet under Section 506 of IPC came to be filed against him. He extended life threats to the informant and his father. He mounted pressure upon them to arrive at an amicable solution in the matter. In his supplementary counter affidavit filed before this Court, the opposite party submitted that the Case Crime No.252/2022 under Sections 420, 406, 323, 307, 504, 307, 506, 315, 354 of IPC was a matrimonial dispute. Whereas perusal of the conclusion arrived by the Investigating Officer while submitting the charge sheet, does not seem to be correct. Therefore, it is apparent that the opposite party filed the affidavit with wrong facts before this Court also.

40. In view of above, I am of the considered view that the opposite party has misused the liberty of bail. He tampered with the evidence and harassed the witnesses by threatening the informant and his father. The conduct of the opposite party also shows that he filed several litigation one after another with distinct names to evade his arrest/presence before the Police/Court. Learned trial Court also

sent a letter to S.S.P., Moradabad for providing adequate security to the informant so that he can fearlessly attend the Court to record his statement.

41. The learned trial Court while passing the impugned order did not consider the material aspect of the matter and ignored certain documents as well the criminal history of the opposite party. The learned trial Court passed the impugned bail order taking into consideration the incorrect facts of the case, therefore, the bail cancellation application deserves to be allowed.

42. Having considered the facts and circumstances of the case, the material available on record and the observations made above, the Court is of the opinion that the impugned bail order dated 21.09.2022 passed by learned Special Judge, SC/ST Act, Moradabad in the aforesaid case crime cannot be sustained. Accordingly, the bail cancellation application is allowed and the impugned bail order dated 21.09.2022 is hereby set aside. The bail granted to opposite party no.2-Zakir Ali @ Hazi Zakir in aforesaid case crime stands cancelled.

43. The opposite party Zakir Ali @ Hazi Zakir is hereby directed to surrender within 10 days before the Court concerned.

44. Any observation made above shall not be treated as any finding on the merit and shall not prejudice the trial.

45. Registrar (Compliance) is also directed to communicate this order to the Chief Judicial Magistrate, Moradabad for necessary compliance forthwith.

(2024) 9 ILRA 17
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2024

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. IInd Bail Application No. 1174 of
2024

Anil Kumar **...Applicant**
Versus
State of U.P. & Ors. **...Opposite Parties**

Counsel for the Applicant:
Sri Ravikant Shukla, Sri Santosh Kumar
Pandey, Sri Yadavendra Dwivedi

Counsel for the Opposite Parties:
G.A.

A. Criminal Law - Criminal Procedure Code,1973-Section 439-Indian Penal Code,1860-Sections 376,506 & 452 - Sections 3/4 of the POCSO Act-PW-1 and PW-2 did not support the prosecution in court, reducing the likelihood of conviction-the prosecution pointed out that the victim initially testified against the applicant, but during a delayed cross-examination(conducted after two months nine days), she resiled from her statement-Held, the evidence of hostile witnesses should not be entirely disregarded if found credible upon scrutiny-cited concern over delays in cross-examinations, which could undermine fair trial principles by enabling undue influence on witnesses-The court directed the trial court to expedite the case proceedings.(Para 1 to 12)

The application is rejected. (E-6)

List of Cases cited:

1. C. Muniappan & ors. .Vs St. of T.N.(2010)INSC 553
2. Vinod Kumar Vs St. of Punj.(2014) INSC 670

3. Rajesh Yadav & anr. Vs. St. of U.P.(2022)
INSC 148

4. Hussian & anr. Vs U.O.I. (2017) 5 SCC 702

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

1. Heard Sri Yadavendra Dwivedi, learned counsel for the applicant and Sri Jai Kishan Chaurasia, learned State Law Officer and also perused the record.

2. This is the second bail application moved on behalf of the applicant seeking bail in Case Crime No. 238 of 2020, under Sections 376, 506, 452 of I.P.C. and Sections 3/4 of POCSO Act, Police Station - Shivli, District - Kanpur Dehat, during the pendency of trial.

3. The first bail application of the applicant was rejected by the coordinate Bench of this Court vide order dated 01.09.2021 passed in Criminal Misc. Bail Application No. 41070 of 2020.

ARGUMENTS ON BEHALF OF APPLICANT :

4. As a new ground, learned counsel for the applicant has stated that PW-1 Informant and PW-2 Victim have been examined in Court and they have not supported the prosecution story, as such, there is no likelihood of conviction of the applicant in the instant case.

5. The applicant is incarcerated in jail since 13.05.2020, as such, more than 4 years have been passed. His fundamental rights enshrined in Article 21 of the Constitution of India stand violated, as such, he is entitled for bail. In case, the applicant is released on bail, he will not misuse the liberty of bail and shall cooperate with trial.

ARGUMENTS ON BEHALF OF STATE LAW OFFICER :

6. Per contra, learned State Law Officer has vehemently opposed the bail application by stating that the statement of the victim recorded by the trial court is intact as her examination-in-chief and cross examination were taken up on 18.04.2024 and she has categorically nominated the applicant to have barged into her house and committed rape with her. The said statement stands unimpeached during her cross-examination taken up the same day but the cross-examination has been deferred at the request of counsel for the applicant and further cross-examination was taken up about 2 months and 9 days thereafter i.e. on 27.06.2024 and the victim had not supported the prosecution story in it. The said act of the applicant for not completing the cross-examination the same day and deferring the matter for more than two months is an act to somehow win over the witness, as such, the applicant is not entitled for bail.

CONCLUSION :

7. Supreme Court, in the case of **C. Muniappan and Others v. State of Tamil Nadu**¹, has observed thus:

"81. It is settled legal proposition that : (Khujji case, SCC p. 635, para 6)

'6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.'

82. In *State of U.P. v. Ramesh Prasad Misra*, (1996) 10 SCC 360] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra*, (2002) 7 SCC

543], *Gagan Kanojia v. State of Punjab*, (2006) 13 SCC 516], *Radha Mohan Singh v. State of U.P.*, (2006) 2 SCC 450], *Sarvesh Narain Shukla v. Daroga Singh*, (2007) 13 SCC 360] and *Subbu Singh v. State*, (2009) 6 SCC 462.

8. In the case of **Vinod Kumar v. State of Punjab**², the Supreme Court has observed thus:

“51. It is necessary, though painful, to note that PW 7 was examined-in-chief on 30-9-1999 and was cross-examined on 25-5-2001, almost after 1 year and 8 months. The delay in said cross-examination, as we have stated earlier had given enough time for prevarication due to many a reason. A fair trial is to be fair both to the defence and the prosecution as well as to the victim. An offence registered under the

Prevention of Corruption Act is to be tried with all seriousness. We fail to appreciate how the learned trial Judge could exhibit such laxity in granting so much time for cross-examination in a case of this nature. It would have been absolutely appropriate on the part of the learned trial Judge to finish the cross-examination on the day the said witness was examined. As is evident, for no reason

whatsoever it was deferred and the cross-examination took place after 20 months. The witness had all the time in the world to be gained over. We have already opined that he was declared hostile and re-examined.

52. It is settled in law that the testimony of a hostile witness can be relied upon by the prosecution as well as the defence. In re-examination by the Public Prosecutor, PW 7 has accepted about the correctness of his statement in the court on 13-9-1999. He has also accepted that he had not made any complaint to the Presiding Officer of the court in writing or verbally that the Inspector was threatening him to make a false statement in the court. It has also been accepted by him that he had given the statement in the court on account of fear of false implication by the Inspector. He has agreed to have signed his statement dated 13-9-1999 after going through and admitting it to be correct. It has come in the re-examination that PW 7 had not stated in his statement dated 13-9-1999 in the court that recovery of tainted money was not effected in his presence from the accused or that he had been told by the Inspector that amount has been recovered from the accused. He had also not stated in his said statement that the accused and witnesses were taken to the Tehsil and it was there that he had signed all the memos.

53. Reading the evidence in entirety, PW 7's evidence cannot be brushed aside. The delay in cross-examination has resulted in his prevarication from the examination-in-chief. But, a significant one, his examination-in-chief and the re-examination impels us to accept the testimony that he had gone into the octroi post and had witnessed about the demand and acceptance of money by the accused.

In his cross-examination he has stated that he had not gone with Baj Singh to the Vigilance Department at any time and no recovery was made in his presence. The said part of the testimony, in our considered view, does not commend acceptance in the backdrop of entire evidence in examination- in-chief and the re-examination.

xxx xxx xxx

57. Before parting with the case we are constrained to reiterate what we have said in the beginning. We have expressed our agony and anguish for the manner in which trials in respect of serious offences relating to corruption are being conducted by the trial courts:

57.1. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.

57.2. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurise the witness and to gain over him by adopting all kinds of tactics.

57.3. There is no cavil over the proposition that there has to be a fair and proper trial but the duty of the court while conducting the trial is to be guided by the mandate of the law, the conceptual fairness and above all bearing in mind its sacrosanct duty to arrive at the truth on the basis of the material brought on record. If an accused for his benefit takes the trial on the path of total mockery, it cannot be countenanced. The court has a sacred duty

to see that the trial is conducted as per law. If adjournments are granted in this manner it would tantamount to violation of the rule of law and eventually turn such trials to a farce. It is legally impermissible and jurisprudentially abominable. The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons.

57.4. In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

57.5. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that

law cannot be allowed to be lonely; a destitute."

9. A similar view has also been taken by the Supreme Court in the case of ***Rajesh Yadav and Another v. State of Uttar Pradesh***³.

10. In the present case, it appears that, on account of a long gap of two months and nine days between the examination-in-chief and cross examination, the witness was won over by the accused and she resiled from the version as deposed in the examination-in-chief which fully incriminates the accused.

11. Considering the facts and circumstances of the case, submissions advanced by learned counsel for the parties, complicity of accused, severity of punishment and also considering the aforesaid judgements of Supreme Court and the facts as narrated above by learned State Law Officer, I do not find it a fit case to release the applicant on bail.

12. The bail application is, accordingly, **rejected**.

13. However, it is directed that the aforesaid case pending before the trial court be decided expeditiously, in view of the principle laid down in the recent judgements of the Supreme Court in the cases of **Vinod Kumar vs. State of Punjab**⁴ and **Hussain and Another vs. Union of India**⁵, if there is no legal impediment.

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

(2024) 9 ILRA 21
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.09.2024

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Misc. Anticipatory Bail Application U/S
438 Cr.P.C. No. 1518 of 2024

Dr. Vinay Kumar Jain ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:

Prashant Kumar, Devesh Srivastava,
Sarvesh Kumar Tiwari, Satish Gulati

Counsel for the Opposite Party:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 420, 425, 467, 468, 471 & 120-B - As per F.I.R. nazul land registered at page No.89 vide order dated 29.08.1956/11.10.1956 in the name of Kapura Devi to the tune of 66,844 sq ft - In the said record, no order number was written neither there was reference of order on paper book, name of officer who has made endorsement was also not on record neither there was any stamp of concerned office - The alleged record appears to be forged - Further allegation that at page No.2 on 12-16 line whitener has been used which makes it suspicious - Applicant contended he was not named in F.I.R., but in the name of investigation he has been called several times for interrogation by investigating agency, therefore, there is an apprehension for arrest. (Para 1, 3)

Held, civil suit was pending between parties and dispute was civil in nature, there was nothing on record to show that applicant was not cooperating in investigation and considering the

undertaking given by applicant that he will cooperate in investigation, interim protection granted earlier was made absolute in view of dictum of Apex Court in Sushila Aggarwal (infra). (Para 5)

Application allowed. (E-13)

List of Cases cited:

Sushila Aggarwal Vs St. (NCT of Delhi) - 2020 SCC online SC 98

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

1. The present bail application under Section 438 Cr.PC. has been filed seeking anticipatory bail in case crime/F.I.R No.1163/2023, under Sections 420, 425, 467, 468, 471, 120-B I.P.C., P.S. Kotwali Nagar, District Barabanki.

2. Heard learned counsel for the applicant and learned A.G.A. for the State.

3. This Court while granting interim protection to the applicant vide order dated 29.08.2024 has passed the following order:-

"Heard learned counsel the applicant and learned A.G.A. for the State.

The present bail application under Section 438 Cr.PC. has been filed seeking anticipatory bail in case crime/F.I.R No.1163/2023, under Sections 420, 425, 467, 468, 471, 120-B I.P.C., P.S. Kotwali Nagar, District Barabanki.

It is alleged in the F.I.R. that nazul land registered at page No.89 vide order dated 29.08.1956/11.10.1956 in the name of Kapura Devi to the tune of 66,844 square ft. In the said record, no order number is written neither there is reference of order on the paper book, the name of the officer who has made the endorsement is also not on the record neither there is any

stamp of the concerned office. It is alleged that due to this reason the alleged record appears to be forged. It is further alleged that at page No.2 on 12-16 line whitener has been used which further makes it suspicious.

Learned counsel for the applicant submits that applicant is not named in the F.I.R. He has made following submissions:-

"Ram Rajeshwar Bali was the owner of the property Khasra Plot No. 315/1, Obari, Civil Lines bearing Municipal No. B/1049/614/T 364 to 368 also known as B-1365, Mohalla Begum Ganj, P.S. Kotwali, District Barabanki.

After the death of Ram Rajeshwar Bali, Ram Dinanath Bali, who was the legal heir, became the owner of the aforesaid property.

Kapura Devi had purchased the property from Dinanath Bali on 03.03.1955.

After the death of Kapura Devi, her son Nandanlal Jain became the owner of this property by inheritance.

In the year 1998, Nandlal Jain transferred his property to Dr. Vinay Kumar Jain through gift deed.

From 1998 till now, applicant Vinay Kumar Jain is the sole owner of the said property Khasra No. 315.

Dr Padma Shukla the then CMO was under tenancy in her individual capacity, but after the transfer of Dr Padma Shukla in the year 1991 the premises would be deemed to be vacated, but the District Administration started to treat the land as CMO Residence. After 1995, CMO Dr. Surendra Kumar had stopped paying rent. Therefore, the Applicant proceedings U/s. 16 of the Act. instituted the

The applicant applied to District Magistrate Barabanki on 25.01.99 for free holding of the said Arajai Nazul.

On 28.08.1999, Additional District Magistrate (Finance and Revenue) ordered to deposit Rs. 6,10,619/- in the treasury within 90 days. After the applicant deposited the said amount, a deed of sale was executed in favor of the applicant by Additional District Magistrate (Finance and Revenue) Barabanki.

After the deed of sale by the Additional District Magistrate on 22.07.2000, the applicant was not given possession of the said premises, since it was being used illegally as residence of CMO.

Then the petitioner filed an application for release of the said property in terms of section 16 of the UP-Act No. 13 of 1972 on march, 2007 for deemed vacancy.

The said Application was rejected by means of order dated 30.03.2011 primarily on the ground that the property in question comes under ownership of State Government and has been in use and occupation of the Chief Medical Officer.

The Petitioner filed the Revision No. 01/2011 in the court of Additional Sessions Court No. 01, which was also rejected by the Learned Court.

Therefore, the Applicant challenged the Order dated 30.03.2011 and 06.09.2012 by filing WRITA No. 1000081 of 2015 (Dr. Vinay Kumar Jain vs. State of U.P. & Others) before this Hon'ble Court, wherein after exchange of pleadings, this Hon'ble Court allowed the said petition vide order dated 14.02.2023 and held that the provisions of Section 16(1)(b) of the act is clearly applicable in the present case indicating vacancy, accordingly, the release application filed by petitioner also stands allowed.

The Authorities have failed to comply the order, accordingly, the Applicant filed Contempt Application

(Civil) No. 1470 of 2023 before this Hon'ble Court for non compliance, but even then the Respondents have not complied the same as such the charges were framed against the contemnor i.e. CMO. Vide order dated 22.09.2023.

Thereafter, State Government filed a Review 1 Application No. 165 of 2023 against the Order Dated 14.02.2023 and the same has been rejected vide order dated 13.10.2023.

Accordingly, the State Government assailed the Order Dated 14.02.2023 and 13.10.2023 before Hon'ble Supreme Court by filing SLP (C) /Diary No. 44267 of 2023, wherein the Hon'ble Supreme Court dismissed the SLP and directed the state to hand over the possession of the property in question till 31.03.2024.

During the pendency of the aforesaid proceedings, the District Collector, Barabanki filed another suit against the Petitioner on 4.05.2023 challenging the free hold deed dated 24.07.2000, wherein the Applicant filed the Written Statement and the same is pending for adjudication.

The CMO has handed over the possession of the premises on 31.03.2024.

Thereafter, on the behest of the District Administration an FIR bearing case crime no. 460/2024 dated 25.05.2024 under Section 2 and 3 of the Prevention of Damage Public Property Act, 1984 has been lodged against the Applicant.

The Applicant challenged the said FIR before this Hon'ble Court by filing Criminal Writ Petition no. 4365 of 2024 before this Hon'ble Court, wherein interim protection was granted vide order dated 24.06.2024.

Thereafter, due to malafide intentions the diagnostic center running by the Applicant has been seized by the district

administration without following due process of law. The said proceedings were challenged by the Petitioner by filing Writ-C 5623 of 2024 wherein this Hon'ble Court has been pleased to stay the proceedings vide order dated 26.06.2024.

During this period, the impugned FIR was lodged U/s. 420, 425, 468, 467, 471 and 120-B of IPC on 01.11.2023 at PS- Kotwali, Barabanki. However, the Applicant is not named in the FIR, but, in the name of investigation he has been called several times for interrogation by the investigating agency, and therefore, there is an apprehension for arrest. Hence this Anticipatory Bail."

Learned A.G.A. has opposed the contention of learned counsel for the applicant .

Learned counsel for the applicant undertakes that applicant will cooperate in the investigation.

Learned Addl. Government Advocate prays for and is granted two weeks' time to file counter affidavit.

List on 20.09.2024.

Considering the above aspect of the matter, perusal of the record as well as the fact that civil suit is pending between the parties before the competent civil court, Barabanki prima facie dispute appears to be civil in nature and the applicant is undertaking to cooperate in the investigation as also the judgment of Apex Court passed in *Sushila Aggarwal and others versus State (NCT of Delhi)* and another (2020) 5 SCC 1, it would be appropriate to grant interim protection to the applicant under Section 438 Cr.P.C.

Till the next date of listing, it is provided that in the event of arrest, the applicant-Dr. Vinay Kumar Jain shall be released on bail on his furnishing a personal bond and two sureties of the like amount to the satisfaction of the arresting officer/I.O./S.H.O. concerned.

The applicant shall cooperate in the investigation and he will not influence the

witness. The accused-applicant will remain present as and when the arresting officer/I.O./S.H.O. concerned call(s) for investigation/interrogation. The applicant shall not leave India without previous permission of the Court.

In case of default, it would be open for the investigating agency to move application for vacation of this interim protection. "

4. Learned AGA has submitted that investigation in the matter is going on, however, he could not show from the material on record that the applicant is not cooperating in the investigation.

5. On due consideration to the fact that civil suit is pending between the parties and dispute is civil in nature, there is nothing on record to show that the applicant is not cooperating in the investigation; as well as considering the undertaking given by the applicant that he will cooperate in the investigation, the interim protection granted by this Court vide order dated 29.08.2024 is made absolute in view of dictum of Apex Court in re: **Sushila Aggarwal Vs. State (NCT of Delhi)-2020 SCC online SC 98.**

6. In view of the aforesaid, the application is **allowed.**

(2024) 9 ILRA 24
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Bail Application No. 2737 of 2024

Jaikun Nisha
State of U.P.

...Applicant
Versus
...Opposite Party

Counsel for the Applicant:

Suraj Singh Visen, Aman Kumar Shrivastav

Counsel for the Opposite Party:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 498-A, 304-B, 302 & 201 - Dowry Prohibition Act, 1961 - Section 3/4 - Code of Criminal Procedure, 1973 - Section 309 - Second Bail - Ground - Subsequent to rejection of first bail application of applicant, informant (P.W.-1) has not supported cross-examination and her husband (P.W.-2) has been declared hostile - Accused persons harassed informant's daughter by demanding dowry - On 29.07.2022, her son-in-law told her that her daughter had ran away from home at 12:00 in night - Six days thereafter, her dead-body was recovered from septic tank situated adjacent to accused persons' house. (Para 3, 4)

Held, a perusal of St.ment of P.W.-1 recorded on 18.10.2023 and continued till 07.08.2024 shows that she supported prosecution case but on last date i.e. 07.08.2024, she took u-turn and started supporting accused - PW-2 was examined and turned hostile - This prima facie indicates that long period of about 10 months spent in recording St.ment of PW-1, gave an opportunity to accused persons to influence prosecution witnesses - Thus, no case for grant of bail to applicant. (Para 10, 12)

Bail application rejected. (E-13)

List of Cases cited:

1. Raj Deo Sharma (II) Vs St. of Bihar: (1999) 7 SCC 604
2. St. of U.P. Vs Shambhu Nath Singh: (2001) 4 SCC 667, (Para 11 to 13)
3. Doongar Singh Vs St. of Raj.: (2018) 13 SCC 741, (Para 8, 10)
4. Ramesh Vs St. of Har.: (2017) 1 SCC 529, (Para 39, 44, 45)

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

1. Heard Sri Suraj Singh Visen, learned counsel for the applicant, Sri Abhishek Kumar Singh, the learned AGA for the State and perused the records.

2. This is the second bail application seeking release of the applicant on bail in Case Crime No.121 of 2022, under Sections 498-A, 304-B, 302 and 201 IPC and 3/4 D.P. Act, registered at Police Station - Khodhare, District - Gonda.

3. The first bail application of the applicant bearing No.14638 of 2022 was rejected by means an order dated 22.03.2023. The second bail application has been moved on the ground that subsequent to rejection of the first bail application of applicant, the informant has been examined as P.W.-1 and her husband has been examined as P.W.-2. P.W.-1 has not supported the cross-examination and P.W.-2 has been declared to be hostile.

4. When this Court perused the statement of P.W.-1, which was recorded on 5 dates between 18.10.2023 and 07.08.2024, it appears that in her statement recorded on 18.10.2023, the informant fully supported the prosecution case. She stated that all the accused persons used to harass her daughter by demanding dowry. On 29.07.2022, her son-in-law Mukeem had told her that her daughter had ran away from the home at 12:00 in the night. Six days thereafter, the dead-body of the informant's daughter was recovered from a septic tank situated in front of a Madarasa adjacent to the accused persons' house. Her cross-examination was recorded on 21.03.2024, 23.05.2024, 05.06.2024 and 07.08.2024. She supported the prosecution case till 05.06.2024, on which date she

stated that she had visited the matrimonial home of her daughter about one month's prior to the incident and her daughter had told her that the accused persons used to harass her. However, in her cross-examination recorded on 07.08.2024, P.W.-1 turned turtle and started supporting the accused persons. Statement of P.W.-2 was recorded thereafter on 27.08.2024 and he has been declared hostile. Now the applicant is seeking his release on bail on this ground after his first bail application was rejected by a reasoned order.

5. The long period of about 10 months consumed by the trial Court in this case in recording the statement of PW-1, during which period PW-1 has sided with the accused, is very disturbing. Cross-examination of prosecution witnesses need to be recorded on day-to-day basis to avoid the possibility of witnesses being influenced. The statutory provision in this regard is contained in Section 309 Cr.P.C., which is being reproduced below: -

“309. Power to postpone or adjourn proceedings.—(1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence under Section 376, Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA or Section 376 - DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him:

Provided also that—

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanation 1.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused.

(Emphasis added)

6. In **Raj Deo Sharma (II) v. State of Bihar**: (1999) 7 SCC 604, the Hon'ble Supreme Court stated that *"We cannot permit the trial court to flout the said mandate of Parliament unless the court has very cogent and strong reasons. No court has permission to adjourn examination of witnesses who are in attendance beyond the next working day"* (emphasis added).

7. In **State of U.P. v. Shambhu Nath Singh**: (2001) 4 SCC 667, the Hon'ble Supreme Court explained the legislative mandate contained in Section 309 Cr.P.C. in the following words:

"11. The first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words "as expeditiously as possible" have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words "as expeditiously as possible" has

chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination "shall be continued from day to day until all the witnesses in attendance have been examined". The solitary exception to the said stringent rule is, if the court finds that adjournment "beyond the following day to be necessary" the same can be granted for which a condition is imposed on the court that reasons for the same should be recorded. Even this dilution has been taken away when witnesses are in attendance before the court. In such situation the court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to sub-section (2) has imposed another condition,

"provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing".

(emphasis in original)

12. Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.

13. Now, we are distressed to note that it is almost a common practice

and regular occurrence that trial courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a "special reason" for bypassing the mandate of Section 309 of the Code."

8. This High Court issued a Circular Letter No. 20/Admin. 'G-II' Dated 14.05.2015, which provides as follows: -

1. C.L. No. 152/VIII-b13, 28.10.1974 2. C.L. No. 58-50/Admn „G“, 23.11.1992 3. C.L. No. 54/VIIb-18, 06.12.2000 4. C.L. No. 8/VIIb-18, 07.02.2000 5. C.L. No. C-72/1990, 26.07.1990	<i>In continuation of marginally quoted Court's earlier Circular Letters and in the light of Hon'ble Apex Court's orders passed in the cases of Akil alias Javed VS. State of NCT of Delhi, reported in 2012 (11) SCALE 709, in paras 27 to 36; State of UP Vs. Shambhu Nath Singh and others, reported in 2001 (4) SCC 667; Raj Deo Sharma Vs. State of Bihar, 1999 Cr.L.J. 4541 and Lt. Col. S.J. Chaudhari Vs. State (Delhi) Administration, (1984) 1 SCC 722, I am directed to state that the High Court is noticing disturbing trend in criminal trials, where Sessions cases are being adjourned, in some cases to suit convenience of counsels or because the prosecution or the defence is not fully ready and considers it necessary to draw the attention of all the Sessions Judges and Additional Sessions Judges once again to the provision of Section 309 of the Code of Criminal Procedure, 1973 and directs 73 them to adhere strictly to these provisions and instructions given below while granting adjournment in Sessions Cases:</i>

(1) Trial Judges are reminded of the need to comply with Section 309 of the Code in letter and spirit.

(2) *In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded: (Section 309 (1) Cr.P.C.)*

* * *

9. In **Doongar Singh v. State of Rajasthan: (2018) 13 SCC 741**, the Hon'ble Supreme Court reiterated that: -

"8. In spite of repeated directions of this Court, the situation appears to have remained unremedied. We hope that the Presiding Officers of the trial courts conducting criminal trials will be mindful of not giving such adjournments after commencement of the evidence in serious criminal cases. We are also of the view that it is necessary in the interest of justice that the eyewitnesses are examined by the prosecution at the earliest.

* * *

10. To conclude:

10.1. The trial courts must carry out the mandate of Section 309 CrPC as reiterated in judgments of this Court, inter alia, in *State of U.P. v. Shambhu Nath Singh, (2001) 4 SCC 667, Mohd. Khalid v. State of W.B.: (2002) 7 SCC 334* and *Vinod Kumar v. State of Punjab, (2015) 3 SCC 220*.

10.2. The eyewitnesses must be examined by the prosecution as soon as possible.

10.3. Statements of eyewitnesses should invariably be recorded under Section 164 CrPC as per procedure prescribed thereunder."

10. A perusal of the statement of P.W.-1 recorded in this case, which had commenced on 18.10.2023 and continued till 07.08.2024 shows that on 18.10.2023, 21.03.2024, 23.05.2024 and 05.06.2024, P.W.-1 supported the prosecution case but on the last date i.e. 07.08.2024, she took u-turn and started supporting the accused. PW-2 was examined thereafter and he turned hostile. This prima facie indicates that the long period of about 10 months spent in recording the statement of prosecution witness PW-1 gave an opportunity to the accused persons to influence or win-over the prosecution witnesses.

11. In **Ramesh v. State of Haryana**: (2017) 1 SCC 529, the Hon'ble Supreme Court expressed its concern about the culture of witnesses turning hostile, in the following words: -

“39. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the investigating officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations.

* * *

44. On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

- (i) Threat/Intimidation.*
- (ii) Inducement by various means.*
- (iii) Use of muscle and money power by the accused.*
- (iv) Use of stock witnesses.*
- (v) Protracted trials.*
- (vi) Hassles faced by the witnesses during investigation and trial.*
- (vii) Non-existence of any clear-cut legislation to check hostility of witness.*

*45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: “witnesses are the eyes and ears of justice”. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in **Zahira Habibullah Sheikh (5) v. State of Gujarat**, (2006) 3 SCC 374 as well.”*

12. As the aforesaid facts and circumstances of the case prima facie indicate that the prosecution witnesses have been influenced in the present case, no case for grant of bail to the applicant is made out.

13. Accordingly, the second application of the applicant is rejected.

(2024) 9 ILRA 30

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 10.09.2024

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Criminal Misc. Anticipatory Bail Application U/S
438 Cr. P.C. No. 6396 of 2024

Rahis Ahmad & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Rajendra Prasad, Sri Vinod Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Prevention of Damage to Public Property Act, 1984 - Sections 3/4 - The Mines and Minerals (Regulation of Development) Act, 1957 - Sections 4/21 - Code of Criminal Procedure, 1973 - Sections 61, 62, 64 & 87 - Bharatiya Nagarik Suraksha Sanhita, 2023 - Sections 63, 64, 66, 90 - Constitution of India, 1950 - Article 21 - In the instant case, summoning order has been passed on 15.11.2018 and thereafter on subsequent dates summons have been directed to be issued - The case before the court concerned travel for four years for issuance of summons - Thereafter, on 21.11.2023, order for issuance of non-bailable warrant was passed - As per report of District Judge, summons were not issued to accused/applicants in pursuance to summoning order. (Para 23)

Held, non - issuance of summons affects right of accused/applicants to defend himself/herself by various legal remedies available to them by challenging said summoning order or filing application u/s

88 Cr.P.C. or to prefer anticipatory bail application - Hence, non-bailable warrant against applicants was issued without following procedure established by law. (Para 24, 25)

Bail application allowed. (E-13)

List of Cases cited:

Sushila Aggarwal Vs St. (NCT of Delhi), (2020) 5 SCC 1, (Para 56, 57)

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard learned counsel for the applicants as well as learned AGA and perused the material available on record.

2. The present Anticipatory Bail Application has been filed with the prayer to grant anticipatory bail to the applicant - Rahis Ahmad and Mohammad Arif in Case No. 4364 of 2024 in Case Crime No. 78 of 2018 under Sections 4/21 of Mine and Minerals Act and Section 3/4 of Damage to Public Property Act, Police Station - Swar, District - Rampur.

3. It is submitted by learned counsel for the applicants that applicant has not been served with the summons although the summoning order was passed on 15.10.2023. On 21.08.2024 this Court has passed the following order:-

"1. The present Anticipatory Bail Application has been filed with the prayer to grant anticipatory bail to the applicants Rahis Ahmad and Mohammad Arif in Case Crime No.78 of 2018, under Section 4/21 of Mines and Minerals Act and Section 3/4 Damage to Public Property Act, Police Station Swar, District Rampur.

2. In the present case, summoning order was issued on 15.10.2023 by the court concerned. A perusal of the order

sheet of the court concerned would demonstrate that the Non-Bailable Warrant has been issued against the applicant.

3. Learned counsel for the applicants submit that summons have not been served on the applicants.

4. This Court on 9.7.2024 granted time to learned A.G.A. to obtain instructions as to whether the summons were served on the applicants. On 6.8.2024, learned A.G.A. has made a statement that summons were not received in the police station as such the same could not be served.

5. Today an affidavit of compliance has been filed by learned A.G.A. in this respect.

6. Paragraph 6 of the compliance affidavit filed today is quoted hereinbelow:-

"6. That it is relevant to mention here that the Inspector Incharge, Police Station Swar, District Rampur has prepared his report and a perusal of the same goes to show that according to order sheet of the Learned Court Below it appears that on different dates ordered to issue summons and Non Bailable Warrant but the same were not received at the Police Station and lastly on 03.04.2024 a Non Bailable Warrant issued against the applicant no.1 was received at the Police Station and the concerned Sub-Inspector namely Amar Pal has gone to serve the same at the house of aforesaid Rahis Ahmad but he was not present at the house and it transpires that he used to work of Dairy in Haldwani (Uttarakhand) accordingly regarding the issuance of Non Bailable Warrant and information given to him at his mobile No.9837165426. Photocopy of Non Bailable Warrant issued against applicant no.1 Rahis Ahmad in which 03.05.2024 was fix and information regarding the same was given to him on telephone is being filed herewith and marked as Annexure-2 to this affidavit."

7. It is to be seen in the present case that as per the State the summons were not received by the police station from the court concerned and as such the same is not served.

8. It is not known as to how the court concerned has issued the Non-Bailable Warrant against the applicants without recording a finding with regard to service of summons.

9. The District Judge, Rampur is hereby directed to submit a report as to why the summons were not issued to police station concerned despite the order being passed by the court concerned for service. In the event, summons were issued then, whether the service was made on the applicants. Any service report was filed by the police shall also be disclosed. In the event, no summons were issued in pursuance to the summoning order of the court concerned, the District Judge, Rampur shall specify reason in the report for non-issuance of the summoning order and the Officer, who have erred in not issuing the summons despite the order of the court concerned summoning the accused.

10. The report shall be submitted before the next date fixed.

11. List on 10th September, 2024 in top ten cases.

12. Interim order granted earlier shall remain in currency, till the next date of listing.

13. Registrar (Compliance) is directed to send a copy of this order to the District Judge, Rampur for necessary compliance forthwith through Special Messenger/Fax/E-mail."

4. The District Judge, Rampur has submitted report dated 05.09.2024. As per report of District Judge, Rampur non-bailable warrants have been issued without issuance of summons to the accused/applicants.

5. It is submitted by learned counsel for applicants that applicants are innocent and have no concern with the present matter. Allegations levelled against the applicants are false. It is further argued that no prima facie case is made out against the applicants. Applicants have no previous criminal history. If the applicants are enlarged on anticipatory bail, they will not misuse the liberty and cooperate with the investigation. The applicants have apprehension of their arrest by the police any time. It is further submitted that Article-21 of the Constitution of India is violated.

6. Learned A.G.A. opposed the prayer but does not dispute the factual matrix.

7. It is not shown by learned AGA that the nature and gravity of allegations are such that the same would disentitle the applicants for relief of anticipatory bail. No material, facts, circumstances or concern been shown by learned AGA for the State that the accused may tamper with the evidence or witnesses or accused is of such character that his mere presence at large would intimidate the witnesses or that accused will use his liberty to subvert justice or tamper with the evidence.

8. Learned Counsel for opposite parties has not placed any criminal antecedents of the applicants. The applicants have no criminal history.

9. When a First information report is lodged, the investigating agency after investigation submits its report before the court concerned having jurisdiction. The court concerned after scrutinising the material, if it is of the opinion that sufficient grounds for proceeding against an accused exist, issues process against the

accused by way of summon or warrant as the case may be. In the event, summoning order is passed by the court concerned against an accused person, a summon is to be issued as per section 61 (Section 63 of BNSS, 2023) of the Criminal Procedure Code, 1973 (for short 'Cr.P.C.'). As per aforesaid section, every summons issued by a Court under the Code shall be in writing, in duplicate, signed by Presiding Officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court. In this respect section 61 of the Cr.P.C. is quoted herein below:-

“61. Form of summons.—Every summons issued by a Court under this Code shall be in writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court.”

10. Further, Section 63 of BNSS, 2023 is quoted herein below :-

“63. Form of summons.—Every summons issued by a Court under this Sanhita shall be,—

(i) in writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court; or

(ii) in an encrypted or any other form of electronic communication and shall bear the image of the seal of the Court or digital signature.”

11. As per section 62 of the Cr.P.C. (Section 64 of BNSS, 2023), summons are required to be served by a police officer or subject to such rules as the state government may make in this behalf, by an

officer of the court issuing it or other public servant. Section 62 of the Cr.P.C., is quoted herein below :-

“62. Summons how served.—(1)

Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.

(2) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(3) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.”

12. Further, Section 64 of BNSS, 2023 is quoted herein below :-

“64. Summons how served.—(1)

Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant:

Provided that the police station or the registrar in the Court shall maintain a register to enter the address, email address, phone number and such other details as the State Government may, by rules, provide.

(2) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons:

Provided that summons bearing the image of Court's seal may also be served by electronic communication in such form and in such manner, as the State Government may, by rules, provide.

(3) Every person on whom a summons is so served personally shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.”

13. As per section 62 of Cr.P.C. (Section 64 of BNSS, 2023), summons are required to be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons. The person on whom a summon is so served, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

14. The law prescribes that once summoning order is passed, the court concerned is required to issue a summon (in writing) in pursuance to the summoning order, to the police officer for service on the accused person. It is to be noted that till the stage of summoning of an accused, normally the accused does not have any knowledge with regard to the process under criminal law being initiated against him by court concerned. It is the summons which when served on the accused, forms the basis of knowledge to the accused with regard to initiation of criminal proceedings against the accused person by court concerned.

15. As per Section 64 of Cr.P.C. (Section 66 of BNSS, 2023), when the person summoned cannot, by exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of other duplicate. In respect of, service of a summon on a corporation, as per section 63

of the Cr.P.C. (Section 65(1) of BNSS, 2023), the same may be effected by serving it on the Secretary, local Manager or other Principal Officer of the Corporation, or by letter sent by registered post, addressed to the chief officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

16. A Court under law is authorised to issue a warrant against an accused under section 87 of the Cr.P.C. (Section 90 of BNSS, 2023), where the accused person fails to appear and the summons is proved to have been duly served in time to admit his appearance in accordance therewith and no reasonable excuse is offered for such failure by accused. The provision of section 87 of the Cr.P.C. is quoted herein below :-

“87. Issue of warrant in lieu of, or in addition to, summons.—A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest—

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.”

17. A perusal of the above-mentioned provision would demonstrate that the court concerned is authorised to issue warrant where the court has reason to believe that

the accused has absconded or will not obey the summons or where the summons have been duly served in time, however, the accused has failed to appear before the court concerned in pursuance to the summons.

18. For proceeding, against an accused for issuance of a warrant, it is imperative on the part of the court concerned to record a finding that summons have been served on the accused person and he has failed to appear before the court concerned without reasonable cause. The finding with regard to service of summons on accused can only be recorded by the court concerned when in pursuance to the summoning order, the court has actually issued summons to the police authorities for service. The issuance of a actual summons in pursuance to the summoning order is the procedure prescribed by law.

19. Article 21 of the Constitution of India provides that no person shall be deprived of his life or liberty except in accordance with procedure established by law. Article 21 of Constitution of India is one of the fundamental rights provided under part-III of the Constitution of India. The right to life and liberty has an important role to play in the life of every individual. The object of the aforesaid provision is to prevent the deprivation of personal liberty of an individual except in accordance with law. It is necessary that before an individual is deprived of his personal liberty, the procedure established by law is followed and must not be departed from, to the disadvantage of accused person. The aforesaid fundamental right is available to every individual including an accused. It is settled law that the procedure established by law has to be

“*due procedure*”. The Supreme Court has read the principle of reasonableness into the said procedure prescribed by Article-21, holding that it must be just and fair & not arbitrary.

20. Article 21 of Constitution of India, has embedded in itself the principle of Rule of Law. It is fundamental right of an individual to be subjected to deprivation of personal liberty by procedure established by law. Whenever an individual is threatened or steps are taken, for deprivation of his personal liberty in violation of Article 21 of Constitution of India, such a procedure or steps would not be constitutionally permissible. It is further to be noted that Constitution is a “grand norm” and all the laws & procedures are subject to Article 21 of Constitution of India. It is, therefore, imperative that whenever personal liberty of individual is threatened or is being violated without following the procedure established by law, courts are required to take steps in furtherance of the mandate of Article 21 of Constitution of India. Personal liberty of an individual is required to be protected.

21. It is further to be noted that provision of anticipatory bail is an extension to the fundamental right of an individual under Article 21 of the Constitution of India. The provision of anticipatory bail ensures that an individual is not subjected to arbitrary arrest and is subjected to deprivation of personal liberty only by established procedure of law. While exercising the jurisdiction of anticipatory bail, the courts are required to also examine, as to whether, the personal liberty of an individual is being proceeded to be curtailed as per the procedure established by law or an individual is being subjected to arbitrary arrest/without

following the procedure established by law. The constitution being the grand norm, all laws and procedures are required to ensure that a right of an individual under Article 21 of the Constitution of India is not in any manner infringed. The state and all authorities (including court of law) are required to preserve the right of an individual under Article 21 of Constitution of India by following the procedure established.

22. In ***Sushila Aggarwal v. State (NCT of Delhi)***, (2020) 5 SCC 1, the Supreme Court has observed as under:-

“56. The reason for enactment of Section 438 in the Code was parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature. In Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , it was observed that : (SCC p. 589, para 35)

“35.... Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.”

57. The interpretation of Section 438 — that It does not encapsulate Article 21, is erroneous. This Court is of the opinion that the issue is not whether Section 438 is an intrinsic element of Article 21 : it is rather whether that provision is part of fair procedure. As to that, there can be no doubt that the provision for anticipatory bail is pro-liberty and enables one anticipating arrest, a facility of approaching the court for a direction that he or she not be arrested; it was specifically enacted as a measure of protection against arbitrary arrests and humiliation by the police, which Parliament itself recognised as a widespread malaise on the part of the police.”

23. In the present case, summoning order has been passed on 15.11.2018 and thereafter on 24.11.2018, 03.01.2019, 06.02.2019, 08.04.2019, 28.05.2019, 17.07.2019, 27.08.2019, 06.11.2019, 17.12.2019, 10.02.2020, 13.03.2020, 24.04.2022, 24.05.2022, 20.08.2022, 25.07.2022, 25.08.2022 & 29.09.2022 summons have been directed to be issued. The case before the court concerned travel for four years for issuance of summons. Thereafter, on 21.11.2023, order for issuance of non-bailable warrant was passed. As per report of District Judge, Rampur, summons were not issued to the accused/applicants in pursuance to the summoning order passed by the court concerned.

24. In the order-sheet of the trial court there is no finding that summons were actually issued to the accused/applicants after passing of the summoning order nor there is any finding that summons were actually served on the accused/applicants. Once summons were not served on the

accused/applicants, the non-bailable warrants could not have been issued in an mechanical manner. Non issuance of the summons affects the right of the accused/applicants to defend himself/herself by various legal remedies available to an accused by challenging the summoning order or filing an application under Section 88 Cr.P.C. or to prefer anticipatory bail application.

25. The accused/applicants have been subjected to issuance of non-bailable warrant without service of summons which is not in accordance with the procedure established by law and as such the right of the accused/applicants under Article 21 of the Constitution of India is violated. In view of aforesaid, non-bailable warrant against applicants is issued without following procedure established by law.

26. It is settled principle of law that the object of bail is to secure the attendance of the accused. No material particulars or circumstances suggestive of the applicants 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 for the State.

27. In view of the above, the applicants are granted anticipatory bail in respect of offence described in para-2 of the present order. In the event of arrest of the applicants, they shall be released on anticipatory bail on their furnishing a personal bond of **Rs.25,000/-** with two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:-

(i) The applicants shall not directly or indirectly, make any

inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade themselves from disclosing such facts to the Court or to any police office.

(ii) The applicants shall not leave India without the previous permission of the Court concerned.

(iii) In the event, applicants change residential address, the applicants shall inform the court concerned/Investigating Officer about new residential address in writing.

(iv) The applicants shall cooperate with the investigation and make themselves available for interrogation whenever required.

(v) The applicants shall not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police.

(vi) The applicants shall maintain law and order.

(vii) The applicants shall at the time of execution of the bond, furnish their address and mobile number to investigating officer, and the court concerned.

(viii) The applicants shall regularly remain present during the trial, and cooperate with the Court to complete the trial for the above offences.

(ix) Non presence of the applicants or their counsel before the court concerned shall be construed as violation of the present order and the court concerned would be at liberty to take coercive measures in accordance with law.

28. In case of default of any of the conditions, the Investigating Officer shall be at liberty to file appropriate application for cancellation of protection granted to the applicants.

29. With the directions made above, the anticipatory bail application stands allowed.

(2024) 9 ILRA 37

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 10.09.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Criminal Misc. Bail Application No. 6762 of 2024

Shashi Bala @ Shashi Bala Singh

...Applicant

Versus

Directorate of Enforcement

...Opposite Party

Counsel for the Applicant:

Pradeep Kumar Rai, Prakarsh Pandey,
Praveen Kumar Shukla

Counsel for the Opposite Party:

Rohit Tripathi

Criminal Law - Prevention of Money Laundering Act, 2002 - Sections 2(u), 2(y) ^{3/4}, 45 - As per Enforcement Case Information Report, applicant was close confidant of Director and master-mind of Shine City Group of Companies - Closely associated with illegal activities of offending company and its management - The said companies were involved in alluring investors to invest in projects of companies which promised handsome returns - Company issued post-dated cheques to instill confidence in investors, when said cheques matured for redemption, they were dishonoured - Complaint was filed against companies including applicant for commission of offence of money laundering - During investigation, various premises were searched including present applicant, bank account Statement and digital devices recovered - Considerable quantum of

proceeds of crime were received in bank accounts of applicant which was received from said Companies, withdrawn by applicant for her personal expenses - Apprehended on 25.11.2023. (Para 3, 9, 11, 12, 13)

Applicant appointed as Assistant Teacher in 2009 and promoted later and during her service she received a sum of Rs. 46,81,538/- as salary for period 2009 to 2020 - She claimed said amount as her hard earned money, derived from sale and purchase of agricultural and commercial land, cow milk and other dairy products, apart from monetary help extended to her by her husband and children, but she failed to prove. (Para 45, 46, 55)

In absence of explanation to justify documents, data and amount found with her such as third party sale deeds, plot buyer agreements, e-payment receipts, shows she was guilty - She has been in touch with main director who was absconding and also in touch with other co-accused, does not bring her in category of vulnerable woman - She was knowing their whereabouts but never came forward to assist prosecution and casts a doubt that she too was a genuine investor. (Para 56, 58, 59)

Bail application rejected. (E-13)

List of Cases cited:

1. Sri Ram Ram Vs St. of U.P. & ors., (Criminal Misc. Writ Petition No. 1834 of 2021)
2. Arvind Kejriwal Vs Directorate Enforcement, 2024 SCC OnLine SC 1703
3. Kalvakuntla Kavitha Vs Enforcement Directorate, 2024 SCC OnLine SC 2269, (Para 26 to 28)
4. Prem Prakash Vs U.O.I. through Directorate of Enforcement; 2024 SCC Online SC 2270, (Para 13, 14)
5. Manish Sisodia Vs Enforcement Directorate, 2024 SCC OnLine SC 1920, (Para 49 to 57)

6. Rohit Tandon Vs Directorate of Enforcement, (2018) 11 SCC 46, (Para 19 to 22, 31)

7. Nikesh Tarachand Shah Vs U.O.I., (2018) 11 SCC 1, (Para 11)

8. Vijay Madanlal Choudhary Vs U.O.I., 2022 SCC OnLine SC 929

9. Tarun Kumar Vs Enforcement Directorate, 2023 SCC OnLine SC 1486

10. Pavana Dibbur Vs Enforcement Directorate, 2023 SCC OnLine SC 1586

(Delivered by Hon'ble Jaspreet Singh, J.)

1. This is a pre-trial bail application moved by the applicant who is arraigned in connection with ECIR No. LKZO/05/2021, under Section 3/4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as The PML Act of 2002).

2. The background is, that large number of FIRs were lodged against Shine City Group of Companies and its Directors, Promoters, share holders, authorized representatives and beneficial owners, all across the country. In the same vein, several FIRs were lodged by the Uttar Pradesh Police under various sections of the I.P.C. at P.S. Gomti Nagar at Lucknow and P.S. Civil Lines at Prayagraj. The FIRs lodged at Lucknow and Prayagraj were all later transferred to the Economic Offence Wing at Lucknow.

3. The contents of the Enforcement Case Information Report (hereinafter referred to as "ECIR"), in a gist, reflects that many real estate projects were floated by various companies under the umbrella of Shine City Group of Companies in Uttar Pradesh, Bihar and West Bengal. The said companies is said to have allured the investors to invest in the projects of the

companies which promised handsome returns. The company is said to have issued post-dated cheques to instill confidence in the investors, however, as alleged, as and when the said cheques matured for redemption, they were dishonored.

4. It is further alleged that in order to dupe the investors forged documents were shown to the investors in order to instill confidence that the company had a very healthy land bank, however, neither the investors got the plot as promised nor the amount invested was returned.

5. The company is also alleged to have a scheme for investing in its alleged virtual currency titled as 'Shine Victory Coin' which was floated through Shine City Infrastructure Projects Pvt. Ltd though the Company had no authority or approval from its Board of Directors nor from any Government Authority.

6. All the companies, under the umbrella of Shine Group of Companies, were managed by its main director and supremo namely Sri Rasheed Naseem. He was responsible for luring investors by persuading them to invest in a scheme namely 'Bid and Hot Deal'. In the instant 'bid and hot deal', the company promised to provide vehicles (two wheeler and four wheelers) to its investors at discounted price, however, despite deposit of money in the said scheme, neither the vehicles were delivered nor the money was returned to the innocent investors and moreover few cheques which were issued towards refund were also dishonored.

7. In the aforesaid fashion, several other schemes were floated inter-alia known as "Project Investment Plan" which was the brain child of one Sri Abhishek Thakur who is

alleged to be the President of Garud Team of Shine City Group of Companies. In the aforesaid scheme, the amount invested was to be returned in 12/15 months by giving a plot and needless to say these promises were also not honored. Another scheme known as 'Principal Cash Back' wherein the persons investing the amount was assured of fantastic returns. It is in this light that a huge corpus was collected and siphoned by the Shine City Group of Companies while large number of investors were duped and cheated.

8. The record would reflect that the investigation in the aforesaid scam relating to investments in Shine City Group of Companies is being monitored by a Division Bench of this Court in Criminal Misc. Writ Petition No. 1834 of 2021 (Sri Ram Ram Vs. State of U.P. and Others) along with several other connected writ petitions.

9. It is in this context that the Enforcement Directorate, Government of India filed a complaint under Section 44 and 45 of the The PML Act of 2002 for commission of offence of money laundering as defined under Section 3 read with Section 17 of The PML Act of 2002 which is punishable under Section 4 of The PML Act of 2002.

10. The ECIR is on record as Annexure No. 2 with the bail application and it reveals that upon investigation made under The PML Act of 2002 by the prosecuting agency, various premises were searched inter-alia including that of the present applicant. The present applicant was apprehended on 25.11.2023 and has been in Jail since then.

11. As per the ECIR, the role of the present applicant reveals that the applicant is said to be the main confidant of Sri Rasheed Naseem who is said to be the Director and master-mind of the companies

under the umbrella of Shine City Group of Companies. The role of the applicant is summarized as under:-

(i) It is alleged that the applicant had created a social media group under the name and style of 'Customer ka Haq'; It is also alleged that she had been acting on behalf of Sri Rasheed Naseem and Shine City Group of Companies trying to give possession, illegally, of the land to their own persons which was already provisionally attached by the Enforcement Directorate. This led to frustrating the final confiscation of the attached property which had been confirmed by the Adjudicating Authority;

(ii) Several incriminating information and data in digital form was available on the applicant's mobile phone which established her role in assisting Sri Rasheed Naseem and Shine City Group of Companies to conceal the proceeds of crime and also siphoning the said proceeds;

(iii) The applicant is said to be the single point of contact between Rasheed Naseem and Shine City Group of Companies;

(iv) The account statement of the applicant indicated that the applicant had deposited cash in bank accounts maintained with the Aryavart Bank and during her interrogation she was confronted with the said statements, however, she could not explain the source of cash amounts;

(v) The applicant is a Government School Teacher by profession and apart from her salary, she does not have any other known source of income and thus the deposits apparently links her to the Shine City Group of Companies;

(vi) That the mobile records of the applicant reflects her being in touch with another co-accused namely Abhishek Thakur who is also one of the alleged

confidant of the Shine City Group of Companies and was responsible for handling the affairs of the Shine City Group of Companies in Uttar Pradesh and Kolkata in the State of West Bengal;

(vii) The said data indicates sending of photos of the properties belonging to the Shine City Group of Companies situate in West Bengal by Sri Abhishek Thakur to the present applicant. The Google locations of the said properties was also shared by Sri Abhishek Thakur with the present applicant to facilitate the illegal handing over of possession of the said properties to the persons who were closely associated with the offending Companies and its management.

12. Thus, in view thereof, it was deduced that the present applicant being a close confidant and closely associated with the illegal activities of the offending company and its management, was instrumental in assisting the main master-mind and Director Sri Rasheed Naseem and the Shine City Group of Companies, to conceal and siphon the proceeds of crime.

13. As per the ECIR, the evidence collected during investigation linking the present applicant to the alleged offence of money laundering has been indicated as under:-

(i) As per the search conducted at the residential premises of the present applicant, bank account statement and digital devices recovered indicated that considerable quantum of proceeds of crime were received in the bank accounts of the present applicant which was received from the various Shine City Group of Companies which was later withdrawn in cash and utilized by the present applicant for her personal expenses and other investment best known to her;

(ii) *The applicant being a School Teacher and apart from her monthly salary, she had received a total sum of Rs. 16,82,331/- in her bank account in cash which is alleged to be the proceeds of crime generated by the criminal activities of the Shine City Group of Companies and being a close confidant of Sri Rasheed Naseem, she was controlling the affairs and was the face of the company vis.a.vis its investors.*

(iii) *Mobile device recovered from her residence pointed towards the conversation between the applicant and Sri Rasheed Naseem which also indicated that she was in constant touch and was acting at his behest including her involvement in giving possession of the properties provisionally attached by the Enforcement Directorate to persons being loyal to the offending group of companies.*

14. The specific role of the applicant as indicated in para 6.1 of the ECIR, is being reproduced hereinafter for ease of reference:-

“ ROLE OF SHASHI BALA (ACCUSED 1)

6.1 She is a teacher in a government school and confidant of Rashid Naseem, head of operations of Shine City Group. She created a social media group and channel namely 'Customer ka Haq' and acting on the directions of Rashid Naseem. Further evidence from the WhatsApp group chat clearly shows that she is in possession of important information regarding the assets/properties of shine city which establishes her role in the concealment and laundering of the proceeds of crime. She is involved in dissipation of proceeds of crime by giving possession of the land/plots belong to Shine City companies which were earlier attached by this office. She has been

assisting Rashid Naseem in acquisition, possession, concealment and use of the Proceeds of Crime and has indulged in offence of continuous money laundering by continuing to cheat innocent public investors even till date, despite knowing about various FIRs registered against Rashid Naseem & Shine City. She had received funds majorly in the form of cash directly from the customers however she also received funds to the tune of Rs. 16.82 lakh against Cash Credit which was nothing but the proceeds of crime generated out of the criminal activities being done by Shine City Group of Companies and its operators. Thus, she knowingly assisted and involved in the process and activity connected with generation of Proceeds of Crime and actually in possession and use of proceeds of crime.”

15. Sri Pradeep Rai, the learned counsel for the applicant submits that the applicant has no concern with Sri Rasheed Naseem or the management of Shine City Group of Companies. It is stated that the applicant herself was duped by the company as she herself had invested money and the same was not returned as per the promise made by the company and its management.

16. It is further urged that in the ECIR, it is alleged that a sum of Rs. 16,82,331/- is the estimated quantum of proceeds of crime found in the account of the applicant, however, the same has been explained to state that the amount shown in her account dated 23rd August, 2013 relating to an entry of Rs. 2,02,000/- was the maturity amount which she received as part of her matured deposit.

17. Similarly, a sum of Rs. 5,05,331/- which was received in her account on 29th

June, 2019 is also the maturity amount relating to her deposits made over a period of 9 years. It has also been urged that the applicant had taken loan from the HDFC Bank and Aryavat Bank between the year 2010-2020 for a total sum of Rs. 28,60,000/- (loan taken in parts have been explained in paragraph 14 of the affidavit in support of the bail application).

18. The applicant has also stated that she has been in Government Service since 2005 and has been receiving salary and as such over a period of one decade i.e. for the period 2009-10 till 2019-20, she had received salary of Rs. 46 lakhs and odd as per her salary account statement.

19. It has further been urged that the applicant being a School Teacher had her own independent source of income and she also earned additional income from agriculture and sale and purchase of land and sale of milk and dairy products.

20. It is submitted that the applicant was not named in the ECIR but came to be arrested on 25.11.2023. Significantly, the applicant has not been named in any FIRs which was lodged against Rasheed Naseem and his group of companies and associates. The applicant is neither a Director nor Officer or employee or associated with Rasheed Naseem or any companies of the Shine City Group of Companies.

21. It is also urged by the learned counsel for the applicant that the applicant has been falsely implicated for the reason that a Division Bench of this Court at Allahabad is seized of a bunch of writ petitions, leading petition being Criminal Misc. Writ Petition No. 1834 of 2021 (Sri Ram Ram Vs. State of U.P. and Others) wherein on 31st January, 2023 during the course of hearing, it was

informed to the Court that the present applicant had filed her impleadment application in the said bunch of writ petitions and was present in the Court and it was further alleged that she was in regular touch with Rasheed Naseem who is allegedly in Dubai.

22. The said Court had made strong negative observations against the Enforcement Directorate and in view thereof the ED falsely implicated the applicant and apprehended her on 25.11.2023. A copy of the said order passed by the Division Bench of this Court at Allahabad has been brought on record as Annexure-7 with the affidavit in support of the bail application.

23. It is urged that no offence of money laundering is made out against the applicant nor the applicant is involved in either of the predicate offence, accordingly, the applicant is a school teacher and has been in judicial custody since 25.11.2023.

24. The learned counsel for the applicant has also relied upon his supplementary affidavit dated 27.08.2024 to impress that on the basis of the present ECIR, 3 separate complaints have been filed by the ED. In the present complaint, there are four accused namely, the applicant, Abhishek Kumar Singh, Udhav Singh and Durga Prasad. A list of 67 prosecution witnesses and 272 documents will be relied by the Prosecution in the present complaint alone. In all there are about 226 FIRs lodged in the predicate offences and needless to say that the trial of the predicate would go along simultaneously with the trial of the complaints made under the PML Act, 2002.

25. It is also urged that the complaint was filed on 23rd January, 2024 of which cognizance was taken by the Court

concerned on 17.05.2024 and till date of filing of the supplementary affidavit, the charges have yet not been framed.

26. In the aforesaid circumstances, there is no likelihood of the trial being concluded in the near future. Hence, the bail application be allowed.

27. The learned counsel for the applicant in support of his submissions has relied upon the following decisions of the Apex Court:- **(i) Arvind Kejriwal v. Directorate Enforcement, 2024 SCC OnLine SC 1703**. However, the said decision may not help the applicants since in the case before the Apex Court, the issue therein was in respect of legality of arrest. Moreover, the Apex Court thereafter referred the matter to a Larger Bench for resolving the issue referred and then interim bail was granted considering that Sri Kejriwal, the accused was an elected leader and the Chief Minister of Delhi and further leaving it open for the Larger Bench to either extend or recall the interim bail. Thus, the case in hand is quite different where there is no challenge to the legality of arrest.

(ii) The learned counsel further relied upon the decision of the Apex Court in **Kalvakuntla Kavitha v. Enforcement Directorate, 2024 SCC OnLine SC 2269** wherein the Apex Court has held as under:-

“26. This Court in the case of Saumya Chaurasia (supra) 2023 SCC OnLine SC 1674, while paraphrasing proviso to Section 45(1) of the PML stated in paragraph 23 as follows:

“23. No doubt the courts need to be more sensitive and sympathetic towards the category of persons included in the first proviso to Section 45 and similar

provisions in the other Acts, as the persons of tender age and women who are likely to be more vulnerable, may sometimes be misused by the unscrupulous elements”

27. This Court, in the carefully couched paragraph extracted above used the phrase “persons of tender age and woman who are likely to be more vulnerable, may sometimes be misused by the unscrupulous elements”. This is vastly different from saying that the proviso to Section 45(1) of the PML applies only to “vulnerable woman”. Further, this Court in the case of Saumya Chaurasia (supra) does not say that merely because a woman is highly educated or sophisticated or a Member of Parliament or a Member of Legislative Assembly, she is not entitled to the benefit of the proviso to Section 45(1) of the PML.

28. We, therefore, find that the learned Single Judge of the High Court has totally misdirected herself while denying the benefit of the proviso to Section 45(1) of the PML.

In the aforesaid case, the question whether the word ‘vulnerable women’ applies only to women who are vulnerable or the word vulnerable will be taken in context to all women being vulnerable per se being a woman. Hence, the facts of this case is quite different to the case at hand, accordingly, it may have a limited impact in the case as the applicant claims benefit merely on the basis of gender without pleading or bringing on record any material to connect her vulnerability.

(iii) The learned counsel for the applicant has relied upon another decision of the Apex Court in **Prem Prakash Vs. Union of India through Directorate of Enforcement; 2024 SCC Online SC 2270**

and the relevant portion thereof read as under:-

“Scope of Inquiry under Section 45 of PML

13. Coming back to the scope of inquiry under Section 45, Vijay Madanlal Choudhary (Supra), while reiterating and agreeing with the holding in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294, held that the Court while dealing with the application for grant of bail in PML need not delve deep into the merits of the case and only a view of the Court based on the available material available on record is required. It held that the Court is only required to place its view based on probability on the basis of reasonable material collected during investigation. The words used in Section 45 are “reasonable grounds for believing” which means that the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt. We deem it fit to extract the relevant portion (Para 131) from Vijay Madanlal Choudhary (supra):

“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. While dealing with a similar provision prescribing twin conditions in MCOCA, this court in Ranjitsing Brahmajeetsing Sharma (supra), held as under:

“44. The wording of section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a

positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of the MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of section 21 of the Act, the court may have to probe into

the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby”.

We are in agreement with the observation made by the court in Ranjitsing Brahmajeetsing Sharma (supra). The court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the court based on available material on record is required. The court will not weigh the evidence to find the guilt of the accused which is, of course, the work of Trial Court. The court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the Trial court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this court in Nimmagadda Prasad (supra), the words used in section 45 of the 2002 Act are “reasonable grounds for believing” which means the court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt.”

(emphasis supplied)

Importance of the foundational facts-under Section 24 PML

14. In Vijay Madanlal Choudhary (supra) dealing with Section 24 of the PML, the three-Judge Bench held as under:—

“97. Be that as it may, we may now proceed to decipher the purport of section 24 of the 2002 Act. In the first place, it must be noticed that the legal presumption in either case is about the involvement of proceeds of crime in money-laundering. This fact becomes relevant, only if, the prosecution or the authorities have succeeded in establishing at least three basic or foundational facts. First, that the criminal activity relating to a scheduled offence has been committed. Second, that the property in question has been derived or obtained, directly or indirectly, by any person as a result of that criminal activity. Third, the person concerned is, directly or indirectly, involved in any process or activity connected with the said property being proceeds of crime. On establishing the fact that there existed proceeds of crime and the person concerned was involved in any process or activity connected therewith, itself, constitutes offence of money-laundering. The nature of process or activity has now been elaborated in the form of Explanation inserted vide Finance (No. 2) Act, 2019. On establishing these foundational facts in terms of section 24 of the 2002 Act, a legal presumption would arise that such proceeds of crime are involved in money-laundering. The fact that the person concerned had no causal connection with such proceeds of crime and he is able to disprove the fact about his involvement in any process or activity connected therewith, by producing evidence in that regard, the legal presumption would stand rebutted.

99. Be it noted that the legal presumption under section 24(a) of the 2002 Act, would apply when the person is charged with the offence of money-laundering and his direct or indirect involvement in any process or activity connected with the proceeds of crime, is

established. The existence of proceeds of crime is, therefore, a foundational fact, to be established by the prosecution, including the involvement of the person in any process or activity connected therewith. Once these foundational facts are established by the prosecution, the onus must then shift on the person facing charge of offence of money-laundering-to rebut the legal presumption that the proceeds of crime are not involved in money-laundering, by producing evidence which is within his personal knowledge. In other words, the expression “presume” is not conclusive. It also does not follow that the legal presumption that the proceeds of crime are involved in money-laundering is to be invoked by the Authority or the court, without providing an opportunity to the person to rebut the same by leading evidence within his personal knowledge.

100. Such onus also flows from the purport of section 106 of the Evidence Act. Whereby, he must rebut the legal presumption in the manner he chooses to do and as is permissible in law, including by replying under section 313 of the 1973 Code or even by cross-examining prosecution witnesses. The person would get enough opportunity in the proceeding before the Authority or the court, as the case may be. He may be able to discharge his burden by showing that he is not involved in any process or activity connected with the proceeds of crime. In any case, in terms of section 114 of the Evidence Act, it is open to the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. Considering the above, the provision under consideration [section 24(a)] by no

standards can be said to be unreasonable much less manifestly arbitrary and unconstitutional.”

(Emphasis supplied)”

The proposition in the aforesaid case cannot be disputed and this Court while considering the case of the applicant shall also notice the applicability of the said decision.

(iv) Learned counsel for the applicant next relied upon the decision of the Apex Court in **Manish Sisodia v. Enforcement Directorate, 2024 SCC OnLine SC 1920**, wherein 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 2024 SCC OnLine SC 1693 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 (1978) 1 SCC 240, Shri Gurbaksh Singh Sibbia v. State of Punjab (1980) 2 SCC 565, Hussainara Khatoon (I) v. Home Secretary, State of Bihar (1980) 1 SCC 81, Union of India v. K.A. Najeeb (2021) 3 SCC 713 and Satender Kumar Antil v. Central Bureau of Investigation (2022) 10 SCC 51. 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.

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."

The proposition in the aforesaid case cannot be disputed and this Court while considering the case of the applicant shall also notice the applicability of the said decision.

28. Sri Rohit Tripathi, learned counsel for the Prosecuting Agency has submitted that during investigation and seizure of the records found from the residence of the applicant as has been disclosed in the ECIR, categorically links the applicant with the operations of the Shine City Group of Companies.

29. It is further urged that even though the applicant has stated in her affidavit regarding her source of income derived from the salary, being a School Teacher, however, it has not been indicated what was her quantum of investments in the Shine City Group of Companies.

30. As per the admission of the applicant, she is alleged to have invested a sum of Rs. 11,00,000/- between the year 2013 to 2019 and she has further indicated that Shine City Group of Companies had registered 11 properties in her name but she was not able to indicate that under what circumstances, the said 11 properties were parked in her name.

31. It is further urged that her own admission which was even recorded before a Division Bench of this Court while hearing was in progress of a bunch of writ petitions at Prayagraj clearly indicates that she was in constant touch with Rasheed Naseem and the applicant's daughter and

her son-in-law had even met Rasheed Naseem in Dubai. This clearly linked the applicant to the Director as well as the master-mind of the Shine City Group of Companies.

32. The conversation and exchange of photos between the applicant and another close confidant of Rasheed Naseem namely Abhishek Thakur also fortifies the strong links between the applicant and the Shine City Group of Companies and her assistance in siphoning of the proceeds of crime.

33. In view of the aforesaid, it is urged that there is ample material available on record which clearly incriminates the applicant and for the aforesaid reasons the bail application of the applicant deserves to be rejected.

34. Before dealing with the respective submissions of the learned counsel for the parties, it will be appropriate to take a glance at the certain relevant provisions relating to The PML Act of 2002:-

Proceeds of crime has been defined in Section 2(u) which reads as under:-

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' including 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]"

35. Scheduled offence has been defined in Section 2(y) which reads as under:-

"(y) "scheduled offence" means

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part-B of the Schedule if the total value involved in such offences is [one crore rupees] or more; or

(iii) the offences specified under Part C of the Schedule;]"

36. The offence of money laundering has been defined in Section 3 while the punishment for money laundering has been provided in Section 4 and they read as under:-

"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 [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 –

1. (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]"

4. Punishment for money-laundering:- Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a terms which shall not be less than three years but which may extend to seven years and shall also be liable to fine

Provided that where the proceeds of crime involve in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted."

37. In so far as the issue regarding consideration of an application for bail is concerned, the same is provided under Section 45 which reads as under:-

"45. Offences to be cognizable and non-bailable:- (1) [Notwithstanding anything contained in the Code of Criminal Procedure, 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 office of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.

[(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.]

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitation under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

[Explanation- For the removal of doubts, it is clarified that the expression "Offences to be cognizable and non-

bailable" shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974), and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfillment of conditions under Section 19 and subject to the conditions enshrined under this section.]”

38. Having taken a glance at the aforesaid statutory provisions it now will be worthwhile to notice certain decisions of the Apex Court on the issue of the offence of money laundering and the approach of courts while dealing with an application for bail.

39. The Apex Court in **Rohit Tandon v. Directorate of Enforcement, (2018) 11 SCC 46** has held as under:-

"19. The sweep of Section 45 of the 2002 Act is no more *res intergra*. In a recent decision of this Court in *Gautam Kundu v. Directorate of Enforcement* (2015) 16 SCC 1, this Court has had an occasion to examine it in paras 28-30. It will be useful to advert to paras 28 to 30 of this decision which read thus : (SCC pp. 14-15)

"28. Before dealing with the application for bail on merit, it is to be considered whether the provisions of Section 45 of PML are binding on the High Court while considering the application for bail under Section 439 of the Code of Criminal Procedure. There is no doubt that PML deals with the offence of money laundering and Parliament has enacted this law as per commitment of the country to the United Nations General Assembly.

PML is a special statute enacted by Parliament for dealing with money laundering. Section 5 of the Code of Criminal Procedure, 1973 clearly lays down that the provisions of the Code of Criminal Procedure will not affect any special statute or any local law. In other words, the provisions of any special statute will prevail over the general provisions of the Code of Criminal Procedure in case of any conflict.

29. Section 45 of PML starts with a non obstante clause which indicates that the provisions laid down in Section 45 of PML will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. Section 45 of PML imposes the following two conditions for grant of bail to any person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule of PML:

(i) That the prosecutor must be given an opportunity to oppose the application for bail; and

(ii) That the court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.

30. The conditions specified under Section 45 of PML are mandatory and needs to be complied with, which is further strengthened by the provisions of Section 65 and also Section 71 of PML. Section 65 requires that the provisions of CrPC shall apply insofar as they are not inconsistent with the provisions of this Act and Section 71 provides that the provisions of PML shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. PML has an overriding effect and the provisions of

CrPC would apply only if they are not inconsistent with the provisions of this Act. Therefore, the conditions enumerated in Section 45 of PML will have to be complied with even in respect of an application for bail made under Section 439 CrPC. That coupled with the provisions of Section 24 provides that unless the contrary is proved, the authority or the Court shall presume that proceeds of crime are involved in money laundering and the burden to prove that the proceeds of crime are not involved, lies on the appellant.”

(emphasis supplied)

20. In para 34, this Court reiterated as follows : (Gautam Kundu case, SCC p. 16)

“34. ... We have noted that Section 45 of PML will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. As mentioned earlier, Section 45 of PML imposes two conditions for grant of bail, specified under the said Act. We have not missed the proviso to Section 45 of the said Act which indicates that the legislature has carved out an exception for grant of bail by a Special Court when any person is under the age of 16 years or is a woman or is sick or infirm. Therefore, there is no doubt that the conditions laid down under Section 45-A of PML, would bind the High Court as the provisions of special law having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for grant of bail to any person accused of committing offence punishable under Section 4 of PML, even when the application for bail is considered under Section 439 of the Code of Criminal Procedure.”

The decisions of this Court in *Subrata Chatteraj v. Union of India* (2014) 8 SCC 768, *Y.S. Jagan Mohan Reddy v. CBI* (2013) 7 SCC 439 and *Union of India*

v. Hassan Ali Khan (2011) 10 SCC 235 have been noticed in the aforesaid decision.

21. The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.

22. It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more *res integra*. The decision in *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra* (2005) 5 SCC 294 and *State of Maharashtra v. Vishwanath Maranna Shetty*, (2012) 10 SCC 561, dealt with an analogous provision in the *Maharashtra Control of Organised Crime Act, 1999*. It has been expounded that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed of the requisite *mens rea*. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the

possibility of the accused committing a crime which is an offence under the Act after grant of bail.

31. Suffice it to observe that the appellant has not succeeded in persuading us about the inapplicability of the threshold stipulation under Section 45 of the Act. In the facts of the present case, we are in agreement with the view taken by the Sessions Court and by the High Court. We have independently examined the materials relied upon by the prosecution and also noted the inexplicable silence or reluctance of the appellant in disclosing the source from where such huge value of demonetised currency and also new currency has been acquired by him. The prosecution is relying on statements of 26 witnesses/accused already recorded, out of which 7 were considered by the Delhi High Court. These statements are admissible in evidence, in view of Section 50 of the 2002 Act. The same makes out a formidable case about the involvement of the appellant in commission of a serious offence of money laundering. It is, therefore, not possible for us to record satisfaction that there are reasonable grounds for believing that the appellant is not guilty of such offence. Further, the courts below have justly adverted to the antecedents of the appellant for considering the prayer for bail and concluded that it is not possible to hold that the appellant is not likely to commit any offence ascribable to the 2002 Act while on bail. Since the threshold stipulation predicated in Section 45 has not been overcome, the question of considering the efficacy of other points urged by the appellant to persuade the Court to favour the appellant with the relief of regular bail will be of no avail. In other words, the fact that the investigation in the predicate offence instituted in terms of FIR No. 205/2016 or that the investigation qua the

appellant in the complaint CC No. 700 of 2017 is completed; and that the proceeds of crime are already in possession of the investigating agency and provisional attachment order in relation thereto passed on 13-2-2017 has been confirmed; or that charge-sheet has been filed in FIR No. 205/2016 against the appellant without his arrest; that the appellant has been lodged in judicial custody since 2-1-2017 and has not been interrogated or examined by the Enforcement Directorate thereafter; all these will be of no consequence."

40. Similarly, the Apex Court in **Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1** has held as under:-

"11. Having heard the learned counsel for both sides, it is important to first understand what constitutes the offence of money laundering. Under Section 3 of the Act, the kind of persons responsible for money laundering is extremely wide. Words such as "whosoever", "directly or indirectly" and "attempts to indulge" would show that all persons who are even remotely involved in this offence are sought to be roped in. An important ingredient of the offence is that these persons must be knowingly or actually involved in any process or activity connected with proceeds of crime and "proceeds of crime" is defined under the Act, by Section 2(1)(u) thereof, to mean any property derived or obtained directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence (which is referred to in our judgment as the predicate offence). Thus, whoever is involved as aforesaid, in a process or activity connected with "proceeds of crime" as defined, which would include concealing, possessing, acquiring or using such property, would be

guilty of the offence, provided such persons also project or claim such property as untainted property. Section 3, therefore, contains all the aforesaid ingredients, and before somebody can be adjudged as guilty under the said provision, the said person must not only be involved in any process or activity connected with proceeds of crime, but must also project or claim it as being untainted property."

41. In **Vijay Madanlal Choudhary v. Union of India, 2022 SCC OnLine SC 929** the Apex Court has held as under:-

"269. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form — be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. Thus, involvement in any one of such process or activity connected with the proceeds of crime would constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — except the proceeds of crime derived or obtained as a result of that crime.

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295. As aforesaid, in this backdrop the amendment Act 2 of 2013 came into being. Considering the purport of the amended provisions and the experience of implementing/enforcement agencies, further changes became necessary to strengthen the mechanism regarding prevention of money-laundering.

It is not right in assuming that the attachment of property (provisional) under the second proviso, as amended, has no link with the scheduled offence. Inasmuch as Section 5(1) envisages that such an action can be initiated only on the basis of material in possession of the authorised officer indicative of any person being in possession of proceeds of crime. The precondition for being proceeds of crime is that the property has been derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence. The sweep of Section 5(1) is not limited to the accused named in the criminal activity relating to a scheduled offence. It would apply to any person (not necessarily being accused in the scheduled offence), if he is involved in any process or activity connected with the proceeds of crime. Such a person besides facing the consequence of provisional attachment order, may end up in being named as accused in the complaint to be filed by the authorised officer concerning offence under Section 3 of the 2002 Act.

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387. Having said thus, we must now address the challenge to the twin conditions as applicable post amendment of 2018. That challenge will have to be tested on its own merits and not in reference to the reasons weighed with this Court in declaring the provision, (as it existed at the relevant time), applicable only to offences punishable for a term of imprisonment of more than three years under Part A of the Schedule to the 2002 Act. Now, the provision (Section 45) including twin conditions would apply to the offence(s) under the 2002 Act itself. The provision post 2018 amendment, is in the nature of no bail in relation to the offence of money-laundering unless the twin conditions are fulfilled. The twin conditions are that there

are reasonable grounds for believing that the accused is not guilty of offence of money-laundering and that he is not likely to commit any offence while on bail. Considering the purposes and objects of the legislation in the form of 2002 Act and the background in which it had been enacted owing to the commitment made to the international bodies and on their recommendations, it is plainly clear that it is a special legislation to deal with the subject of money-laundering activities having transnational impact on the financial systems including sovereignty and integrity of the countries. This is not an ordinary offence. To deal with such serious offence, stringent measures are provided in the 2002 Act for prevention of money-laundering and combating menace of money-laundering, including for attachment and confiscation of proceeds of crime and to prosecute persons involved in the process or activity connected with the proceeds of crime. In view of the gravity of the fallout of money-laundering activities having transnational impact, a special procedural law for prevention and regulation, including to prosecute the person involved, has been enacted, grouping the offenders involved in the process or activity connected with the proceeds of crime as a separate class from ordinary criminals. The offence of money-laundering has been regarded as an aggravated form of crime “world over”. It is, therefore, a separate class of offence requiring effective and stringent measures to combat the menace of money-laundering.

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400. 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. While dealing with a similar provision prescribing twin conditions in MCOCA, this Court in **Ranjitsing Brahmajeetsing Sharma(2005) 5 SCC 294**, held as under:

“44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must

demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby”

(emphasis supplied)

401. We are in agreement with the observation made by the Court in **Ranjitsing Brahmajeetsing Sharma**. The Court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the Court based on available material on record is required. The Court will not weigh the evidence to find the guilt of the accused which is, of course, the work of Trial Court. The Court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the Trial Court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this Court in **Nimmagadda Prasad(2013) 7 SCC 466** the words used in

Section 45 of the 2002 Act are “reasonable grounds for believing” which means the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt.”

42. Similarly, the Apex Court in **Tarun Kumar v. Enforcement Directorate, 2023 SCC OnLine SC 1486** has held as under:-

*“15. In our opinion, there is hardly any merit in the said submission of Mr. Luthra. In **Rohit Tandon v. Directorate of Enforcement (2018) 11 SCC 46**, a three Judge Bench has categorically observed that the statements of witnesses/accused are admissible in evidence in view of Section 50 of the said Act and such statements may make out a formidable case about the involvement of the accused in the commission of a serious offence of money laundering. Further, as held in **Vijay Madanlal** (supra), the offence of money laundering under Section 3 of the Act is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The offence of money laundering is not dependent or linked to the date on which the scheduled offence or predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with the proceeds of crime. Thus, the involvement of the person in any of the criminal activities like concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so, would constitute the offence of money laundering under Section 3 of the Act.*

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17. As well settled by now, the conditions specified under Section 45 are mandatory. They need to be complied with. The Court is required to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. It is needless to say that as per the statutory presumption permitted under Section 24 of the Act, the Court or the Authority is entitled to presume unless the contrary is proved, that in any proceedings relating to proceeds of crime under the Act, in the case of a person charged with the offence of money laundering under Section 3, such proceeds of crime are involved in money laundering. Such conditions enumerated in Section 45 of PML Act will have to be complied with even in respect of an application for bail made under Section 439 Cr. P.C. in view of the overriding effect given to the PML Act over the other law for the time being in force, under Section 71 of the PML Act.”

43. Again, the Apex Court in **Pavana Dibbur v. Enforcement Directorate, 2023 SCC OnLine SC 1586** has held as under:-

“15. The condition precedent for the existence of proceeds of crime is the existence of a scheduled offence. On this aspect, it is necessary to refer to the decision of this Court in the case of Vijay Madanlal Choudhary. In paragraph 253 of the said decision, this Court held thus:

“253. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption

that the property recovered by them must be proceeds of crime and that a scheduled offence has been committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression “derived or obtained” is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause “proceeds of crime”, as it obtains as of now.”

(underline supplied)

16. In paragraphs 269 and 270, this Court held thus:

“269. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence. The process or activity can be in any form — be it one of concealment, possession, acquisition, use of proceeds of crime as much as projecting it as untainted property or claiming it to be so. Thus, involvement in any one of such process or activity connected with the proceeds of crime

would constitute offence of money-laundering. This offence otherwise has nothing to do with the criminal activity relating to a scheduled offence — except the proceeds of crime derived or obtained as a result of that crime.

270. Needless to mention that such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity (a scheduled offence). It would be an offence of money-laundering to indulge in or to assist or being party to the process or activity connected with the proceeds of crime; and such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence. In other words, the criminal activity may have been committed before the same had been notified as scheduled offence for the purpose of the 2002 Act, but if a person has indulged in or continues to indulge directly or indirectly in dealing with proceeds of crime, derived or obtained from such criminal activity even after it has been notified as scheduled offence, may be liable to be prosecuted for offence of money-laundering under the 2002 Act — for continuing to possess or conceal the proceeds of crime (fully or in part) or retaining possession thereof or uses it in trenches until fully exhausted. The offence of money-laundering is not dependent on or linked to the date on which the scheduled offence or if we may say so the predicate offence has been committed. The relevant date is the date on which the person indulges in the process or activity connected with such proceeds of crime. These ingredients are intrinsic in the original provision (Section 3, as amended until 2013 and were in force till 31.7.2019); and the same has been merely explained and clarified by way of

Explanation vide Finance (No. 2) Act, 2019. Thus understood, inclusion of Clause (ii) in Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all."

(underline supplied)

17. Coming back to Section 3 of the PML, on its plain reading, an offence under Section 3 can be committed after a scheduled offence is committed. For example, let us take the case of a person who is unconnected with the scheduled offence, knowingly assists the concealment of the proceeds of crime or knowingly assists the use of proceeds of crime. In that case, he can be held guilty of committing an offence under Section 3 of the PML. To give a concrete example, the offences under Sections 384 to 389 of the IPC relating to "extortion" are scheduled offences included in Paragraph 1 of the Schedule to the PML. An accused may commit a crime of extortion covered by Sections 384 to 389 of IPC and extort money. Subsequently, a person unconnected with the offence of extortion may assist the said accused in the concealment of the proceeds of extortion. In such a case, the person who assists the accused in the scheduled offence for concealing the proceeds of the crime of extortion can be guilty of the offence of money laundering. Therefore, it is not necessary that a person against whom the offence under Section 3 of the PML is alleged must have been shown as the accused in the scheduled offence. What is held in paragraph 270 of the decision of this Court in the case of **Vijay Madanlal Choudhary** supports the above conclusion. The conditions precedent for attracting the offence under Section 3 of the PML are that there must be a scheduled offence and that there must be proceeds of crime in relation to the

scheduled offence as defined in clause (u) of sub-section (1) of Section 3 of the PML.

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31. While we reject the first and second submissions canvassed by the learned senior counsel appearing for the appellant, the third submission must be upheld. Our conclusions are:

a. It is not necessary that a person against whom the offence under Section 3 of the PML is alleged, must have been shown as the accused in the scheduled offence;

b. Even if an accused shown in the complaint under the PML is not an accused in the scheduled offence, he will benefit from the acquittal of all the accused in the scheduled offence or discharge of all the accused in the scheduled offence. Similarly, he will get the benefit of the order of quashing the proceedings of the scheduled offence;

c. The first property cannot be said to have any connection with the proceeds of the crime as the acts constituting scheduled offence were committed after the property was acquired;

d. The issue of whether the appellant has used tainted money forming part of the proceeds of crime for acquiring the second property can be decided only at the time of trial; and

e. The offence punishable under Section 120-B of the IPC will become a scheduled offence only if the conspiracy alleged is of committing an offence which is specifically included in the Schedule."

44. The Court has heard the learned counsel for the parties at length and also perused the material on record.

45. As far as the alleged involvement of the present applicant is concerned if the

documents on record are perused, it indicates that the applicant was appointed as an Assistant Teacher in the year 2009 and was promoted later and for her service she received a sum of Rs. 46,81,538/- as salary for the period 2009 to 2020.

46. An attempt has been made to indicate that the amount as shown by the prosecution as received by the applicant as proceeds of crime is nothing but hard earned money of the applicant. The said amount is said to be her saving from her part of salary which she invested as well as money she earned from the sale and purchase of agricultural and commercial land and also part of her income she derived from sale and purchase of cow milk and other dairy products and from agricultural income apart from the monetary help extended to her by her husband and children.

47. The record would further indicate that large number of documents were recovered from the premises/house of the applicant. The details of which have been mentioned in ECIR, Clause 3.4. The nature of the documents so recovered are certain FIRs lodged against the applicant relating to the year 2016. Documents indicating investments made in PIP Plan of Shine City Infra Project relating to Ajay Pal, Kuldeep Singh, Ram Awadh Yadav and the applicant herself.

48. Further, the documents recovered reveal the liabilities of Kuldeep Singh. Various cheques paid by Shine City Infra Projects Ltd. to Kuldeep Singh. Copy of investment made by Sri Ajay Pal, Kuldeep Singh, Ram Awadh Yadav, details of land holdings of Kuldeep Singh.

49. Several original sale deeds in the name of Kuldeep Singh, Santram son of Banwari, Nitish Singh Son of Virendra

Singh and Kishor Kumar were recovered. About 12 original sale deeds in the name of Kuldeep Singh, 3 original sale deeds in the name of Santram, 4 original sale deeds relating to Kishore Kumar and 3 original sale deeds relating to Nitish Kumar (son of the present applicant) along with 2 sale deeds in favour of the present applicant were also recovered.

50. It could not be explained by the applicant as to why there large number of original sale deeds belonging to third parties were present at the residence of the applicant. Thus, in absence of any plausible reason, either the properties have been parked in names of third parties to create a smokescreen to evade it being traced to the applicant or the applicant has deep rooted connections to hold on to said documents for third parties for some ulterior gains.

51. The record further reflects that Kuldeep Singh in whose name, there were 12 sale deeds is none other than the Manager of Aryavrat Bank where the applicant has her account and is also the bank from where the applicant has taken loan. There are certain other documents indicating that Kuldeep Singh had paid some money to Richa Singh, the daughter of the applicant and he also transferred some money to the son of the applicant. Then there is transfer of a sum of Rs. 6,70,000/- from the account of Richa Singh, the daughter of the applicant. There are certain other payment receipts indicating that the applicant had some stake in project 'Royal Residency'. Certain E-payment receipts were also recovered indicating movements of fund from the applicant in respect of certain plots of Shine City Infra Project.

52. In this manner, it would be seen that there are several transactions between

the applicant and Kuldeep Singh and the son and daughter of the applicant. There is no explanation regarding the aforesaid transactions as to why the Bank Manager of Aryavrat Bank would give money to the son and daughter of the applicant and why would he keep 12 original sale deeds relating to properties in his name at the residence of the applicant.

53. Merely to suggest that a sum of Rs. 16,00,000/- and odd has been shown as proceeds of crime and the applicant being a school teacher and later promoted to the post of Headmaster between the year 2009 to 2020 had the means to garner such amount which was in her account and it cannot be treated as an alarming figure.

54. However, at this stage, it will be relevant to notice that the prosecution has stated that the amount of 16 lakhs and odd as shown in the ECIR is a clerical error rather the sum total of the said amount in the ECIR comes to Rs. 36,93, 831/- and this assumes significance for the reason that as per the applicant her total salary received by her is about Rs. 46 lakhs and out of which she has Rs. 36,93, 831/- in her account in liquid cash and also 11 properties are alleged to be parked in her name and large number of sale deeds relating to various immovable properties in name of third parties were found from her custody, sharing of data including GPS locations of various other properties in control of the Companies of Shine City and chats with Rasheed Naseem and co-accused Abhishek Thakur prima facie indicates the involvement of the applicant.

55. The applicant could have easily indicated her source of income from agricultural activities if she could give details of the extent of her landholding but

it has not been done. No details were given to show how much live stock she had from where she could substantially earn by the sale of milk and dairy products. She has not indicated what her husband, son and daughter were doing that their source of earnings to justify that they could offer funds to the applicant to be utilized by her for investments nor the details of investments has been given by her to prima facie ascertain the quantum of funds available and how and when such investments were made that it have grown into a handsome amount and that they were duly reflected in her income tax returns.

56. In absence of such material or explanation to justify the documents, data and amount found with the applicant such as third party sale deeds, plot buyer agreements, e-payment receipts which if seen in juxtaposition to the language of Section 3 of The PML Act of 2002 which provides that any act of a person engaged directly or indirectly being connected or associated with proceeds of crime or even being involved in concealing, possessing, acquisition or use or projecting as untainted property, all such acts falls within Section 3 of The PML Act of 2002.

57. Though, this Court is aware that at this stage, a mini trial is not to be held nor the Court is required to delve deep into the evidence to return a finding of guilt but what is required of the Court is to consider the matter before it and it must enable the Court to prima facie satisfy itself and form an opinion that the applicant is not guilty and that the applicant is not likely to commit any offence on bail and while forming such satisfaction, the Court is required to consider the nature and gravity of accusations, severity of punishment in the event of conviction, danger of the

accused absconding or fleeing also the character, behaviour, means, position and standing of the accused and the likelihood of the offence being repeated, coupled with the reasonable apprehensions of the witnesses being influenced and danger of justice being defeated by grant of bail.

58. Thus, keeping the aforesaid in mind and considering the material before this Court, including the fact that Rasheed Naseem is absconding but the applicant has been in touch with him and also being in touch with other co-accused and this was while prosecution was searching for the Directors and the applicant was knowing their whereabouts but she never came forward to assist the prosecution and this also casts a doubt on the plea of the applicant that she too was a genuine investor and the alleged explanation on her part, rather absence of any cogent explanation of recovery of huge data, documents from her residence and money in her account which leads this Court at this stage to be unable to form a prima facie satisfaction as required in terms of Section 45 of The PML Act of 2002.

59. The plea that the applicant is a woman and she has been in custody since November, 2023 and the trial is not likely to conclude soon pales into insignificance at this stage since the main director with whom the applicant was in touch this fact does not bring her in the category of a vulnerable woman, coupled with the proportion of fraud committed as the number of FIR's spread across various States duping very large number of persons does not permit this Court to extend the benefit of the decision of the Apex Court in Kalvakuntla Kavitha (supra) and Manish Sisodia (supra) to the applicant at this stage.

60. Section 3 of The PML Act of 2002 not only takes into account a role of a person actively engaged in any process connected with the proceeds of crime but even if such person

directly or indirectly is associated in the concealment, possession, acquisition or use or projecting as untainted property or claiming as untainted property, all such acts are covered under the offence of money laundering.

61. Thus taking an overall view including the gravity of offence including the fact that the witnesses of fact are yet to be examined also keeping in mind the dictum of the Apex Court in Pavana Dibbur (supra) and for all the reasons aforesaid, this Court is unable to persuade itself to form a, prima facie, satisfaction in terms of Section 45 of The PML Act of 2002, at this stage, that the applicant is not guilty or that she may not commit an offence on bail. Thus, for all the aforesaid reasons, the bail application is ***rejected***.

43. However, it is also clarified that any observations made by this Court may not be taken as an expression of opinion on merits. The trial court is directed to expedite the trial to complete it as swiftly as possible and the prosecuting agency shall not seek any unnecessary adjournments on the ground of examination of witnesses.

(2024) 9 ILRA 61
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2024

BEFORE

THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.

Criminal Misc. Bail Application No. 25547 of
 2024
 With

Criminal Misc. Bail Application Nos. 27277/2024,
 27447/2024, 27485/2024, 27459/2024 & 27693

Kanika Dhingra **...Applicant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:

Mr. Anoop Trivedi Sr. Advocate, Mr. Nafees Ahmad, Advocate

Counsel for the Opposite Party:

Mr. Manish Goel, Sr. Advocate, Sr. Advocate/ A.A.G., U.P., Mr. Amit Singh Chauhan, AGA-I, Mr. Mayank Awasthi, Brief Holder, Mr. Rishi Kumar, Addl. C.S.C., Mr. Nitesh Srivastava, AGA

Criminal Law - Indian Penal Code, 1860 - Sections 420, 467, 468 & 471 - Allegations against accused persons that they created fraudulent firm by using PAN Card, Aadhaar Card, Mobile Number of informant and through fake invoices, they breached supply chain of ITC, no actual goods or services are exchanged but ITC was claimed multiple times. (Para 32)

Co-accused (son of applicant) was proprietor of M/s Radhey Krishna Marketing, in whose account a hefty transaction of crores of rupees was found in a very short span from M/s Good Health Industries Pvt. Ltd. (managed by applicant's husband) and M/s Radhey Krishna Marketing transferred Rs. 16.35 crores to saving bank account of applicant through on-line mode - There were 71 consecutive transactions in account of her son and 168 times in account of applicant - The said transactions were of about Rs. 300 crores – Applicant contended that no evidence against her in entire case diary constituting any offence of cheating or forging any documents or hatching any conspiracy - Only money transaction from one account to another has been taken into consideration for implicating applicants. (Para 14, 16, 29)

Held, illegal profits as made by fake GST firms registered by using PAN and Aadhaar Cards of informant, were made to appear legitimate by moving money / funds to Bank accounts of others, may be company or firm or relatives' accounts - Fraudsters, like all alleged accused in instant case set up companies only on

paper to generate fake transactions, such companies are abandoned or shutdown after a short period. (Para 43, 45)

Bail application rejected. (E-13)

List of Cases cited:

1. Maghavendra Pratap Singh @ Pankaj Singh Vs St. of Chhattisgarh, 2023 Livelaw (SC) 358
2. Yogesh Jagdish Kanodia Vs St. of Mah. & anr., (2021) 90 GSTR 402 : 2021 SCC OnLine Bom 154 : (2021) 2 Bom CR (Cri) 112
3. Ajay Khanna Vs St. Tax Anti Evasion Bureau, Jabalpur (M.P.), (2020) 73 GSTR 296 2019 SCC OnLine MP 2130 : (2019) 30 GSTL 44
4. Rajesh Jindal Vs Commissioner of Central Tax GST, Delhi (West), 2018 SCC OnLine Del 1344 : (2019) 21 GSTL 471
5. Jagdish Kanani Vs Commissioner of CGST & Central Excise, Indore, 2019 SCC OnLine MP 7108 : (2019) 12 GSTL 460
6. Ranjeet @ Ranjeet Singh Vs U.O.I., 2018 SCC OnLine All 6085 : (2018) 17 GSTL 381
7. Y.S. Jagan Mohan Reddy Vs Central Bureau of Investigation; Central Bureau of Investigation, (2013) 7 SCC 439, (Para 34 and 35)
8. Central Bureau of Investigation Vs Ramendu Chattopadhyay, (2020) 14 SCC 396
9. Tarun Kumar Vs Assistant Director, Directorate of Enforcement, 2023 SCC OnLine SC 1486
10. St. of Bihar & anr. Vs Amit Kumar @ Bachcha Rai, (2017) 13 SCC 751
11. Nimmagadda Prasad Vs Central Bureau of Investigation, (2013) 7 SCC 466, (Para 24)
12. Serious Fraud Investigation Office Vs Nittin ohari & anr., (2019) 9 SCC 165
13. St. of Gujarat Vs Mohanlal Jitmalji Porwal & anr., (1987) 2 SCC 364

14. UTI Infrastructure Technology and Services Limited Vs Extra Tech World and Ors, (By Bombay High Court in Interim Application (L) No. 564 of 2024 in Commercial Intellectual Property Rights Suit (L) No. 537 of 2024)

15. Manish Sisodia Vs Central Bureau of Investigation, 2023 SCC OnLine SC 1393

16. Directorate of Enforcement Vs M. Gopal Reddy & anr., 2022 SCC OnLine SC 1862

17. Tahir Hussain Vs The Assistant Director Enforcement Directorate, (Crl. ReVs P. 775/2022 and Crl. M.A. No. 23452/2022, Order dated 24.11.2022)

18. Gurcharan Singh Vs St. (Delhi Administration), (1978) 1 SCC 118, (Para 29)

19. Prahlad Singh Bhati Vs NCT, Delhi & anr., (2001) 4 SCC 280, (Para 8)

20. Kalyan Chandra Sarkar Vs Rajesh Ranjan, (2004) 7 SCC 528 : 2004 SCC (Cri) 1977, (Para 11)

21. St. of U.P. Through CBI Vs Amarmani Tripathi, (2005) 8 SCC 21, (Para 18)

22. P. Chidambaram Vs Directorate of Enforcement, (2020) 13 SCC 791 : (2020) 4 SCC (Cri) 646, (Para 23)

23. Satendra Kumar Antil Vs Central Bureau of Investigation & anr., (2022) 10 SCC 51

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. This bunch of bail applications arises out of three first information reports, which are: (i) FIR /Case Crime No. 203 of 2023, dated 04.05.2023, under Sections 420, 467, 468, 471 IPC, Police Station Noida Sector-20, District Gautam Buddh Nagar (ii) FIR/Case Crime No. 248 of 2023, dated 01.06.2023, under Sections 420, 467, 468, 471 IPC, Police Station Noida Sector-20, District Gautam Buddh

Nagar, and (iii) FIR/Case Crime No. 255 of 2023, dated 08.06.2003, under Sections 420, 467, 468, 471 & 120B IPC, Noida Sector-20, District Gautam Buddh Nagar.

2. As per prosecution version in FIR/Case Crime No. 203/2023, dated 04.05.2023 under Sections 420, 467, 468, 471 IPC, Police Station Noida Sector-20, Gautam Buddh Nagar, the informant Saurabh Dwivedi is a journalist and works as an Editor of the Lallantop internet news portal and India Today Hindi Magazine. He came across two GST registrations viz. 03AUSPD7067N1Z3 and 27AUSPD7067N1ZT obtained in the State of Punjab and Maharashtra respectively w.e.f. 20.03.2023. These have been applied on informant's PAN AUSPD7067N (Exhibit 1) and bear his name, Saurabh Dwivedi as legal name of the business entity. The details of both the registrations from GST portal are enclosed as Exhibit 2 to the complaint. The registered address mentioned for the given two registrations are as under – (a) 03AUSPD7067N1Z3 having registered address as 787, Ground Floor, Railway Office, ATI Road, Ludhiana, Punjab, 141008, (b) 27AUSPD7067N1ZT having registered address as 172, Sau Alakatal Uttamrao Nikalaje Path, Solapur, Solapur, Maharashtra, 413003. These have not been obtained with his consensus and he is totally unaware of the person who applied for these registrations and whose contact details are updated in these GST registrations. It is also mentioned that the two registrations are already authenticated for Aadhaar verification whereas as on date no email ID and mobile number is linked with his Aadhaar. Copy of Aadhaar Card along with screenshot showing the absence of any email ID or mobile number in Aadhaar details is enclosed as Exhibit.

Further it has been learnt that similar registration has been applied in the UT of Delhi, however, the same got rejected by the GST authorities. The acknowledgement number generated after filing of GST registration application is AA070323054161Q. Hence, the FIR has been lodged.

3. As per prosecution version in **FIR/Case Crime No. 248/2023**, dated 01.06.2023 under Sections 420, 467, 468, 471 IPC, Police Station Noida Sector-20, Gautam Buddh Nagar, the informant – Sumit Yadav came to know about registration of fake firm, Yadav Traders, against his PAN Card No. AHFPX9874Q and the address is recorded as Ground Floor JL No. 219 Khatian No. 2275 dag no. 1835, Sahibganj Road, near Sahibganj, High School, Kharimala, Khagrabari Cooch behar West Bengal – 736101. Said Firm is got registered fallaciously against informant's PAN Card AHFPX9874Q. It has been registered illegally by some unknown miscreants. Informant has mentioned his permanent address as K-11 Gyan Sarowar Colony, Ramghat Road, Aligarh, and present address as J-41, Senior Citizen Society, Greater Noida. Thus, the FIR has been lodged.

4. As per prosecution version in **FIR/Case Crime No. 255/2023**, dated 08.06.2023 under Sections 420, 467, 468, 471, 120-B IPC, Police Station Noida Sector-20, Gautam Buddh Nagar, the informant - Arvind Kumar Yadav, on being known about arrest of some persons who illegally got GST registration using PAN Card of the persons, checked on GSTSEARCH.in and found that three fake GST Numbers detailed in the FIR bearing: (1) GST No. 24ABBP43323J12N, (2) GST No. 24ABBPY43323J2ZM and (3) GST

No. 06ABBPY3323J12L have been obtained by someone, whereas he or his family member never obtained any GST Number and has no concern with the firms. He has stated that his documents have been misused. Hence, the FIR has been lodged.

5. Learned counsel for the applicant while placing the fact in the case of Kanika Dhingra and Mayank Dhingra, submits that three first information reports have been lodged, for which investigation started and charge sheet was submitted against 8 accused persons on 29.08.2023. The applicants are neither named in the first information reports nor have been chargesheeted till 29.08.2023.

6. On 06.09.2023 CD Parcha No. 75 was forwarded, wherein the Investigating Officer has recorded that he has received information from DGGI Meerut, Zonal Unit, Ghaziabad regarding prosecution of Sanjay Dhingra conducted by DGGI, Meerut under the provisions of the GST Act, 2017. The Investigating Officer reduced into writing the complaint dated 04.08.2023 filed by DGGI, Meerut in the court of Special Chief Judicial Magistrate, Meerut bearing Case No. 1942 of 2023. In the said complaint it was alleged that M/s Good Health Industries Pvt. Ltd., the Company where husband of the applicant - Kanika Dhingra, works as a consultant, had transactions with M/s AKS Traders which in turn had transactions with M/s YOYO Traders.

7. Learned counsel for the applicants submits that the case-diary of Case Crime No. 203 of 2023 consists of 70 parchas, wherein investigation as conducted from 04.05.2023 to 29.08.2023 does not mention names of YOYO Traders and M/s AKS Traders. The same is situation in the case

diary of Case Crime No. 248 of 2023, wherein investigation was conducted from 01.06.2023 to 29.08.2023 containing 63 parchas and also that in the case of Case Crime No. 255 of 2023, wherein 51 parchas were there, investigation has been conducted from 08.06.2023 to 29.08.2023.

8. It appears that taking a clue from the complaint of GST, the Investigating Officer has forwarded CD Parcha No. 59 wherein he records that M/s YOYO Traders passed on input tax credit to M/s AKS Traders and M/s AKS Traders passed on input tax credit to M/s Good Health Pvt. Ltd. It is for the first time in the entire case diary wherein names of M/s YOYO Traders and M/s AKS Traders have been included in the investigation and it has been alleged that M/s YOYO Traders had been registered using mobile phone having IMEI No. 862625043825695 which was allegedly shown to have been recovered from Deepak Murjani. Thus, it is evident that allegation of transactions made by M/s Good Health Pvt. Ltd. with M/s AKS Traders which in turn transacted to M/s YOYO Traders, has already been investigated by the DGGI, Meerut and charge sheet in form of complaint under CGST Act, 2017 has been submitted before the Special Chief Judicial Magistrate, Meerut. However, the same allegation has been pressed into CD Parcha No. 57 of the instant case.

9. It is also relevant to mention that Sanjay Dhingra, against whom complaint is there under CGST Act, 2017, has already been released on bail in the aforesaid case by an order dated 03.08.2023 passed in **Criminal Misc. Bail Application No. 32951 of 2023**, Sanjay Dhingra v. Union of India and another.

10. Thus, for the offence under the GST Act, where provisions of the CGST

Act are applicable, the proceedings have been drawn and Sanjay Dhingra had already been released on bail, for the said offence, Kanika Dhingra (wife of Sanjay Dhingra) and Mayank Dhingra (son of Sanjay Dhingra) cannot be prosecuted as there were some transactions between the companies of Sanjay Dhingra and Mayank Dhingra whereas only money has been transferred from the account of Mayank Dhingra to that of Kanika Dhingra.

11. It has also been submitted by learned counsel for the applicants that from CD Parcha No. 60 wherein Investigating Officer records statements of employees of M/s Good Health Pvt. Ltd., no such statement has come on behalf of the employees which suggests complicity of the applicants in the aforesaid case. The Investigating Officer further records that Rs. 16.35 crore have been transferred to Kanika Dhingra from M/s Radhey Krishna Marketing, which is the firm of son of Sanjay Dhingra. All transactions were through online mode i.e. bank to bank transactions and the amount has been returned / adjusted by the applicant as on 31.03.2024.

12. In CD Parcha No. 60, wherein statements of employees of M/s Good Health Pvt. Ltd., have been recorded, it has been alleged that Rs. 289.14 crores have been transferred from M/s Good Health Industries Pvt. Ltd. to M/s Radhey Krishna Marketing (firm of Mayank Dhingra). The aforesaid amount was paid by M/s Good Health to M/s Radhey Krishna Marketing against the supply of milk, which is an exempted item under GST, made by M/s Radhey Krishna Marketing which was in turn purchased by its own vendors. It is relevant to point out that payments made by applicant's (Mayank Dhingra's) firm to its

vendors have already been demonstrated in the balance sheet annexed in bail application.

13. The Investigating Officer has recorded that Rs. 16.35 crore have been transferred to Kanika Dhingra from M/s Radhey Krishna Marketing, which is the firm of Mayank Dhingra, through on-line mode and Mayank Dhingra has received back the adjusted amount.

14. Except the aforesaid, there is no evidence against the applicant - Kanika Dhingra in the entire case diary constituting any offence of cheating anybody or forging/ manipulating any documents or hatching any conspiracy whatsoever. There being no evidence of cheating anybody or forging any document, the applicants are entitled to be released on bail.

15. The applicants have been arrested on 30.04.2024 without there being any credible evidence against them.

16. The Investigating Officer has falsely implicated the applicants in the present case, without there being any credible evidence against them. Neither any collusion of applicants was found with any of the fake firm nor disclosed any proof of forging or creating any such document. It is only money transaction from one account to another which has been taken into consideration for implicating the applicants in the present case. Other basis of implication is the SIM used in registration of M/s YOYO Traders which belongs to Deepak Murjani.

17. From the aforesaid facts, it cannot be said that the applicants can be charged of criminal conspiracy under Section 120-B IPC as there is no direct evidence to

establish conspiracy and there being no agreement or connection with fake GST firms. In support of his submissions, learned counsel for the applicants has placed reliance on a judgement of the Supreme Court in the case of **Maghavendra Pratap Singh @ Pankaj Singh v. State of Chhattisgarh**¹.

18. Learned counsel for the applicant has elaborated his arguments submitting that in the counter affidavit State has come with Parcha Nos. 77, 78, 79 and 87. It says that the husband of Kanika Dhingra, namely, Sanjay Dhingra happens to be owner of M/s Good Health Industries Pvt. Ltd.² and son of Kanika Dhingra, namely, Mayank Dhingra is the owner of Radhey Krishna Marketing Pvt. Ltd.³ Certain amount has been transferred from Good Health to the firm of Kanika Dhingra's son, and from Radhey Krishna Marketing to the personal account of Kanika Dhingra.

19. He further submits that as on date no charge sheet has been submitted in the matter of the applicant. Learned Senior Counsel further argued that allegation is against Good Health. As per allegations, there are two companies, namely, YOYO Traders and AKS Traders which are mentioned in the charge sheet, which have been formed by the accused persons who have been chargesheeted in the first charge sheet. Allegation is that from these traders, transactions were made to Good Health. Statements of employees show that M/s Good Health was controlled by Sanjay Dhingra. Perusal of record shows that some complaints have been filed against the applicant under GST Act. This allegation has already been investigated by GST Department. He has drawn attention of the court to bail order dated 03.08.2023 passed in the case of Sanjay Dhingra i.e. **Criminal**

Misc. Bail Application No. 32951 of 2023,
Sanjay Dhingra v. Union of India and another.

20. Insofar as transfer of money is concerned, money came from the company of applicant's son. Sanjay Dhingra's Company has 5000 vendors. Money was deposited in Mayank Dhingra's Company because milk was transacted by his Company. Transaction reveals that son gave money to his mother, which has been returned to Mayank Dhingra's account.

21. Learned Senior Advocate argues that transfer of money from Radhey Krishna Marketing to Kanika Dhingra's account and returning it back does not amount to any offence.

22. Sri Manish Goel, learned Additional Advocate General assisted by Sri Amit Singh Chauhan, AGA-I, Sri Nitesh Srivastava, learned AGA and Sri Mayank Awasthi, learned Brief Holder, appearing for the State submits that nucleus of the entire issue is that there is a Press Reporter. He says that his PAN Card was misused and on the basis of his PAN Card two Firms were registered. Thus, offence under the provisions of IPC stands committed. On the basis of these fake firms, a transaction is being done with the Company, of which Sanjay Dhingra is a Director. Each and every transaction is separate set, for this they have to submit separate return. Applicants have committed offence of separate nature, so GST Rule will not apply, but it will not take them out of the offence that has been committed under Indian Penal Code, 18604.

23. Elaborating the points, learned Additional Advocate General has placed following arguments:

A. He submits, insofar as involvement of the applicants in the offence is concerned, that they formed a syndicate and their modus operandi configures four segments: (i) assignment of job of collection of SIM Cards and personal data of people that have been uploaded on the portal of Goods & Services Tax; (ii) to use personal data for creation of fake firms by uploading it on GST Portal; (iii) there will be one actual firm which will be working and money transaction will flow to this actual firm and the input tax credit will be availed; and (iv) distribution of monetary benefits amongst all. He has very strenuously argued that to divulge the involvement of the applicants, the dots are required to be joined to examine as to who has done it.

B. It is submitted by Mr. Goel that 2600 fake firms were found to be registered and the input tax credit availed with these 2600 firms was more than Rs. 40,00,00,00,000/- (Rupees Four Thousand Crore). In the present matter anticipatory bail application was filed by one of the co-accused persons and after due consideration the Court has rejected the said anticipatory bail application.

C. Learned Additional Advocate General has further contended that from the material as collected by the Investigating Officer including statements, as recorded, it is evident that it is a case where a number of SIM Cards have been utilized, therefore, it is a case where the entire family is involved and if the bail is granted to one person, it will perpetuate illegality.

D. The FIR was lodged by one Saurabh Dwivedi, who is a journalist and Editor of The Lallantop Internet News Portal, about unknown GST registrations applied on his PAN showing the addresses of Punjab and Maharashtra. The said GST registrations have been obtained without

consensus. It has also been alleged that two registrations are already authenticated for Aadhaar verification whereas as on date no email ID or mobile number is linked with the Aadhaar.

E. Learned Additional Advocate General submits that the informant finds his name as a business entity. There are already two registrations for which he has never applied and there are two different addresses which have been shown. The informant in the FIR has emphatically stated that he never applied for such registrations and there is no consensus on his part. It is also stated that similar registration has been applied in the UT of Delhi, however, same has been rejected by the GST authorities.

F. Mr. Goel submits that the argument with regard to applicability of the provisions of GST Act, the informant levelled allegations of misusing his Aadhaar and PAN Cards for GST registration, thus, FIR has rightly been lodged under the relevant Sections 420, 467, 468, 471 IPC.

G. With regard to arguments of learned counsel for the applicants that once chargesheet has been submitted in economic offence, the person should be released, learned AAG contends that each economic offence has distinct parameter while consideration of bail, which can be summarized in three counts: (i) Gravity of Economic Offence, (ii) Impact, if the person is released on bail or the person is detained, and (iii) Interest of the Nation. It is argued that economic offence is not possible at the hands of one person and the present case is an organized crime where crores of government money has been siphoned by registration of fake firms in which all applicants are connected in one or the other way.

H. With respect to consideration of bail in offences related to GST, learned AAG has placed reliance on various judgements of the Apex Court in the cases of **Yogesh Jagish Kanodia v. State of Maharashtra and another**,⁵ **Ajay Khanna v. State Tax Anti Evasion Bureau, Jabalpur (M.P.)**,⁶ **Rajesh Jindal v. Commissioner of Central Tax GST, Delhi (West)**,⁷ **Jagdish Kanani v. Commissioner of CGST & Central Excise, Indore**,⁸ **Ranjeet @ Ranjeet Singh v. Union of India**.⁹

I. It has also been argued that the Supreme Court has viewed the matters of economic offences and laid down law while considering bail applications in the cases of **Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation; Central Bureau of Investigation**,¹⁰ **Central Bureau of Investigation v. Ramendu Chattopadhyay**,¹¹ **Tarun Kumar v. Assistant Director, Directorate of Enforcement**,¹² **State of Bihar and another v. Amit Kumar alias Bachcha Rai**,¹³ **Nimmagadda Prasad v. Central Bureau of Investigation**,¹⁴ **Serious Fraud Investigation Office v. Nittin ohari and another**,¹⁵ and **State of Gujarat v. Mohanlal Jitamalji Porwal and another**.¹⁶

24. As argued by Mr. Amit Singh Chauhan, learned AGA-I and Sri Mayank Awasthi, learned Brief Holder, for the State, the following material has been collected to show the involvement of the applicants in the present case:

(i) C.D. Parcha No. 2 bears details of Mobile No. 8800966916 which was used to register the GST firms mentioned in the FIR, its CDR17/ CAF18

reports were obtained from Surveillance Cell.

(ii) CDR/ CAF reports were received which reveal that accused's location is of Pitampura Delhi, said information forms part of C.D. Parcha No. 4, whereafter informer as per CD Parcha No. 5 disclosed the names of Deepak Murjhani and Yaseen Sheikh found to have been involved in the crime.

(iii) CD-Parcha No. 7 says that on the aforesaid information, police arrested Ashwani Pandey and Yaseen Sheikh along with the recovery of incriminating materials i.e. SIM Cards of different companies, laptops, Aadhaar Cards, PAN Cards. On being checked the laptop, a master file contained in folder at the desktop, names of 1891 GST firms in various names were found, and in another master sheet contained in a separate folder there were details of 680 GST firms. In the said sheet, name of firms mentioned in the FIR were also found. On the pointing out of Ashwani Pandey and Yaseen Sheikh, the investigating team reached at Madhu Vihar office, where accused Deepak Murjhani, Akash Saini, Vishal Singh, Atul Sengar, Rajiv, Vineet were found and arrested along with huge amount of money and documents relating to fake GST firms. Copy of recovery memo was duly received by the accused persons putting their signatures thereon. The arrested accused persons, in their confessional statements, disclosed names of Anchit Goyal, Pradeep Goyal, Archit Goyal, Mayur alias Mani Nagpal, Charu Nagpal and Deepak Singhal. Consequently, Section 120B IPC was added.

(iv) C.D. Parcha No. 11 shows supplementary statement of accused persons in judicial custody, who said to assist in recovery of incriminating articles from concerned place and persons.

(v) C.D. Parcha No. 14 contains majid-statement of Yaseen Sheikh, Rajiv Jindal and Deepak Murjhani, who disclosed names of Rajiv Maheshwari and Rahul Gupta. In the same parcha the aforesaid accused persons including accused Ashwani Pandey, Vishal and Akash, all of them disclosed the complicity of Rajiv Maheshwari, Rahul Gupta, Gaurav Singhal and Gurmeet Singh Batra alias Sahil and confessed that they used to generate fake GST bills/ invoices in the names of registered fake firms on the basis of fake SIM and IDs.

(vi) C.D. Parcha No. 15 shows that at the instance and pointing out of Deepak Murjhani, Ashwani Pandey and Yaseen Sheikh, arrest of Gaurav Singhal and Gurmeet Singh Batra was effected on 10.06.2023 from the residence of Gaurav, i.e., House No. 2/214, Sector-16, Rohini, Delhi, along with huge recovery of incriminating articles. Whereafter, the investigating team reached at Gautam Buddh Nagar along with accused taken in police custody remand alongwith arrested accused persons Gurmeet Singh Batra and Gaurav Singhal, from where accused Rahul Gupta and Rajiv Maheshwari were arrested with several SIMs and other incriminating material and the recovery memo was handed over with consent to Rajiv.

(vii) C.D. Parcha No. 16 shows that the accused taken in police custody disclosed the names of Atul Gupta, Sumit Garg alias Sumit alias Chacha, Mannan Singhal, Baldev alias Balli, Ishwar, Praveen, Sanjay Garg, Banti, Archit Goyal. All of them confessed to prepare fake GST invoices against the names of fake firms at the office taken on rent by Deepak Murjhani and Archit Goyal.

(viii) On being reached at the office of Jiwalo India Pvt. Ltd. (Shop No. 1-F/A-16, Gurudwara Road, Madhu Vihar,

Delhi), statement of property owner, namely, Sahil Gupta S/o Sri Prakash Chandra Gupta was recorded, which revealed that the shop was taken on rent by one Rajnish Kumar Jha along with Raj Kumar Jha, for which a rent agreement was executed in the name of Jiwalo India Pvt. Ltd. The landlord identified the photograph of accused Yaseen Sheikh to be of Rajnish Kumar Jha, which shows the accused impersonated himself to be Rajnish Kumar Jha, thus it is a connecting chain in the commission of present offence. The information forms the part of CD Parch No. 17 (12.06.2023).

(ix) In C.D. Parcha No. 18 (13.06.2023) the Investigating Officer found that fake GST firm - Tam Enterprises mentioned in the FIR does not exist at given address of Ludhiyana, Punjab, whereas at the relevant place there exists a shop in the name of Kings Footwear being run by one Prabhujeet Singh.

(x) C.D. Parcha No. 22, dated 23.06.2023, shows arrest of Atul Gupta, Sumit Garg alias Chacha and Mannan Singhal along with recovery at two instance of various fake invoices and cars, from which documents relating to A.K. Enterprises were found. Two separate recovery memos were given to the arrested accused persons which bear their signatures. Statements of aforesaid accused persons were recorded, who revealed names of Goldi, Anchit, Anshul, Pradeep Goyal, Praveen, Banti, Puneet, Ishwar, Vikas Dabbas and Sanjay Garg, Mayur alias Mani Nagpal, Charu Nagpal, Rohit Nagpal, Deepak Singhal, Peetam, Mintu, Montu, Ashish, Nandlal, Mahesh, Gaurav Nagpal and Sahil, and admitted to have been working together in this GST fake registrations and for earning undue monetary benefit.

(xi) In C.D. Parcha No. 24 (29.06.2023) the Investigating Officer found that the fake mobile no. 8800966916, which has been used in registration of GST firms with PAN Number, mentioned in the FIR, was found to have been used in four different mobile sets bearing different IMEI Numbers, therefore, the CDR/CAF report reveals that one of the IMEI in which the aforesaid mobile number was used, it was recovered from the possession of accused Yaseen Sheikh on 01.06.2023 as mobile set Nokia 1423. CDR and CAF reports are enclosed in the parcha, making evident the complicity of accused Yaseen along with all other accused persons.

(xii) Parcha No. 25 shows (11.07.2023) the Investigating Officer found that fake GST firm - Tam Traders mentioned in the FIR does not exist at given address of Maharashtra and the documents shown were found to be forged.

(xiii) Parcha No. 29 shows (07.07.2023) the details of persons in whose names SIM Cards were procured, have been recovered from the accused Yaseen and Deepak Murjhani.

(xiv) Arrest of accused Ajay alias Mintu, Amit alias Montu and Mahesh was made, which is mentioned in C.D. Parcha No. 30 (09.07.2023). Recovery of 07 mobile phones, 06 tax invoices, one car and 3 aadhaar cards was made from said accused persons.

(xv) In the C.D. Parcha No. 31 the Investigating Officer found that the registration of vehicle mentioned in the invoices were found to be fake and fabricated.

(xvi) In the C.D. Parcha No. 37 arrest of Preetam Garg alias Chacha is mentioned along with recovery of fake tax invoices, mobile, aadhaar and voter ID. In his statement, the accused Preetam Garg confessed that he along with his elder

brother Sanjay Garg went to Rohini, New Delhi, where he was introduced with Gaurav Singhal, Pradeep, Atul, Mannan, Sumit, Vikas Dabas, Goldi and Nand Lal, at the office of Arjit and Anchit.

(xvii) In the C.D. Parcha No. 39 the Investigating Officer recorded arrest of Jatin Murjhani alias Rohit and Dolsy Murjhani. In their confessional statements, both have stated to have part of the entire transaction by getting commission.

(xviii) In the C.D. Parcha No. 44 the Investigating Officer recorded arrest of accused Nandlal alias Nandu father of co-accused Mahesh and recovery of tablet (notepad). They informed that said tablet and mobile belong to accused Deepak Murjhani and Dolsy Murjhani. During his confessional statement, he has stated that the mobile recovered was to be returned to Deepak Murjhani as it is used for the purposes of obtaining OTP in registration firms, as also used in collection of payment from the customers.

(xix) In the C.D. Parcha No. 49 the Investigating Officer mentioned details of bank accounts of accused persons.

(xx) In the C.D. Parcha No. 53 the Investigating Officer found the tax invoice of Gurmet Singh Batra to be fabricated.

(xxi) C.D. Parcha No. 55 mentions that DGI, Ghaziabad Unit has provided list of 1192 PAN Cards and on verification from the PAN Card holders they denied knowledge of any such registration of firms.

(xxii) C.D. Parcha Nos. 61 to 65 the Investigating Officer recorded statements of affected persons and victims, in whose names fake GST firms have been registered.

(xxiii) C.D. Parcha No. 69 shows that IMEI Numbers of recovered mobile phones from accused persons were sent to

respective companies, namely, AirTel, Jio, Vodafone Idea and on being run it was found that said mobiles with certain IMEI numbers were used in registration of a number of fake firms. They provided information that the mobile (IMEI) recovered from accused Yaseen Sheikh was used in 92 GST registration firms, from Vishal Singh and Akash Saini in 53 GST firms, from Atul Sengar in 45 GST firms, and mobile (IMEI) recovered from Deepak Murjhani was used in 139 fake GST firms.

(xxiv) In C.D. Parcha No. 72 the Investigating Officer has referred the letter sent to DGGI19, Unit Ghaziabad, in response thereto he had relied that total 2528 GSTIN fake firms were identified which are involved in ITC of Rupees Four Thousand Crore, in respect to the same different Zonal Units have arrested accused, namely, Tushar Gupta, Sanjay Dhingra, Rishabh Jain, Shubham Jindal, Tarun Jindal, A. Suresh Kumar, Sanjay Jindal and Ajay Sharma.

(xxv) In C.D. Parcha No. 75 the Investigating Officer has requested DGGI, Meerut Unit, Ghaziabad to provide entire details along with charge sheet with regard to Sanjay Dhingra, controller of M/s Good Health Industries.

(xxvi) In C.D. Parcha No. 76, a report from DGGI, Meerut Unit was received along with charge sheet filed against Sanjay Dhingra, which reveals that Inspector, DGGI Office, Ghaziabad has informed that accused persons were arrested by the police of P.S. Sector-20 Noida, Gautam Buddh Nagar and from their possession list of 2600 fake GST registration firms was recovered. On thorough inquiry it was found that the forged GST firms YOYO Traders has transferred ITC to fake GST firm AKS Traders, from which it was transferred to M/s Good Health Industries Pvt. Ltd., and

both YOYO Traders and AKS Traders were found to be registered on fake documents. A complete report of DGGI office containing 28 pages is enclosed along with the parcha. In the said report it has been found that YOYO Traders and AKS Traders are non-existing firms and mobile numbers have been provided which are used in the registration of fake firms.

(xxvii) C.D. Parcha No. 77 shows that on physical verification Investigating Officer found that both firms, namely, YOYO Traders and AKS Traders are non-existent at the principle place of business.

(xxviii) In C.D. Parcha No. 78, the Investigating Officer mentions that mobile number used in the registration of GST firm YOYO Traders i.e. 9873797648 was found to be used in mobile having IMEI No. 862625043825695, the said mobile was recovered at the initial stage from the accused Deepak Murjani.

(xxix) C.D. Parcha No. 79 shows that I.O. verified about whereabouts of the company but found the company YOYO Traders non-existent, further it was revealed that at the office of M/s Good Health Industries Pvt. Ltd. situated at F-82, Shivaji Palace, Rajauri Garden, Delhi, accused Sanjay Dhingra is not present since 15-20 days and the name of the Company has been changed to Live Light. Thereafter, statements of employees of the Company were recorded. They stated to have never seen Sukhveer Yadav and Rajesh Yadav who are also said to be Director of M/s Good Health and they use to report to Sanjay Dhingra who is owner of the said firm. Further, the complicity of Kanika Dhingra and Mayank Dhingra came to light.

(xxx) In C.D. Parcha No. 81 the I.O. recorded arrest of Ashish Allavadi along with the recovery of driving licence of accused Mannan Singhal and voter I.D.

of Baldev. In his statement, Ashish stated that he used to bring payment of GST commissions and he has confessed the names of his cousin brother Amit alias Montu, Arjit, Anchit, Atul, Mannan, Baldev, Nandlal, Ajay, Ishwar, Sanjay Garg, Gaurav Singhal, Preetam alias Chacha and others in the commission of the offence.

(xxxi) C.D. Parcha No. 82 shows the entry of bank account of accused persons wherein concerned GST ITC transaction was found, as such the accounts were requested to be ceased by the Bank under Section 102(1) Cr.P.C.

(xxxii) In C.D. Parcha No. 84 the I.O. shows arrest of accused Praveen Kumar with the recovery of mobile phone, Debit Card of Atul Gupta and two tax invoices. In his confessional statement he admitted complicity in the offence with other accused persons including Rajiv Jindal. He further disclosed the fact that with regard to the fake invoices GST Department has initiated proceedings against the accused, in which penalty of Rs. 12 lacs was recovered from the company.

(xxxiii) C.D. Parcha No. 85 shows that IMEI of the mobile phones recovered from the accused persons was got run on surveillance of concerned service providers, from where it was found that those IMEI numbers were used in 83 mobile number/ SIMs.

(xxxiv) C.D. Parcha No. 98 refers about the report of one of the DGGI Zonal Units i.e. DGGI Gurugram Zonal Unit. It reveals that from the list of about 2600 fake GST firms which was recovered from the accused persons, out of these 20 companies were found to be common, by which fake ITC claims were received. Further, Annexure-1 of the said report reveals that from these 20 firms, by way of fake tax invoices about Rs. 16,91,74,236/- was

misappropriated as a tax claim as such huge loss to the State Exchequer was caused. From Annexure No. 2 it is revealed that fake ITC claims of Rs. 8,57,60,146/- were fraudulently claimed from the fake GST firms. Further, Annexure-3 discloses that fake ITC of Rs. 226.45 crores were claimed in collusion with the accused Sanjay Jindal and Ajay Sharma. The report of DGGI is enclosed along with the said Parcha.

(xxxv) C.D. Parcha No. 105 shows the arrest of accused Rahul Nigam, Piyush Kumar Gupta and Dilip Sharma. They confessed that they use to create fake GST firms and invoices for the accused persons Arjit Goyal alias Adarsh Goyal, Anchit, Pradeep, Vikas Dabas and told that they are somewhere outside but they create fake GST firms and fake invoices on the email i.d. of adarshgoyal129@gmail.com which is still logged-in on his laptop, wherein many fake GST firms are uploaded. Whereafter, 2 boxes containing 40 stamps, 1 box with 2 bank passbooks and 19 various bank' cheque books, 1 box containing 17 smart mobile phones, 1 box with key-pad mobile phones, 1 box with 20 pendrives, 1 box with one POS machine, and 45 SIM Cards, 12 PAN Cards, 10 Aadhaar Cards and 29 Credit Cards, 1000 fake documents relating to GST firms were recovered and sealed. From the confessional statements of arrested accused, complicity of accused Sachin, Babar, Parmeshwar and Nishant Agarwal came into light.

(xxxvi) C.D. Parcha No. 107 shows the entry of bank account of accused persons wherein concerned GST ITC transaction was found, as such the accounts were requested to be ceased by the Bank under Section 102(1) Cr.P.C.

(xxxvii) C.D. Parcha No. 119 shows the arrest of accused Vikas Dabas and in his confessional statement he

disclosed that he along with other persons, at the office of Arjit, Anchit and Pradeep Goyal, used to transfer the said GST firms bills to different places and receive commission thereof. Further, he disclosed the family of Archit and Anchit is mainly involved in this offence and all other accused are involved in different aspects of commission of crime.

(xxxviii) C.D. Parcha No. 125 (09.03.2024) reveals that against the absconding accused (1) Anchit Goyal, (2) Pradeep Goyal, (3) Arjit Goyal, (4) Baldev alias Balli, (5) Rohit Nagpal proceedings of Non-Bailable Warrants, declaration under Sections 82 and 83 Cr.P.C. have been completed and lookout circular (LOC) has been issued as such there is less chances of arrest of the mentioned accused so charge sheet was filed against them under Sections 420, 467, 468, 471, 120-B IPC. Meaning thereby that accused have fled away from the proceedings of law, hence, shows their guilt.

(xxxix) C.D. Parcha No. 126 (11.03.2024) shows that during the course of investigation accused Kunal Mehta was in judicial custody as such vide judicial permission the statement of accused Kunal Mehta alias Goldi was recorded in jail, wherein he stated to effect the recovery of forged documents from the office of Balli situated in Rohini, Delhi.

(xl) C.D. Parcha No. 128 (15.03.2024) indicates the recovery of documents relating to fake GST firm from accused Kunal Mehta alias Goldi.

(xli) C.D. Parcha No. 131 (21.03.2024) shows that during investigation it was found that accused Ajay Sharma and Sanjay Jindal, who were arrested by DGGI, Gurugram Unit amongst 8 other persons and also involved in the registration of 2600 fake GST firms, whose information was provided to the police by

DGGI Ghaziabad Unit, are in jail, as such the statement of the accused persons were recorded wherein they have confessed their complicity in the present offence and requested the court below for allowing the remand of the accused in the present case crime under Section 420, 467, 468, 471, 120B IPC.

(xlii) In C.D. Parcha No. 135, a letter from DGGI Delhi Unit is submitted by the IO which reveals that the accused Tushar Mehta who was arrested by DGGI Delhi Unit, was involved in recipient of fraudulent ITC to the tune of Rs. 24 crores on the strength of purported invoices issued by the fake GST firm M/s MKJ Enterprises which is a part of Noida fake invoice syndicate.

(xliii) In C.D. Parcha No. 139 (10.04.2024) shows that during investigation it was found that accused Tushar Gupta, who was arrested by DGGI, Delhi Unit amongst 8 persons and also involved in the registration of 2600 fake GST firms, is in jail, as such the statement of the accused persons were recorded wherein they have confessed their complicity in the present offence and requested the court below for allowing the remand of the accused in the present case crime under Section 420, 467, 468, 471 120B IPC.

(xliv) C.D. Parcha No. 146 (01.05.2024) indicates that the accused Sanjay Dhingra along with Mayank Dhingra & Kanika Dhingra were arrested by the police from Delhi on 30.04.2024. At their instance/ possession, 7 mobile phones, 1 tablet, 6 cars, cash of Rs. 1,41,000/- were recovered. Subsequently, in their confessional statement, Sanjay Dhingra along with accused have confessed their guilt in the alleged offence. Moreover, accused Sanjay Dhingra disclosed that fake GST firms were prepared by him along

with Deepak Murjhani and others and it is important to point out that Kanika Dhingra who is wife of Sanjay Dhingra has stated that through M/s Radha Krishna Marketing about Rs. 16,35,00,000/- were transferred to her saving bank account. Copy of recovery memo was served upon the accused receiving their signatures thereon.

(xlv) C.D. Parcha No.149 (03.05.2024) shows that mobile phones and tablet which were recovered from the daughter of Deepak Murjhani, namely, Dolsy Murjhani, were sent to Forensic Science Laboratory, Ghaziabad for examination.

(xlvi) C.D. Parcha No. 156 (13.05.2024) reveals that the data relating to fake GST firms was shared with DGGI Unit, Jaipur, Rajasthan, wherein on 30.08.2023 names of Rishabh Jain, Shubham Jindal and Tarun Jindal came to light in the present offence. The report of DGGI indicates that the computerised data obtained discloses that aforesaid accused persons have received ITC benefits by way of forged GST firms by creating fake bills and invoices.

(xlvii) C.D. Parcha No. 158 (19.05.2024) refers the arrest of accused Rishabh Jain and Tarun Jindal from House No. 105, Prashant Vihar, Rohini, Sector-14 and from their possession recovery of 2 mobile phones, 1 laptop and list of fake GST firms was made. In their confessional statement, said accused stated that they along with Deepak Murjhani, Yaseen, Anchit and Arjit and others have created these forged and fabricated GST firms. In the same parcha, it has been mentioned that accused Shubham Jindal was also arrested from Rajasthan by another team on 18.05.2024, from whose possession 3 mobile phones, 2 laptops and a list of fake GST firms were recovered. It is mentioned

that copy of recovery memo was given to accused persons.

(xlvi) C.D. Parcha No. 161 (25.05.2024) shows that confessional statements of accused Anshul Goyal were recorded, wherein he has stated the complicity of the accused persons naming them.

(xlix) C.D. Parcha No. 162 (26.05.2024) reveals that a report from DGGI, Coimbatore which reveals that names of Smt. Suganya Prabhu and Sri Prabhuparam Shivam came to the light in the complicity of offence, showing huge amount was misappropriated through ITC.

(l) C.D. Parcha No.167 (23.06.2024) details about the arrest of Smt. Suganya Prabhu, her confessional statement was recorded which discloses the complicity in the present case.

(li) C.D. Parcha No.172 (27.06.2024) shows the arrest of accused Babar Khan and recovery of forged tax invoices and other incriminating material and thereafter confessional statement of the accused was recorded.

25. Learned counsel for the State submits that in relation to the accused person, namely, Sanjay Dhingra, Mayank Dhingra and Kanika Dhingra, chargesheet was submitted on 26.07.2024 under Sections 420, 467, 468, 471, 120-B IPC in respective case crime numbers.

26. Learned counsel for the State has argued that the complicity of accused Sanjay Dhingra along with applicants Mayank Dhingra and Kanika Dhingra was unravelled by complete chain of evidence and the name of firms AKS Traders and YOYO Traders were disclosed which were connected with the firm M/s Good Health Industries Private Limited, which was ultimately involved in the entire scam.

These firms, namely, AKS Traders and YOYO Traders, during investigation, were found to be non-existing and fake as they were registered by procuring fake and fabricated documents by the applicants along with other accused persons. On being asked, Ramkumar and Rajni Kumar who were found at the addresses of said firms, they stated that no such firm in the aforesaid names is being operated by them and their documents have been misused and a written complaint along with aadhaar and electricity bill were given to the Investigating Officer.

27. It has also been argued that the mobile phones which were used in the registration of firms YOYO Traders and AKS Traders were used in mobile phone having IMEI No. 862625043825695. The same mobile having the said IMEI was recovered from accused Deepak Murjani who was initially arrested.

28. During investigation it was found that M/s Good Health Pvt. Ltd. was having Directors Sukhveer Singh Yadav and Rajesh Kumar Jha. These persons could not be traced out and it was found that they were dummy directors for the purpose of committing the offence and further during investigation when the statements of employees of the company were recorded they disclosed that they have never seen the said Directors but they used to report only to accused Sanjay Dhingra (husband of applicant-Kanika Dhingra and father of applicant-Mayank Dhingra), and he is said to be the chief controller of the company M/s Good Health Pvt. Ltd. as such complicity of the Director of the Company and that of the applicants was also found in the commission of said offence.

29. Further it was found that accused - Mayank Dhingra is the proprietor of M/s

Radhey Krishna Marketing, in whose account a hefty transaction of crores of rupees was found to be made in a very short span from M/s Good Health Pvt. Ltd., and thereafter, from M/s Radhey Krishna Marketing to the saving bank accounts of applicants – Kanika Dhingra and Mayank Dhingra. It was found that there were 71 consecutive transactions in the account of applicant – Mayank Dhingra and 168 times in the account of applicant – Kanika Dhingra. The said transactions were of about Rs. 300 crores. These cumulative facts reveal that the applicants were involved in hatching up entire conspiracy for gaining wrong financial benefits along with other accused persons, and it has not been appropriately replied by the accused persons.

30. While assisting the Court, Mr. Rishi Kumar, learned Additional Chief Standing Counsel submits that the present case begins with lodging of FIR by Saurabh Dwivedi, wherein allegations for fake GST registration applied in his name with PAN No. AUSPD7067N by anonymous person and got two GST firms registered, thus, the entire case begins with fake GST registration using PAN Card and Aadhaar Card of the informant. During the investigation it was found that larger nexus works for having benefit of input tax credit. The offence has been committed in an organized and synchronized manner, wherein fake and bogus invoices have been created to cover the money trail and goods supply as well as money transactions are there with forged firms. Establishing the entire chain, the accused persons have been found connected with each other and in one or the other way they have been benefited by fake GST registration shown by using PAN Card and Aadhaar Card of the informant.

31. The backbone of goods and services regime is input tax credit. Under the GST regime, ITC follows supply chain not only intrastate but also interstate supply.

32. It has been established through investigation that crime has been committed by the accused persons by making fraudulent firm by using PAN Card and Aadhaar Card, Mobile Number for creating fake firms and through fake invoices, they breached supply chain of ITC and got benefit through fake gains which have been created by them. Thus, in so many words, the said case is started with registration of fake firms using PAN Card and Aadhaar Card of the informant for consequential benefits of claiming ITC. Thus, it cannot be said that the proceedings have to be initiated against the applicants under the special Act i.e. Goods and Services Tax Act, where the proper procedure has been laid down and FIR could not have been registered.

33. The next finding in the case of recovery and use of fake PAN Cards has to be understood by analysing the purpose of issuing a PAN Card. The PAN card is issued to keep a track of financial activity of a person and a PAN is integral for all forms of payments. A PAN Card number is located to a needful and contains information such as Aadhaar number, date of birth and address. Similar is the use of Aadhaar Card which is now linked with the account of individual in favour of whom it has been issued. The PAN Card contains details of Aadhaar also. The PAN Card can be used for availing utility connections like electricity, telephone, LPG and internet. Under GST, a registered taxable person is required to issue an invoice containing all relevant information, such as the GSTIN,

tax divergence and so on. If a taxpayer issues an invoice that is missing critical information, the invoice may be considered a fake GST invoice. Thus, by forging fake GST number using PAN Card of the informant fake GST invoices have been created for financial benefit, thus, the very basis of the present case is forgery done by the accused persons, on the basis of which financial gains in terms of ITC have been availed by them.

34. The learned Additional Chief Standing Counsel, in order to show how use of PAN Card in such a manner, is detrimental not only to the interest of the person whose PAN Card has been used but is also detrimental in national interest, has relied upon a judgement of Bombay High Court in the case of **UTI Infrastructure Technology and Services Limited v. Extra Tech World and Ors.**²⁰, wherein the Court has observed thus:

“It cannot be in dispute that the PAN system is of paramount importance on a national scale due to its multifaceted impact on governance, taxation, and financial integrity, and it can be said to be the cornerstone of a robust financial economic system. PAN related services are pivotal in fostering fiscal discipline and ensuring a transparent and accountable economic framework, as apart from being a unique identifier for individuals and entitles, it also aim at streamlining the tax recovery and payment process. Government of India has made it mandatory for PAN card holders to link the same to Aadhar Card, which is an acceptable proof of identification in India, and therefore, any potential misuse of the licence/ authorisation to issue PAN cards, would be highly detrimental not only to the interest.”

35. Thus, the offence in the present case is affecting the interest of public at large.

36. I have considered the submissions advanced by learned counsel for the parties and perused the record.

37. The main argument of learned counsel for the applicant is with respect to there being no direct evidence of being in any way connected with the fake GST firms and even if it is presumed that there were any transaction of the applicants with Company of Sanjay Dhingra, he has already been released on bail, this Court feels that unknowing involvement in such transactions which are fraudulent in nature, which benefitted them and has aided in concealing the money trail in the commission of offence, the same was subject to investigation, where after collecting evidence, charge sheet has been submitted.

38. Learned counsel for the applicants, in order to prove innocence of Kanika Dhingra, has submitted that transaction of money in her account from her son's account would not hold her guilty of participating in the crime in criminal offence. This Court is of the opinion that if the relatives, mother and son in the present case, are knowingly benefitted from money/ transactions even without directly participating in the crime, they shall stand implicated in the legal proceedings as offence against them is made out. This Court has found from the case diary, portion of which has been placed above, that the mother and son have personally gained from the illegal funds, thus, it cannot be said that as they are not directly involved in registration of fake firms, they are not guilty. In these transactions,

suspicious financial activity, especially a large sum of money has been deposited in the account of Kanika Dhingra unexpectedly. Such financial activity has to be reported and failure to report deposition of huge amount of funds is an activity which might lead to legal consequence even if the person concerned being relative was not actively involved in fraud.

39. Nowadays, money laundering has become a frequent feature and if there is evidence that the recipient attempted to conceal source of funds or participated in transferring the money in ways that suggests intentional wrong doing, thus, create circumstantial evidence as in the present case to hold them involved in the criminal activity.

40. In the facts of the present case, the involvement, knowledge and actions following the deposit determines that the applicants were well connected with Sanjay Dhingra in respect of transactions which he had with GST firms which were registered by using PAN Card and Aadhaar Card of the informant.

41. As regards the submissions regarding no credible evidence that the applicants have conspired, planned or plotted, in any manner, with Sanjay Dhingra or any of the fake firms, this Court has found from case diary, as placed above, that the SIM which has been used by accused Deepak Murjani in whose name M/s YOYO Traders is registered, and the same has been done with intention of achieving some gain, thus, it is an organized crime where the money trail is involved.

42. Money trail/ financial transaction and the records that have been traced to

track the flow of funds, detect illegal activity which can be analyzed from the bank account of the applicants wherein it is not clear as to from where such huge amount of money came into accounts of the alleged accused persons and have been deposited in other accounts. The Investigating Officer has, while submitting the charge sheet, found unusual and unexplained transactions which indicate some illegal activity as showing involvement of the applicants in the criminal offence.

43. It is also clear that the illegal profits as made by the fake GST firms registered on the basis of PAN and Aadhaar Cards of the informant, were made to appear legitimate by moving money / funds to the Bank accounts of others, may be company or firm or relatives' accounts.

44. The intention of all the accused of having transactions with fake GST firms, was for claiming input tax credit. For the purposes, fake invoices are created for purchase of goods, a group of firms engaged in fictitious transactions and no actual goods or services are exchanged but ITC is claimed multiple times.

45. Fraudsters, like all the alleged accused in the present case set up companies only on paper to generate fake transactions and claim ITC. Such companies are abandoned or shutdown after a short period.

46. GST Department has blown a whistle to report the fraudulent activities like fake invoicing or ITC theft, thus, giving opportunity to the Investigating Agency to trace the conspiracy as planned which was the outcome of fake GST firm registered on the basis of Aadhaar and PAN cards of others as in the present case.

47. As regards the bail being granted to Sanjay Dhingra, the same is for an offence under the GST Act, which has no relevance in facts of the present case as the same involves offences under IPC.

48. The principal of "bail is the rule, jail is the exception" is a fundamental concept in criminal law, where the criminal justice system recognizes the importance of personal liberty and the presumption of innocence until proven guilty. This principal emphasizes that an accused should ordinarily be granted bail unless there are compelling reasons to detain him in custody. But there are exceptions to the aforesaid principal. While, the general rule favours granting bail, there are several exceptions where courts may deny bail due to specific circumstances. These exceptions are based on factors that indicate a potential risk to society, the judicial process, or the investigation. Some points that should be kept in mind while granting bail are; the nature and gravity of the offence, likelihood of flight risk, risk of tampering with the evidence of witnesses, repeated offenders or habitual criminals, danger to society or the victim, possibility of committing another offence while on bail, interference with justice, specific statutory provisions like the Narcotic Drugs and Psychotropic Substances Act, 1985, Unlawful Activities (Prevention) Act (UAPA) and the Prevention of Money Laundering Act, 2002 (PMLA), lastly economic offence and white collar crimes.

49. The present case relates to economic offences. Such offence like large scale fraud, money laundering and corruption, are often viewed seriously because they affect the economic fabric of the society. The Courts may deny bail in such cases especially if the accused holds a

position of influence or power. In the present case, money trail of crores, which affects the society at large scale, is involved which started from registration of fake firms by using Aadhaar and PAN Cards of the informant who had not applied for such registration.

50. The Apex Court in the case of **Manish Sisodia v. Central Bureau of Investigation, 2023 SCC OnLine SC 1393**, has discussed about the constitutional mandate which is higher law and accordingly it is the basic right of person charged of offence and not convicted be ensured and given a speedy trial, thus, where the trial is not proceeding for the reasons not attributed to the accused, the Court unless there are good reasons may well be guided by exercising power to grant bail. This would be true, the trial would take years.

51. As discussed while rejecting bail of other accused persons in **Criminal Misc. Bail Application No. 53010 of 2023, Rajiv Jindal v. State of U.P.**, and connected bail applications, from the report of the concerned District Judge/ Chief Judicial Magistrate, it is clear that the co-accused have avoided coming to the court and discharge application of one of the accused has been rejected. One or the other grounds are being taken by the accused persons in getting the matter adjourned so that the charge is not framed, therefore, they are trying to cause deliberate delay so that the charges may not be framed, hence, interfering in judicial process, thus, giving ample reason of not enlarging them on bail.

52. From the report also it is clear that the discharge application of one of the accused has been rejected and it shows that the charges are proved and once on the

basis of material collected chargesheet has been submitted, discharge is rejected, the case of bail is not made out in economic offence where money trail of crores has been found which is a result of registration of fake firms. Offence under the IPC is made out and such accused cannot be dealt with easy hands. The applicants are also chargesheeted hence to be dealt with the same rod. In the case of **Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation, (2013) 7 SCC 439**, the Supreme Court has held thus:

“34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.”

53. The Apex Court in the case of **Nimmagadda Prasad v. Central Bureau of Investigation, (2013) 7 SCC 466** has formulated some important factors to be taken into consideration while considering bail applications.

Relevant paragraph of the said judgement is quoted herein below:

“24. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words “*reasonable grounds for believing*” instead of “*the evidence*” which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.”

54. Hon'ble Apex Court in the case of **Directorate of Enforcement v. M. Gopal Reddy and another, 2022 SCC OnLine SC 1862** has held that in the economic offences which are having great impact on the society, the court must be slow in exercising discretion under Section 438 of Cr.P.C.

55. Insofar as the argument of learned counsel for the applicants that the cases where the accused are females, they are entitled to be released on bail giving benefit of Section 437 Cr.P.C., the court is of the opinion that the benefit can be given to

women who do not have agency and not who themselves are powerful or connected with such powerful persons and the offence is such which is affecting the public at large.

56. In the case of **Tahir Hussain v. The Assistant Director Enforcement Directorate**²¹, the Court has observed that the accused Tahir Hussain was involved in the acts of cheating/ falsification/ forgery of documents which resulted in fraudulent removal of money from the accounts of the three companies (M/s SEAPL, ECPL and EG SPL). On the directions and instructions of Tahir Hussain, huge amount of money was withdrawn from the accounts of the said three companies by way of transfer of funds to entry operators and bogus companies. Tahir Hussain was ultimate beneficiary of the laundered money which he used for fulfilment of ulterior motives. Fake and bogus invoices were created to cover the money trail.

57. The same situation is there in the facts of this case where the crime has started with registration of fake GST firms by using Aadhaar and PAN Card of the informant which amounts to forgery, therefore, offence under the relevant sections is made out and these offences have been properly investigated by the Investigating Officer after lodging of FIRs. The evidences have been collected from the GST Department also.

58. While considering an appeal against the bail cancellation order, the Apex Court in the case of **Gurcharan Singh v. State (Delhi Administration)**²², has held that there cannot be an inexorable formula in the matter of granting bail. Paragraph-29 of the said judgement is thus:

“29. We may repeat the two paramount considerations, viz. likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a Court of Justice. It is essential that due and proper weight should be bestowed on these two factors apart from others. 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.”

59. The Apex Court in the case of **Prahlad Singh Bhati v. NCT, Delhi and another**²³, has held that while granting bail, the court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, larger interest of the public or State and similar other considerations. Relevant paragraph no. 8 of the said judgement is reproduced hereunder:

“8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the

presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words “reasonable grounds for believing” instead of “the evidence” which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.”

60. Law on consideration of the Court to grant or refusal of bail has been settled by the Apex Court in a catena of decisions. In the case of **Kalyan Chandra Sarkar v. Rajesh Ranjan**²⁴, the Supreme Court has held that the court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Paragraph-11 of the said judgement is being quoted below:

“11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to

consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh*²⁵ and *Puran v. Rambilas*²⁶).”

61. In the case of **State of U.P. Through CBI v. Amarmani Tripathi**²⁷, the Supreme Court has formulated eight points for consideration of bail application. It would be apposite to quote the relevant paragraph no. 18 of the said judgement:

“18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. ...”

62. The Apex Court has, in the case of **P. Chidambaram v. Directorate of Enforcement**²⁸, held that precedent of another case alone will not be the basis for either grant or refusal of bail though it may have bearing on principle and the

consideration will have to be on case-to-case basis on facts involved therein and securing the presence of the accused to stand trial. Paragraph-23 of the said judgement reads thus:

“23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of “grave offence” and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of

another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.”

63. Recently the Apex Court in the case of **Satendra Kumar Antil v. Central Bureau of Investigation and another**²⁹, has outlined the considerations by the Court in the matter of grant or refusal of bail.

64. In the matter of other accused persons, this Court has rejected the bail applications vide judgement dated 31.08.2024 passed in **Criminal Misc. Bail Application No. 53010 of 202330**.

65. Having gone through the submissions of learned counsel for the parties, nature of accusation of offence, role of the applicants as well as reasons given in judgement passed in Bail Application No. 53010 of 2023, I do not find it a fit case for granting bail.

66. The bail applications preferred by the applicants - Kanika Dhingra and Mayank Dhingra are rejected.

(2024) 9 ILRA 83
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Bail Application No. 34904 of
2024

Dharmendra		...Applicant
	Versus	
State of U.P. & Ors.		...Opposite Parties

Counsel for the Applicant:

Shashi Kumar Mishra

Counsel for the Opposite Parties:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 376, 506 & 120B - Protection of Children from Sexual Offences Act, 2012 - Section 3/4 - Code of Criminal Procedure, 1973 - Section 161 - Juvenile Justice (Care and Protection of children) Act, 2015 - Section 94 - Quashing of FIR - Determination of age of victim - Victim was wrongly shown as minor of 15 years in F.I.R. only to falsely implicate applicant under stringent provisions of POCSO Act - Material contradictions in her age as recorded in prosecution documents - No lawful basis for age related entry of victim - Medical report records age of victim as 13 years - She was in fact a major. (Para 2, 9)

Held, medical reports determining age of victim which are bereft of reasoning or made in breach of existing scientific parameters and medical protocols are inconsistent with Section 27 of POCSO Act r/w Section 164A (2)(3) of Cr.P.C - In the instant case, the age column has been simply filled, and reasons for conclusion regarding age was absent - Thus, report was invalid - Entitled to bail, directions accordingly. (Para 17)

Bail application allowed. (E-13)

List of Cases cited:

1. Junaid Vs St. of U.P. & anr., 2021 (6) ADJ 511
2. Monish Vs St. of U.P., 2024 (6) ADJ 361
3. Arvind Singh Vs St. of U.P. Thru. Prin. Secy. Home Department, (Application U/S 482 No.2613 of 2023)
4. Aman @ Vansh Vs St. of U.P, 2024 (8) ADJ 523
5. Anurudh Vs St. of U.P., 2024 (8) ADJ 469

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

1. Matter is taken up in the revised call.

2. Shri Paritosh Kumar Malviya, learned AGA-I for the State contends that the police authorities in compliance of the directions issued by this Court in **Junaid Vs State of U.P. and another¹** and with a view to implement the provisions of POCSO Act, 2012 read with POCSO Rules, 2020, have served the bail application upon the victim/legal guardian as well as upon the CWC.

3. By means of this bail application, the applicant has prayed to be enlarged on bail in Session Trial No.103 of 2024 arising out of Case Crime No.492 of 2023 at Police Station-Kotwali Dehat, District-Etah under Sections 376, 506, 120B I.P.C. and Section 3/4 of the POCSO Act, 2012. The applicant is in jail since 17.12.2023.

4. The bail application of the applicant was rejected by the learned trial court on 23.08.2024.

5. The following arguments made by Shri Shashi Kumar Mishra, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Paritosh Kumar Malviya, learned AGA-I from the record, entitle the applicant for grant of bail:

I. The victim was wrongly shown as a minor of 15 years in the F.I.R. only to falsely implicate the applicant under the stringent provisions of the POCSO Act and cause her imprisonment.

II. The age of the victim set out in the prosecution case is refuted in light of the judgement of this Court in **Monish vs State of U.P. 2** and on the following grounds:

(i) There are material contradictions in the age of the victim as recorded in various prosecution documents.

(ii) The age of the victim was incorrectly got registered in the school records by the victim's parents to give her an advantage in life. There is no lawful basis for the age related entry of the victim in the school records. The school records disclosing her age as 15 years are unreliable.

(iii) The victim in her statement under Section 161 Cr.P.C. has stated that she is 15 years of age.

(iv) The medical report records the age of the victim as 13 years. The medical report has been drawn up in a mechanical manner and is bereft of all reasons. The scientific criteria and medical parameters on the basis of which the said age has been determined are not disclosed in the medical report. The said medical report is in the teeth of Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C.

(v) No medical examination in consonance with Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C. to determine the correct age of the victim as per the latest scientific criteria and medical protocol by competent doctors was got done and no such medical report was drawn up by the prosecution as it would establish the majority of the victim and falsify the prosecution case. The victim is in fact a major.

III. Delay in lodgement of the F.I.R. in the facts of this case is fatal to the prosecution case.

IV. The victim was intimate with the applicant. The couple had eloped together and got married.

V. Subsequently the victim and her husband became estranged. The victim returned her home after five months.

VI. False and aggravated allegations were made by the victim against the applicant only to deflect attention from her conduct.

VII. The victim was present at various public places but never raised an alarm nor did she resist the applicant. The conduct of the victim shows that she was a consenting party.

VIII. Medical evidence to corroborate commission of rape by the applicant with the victim has not been produced by the prosecution.

IX. The victim has not identified the applicant as the principal offender who committed rape with her.

X. The applicant does not have any criminal history apart from this case.

XI. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to join the trial proceedings. There is no possibility of the applicant influencing witnesses, tampering with the evidence or reoffending.

6. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

7. Let the applicant-Dharmendra 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 below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

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

8. The learned trial court is directed to fix the sureties after due application of mind in light of the judgement rendered by this Court in **Arvind Singh v. State of U.P. Thru. Prin. Secy. Home Department**.³

The learned trial court shall ensure that the right of bail of the applicant granted by this Court is not frustrated by arbitrary demands of sureties or onerous conditions which are unrelated to the socioeconomic status of the applicant.

9. The issue relating to determination of age of a victim in a bail under a POCSO Act offence has arisen in the instant case. The said issue will now be addressed. It is noteworthy that the same issue is constantly arising in bail applications under the POCSO Act offences.

10. The age of the victim in the POCSO Act offences has to be determined in light of the statutory provisions holding the field. Needless to add, only a prima facie determination of the age of a victim is made in a bail application of an accused under the POCSO Act.

11. It has been repeatedly noticed by this Court that the age of a victim is disputed by the accused in an overwhelming majority of cases. On many occasions there are no age related documents pertaining to the victim which are available with the prosecution. The age related documents are disputed with credibility by the accused persons in the other set of cases. At times there are material contradictions in the age of the victim in the prosecution documents. This has led to a widespread misuse of the POCSO Act.

12. The provisions which govern and regulate determination of age of victims of POCSO Act offences are as follows:

A. Section 94 of Juvenile Justice (Care and Protection of children) Act, 2015;

B. Section 27 of POCSO Act read with Section 164A(2)(3) of Cr.P.C.

13. The said statutory provisions have to be construed as a complete scheme. No part thereof can be made redundant by non consideration of the documents mentioned therein or failure to comply with the mandate of said provisions. The manner of an application of the said provisions in bail jurisdiction however has been the subject matter of various decisions of this Court.

14. This Court was faced with the issue of age determination of victims under the POCSO Act for the purposes of deciding the bail applications in **Monish (supra)**. In **Monish (supra)** while examining the manner of applicability of Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015, it was held:

"93. In wake of the preceding narrative, the manner of consideration of age of a victim in a bail application under the POCSO Act shall be guided as follows:

I. The procedure for determination of a victim's age provided in Section 94 of the JJ Act, 2015 read with JJ Rules, 2016 shall not apply to bail applications, though the documents therein are liable to be considered. Age of victim as per procedure prescribed in Section 94 of the JJ 46 Act, 2015 is determined conclusively only in the trial.

II. The line of enquiry and relevant factors to assess the age of the victim in a bail application under the POCSO Act offences are these. The consideration of the age related documents mentioned in Section 94 of the JJ Act, 2015

i.e. school certificate (including matriculation), date of birth certificate issued by a local body, and medical report for age determination as produced by the prosecution is a good start point in the process.

III. The accused has a right to assail the veracity of the age of the victim as stated in the prosecution case.

IV. The court while deciding the said bail application is obligated to independently:

A. Examine the challenge laid to the victim's age by the accused applicant.

B. Evaluate credible doubts about the age of the victim.

V. The assessment of age in a bail order is of a tentative nature, and is based on probative value of documents which are yet to be proved or statements of witnesses who are still to be examined in court. Such determination by a court is not conclusive and is made only for the limited purpose for deciding the bail application.

VI. Same parameters shall apply to the bail applications filed at a different stages of trial. However, with each stage of the trial, the threshold of the satisfaction of the court may be raised in the facts and circumstances of the case. Heightened threshold of satisfaction means the duty of the court to give full weight to prosecution evidence, and due regard to the defence case while considering grant of bail.

VII. It is not advisable to lay down an inflexible or a straitjacket formula for grant of bail which will fit all cases. Practices and precedents in point are a reliable guide for the Court while exercising its judicial discretion in bail proceedings and a good defence against arbitrary decisions."

15. Apart from Section 94 of Juvenile Justice (Care and Protection of Children)

Act, 2015, there are other provisions also which deal with the determination of age of a victim in a POCSO Act offence. The said provisions are Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. A faultline in police investigations which has repeatedly come to fore is the failure of the police and the medical authorities to comply with the provisions of Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. It will be apposite to reproduce the said provisions to facilitate the discussion:

"Section 27 of the POCSO Act- Medical examination of a child.—

(1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973 (2 of 1973).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

Section 164A of CrPC- Medical examination of the victim of rape.-

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person

and prepare a report of his examination giving the following particulars, namely:—

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.”

16. The legislative mandate of Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C. is explicit and mandatory. The law enforcement authorities as well as competent medical authorities are enjoined to draw up the medical report pertaining to the age of the victim. (This is apart from other medical parameters). The same is of course subject to the consent of the victim. The age of the victim is a jurisdictional issue in the POCSO related offences. Thus, the determination of age under Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C. assumes critical importance and has jurisdictional significance. The said medical reports traceable to Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. determining the age have to record the scientific criteria and the medical protocols on which the opinion regarding the age is based. The said medical reports are examined by the courts on the footing of the reasoning and the scientific tests/medical protocols adopted to make the finding on age.

17. The medical reports determining the age of the victim which are bereft of reasoning or made in breach of the existing scientific parameters and medical protocols are inconsistent with Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C. In the instant case the age column has been simply filled, and the reasons for the conclusion regarding age is absent. The report is invalid.

18. Reasons and description of the medical parameters or scientific criteria adopted to determine the age of the victim are the mandatory prerequisites of a valid medical report. The Court is noticing that in a number of cases the medical report mechanically records the age of the victim. The medical reports which do not give reasons in support of conclusions with respect to the victim's age are vitiated, being in contravention of Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C.

19. This Court handed down the directions to the police authorities in **Aman @ Vansh vs State of U.P.**⁴ to ensure strict compliance with Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. The competent medical authorities of the State too are liable to implement the mandate of Section 27 of POCSO Act read with Section 164A (2)(3) of Cr.P.C. by giving reasoned medical reports for age determination of victims.

20. The statutory scheme of determination of age of the victims in POCSO Act offences is a composite one and involves an interplay of Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 and also Section 27 of POCSO Act read with Section 164A(2)(3) of Cr.P.C.

21. As seen earlier the scope of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 has been determined by various holdings of the Supreme Court and the High Courts. In particular, the nuanced applicability of Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 in relation to the offences under the POCSO Act has been considered by this Court in **Monish (supra)** for the purposes of grant of bail of an accused.

22. The age of the victim in POCSO Act cases has to be determined in light of and upon holistic examination of the above said provisions, namely, Section 94 of Juvenile Justice (Care and Protection of children) Act, 2015 and Section 27 of POCSO Act read with Section 164A(2)(3) of Cr.P.C. The criteria and the documents referenced in all the aforesaid provisions are liable to be considered to determine the age of the victim while deciding the bail applications under the POCSO Act. The said statutory provisions mandate that the consideration of the age of the victim of a POCSO Act offence has to be made in a manner which implements the above said provisions in an integrated manner and neglects no provision.

23. The documents mentioned in Section 94 of Juvenile Justice (Care and Protection of children) Act, 2015 cannot be neglected from consideration. Similarly, the provisions of Section 27 of the POCSO Act read with Section 164A(2)(3) of the Cr.P.C. cannot be rendered otiose by non consideration of the medical report determining the age of the victim, or on account of failure to submit a reasoned medical report determination of age of the victims.

24. The Principal Secretary, Medical Health and Family Welfare, Uttar Pradesh

and Director General, Medical and Health, Uttar Pradesh, shall ensure that the medical specialists who determine the age of the victims/medical reports under the POCSO Act are properly trained and the said medical reports are drawn up after giving reasons for the conclusions consistent with the mandate of Section 27 of the POCSO Act read with Section 164A (2)(3) of the Cr.P.C.

25. After composite consideration of the law in **Monish (supra)**, **Aman (supra)** and the provisions of Section 27 of the POCSO Act read with Section 164A(2)(3) of the Cr.P.C., this Court in Anurudh⁵ issued appropriate directions. The directions in **Anurudh (supra)** are reiterated.

26. The Director General of Police, Government of U.P. Lucknow, Principal Secretary, Medical Health and Family Welfare, Uttar Pradesh and Director General, Medical and Health, Uttar Pradesh are directed to ensure compliance of the judgements rendered in **Monish (supra)**, **Aman (supra)**, **Anurudh (supra)** and the instant case.

(2024) 9 ILRA 89
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2024

BEFORE
THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.

Criminal Misc. Bail Application No. 53010 of
 2023

With other connected cases

Rajiv Jindal

State of U.P.

...Applicant

Versus

...Opposite Party

Counsel for the Applicant:

Arvind Srivastava, Ashok Kumar Dubey

Counsel for the Opposite Parties:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 420, 467, 468 & 471 - Code of Criminal Procedure, 1973 - Sections 100, 161, 167 & 177 - Indian Evidence Act, 1872 - Sections 3, 4, 25 & 27 - FIR was lodged by one journalist and editor - Allegations that fake GST registration applied in his name with PAN and Aadhaar Card by anonymous person and got two GST firms registered - The said GST registrations have been obtained without his knowledge and consensus - During investigation it was found that larger nexus works for having benefit of input tax credit - The offence has been committed in an organized and synchronized manner, wherein fake and bogus invoices have been created to cover money trail and goods supply, money transactions are there with forged firms. (Para 111)

Held, after registration of FIR, Investigating Officer arrested two accused who disclosed about office where work of firm was being done - Thereafter, Investigating Officer reached office premises, where he found other persons working for firm of arrested accused persons - Laptops, mobiles, SIM Cards, fake invoices were recovered - Therefore, contention by applicants regarding fact that confessional St.ments can be taken as a piece of evidence, has no relevance. (Para 126)

On ground of jurisdiction as contended by applicant, Court found that though registration of fake firms were at Punjab and Maharashtra, complainant was resident of New Delhi and FIR lodged at Gautam Buddha Nagar, genuineness of complaint questioning territorial jurisdiction cannot be raised on basis of occurrence as it was not at one place where GST firm was registered but its

connections with other fake firms are also required to be seen. (Para 144)

Bail applications rejected. (E-13)

List of Cases cited:

1. Dinesh Gupta Vs St. of U.P.& anr., 2024 SCC OnLine SC 34, (Para 24, 36, 38)
2. Manoj Kumar Sharma & ors. Vs St. of Chhattisgarh & anr., (2016) 9 SCC 1, (Para 27 and 28)
3. Haricharan Kurmi & anr. Vs St. of Bihar, AIR 1964 SC 1184 : 1964 SCC OnLine SC 28, (Para 13)
4. Y Abraham Ajith & ors. Vs Inspector of Police, Chennai & another, (2004) 8 SCC 100
5. Haricharan Kurmi & anr. Vs St. of Bihar, 1964 SCC OnLine SC 28
6. Narcotics Control Bureau Vs Pallulabid Ahmad Arimutta, (2022) 12 SCC 633
7. U.O.I. (NCB) etc. Vs Khalil Uddin etc, 2022 SCC OnLine SC 2109, (Para 8)
8. Bharat Chaudhary Vs U.O.I., (2021) 20 SCC 50
9. Sanjeev Chandra Agarwal Vs U.O.I., (2021) 20 SCC 57
10. Dinesh Kumar Vs St. of H.P., (2020) SCC OnLine HP 899
11. Dipakbhai Jagdishchandra Patel Vs St. of Guj., (2019) 16 SCC 547
12. Surinder Kumar Khanna Vs Directorate of Revenue Intelligence, (2018) 8 SCC 271
13. Rajender Singh & ors. Vs St. of Bihar, (2000) 4 SCC 298
14. Ramashish Yadav & ors. Vs St. of Bihar, (1999) 8 SCC 555
15. Kehar Singh Vs St. (Delhi Admn.), (1988) 3 SCC 609

16. Arnab Manoranjan Goswami Vs St. of Mah., (2021) 2 SCC 427
17. Sanjay Chandra Vs CBI, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S)
18. Susanta Ghosh Vs St. of W.B., (2012) 2 SCC 680 : (2012) 1 SCC (Cri) 979
19. Satender Kumar Antil Vs C.B.I., (2022) 10 SCC 51
20. St. of Har. Vs Ram Singh, (2002) 2 SCC 426
21. Sanju Bansal Vs St. of U.P., 2024 LiveLaw (SC) 467
22. Rajesh & anr. Vs St. of M.P., (2023) SCC OnLine SC 1202
23. Avtar Singh Vs St. of Pun., (2002) 7 SCC 419
24. Yogendra Kumar Mishra Vs St. of U.P., 2011:AHC:52011
25. Mohd. Muslim Vs St. (NCT of Delhi), 2023 SCC OnLine SC 352
26. Manish Sisodia Vs Directorate of Enforcement, (Arising Out of SLP (Criminal) No. 8772 of 2024), decided on 09.08.2024
27. Navaneethakrishnan Vs St. By Inspector of Police, AIR 2018 SC 2027
28. Mohd. Muslim Vs St. (NCT of Delhi), 2023 LiveLaw (SC) 260
29. U.O.I. Vs K.A. Najeeb, (2021) 3 SCC 713
30. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr., (2004) 7 SCC 528 : 2004 SCC (Cri) 1977, (Para 11)
31. Masroor Vs St. of U.P.& anr., (2009) 14 SCC 286
32. St. of U.P. Through CBI Vs Amarmani Tripathi, (2005) 8 SCC 21, (Para 18)
33. Mehboob Ali & anr. Vs St. of Raj., (2016) 14 SCC 640
34. P. Chidambaram Vs Directorate of Enforcement, (2019) 9 SCC 24
35. Sunil Kumar Vs St. of Bihar & anr., (2022) 3 SCC 245 : (2022) 1 SCC (Cri) 603 : 2022 SCC OnLine SC 88
36. Shahzad Alam Vs St. of U.P., 2020 SCC OnLine All 1901 : (2020) 35 GSTL 529
37. Govind Agarwal Vs St. of U.P., 2020 SCC OnLine All 1902 : (2020) 35 GSTL 551
38. Yogesh Jagish Kanodia Vs St. of Mah. & anr., (2021) 90 GSTR 402 : 2021 SCC OnLine Bom 154 : (2021) 2 Bom CR (Cri) 112
39. Ajay Khanna Vs St. Tax Anti Evasion Bureau, Jabalpur (M.P.), (2020) 73 GSTR 296 2019 SCC OnLine MP 2130 : (2019) 30 GSTL 44
40. Rajesh Jindal Vs Commissioner of Central Tax GST, Delhi (West), 2018 SCC OnLine Del 1344 : (2019) 21 GSTL 471
41. Jagdish Kanani Vs Commissioner of CGST & Central Excise, Indore, 2019 SCC OnLine MP 7108 : (2019) 12 GSTL 460
42. Ranjeet @ Ranjeet Singh Vs U.O.I., 2018 SCC OnLine All 6085 : (2018) 17 GSTL 381
43. Y.S. Jagan Mohan Reddy Vs Central Bureau of Investigation; Central Bureau of Investigation, (2013) 7 SCC 439, (Para 34, 35)
44. Central Bureau of Investigation Vs Ramendu Chattopadhyay, (2020) 14 SCC 396
45. Tarun Kumar Vs Assistant Director, Directorate of Enforcement, 2023 SCC OnLine SC 1486
46. St. of Bihar & anr. Vs Amit Kumar @ Bachcha Rai, (2017) 13 SCC 751
47. Nimmagadda Prasad Vs Central Bureau of Investigation, (2013) 7 SCC 466, (Para 24)
48. Serious Fraud Investigation Office Vs Nittin ohari & anr., (2019) 9 SCC 165

49. St. of Gujarat Vs Mohanlal Jitalmalji Porwal & anr., (1987) 2 SCC 364

50. UTI Infrastructure Technology and Services Limited Vs Extra Tech World and Ors, (Bombay High Court in Interim Application (L) No. 564 of 2024 in Commercial Intellectual Property Rights Suit (L) No. 537 of 2024)

51. Pulukuri Kotayya & ors. Vs King Emperor, [P.C. App. No. 37 of 1946, 19th Dec. 1946 (Indian Appeal Vol. LXXIV Page 65)]

52. St. of U.P.Vs Deoman Upadhyaya, 1960 SCC OnLine SC 8 : AIR 1960 SC 1125

53. Manish Sisodia Vs Central Bureau of Investigation, 2023 SCC OnLine SC 1393

54. Directorate of Enforcement Vs M. Gopal Reddy & anr., 2022 SCC OnLine SC 1862

55. Tahir Hussain Vs The Assistant Director Enforcement Directorate, (Crl. ReVs P. 775/2022 and Crl. M.A. No. 23452/2022, Order dated 24.11.2022)

56. Perumal Raja @ Perumal Vs St., Rep. By Inspector of Police, 2024 LiveLaw (SC) 8, (Para 22, 23)

57. Gurcharan Singh Vs St. (Delhi Administration), (1978) 1 SCC 118, (Para 29)

58. Prahlad Singh Bhati Vs NCT, Delhi & anr., (2001) 4 SCC 280, (Para 8)

59. P. Chidambaram Vs Directorate of Enforcement, (2020) 13 SCC 791 : (2020) 4 SCC (Cri) 646, (Para 23)

60. Satendra Kumar Antil Vs Central Bureau of Investigation & anr., (2022) 10 SCC 51

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. This bunch of bail applications arises out of three first information reports, which are: (i) FIR /Case Crime No. 203 of 2023, dated 04.05.2023, under Sections

420, 467, 468, 471 IPC, Police Station Noida Sector-20, District Gautam Buddh Nagar (ii) FIR/Case Crime No. 248 of 2023, dated 01.06.2023, under Sections 420, 467, 468, 471 IPC, Police Station Noida Sector-20, District Gataum Buddh Nagar, and (iii) FIR/Case Crime No. 255 of 2023, dated 08.06.203, under Sections 420, 467, 468, 471 & 120B IPC, Noida Sector-20, District Gataum Buddh Nagar.

2. For ready reference, it would be appropriate to refer the details of bail applications preferred by the applicants under relevant sections, detailing case crime numbers, police stations and districts in the form of a chart, which are being summarized as under:

Sl. No.	Bail Application No.	Applicant's Name	Case Crime No.	Under Sections	Police Station	District
	53010/2023	Rajiv Jindal	0248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gataum Buddh Nagar
	52966/2023	Rajiv Jindal	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gataum Buddh Nagar
	53475/2023	Rajiv Jindal	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gataum Buddh Nagar
	55125/2023	Manan Singhal	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gataum Buddh Nagar
	55131/2023	Manan Singhal	203/2023	420, 467,	Noida Sector-	Gataum

				468, 471 & 120B IPC	20	Bud dh Nag ar
	51907/2 023	Mahesh	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	51920/2 023	Mahesh	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	52254/2 023	Mahesh	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	53246/2 023	Nand Kishore	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	50362/2 023	Nand Kishore	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	50510/2 023	Nand Kishore	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	55268/2 023	Manan Singhal	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	55161/2 023	Sumit Garg @ Chacha	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar

				IPC		Nag ar
	55235/2 023	Sumit Garg @ Chacha	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	55245/2 023	Sumit Garg @ Chacha	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	6728/20 24	Dolsy Murjha ni	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	8746/20 24	Dolsy Murjha ni	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	9061/20 24	Dolsy Murjha ni	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	10526/2 024	Jatin Murjani	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	10527/2 024	Jatin Murjani	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	10528/2 024	Jatin Murjani	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar

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	6882/2024	Gaurav Singh @ Gaurav Singhal	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	5007/2024	Amit @ Moti @ Motu	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	50753/2023	Akash Saini	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	10603/2024	Akash Saini	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	8643/2024	Akash Saini	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	11406/2024	Ajay @ Mintu	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	11452/2024	Ajay @ Mintu	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	11581/2024	Ajay @ Mintu	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	50337/2023	Vishal	203/2023	420, 467, 468, 471	Noida Sector-	Gatamum Bud

				& 120B IPC	20	dh Nagar
	2994/2024	Vishal	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	2742/2024	Vishal	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	525/2024	Praveen Kumar	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	561/2024	Praveen Kumar	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	56396/2023	Praveen Kumar	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	8136/2024	Piyush Kumar Gupta	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	52956/2023	Ashwan i	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector-20	Gatamum Bud dh Nagar
	53087/2023	Ashwan i	203/2023	420, 467, 468, 471	Noida Sector-	Gatamum Bud

				& 120B IPC	20	dh Nag ar
	53088/2 023	Ashwan i	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	18705/2 024	Atul Gupta	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	12687/2 024	Pritam Garg @ Chacha	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	13150/2 024	Pritam Garg @ Chacha	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	13386/2 024	Pritam Garg @ Chacha	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	16146/2 024	Gaurav Singh @ Gaurav Singhal	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	16288/2 024	Gaurav Singh @ Gaurav Singhal	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	16413/2 024	Atul Gupta	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar

	16981/2 024	Amit @ Moti @ Motu	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	16999/2 024	Amit @ Moti @ Motu	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	17749/2 024	Rakesh Dialani	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	17802/2 024	Rakesh Dialani	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	17809/2 024	Rakesh Dialani	248/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	18616/2 024	Atul Gupta	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	19304/2 024	Dilip Sharma	203/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	26838/2 024	Piyush Kumar Gupta	255/2023	420, 467, 468, 471 & 120B IPC	Noida Sector- 20	Gata um Bud dh Nag ar
	26942/2 024	Piyush Kumar Gupta	248/2023	420, 467, 468, 471 & 120B	Noida Sector- 20	Gata um Bud dh Nag

				IPC		ar

3. As per prosecution version in **FIR/Case Crime No. 203/2023**, dated 04.05.2023 under Sections 420, 467, 468, 471 IPC, Police Station Noida Sector-20, Gataum Buddh Nagar, the informant Saurabh Dwivedi is a journalist and works as an Editor of the Lallantop internet news portal and India Today Hindi Magazine. He came across two GST registrations viz. 03AUSPD7067N1Z3 and 27AUSPD7067N1ZT obtained in the State of Punjab and Maharashtra respectively w.e.f. 20.03.2023. These have been applied on informant's PAN AUSPD7067N (Exhibit 1) and bear his name, Saurabh Dwivedi as legal name of the business entity. The details of both the registrations obtained from GST portal are enclosed as Exhibit 2 to the complaint. The registered address mentioned for the given two registrations are as under – (a) 03AUSPD7067N1Z3 having registered address as 787, Ground Floor, Railway Office, ATI Road, Ludhiana, Punjab, 141008, (b) 27AUSPD7067N1ZT having registered address as 172, Sau Alakatal Uttamrao Nikalaje Path, Solapur, Solapur, Maharashtra, 413003. These have not been obtained with his consensus and he is totally unaware of the person who applied for these registrations and whose contact details are updated in these GST registrations. It is also mentioned that the two registrations are already authenticated for Aadhaar verification whereas as on date no email ID and mobile number is linked with his Aadhaar. Copy of Aadhaar Card along with screenshot showing the absence of any email ID or mobile number in Aadhaar details is enclosed as Exhibit. Further it has been learnt that similar registration has been applied in the UT of Delhi, however, the same got rejected by

the GST authorities. The acknowledgement number generated after filing of GST registration application is AA070323054161Q. Hence, the FIR has been lodged.

4. As per prosecution version in **FIR/Case Crime No. 248/2023**, dated 01.06.2023 under Sections 420, 467, 468, 471 IPC, Police Station Noida Sector-20, Gataum Buddh Nagar, the informant – Sumit Yadav came to know about registration of fake firm, Yadav Traders, against his PAN Card No. AHFPX9874Q and the address is recorded as Ground Floor JL No. 219 Khatian No. 2275 dag no. 1835, Sahibganj Road, near Sahibganj, High School, Kharimala, Khagrabari Cooch behar West Bengal – 736101. Said Firm is got registered fallaciously against informant's PAN Card AHFPX9874Q. It has been registered illegally by some unknown miscreants. Informant has mentioned his permanent address as K-11 Gyan Sarowar Colony, Ramghat Road, Aligarh, and present address as J-41, Senior Citizen Society, Greater Noida. Thus, the FIR has been lodged.

5. As per prosecution version in **FIR/Case Crime No. 255/2023**, dated 08.06.2023 under Sections 420, 467, 468, 471, 120-B IPC, Police Station Noida Sector-20, Gataum Buddh Nagar, the informant - Arvind Kumar Yadav, on being known about arrest of some persons who illegally got GST registration using PAN Card of the persons, checked on GSTSEARCH.in and found that three fake GST Numbers detailed in the FIR bearing: (1) GST No. 24ABBP43323J12N, (2) GST No. 24ABBPY43323J2ZM and (3) GST No. 06ABBPY3323J12L have been obtained by someone, whereas he or his family member never obtained any GST Number and has no concern with the firms.

He has stated that his documents have been misused. Hence, the FIR has been lodged.

6. The applicants have preferred bail applications in respective First Information Reports/ Case Crime Numbers, details whereof according to case crime number, are being enumerated in following chart:

(i) Bail Applications in FIR/Case Crime No. 203 of 2023, dated 04.05.2023:

Sl. No.	Bail Application No.	Applicant's Name
1.	53475/2023	Rajiv Jindal
2.	13386/2024	Pritam Garg @ Chacha
3.	16146/2024	Gaurav Singh @ Gaurav Singhal
4.	16999/2024	Amit @ Moti @ Motu
5.	17749/2024	Rakesh Dialani
6.	19304/2024	Dilip Sharma
7.	18616/2024	Atul Gupta
8.	55131/2023	Manan Singhal
9.	55245/2023	Sumit Garg @ Chacha
10.	56396/2023	Praveen Kumar
11.	8136/2024	Piyush Kumar Gupta
12.	53087/2023	Ashwani
13.	50337/2023	Vishal
14.	10603/2024	Akash Saini

15.	11452/2024	Ajay @ Mintu
16.	10526/2024	Jatin Murjani
17.	51907/2023	Maresh
18.	53246/2023	Nand Kishore
19.	6728/2024	Dolsy Murjhani

(ii) Bail Applications in FIR/Case Crime No.248/2023, dated 01.06.2023:

Sl. No.	Bail Application No.	Applicant's Name
1.	53010/2023	Rajiv Jindal
2.	12687/2024	Pritam Garg @ Chacha
3.	16288/2024	Gaurav Singh @ Gaurav Singhal
4.	16413/2024	Atul Gupta
5.	17809/2024	Rakesh Dialani
6.	55125/2023	Manan Singhal
7.	55235/2023	Sumit Garg @ Chacha
8.	561/2024	Praveen Kumar
9.	53088/2023	Ashwani
10.	5007/2024	Amit @ Moti @ Motu
11.	2994/2024	Vishal
12.	8643/2024	Akash Saini
13.	11406/2024	Ajay @ Mintu
14.	8746/2024	Dolsy Murjhani

15.	10527/2024	Jatin Murjani
16.	52254/2023	Mahesh
17.	50362/2023	Nand Kishore
18.	26942/2024	Piyush Kumar Gupta

15.	52966/2023	Rajiv Jindal
16.	51920/2023	Mahesh
17.	50510/2023	Nand Kishore
18.	26838/2024	Piyush Kumar Gupta

**(iii) Bail Applications in
FIR/Case Crime No.255/2023, dated
08.06.2023:**

Sl. No.	Bail Application No.	Applicant's Name
1.	13150/2024	Pritam Garg @ Chacha
2.	16981/2024	Amit @ Moti @ Motu
3.	17802/2024	Rakesh Dialani
4.	18705/2024	Atul Gupta
5.	55268/2023	Manan Singhal
6.	55161/2023	Sumit Garg @ Chacha
7.	525/2024	Praveen Kumar
8.	52956/2023	Ashwani
9.	6882/2024	Gaurav Singh @ Gaurav Singhal
10.	2742/2024	Vishal
11.	50753/2023	Akash Saini
12.	11581/2024	Ajay @ Mintu
13.	9061/2024	Dolsy Murjhani
14.	10528/2024	Jatin Murjani

7. Sri Arvind Srivastava, learned counsel for the applicant submits that instant bail application being Criminal Misc. Bail Application No. 51920 of 2023 has been preferred by the applicant – Mahesh with a prayer to release him on bail in Case Crime No. 255 of 2023, under Sections 420, 467, 468, 471 and 120B IPC, Police Station Noida Sector-20, District Gautam Buddh Nagar.

8. As per prosecution story the informant on being searched on internet found that three fictitious firms have been formed with his PAN and three GST Numbers have been obtained, whereas the applicant neither got any such firm opened nor obtained any GST Number, thus he prayed for legal action against the accused who have manipulated and misused his documents and lodged the first information report on 08.06.2023.

9. Learned counsel for the applicant submits that the applicant is innocent and has been falsely implicated in the present case. He is not named in first information report¹. Placing forth the facts, learned counsel next submits that on 07.07.2023 when the applicant came back from Delhi after appearing in a competitive examination of IELTS, he along with his brother (deponent) were quizzed and exerted pressure to produce their father, however, on being asked the reason, the applicant was challaned on 09.07.2023.

10. To show the fair background of the applicant, it is stated that the applicant is a student of K.R. Mangalam University, Gurugram, State of Haryana, he is aged about 20 years and is a meritorious student. However, due to arrest he has missed his one semester. In paragraph-15 of the application, the applicant has averred that he is a heart patient and his bypass surgery has been done, for the said purpose he has been undergoing medical treatment at Narayan Hrudayalaya Super Speciality Clinic & Diagnostic Centre, Bangalore.

11. Learned counsel for the applicant contended that there is no evidence in the entire case diary against the applicant as nothing has been recovered from him to prove the offence against him. However, the chargesheet has been submitted on 03.10.2023 only the basis of alleged circumstantial evidence. It is argued on behalf of the applicant that prima face if no offence is made out against the applicant, he should not ordinarily be apprehended. Article 21 of the Constitution of India mandates that no person shall be deprived of his life or personal liberty except according to procedure established by law. The basic rule is to release him on bail unless there are circumstances suggesting the possibility of his fleeing from justice or thwarting the course of justice.

12. Learned counsel for the applicant contends that the complainant is resident of New Delhi whereas he has filed first information report in Gautam Buddha Nagar without there being any reason as to why the applicant came to Noida to lodge the FIR. He raises question over the genuineness of the complaint stating that the territorial jurisdiction is decided on the basis of place of occurrence. In support of his submission, learned counsel for the

applicant has placed reliance on a judgement of the Supreme Court in the case of **Dinesh Gupta v. State of Uttar Pradesh and another**². Paragraph Nos. 24, 36 & 38 of the said judgement are quoted as under:

“**24.** The falsehood in the complaint, filed with reference to the addresses of the accused, was established at the time of filing of charge-sheet. Whereas in the FIR, the addresses of all the accused given were incomplete merely mentioning the address as ‘Sector 20, Gautam Buddha Nagar’, in the charge-sheet addresses of not only the appellants, namely, Rajesh Gupta and Dinesh Gupta, were found to be ‘D-393, New Friends Colony, New Delhi, even Sushil Gupta and Baljeet Singh were also found to be residents of New Delhi. ...

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36. In view of the aforesaid discussion, we find that the FIR in question, if proceeded further, will result in absolute abuse of process of court. It is a clear case of malicious prosecution. Hence, the same is required to be quashed.

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38. Before parting with the judgment, we are reminded of the opening remarks. The respondent Karan Gambhir having misused the legal system by lodging false and frivolous complaint with non-disclosure of necessary facts must bear its costs. The registration of FIR at Noida despite having registered offices of

companies in question at Delhi shows a wishful forum shopping by the Complainant, casting serious doubts on their bona fides. The Complainant had already sought remedy against amalgamation order before the High Court and the High Court had dismissed the same. However, Complainant chose to again use judicial mechanisms to raise his grievances. A criminal complaint was filed and FIR was registered against appellants despite the commercial nature of dispute. Such ill intended acts of abuse of power and of legal machinery seriously affect the public trust in judicial functioning. Thus, we find ourselves constrained to impose cost on Complainant with a view to curb others from such acts leading to abuse of judicial remedies.”

13. It is also contended that neither FIR has been lodged at the concerned police station nor investigation has been done by it, thus, it is a malicious prosecution. To strengthen his argument, learned counsel for the applicant has referred two judgements of the Supreme Court in the cases of **Manoj Kumar Sharma and others v. State of Chhattisgarh and another**³. Relevant Paragraph Nos. 27 & 28 of the said judgement are thus:

“27. The territorial jurisdiction of a court with regard to a criminal offence would be decided on the basis of the place of occurrence of the incident. In the instant case, the suicide was committed at Ambala. Ambala Police closed the case after fulfilling the requirements of Section 174 of the Code holding that there was no foul play in the incident and also there was no requirement of lodging FIR under Section 154 as none of the family members of the deceased raised any suspicion over the

death even though the death was committed within seven years of marriage. Also, there is no evidence of it being a continuing offence. Hence, the offence alleged cannot be said to have been committed wholly or partly within the local jurisdiction of the Magistrate's Court at Durg. Prima facie, none of the ingredients constituting the offence can be said to have occurred within the local jurisdiction of that Court.

28. In the case on hand, as per the materials on record, in Crime No. 194 of 2005, charge-sheet has been filed and the Judicial Magistrate First Class, Durg has taken cognizance of the proceedings. In the present fact situation, we are of the considered opinion that the court at Durg has no territorial jurisdiction to try the case and the proceedings are liable to be quashed on the ground of lack of territorial jurisdiction since the entire cause of action for the alleged offence had purportedly arisen in the city of Ambala.”

14. He further contends that no recovery has been made from the applicant's possession and the alleged recovery is fake and it does not make any case against the applicant.

15. Mr. Arvind Srivastava, learned counsel argued on behalf of the applicant – Rajiv Jindal in Criminal Misc. Bail Application Nos. 53010 of 2023, 53475 of 2023, 52966 of 2023; applicant – Mahesh in Criminal Misc. Bail Application Nos. 51907 of 2023, 51920 of 2023, 52254 of 2023, and applicant-Nand Kishore in Criminal Misc. Bail Application Nos. 53246 of 2023, 50362 of 2023 and 50510 of 2023.

16. Placing reliance upon a judgement of the Supreme Court in the case of

Haricharan Kurmi and another v. State of Bihar⁴, learned counsel for the applicants has drawn attention of the Court to Paragraph-13 and argued that it has been held in the said judgement that Section 30 of the Indian Evidence Act, 1872⁵ provides that the court may take confession into consideration and thereby no doubt, makes it evidence on which the court may act; but the section does not say that the confession amounts to proof. Relevant excerpt of Paragraph-13 of said judgement is quoted herein below:

“13. ... Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved the case; it can be put into the scale and weighed with the other evidence”. It would be noticed that as a result of the provisions contained in Section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of Section 30, the fact remains that it is not evidence as defined by Section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said

evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. ...”

17. Learned counsel for the applicants has vehemently argued that with respect to grant of bail the applicants cannot tamper any evidence and a case of bail is made in their favour as nothing, even prima facie, is available on record which may require the applicant to be apprehended, as also it is a settled law that the bail is rule and jail is exception.

18. Placing the three first information reports bearing Case Crime Nos. 203 of 2023, 248 of 2023 and 255 of 2023, lodged by Saurabh Dwivedi, Sumit Yadav and Arvind Kumar Yadav, respectively, learned counsel for the applicants submits that neither the permanent addresses of the informants are shown, nor the alleged forged firms registered on the PAN Card and Aadhaar Card is within the limits of State of U.P., therefore, the registration of proceedings in the State of U.P. is without jurisdiction and the investigation so conducted by the officers is also without jurisdiction and is in teeth of Section 177 Cr.P.C. In support of his submissions, learned counsel for the applicants has relied upon the judgements of Supreme Court in the case of **Dinesh Gupta v. State of U.P.**⁶, **Manoj Kumar Sharma & others v. State of Chhattisgarh & another**⁷, and **Y Abraham Ajith & others v. Inspector of Police, Chennai & another**⁸.

19. The entire investigation started from an input by a secret informer and then on the basis of confessional statement of co-accused persons, the name of other co-accused persons came into light, thus, the implication of the

applicants on the basis of confessional statements of co-accused cannot be taken as a substantial piece of evidence. In support of his submissions, learned counsel for the applicants has relied upon the judgements of Supreme Court in the cases of **Haricharan Kurmi & another v. State of Bihar**⁹, **Narcotics Control Bureau v. Pallulabid Ahmad Arimutta**¹⁰, **Union of India (NCB) etc. v. Khalil Uddin etc.**¹¹, **Bharat Chaudhary v. Union of India**¹², **Sanjeev Chandra Agarwal v. Union of India**¹³, **Dinesh Kumar v. State of Himachal Pradesh**¹⁴, **Dipakbhai Jagdishchandra Patel v. State of Gujarat**¹⁵, and **Surinder Kumar Khanna v. Directorate of Revenue Intelligence**¹⁶.

20. From the investigation as carried out, there is no evidence against the applicants regarding commission of the alleged offence as there is no allegation against the applicants of any overact or any meeting of mind between the applicants or other co-accused persons for commission of the offence. Thus, no offence under the relevant Sections is made out against the applicants. He has relied upon the judgements of Supreme Court in the cases of **Rajender Singh & others v. State of Bihar**¹⁷, **Ramashish Yadav & others v. State of Bihar**¹⁸, and **Kehar Singh v. State (Delhi Admn.)**¹⁹.

21. As the applicants have not taken the benefit of any document (ITC) nor has facilitated any person in any manner to take these documents, hence no proceeding, against the applicants under the Goods and Services Tax Act²⁰, can be initiated. In the entire investigation there is no allegation against the applicants that they have prepared incorrect Form GSTR-I under Rule 59(1) of the Central Goods and Services Tax Rules, 2017²¹ or the Form GSTR-2A under Rule 60(2) of the Rules,

2017, or the Form GSTR-2B under Rule 60(7) of the Rules, 2017 or the Form GSTR-3B of the Rules, 2017.

22. There is no case of theft of GST, as a result no criminal proceedings under Section 132 of the GST Act has been initiated against the applicant. Even otherwise, an elaborated provision has been given in Rule-8, 9 & 10 of the Rules, 2017 for registration of firm and it is clearly stipulated that the registration can be done only after PAN is validated online by a Common Portal from the Database maintained by Central Board of Direct Taxes²² and the mobile number is verified with One Time Password sent on the same mobile number. No such evidence has been collected, therefore, the implication of the applicant is false.

23. The Bail is the Rule and Jail is an exception. Said view has been taken by the Apex Court in the cases of **Arnab Manoranjan Goswami v. State of Maharashtra**²³, **Sanjay Chandra v. CBI**²⁴, **Susanta Ghosh v. State of W.B.**²⁵, and **Satender Kumar Antil v. CBI**²⁶.

24. Relying upon the the judgement of the Supreme Court in the case of **State of Haryana v. Ram Singh**²⁷, learned counsel for the applicants submits that no evidence exists and no recovery against the applicant Rajiv Jindal, co-accused Mahesh and Nand Kishore, for the alleged forged GST papers and for misappropriation of any tax or use of any ITC has been collected. The recoveries shown are planted without there being any independent witness and these recoveries are held to be having no credibility and these recoveries cannot be taken as a piece of credible evidence.

25. Sri Kamal Krishna, learned Senior Advocate assisted by Sri Prakhar Saran Srivastava, learned Advocate argued the matter on behalf of the applicant - Manan Singhal in Criminal Misc. Bail Application Nos. 55125 of 2023, 55131 of 2023, 55268 of 2023, and applicant – Sumit Garg alias Chacha in Criminal Misc. Bail Application Nos. 55161 of 2023, 55235 of 2023, and 55245 of 2023.

26. Learned Senior Counsel submits that pursuant to the first information reports, the Investigating Officer proceeded with the investigation on receiving information about the accused Yaseen from an informer. Accordingly, Yaseen and Ashwani Pandey were arrested from Film City Flyover. Rs. 10,000/-, 5 SIM Cards, Aadhaar Card, PAN Card and a mobile phone were recovered from Ashwani Pandey. Two mobile phones, Rs. 1,88,000; 5 keypad mobile phones, 12 SIM Cards and a laptop were recovered from the possession of Yaseen. A data of 1891 and 680 firms was found on different excel sheets in the laptop. Fake PAN Cards, Aadhaar Cards and photographs were also found in pdf file. The data of informants of Case Crime Nos. 203 of 2023 and 248 of 2023 was also found in the laptop.

27. The accused Yaseen allegedly confessed that they worked in a group and their office is at Madhu Vihar, New Delhi. The Investigating Officer proceeded to the said office and arrested Deepak Murjhani, Vinita, Vishal Singh, Akash Saini, Atul Sengar and Rajiv therefrom. Total recovery of Rs. 12,66,000/-, 24 computer systems, 4 laptops, 30 mobile phones, 50 fake PAN and Aadhaar Cards, 60 SIM Cards and 3 cards parked near the office was made.

28. The aforesaid arrested persons confessed about the involvement of Anchit Goyal, Pradeep Goyal, Archit, Mayur, Charu Nagpal, Rohit Nagpal and Deepak Singhal, to whom the alleged firms were allegedly sold. **Names of applicants Manan and Sumit have not been surfaced till date.**

29. On 05.06.2023 and 08.06.2023, supplementary statements of arrested accused persons were recorded, wherein name of Manan and Sumit have not been mentioned.

30. In the supplementary statement dated 08.06.2023, **names of Rajiv Maheshwari, Rahul Gupta, Gaurav Singhal and Gurmeet Batra surfaced**, after which Gaurav Singhal and Gurmeet Batra were arrested on 08.06.2023 and Cash Counting Machine, one POS machine, 18 false invoices, 12 Aadhaar Cards, 1 GST registration certificate, 1 PAN Card and a show cause notice from Commissioner of Customs were allegedly recovered. On 10.06.2023 co-accused Rahul and Rajiv Gupta were arrested.

31. Name of Sumit along with 16 other persons figured in the confessional statements of co-accused Gaurav Singhal and Gurmeet Batra alleging their involvement but no specific role has been assigned to accused Sumit. Till this date, i.e., 10.06.2023 name of accused Manan has not been mentioned. On 11.06.2023, names of both applicants Manan and Sumit figured in the joint statements of arrested accused persons, no specific role has been assigned to the aforesaid persons.

32. On 22.06.2023 the alleged accused Manan and Sumit along with co-accused Atul Gupta were allegedly apprehended on

the road connecting DND²⁸ and Greater Noida Expressway in Mahindra XUV 700 Car bearing registration no. HR21-Q-0725. Recovery of Rs. 40,500/- from the pocket of accused Sumit, iPhone 10 and Rs. 10,000/- from the pocket of applicant Manan was made. As per the confessional statement, the Car belonged to Goldy. Bills of Shri Radhey Trading Company were recovered from the back seat of the car; key of another car and **few documents were recovered from the dashboard and the car key recovered belonged to Anchit's car as confessed by Manan, Sumit and Atul Gupta.** Copy of recovery memo was given to only co-accused Atul Gupta.

33. On 22.06.2023 Skoda Rapid UP16-BD2278 was recovered from Sector-9, Rohini, Delhi and this car was opened with the key that was recovered from the vehicle from which Manan, Sumit and co-accused Atul Gupta were apprehended and after opening the aforesaid car, documents relating to alleged offence were found from the dashboard.

34. On 19.08.2023 and 20.08.2023 a large number of persons were examined and they made general allegation of misuse of their PAN Cards but they have not taken name of the applicants Sumit Garg and Manan Singhal which could connect them in the present case.

35. On 19.09.2023 a chargesheet has been filed against Sumit, Manan and Atul Gupta, however, no specific role has been attributed to Sumit and Manan, and only general allegations of involvement in conspiring in money trail is there. No offence under the relevant Sections is made out against Manan and Sumit as there is no allegation of any kind of deceit or inducement against them nor any allegation

of preparation of any kind of forged document, whereas there are general allegations of conspiracy which are insufficient to attract the specific requirement as settled in Section 120A IPC. Thus, the offence of criminal conspiracy under Sections 120A & 120B IPC is not made out.

36. There is no substantive evidence against Manan and Sumit as the prosecution case hinges upon confessional statement of co-accused and alleged recoveries. Confessional statement of co-accused cannot be made the sole basis or foundation of conviction. In support of his submissions, learned counsel has relied upon the judgements of Supreme Court in the cases of **Surinder Kumar Khanna v. Intelligence Officer**²⁹ and **Sanju Bansal v. State of Uttar Pradesh**³⁰.

37. There is no independent witness to the alleged recovery and despite the fact that the alleged recovery has been made at the busy place recovery memo has not been given to accused Manan and Sumit, therefore, recovery is false and planted.

38. The alleged recovery from the car, in which the accused Sumit and Manan were travelling has been made prior to arrest, thus, the statement of applicants as such is not admissible under Section 27 of the Evidence Act, as the same has not been recorded in terms of Section 27 of the Act, 1872 and the direction issued by the Supreme Court and this Court, nor any panchnama or disclosure statement has been prepared. Learned counsel for the applicants has relied upon the judgement of the Supreme Court in the case of **Rajesh and another v. State of Madhya Pradesh**³¹. Learned counsel for the applicants submits that provisions of

Section 100 Cr.P.C. have not been complied with, therefore, reliance cannot be placed upon the alleged recovery. The alleged accused Manan and Sumit cannot be said to be in conscious possession of the alleged documents recovered from two accused as they are not the owner of the car and they were only travelling in the car with the co-accused Atul Gupta.

39. The alleged documents have been recovered from the dashboard of XUV 700 and Skoda car, therefore, the same cannot be pinned upon the applicants. In support of his submissions, learned counsel has relied upon a judgement of the Supreme Court in the case of **Avtar Singh v. State of Punjab**³². He next submits that the present case is a case of false implication as the police is implicating the friends and family of co-accused persons. Cousin of the applicants Manan and Sumit, namely, Gaurav Singhal was initially implicated and when the applicant met the co-accused Gaurav Singhal, they were also implicated in the case and arrested on 20.06.2023.

40. Raising objections on the issue of jurisdiction, learned counsel for the applicants submits that the informant is resident of Delhi and the alleged firms were registered in other States, therefore, no jurisdiction is vested in Police Station Sector-20 Noida, Gautam Buddha Nagar in Case Crime No. 255 of 2023. In support of his submissions, learned counsel has relied upon a judgement of the Supreme Court in the case of **Dinesh Gupta v. State of U.P.**³³

41. He next submits that there is an inordinate delay in framing of charges despite submission of chargesheet and cognizance on 20.09.2023. In order to defeat the provisions of Section 167 Cr.P.C. chargesheet has been submitted in a hasty manner, hence, the charges are not being framed due to insufficiency of

evidence. Thus, they are entitled for being released on bail under the provisions of Section 437(6) Cr.P.C. In support of his submission, learned counsel has relied upon a judgement of this Court in the case of **Yogendra Kumar Mishra v. State of U.P.**³⁴. Lastly, he submits that the offence in the present case is triable by Magistrate. The applicants are languishing in jail since more than one year, hence, they are entitled to be released on bail as there is a little possibility of early completion of trial. In support of his submission, he has relied upon a judgement of the Supreme Court in the case of **Mohd. Muslim v. State (NCT of Delhi)**³⁵.

42. Learned Senior Counsel submits that till date charges have not been framed and the delay is not on the part of the applicants. Despite application moved by the accused, documents have not been provided, there is no chance of conclusion of trial in near future, thus, the principal that 'bail is rule and refusal is exception' has to be followed and the applicant is entitled to be released on bail due to his prolong incarceration in jail. In support of his submissions, he has relied upon a judgement of the Supreme Court in the case of **Manish Sisodia v. Directorate of Enforcement**³⁶.

43. **Sri Vinay Saran, learned Senior Advocate** assisted by Sri Eshan Lamba, learned Advocate argued the matter on behalf of the applicant – Dolsy Murjhani in Criminal Misc. Bail Application Nos. 6728 of 2024, 8746 of 2024 & 9061 of 2024, and applicant – Jatin Murjani in Criminal Misc. Bail Application Nos. 10526 of 2024, 10527 of 2024 and 10528 of 2024. He submits that the applicants are neither named in all three first information reports nor have been arrested from the

alleged place of incident where raids were apparently made by police personnel.

44. The applicant Jatin Murjani is 21 years old student of B.Com. and applicant Dolsy Murjhani is an unmarried 23 years old girl. They have been falsely implicated being the son and daughter of co-accused Deepak Murjhani. On 01.06.2023 first statement of accused Yaseen Sheikh and Deepak Murjhani were recorded along with others and none of them stated that the applicants were involved in the controversy in any manner. After a lapse of 4 days i.e. on 05.06.2023 second statement of Deepak Murjhani and Yaseen Sheikh were recorded by the Investigating Officer and the earlier statements were reiterated. Deepak Murjhani has categorically stated that he has kept the alleged laptop and mobile hidden from his children, thus, Jatin Murjani and Dolsy Murjhani had no knowledge about the said laptop and mobile.

45. On 08.06.2023 statements of Deepak Murjhani and Yaseen Sheikh were recorded. They for the first time introduced the names of Jatin Murjani and Dolsy Murjhani. In their statements, no specific role has been assigned to the applicants.

46. In the investigation of Case Crime No. 255 of 2023, statements of Deepak Murjani were recorded and for the first time he disclosed the name of his son Jatin Murjani. Statements of co-accused Gaurav Singhal and Gurmeet were recorded by the Investigating Officer on 10.06.2023. They did not level any allegation against the applicants Jatin Murjani and Dolsy Murjhani. The applicants have been falsely implicated

being the son and daughter of accused Deepak Murjhani.

47. On 18.07.2023 Jatin Murjani and Dolsy Murjhani were arrested showing recovery of one mobile phone, having IMEI No. 354016094312491/9. Learned counsel for the applicants submits that there is no material on record to connect the said mobile phone having IMEI No. 354016094312491/9 with Jatin and Dolsy Murjhani.

48. On 26.08.2023 in CD Parcha No. 69, the Investigating Officer has noted down the report of running IMEI matching of mobile sets and tablets of all mobile phones allegedly recovered during the investigation from different accused persons. However, the aforesaid mobile did not find place in the said report.

49. On 02.10.2023 Parcha No. 85 noted down the report of running IMEI of SIM Cards alleged recovery during the investigation from different accused persons. However, mobile having IMEI – 354016094312491/9 did not find place in the said report.

50. Learned counsel for the applicants submits that barring the statements of co-accused Yaseen Sheikh, Deepak Murjhani, Gaurav Singhal, Gurmeet Singh and Nandlal recorded under Section 161 Cr.P.C. along with confessional statement of the applicants Jatin Murjani and Dolsy Murjhani, there is nothing on record to connect the applicants with the present offence, especially when the so called mobile phone having IMEI-354016094312491/9 could not be connected by any way with the commission of the offence in question. He seeks benefit

of Section 437 Cr.P.C. in respect to the matter of Dolsy Murjhani.

51. Sri Manish Tiwary, learned Senior Advocate assisted by Sri Aushim Luthra, learned counsel for the applicant – Gaurav Singh alias Gaurav Singhal argued the case in Criminal Misc. Bail Application Nos. 6882 of 2024, 16146 of 2024 and 16288 of 2024.

52. Upon receipt of an information from a secret informer on 31.05.2023, Yaseen and Ashwani Pandey were arrested on 01.06.2023 from a flyover at Film City located at 16-A, Noida, U.P. and certain recovery of money, SIM Cards, Aadhaar Cards, PAN Cards, Mobile Phones, Laptops were shown from their possession. Their arrest and recovery from their possession has been transcribed in the case diary, from where it transpires that the accused Yaseen and Ashwani Pandey were taken to their office situated at Madhu Vihar, New Delhi.

53. While, the police raided the office at Madhu Vihar, New Delhi, it found 6 other accused persons, namely, Deepak Murjhani, Vineeta W/o Deepak Murjhani, Vishal Singh, Rajeev, Akash Saini and Atul Sengar. Yaseen confessed before the Investigating Officer that they worked for Deepak Murjhani and their office is at Madhu Vihar, New Delhi. A total of Rs. 12,66,000/-, 4 laptops, 30 mobile phones, 50 PAN Cards and Aadhaar Cards, 60 SIM Cards of different companies and 3 Cars were recovered.

54. The Investigating Officer has recorded in Parcha No. 7, dated 01.06.2023, that upon enquiry it was found that the office belongs to Deepak Murjhani, and his wife Vineeta, Vishal Singh, Akash

Saini, Atul Sengar and Rajeev were found working in the office of Deepak Murjhani and the aforesaid persons were arrested. Laptop of accused Yaseen is said to have contained excel sheets where details of approximately 2571 Firms, having different GST Numbers, had been mentioned, and it was informed by the co-accused Yaseen that the said Firms are fake Firms and had been created for claiming Input Tax Credit³⁷.

55. Statements of accused persons were recorded and the name of applicant – Gaurav Singh alias Gaurav Singhal does not find any mention whatsoever. The Investigating Officer has recorded statements of co-accused Ashwani Pandey, Yaseen Sheikh, Deepak Murjhani, Vishal Singh, Akash Saini, Atul Sengar, Rajeev and Vineeta wife of Deepak Murjhani. Investigation has been carried out, the role of the accused persons in commission of offence has come up in the aforesaid statements. Names of accused persons, namely, Anchit Goyal, Pradeep Goyal, Archit, Mayur alias Mani Nagpal, Charu Nagpal, Rohit Nagpal and Deepak Singhal came into light on the basis of statements of co-accused persons.

56. The second confessional statement of accused Deepak Murjhani, Yaseen Sheikh, Ashwani Pandey, Vishal Singh, Akash Saini, Atul Sengar and Rajiv Agarwal were recorded and the name of the applicant – Gaurav Singh alias Gaurav Singhal does not find place.

57. The confessional statement of Yaseen Sheikh, Deepak Murjhani and Rajiv were again recorded. It was for the first time that name of Gaurav Singhal surfaced on 08.06.2023 i.e. after lapse of more than a month. The applicant was

arrested along with one Gurmeet Singh Batra alias Sahil on 10.06.2023. The arrest and recovery memo as recorded by the Investigating Officer would go to reveal that the same was made from the house of the applicant – Gaurav Singh and he confessed to have committed the offence.

58. Cash counting machine, POS machine and certain documents which are alleged to be forged invoices, 6 Aadhaar Cards were alleged to have been recovered from a car (Innova Crysta CS01-CF2606) which was allegedly parked outside the house of the applicant – Gaurav Singh and similar recovery was shown from the car of co-accused Gurmeet Batra.

59. Learned counsel for the applicant submits that the applicant is not named in the FIR bearing Case Crime No. 203 of 2023 lodged on 04.05.2023. On the basis of information by a secret informer, co-accused Ashwani Pandey and Yaseen Sheikh were apprehended on 01.06.2023. Name of the applicant surfaced in the confessional statement of Yaseen Sheikh, Deepak Murjhani and Rajeev. Accordingly, the applicant and one Gurmeet Singh Batra were arrested on 10.06.2023 showing certain recovery.

60. He further submits that there is no independent witness to the alleged recovery shown from the applicant or the co-accused persons. The alleged forged invoices as recovered from the car of the applicant and another co-accused Gurmeet Singh Batra have not been connected to the offence in question. The applicant is not a beneficiary of the crime in any manner, however, solely on the basis of confessional statement of co-accused and totally false and fabricated recovery, the

applicant has been implicated in the present case.

61. The prosecution claims that a total ITC of Rs. 26,45,28,96,500/- had been wrongly claimed by the accused persons, however, it has failed to connect the same to the applicant in any manner. The applicant – Gaurav Singh alias Gaurav Singhal has been granted bail in another offence of GST by a Coordinate Bench of this Court vide order dated 29.05.2024 passed in **Criminal Misc. Bail Application No. 16786 of 2024**³⁸. The applicant has been arrayed as accused in the case at hand because he is cousin of Arjit Goyal who is mastermind of the alleged offence and was solely involved in the illegal activities. The police has arrested the applicant from Dehradun on 05.06.2023, however, they have shown his arrest on 10.06.2023.

62. Learned counsel for the applicant next submits that compliance of Section 100 Cr.P.C. has not been done as there was no independent witness to the alleged recovery, as such a recovery shown to be made from the applicant's house is barred and inadmissible. The only evidence connecting the applicant to the offence in question is confessional statement of the applicant and co-accused which is totally inadmissible and cannot be read against the applicant in view of Sections 25 and 27 of the Indian Evidence Act. Placing reliance upon Section 27 of the Indian Evidence Act, learned counsel for the applicant submits that the aforesaid section is applicable only if the confessional statement leads to discovery of some new fact. Relevance is limited as it relates distinctly to the fact thereby discovered. In support of his submissions he has relied upon a judgement of the Supreme Court in

the case of **Navaneethakrishnan v. State By Inspector of Police**³⁹.

63. Placing reliance upon Section 25 of the Indian Evidence Act and corresponding provisions of Section 23(1), he submits that the confession made by an accused to the police is not admissible. The alleged recovery is also not a proper one as no memo of recovery has been made in the present case, as has been held in the case of **Sanju Bansal v. State of Uttar Pradesh**⁴⁰. He, lastly, submits that there is no chance of early conclusion of trial in near future, thus, bail can be granted if there is undue delay in trial as held by the Supreme Court in the case of **Mohd. Muslim v. State (NCT of Delhi)**⁴¹. He has also placed reliance on a judgement in the case of **Union of India v. K.A. Najeeb**⁴².

64. Sri Bharat Singh Pal, learned counsel appeared on behalf of the applicant Vishal in Criminal Misc. Bail Application Nos. 50337 of 2023, 2994 of 2024 and 2742 of 2024. He submits that the FIR was lodged on the basis of written application of Saurabh Dwivedi against unknown persons. There is delay in lodging the FIR which is not explained. No specific time and place of the incident has been provided in the FIR.

65. The Investigating Officer on the basis of aforesaid FIR arrested Ashwani Kumar Pandey and Yaseen Sheikh from Film City Flyover on 01.06.2023 on the basis of information of the informant and recovered money, SIM Cards, Mobile etc. At the instance of Yaseen Sheikh, police went to the office of Jiwalo Pvt. Ltd. located at Madhu Vihar, Delhi, where the police found some people working on computer and laptops, and others were sitting idle. The police arrested all accused

persons from the office and the applicant-Vishal is also said to be arrested from there, and from right pocket of his pant two mobile phones (Samsung Galaxy and iPhone Pro) were recovered. From his table 3 Keypad Phones and 12 SIM Cards were recovered. The police recorded statements of Ashwani Pandey, Yaseen Sheikh, Deepak Murjhani, applicant-Vishal Singh, Akash Saini, Atul Sengar, Rajeev and Vineeta. In CD Parcha-7 dated 01.06.2023 the Investigating Officer added Section 120B IPC in Case Crime No. 203 of 2023. Learned counsel further submitted that only Yaseen Sheikh took name of the applicant in his statement and none other referred applicant's name or assigned any role to him. In the statement of Yaseen it is stated that the applicant was hired to bring material for preparing forged documents.

66. Pointing out the real story, learned counsel for the applicant submits that the applicant was lifted from his house and the same can be verified from CCTV footage. Thus, the arrest and the alleged recovery shown from the applicant on the said date, i.e., 01.06.2023 from the office at Madhu Vihar, Delhi are false and illegal. On 05.06.2023, statements of Deepak Murjhani, Yaseen Sheikh, Ashwani Pandey, applicant-Vishal Singh, Akash Saini, Atul Sengar and Rajeev Agrawal were recorded. None of them took name of applicant except Yaseen Sheikh. On 08.06.2023 statement of Yaseen Sheikh, Rajeev Jindal and Deepak Murjhani were recorded. None of the accused took name of the applicant or assigned him any role. On 10.06.2023 the police arrested Gaurav Singhal and Gurmeet Singh Batra and recovered certain things. Their statements were recorded but they did not take name of the applicant nor assigned any role in commission of the alleged offence.

67. On 12.06.2023 statement of Sahil Gupta, landlord of the property on which the office of Jiwalo Pvt. Ltd was situated, was recorded. He did not take name of the applicant which could show that the applicant took the office on rent from the landlord nor he has been assigned any role in setting up the said office. On 23.06.2023 Atul Gupta, Sumit Garg and Manan Singhal were arrested and their statements were recorded. Certain things were also recovered from their possession. None of them disclosed name of the applicant. On 09.07.2023 Amit, Ajay alias Mintu and Mahesh were arrested. Their statements were recorded and certain things were recovered from them. They also did not take name of the applicant.

68. Honda City Car bearing registration no. DL8C-NA4506 which is registered in the name of the applicant has been taken to connect the applicant in the aforesaid offence. **The applicant had only attached his car with the office on rent. There is no evidence that the car has been used by the applicant in commission of offence.** On 15.07.2023 Pritam Garg alias Chacha was arrested and certain things were recovered from his possession and also his statements were recorded. He also did not take name of the applicant.

69. The police arrested Rohit alias Jatin and Dolsy Murjhani on 18.07.2023 and recovered certain things and documents and also recorded their statements. On 26.07.2023 Nand Kishore alias Nand Lal alias Nandu was arrested. Certain things were recovered from them and their statements were recorded. Said persons did not take name of the applicant, nor they assigned any role to the applicant in commission of the alleged offence. On

15.08.2023 the Investigating Officer recorded statements of witnesses of arrest and recoveries, namely, SI Satan Kumar, SI Mukul Yadav, SI Birbhadra Singh, HC Sunil Kumar, C Ashish Kumar, WC Shailesh Kuntal, HC Vinod Kumar, Kailash Nath, Satish Kumar, Jitendra Singh, Rohit Sahrawat, Mukesh Rathor, Ram Niwas Singh, Deena Nath Yadav, Amit Balyan, Rajesh Babu, Anand, Manish Badhana, Ranjeet Kumar, Saurabh Chauhan, Jitendra Singh, Vishwesh, Vipin, Amit Kumar, Priyansh, Idrish, Akhil Kumar, Shilpa Chikara and Kavita. All the said witnesses are police personnel and there is no independent witness to support the arrest or recovery.

70. On 19.08.2023 statements of the victim/ witnesses, namely, Amit Kumar, Amit Agrawal, Vivek Garg, Sumit Anand, Anup Kumar Singh, Saurabh Kumar, Vivek Kumar, Sumit Gautam, Amit Kumar Chaturvedi, Amit Chauhan and Vivek Sharma were recorded. None of them named the applicant nor assigned any role to him. On 20.08.2023, 21.08.2023 and 22.08.2023 statements of victim/ witnesses were recorded. None of them named the applicant nor assigned any role to him. On 26.08.2023 the Investigating Officer has noted that by way of 22 mobile phones recovered from the applicant - Vishal Singh and Akash, on the basis of report obtained from GST Department, 53 GST Firms have been found to be registered.

71. From the aforesaid, it can be said that the Investigating Officer has not collected any credible evidence against the applicant connecting him in the alleged offence. Chargesheet has been submitted on 29.08.2023.

72. Learned counsel Sri Amit Kumar, Sri Jitendra Dwivedi and Sri Vinod Kumar Tripathi appearing on behalf of the applicant – Praveen Kumar in Criminal Misc. Bail Application Nos. 56396 of 2023, 525 of 2024 and 561 of 2024, submit that pursuant to the three first information reports, the matter was investigated simultaneously by the Investigating Officer. The applicant's name came to light from the joint statements of all the accused. Neither the applicant is named in the FIR nor he has committed any theft of PAN Card of the informant nor has registered any Firm using informant's PAN Card. He has no previous criminal history.

73. The alleged recovery shown by the Investigating Officer is planted, false and fabricated. The applicant's name came for the first time in the statements of co-accused on being interrogated by the Investigating Officer on 11.06.2023, which is CD Parcha No. 16. There is no independent witness to the said recovery. There is no evidence against the applicant except the confessional statement of co-accused.

74. The applicant was arrested on 30.09.2023 and from his possession one mobile of Oppo company, one debit card, one Tax Invoice (two copies) in the name of Ram Enterprises to Keshav Traders (applicant's firm) were shown.

75. The applicant is the Director of the Firm running in the name and style of Keshav Traders which is registered with PAN Card of the applicant and said Firm has been registered under the relevant provisions of the Companies Act.

76. Learned counsel Sri Deo Kumar Tripathi and Sri Prashant Kumar Singh appearing on behalf of the applicant - Ashwani in Criminal Misc. Bail

Application Nos. 52956 of 2023, 53087 of 2023 and 53088 of 2023, submit that the statements of informant were recorded on 05.05.2023 after lodging of the FIR on 04.05.2023, and on information of private informant police team arrested Ashwani and Yaseen Sheikh from Film City Flyover. The police party saw that the accused Yaseen has passed some documents and money to the applicant Ashwani, however, nothing incriminating was recovered from their possession. Recoveries from the office of Jiwaloo Pvt. Ltd., Delhi were made. From the possession, recovery of Ashwani Rs. 10,000/-, 5 SIM Cards of different mobile companies, 1 Aadhaar Card, PAN Card and one mobile phone was made.

77. The applicant - Ashwani has confessed his guilt. He stated that he is employee of HDFC Bank and was engaged in opening of bank accounts. He had opened three fake bank accounts in the name of Rajneesh Jha, Jhameli Chaupal, Jiwaloo Pvt. Ltd. and Vivek Kumar Jha. He also confessed that he had provided the documents of the said bank accounts to Yaseen Sheikh and had received Rs. 10,000/- for each forged bank account. He further disclosed that the said bank accounts were used by Yaseen to get GST registration numbers from GST Department. The police team further recovered 1 Aadhaar Card, Pan Card, Rs. 10,000/- which were handed over to Yaseen and by using the same he got OTP to open the bank accounts. **No fard recovery has been made.**

78. The investigation is silent as to which firms are connected with the Bank Accounts. Co-accused Yaseen has confessed that he worked in a group in the office of M/s JIWALO PVT LTD., from where co-accused persons have been

arrested and alleged recovery has been made.

79. There is no evidence to connect the applicant in the commission of alleged offence, on the basis of statements of the applicant as well as other co-accused persons who were arrested from the office.

80. Sri Prashant Kumar Singh, learned counsel informs the Court that one co-accused Anshul Goyal was granted anticipatory bail by the Supreme Court by an order dated 29.04.2024 passed in Petition for **Special Leave to Appeal (Crl.) No. 5472 of 2024** (Anshul Goyal v. State of U.P. & Anr.)⁴³, which has been made absolute by the Apex Court vide judgement dated 27.08.2024, passed in **Criminal Appeal No. 3566 of 2024**⁴⁴.

81. Sri Alok Kumar Singh, learned counsel appearing on behalf of accused-Ajay alias Mintu in Criminal Misc. Bail Application Nos. 11406 of 2024, 11452 of 2024 and 11581 of 2024, submits that the applicant is not named in the FIR. His named surfaced for the first time in the confessional statement on 09.07.2023. Recovery of a car AMEO, HR 242 48842, which is shown to have been recovered from joint possession, does not belong to the applicant. From the said car 4 keypad mobile phones, 6 tax invoices, 3 aadhaar cards have been recovered. A mobile phone (Apple) in switched off condition, was recovered from the applicant, same belongs to him. Only on the basis of confessional statement of the applicant and other co-accused persons, the applicant has been arrested. The role of the applicant as per statements of other co-accused persons is of collection of payments.

82. Sri Saurabh Basu and Sri Abhinay Bhattacharya, learned counsel for the applicant – Rakesh Dialani in Criminal

Misc. Bail Application Nos. 17749/2024, 17809/2024 & 17802/2024, and applicant – Pritam Garg alias Chacha in Criminal Misc. Bail Application Nos. 13386/2024, 12687/2024, 13150/2024 submit that name of the applicants surfaced in the statements of co-accused after they were arrested. From the applicant - Rakesh Dialani's possession recovery of 2 mobile phones, 1 Passport, SIM Cards, Aadhaar Cards and ID Cards was shown, whereas from the applicant - Pritam Garg recovery of fake tax invoice, 3 mobile phones, Aadhaar Card and ID card was also shown. No other substantive recovery has been shown, thus it is clear that no recovery of any item which coincides with the allegations of the informant or the case of the prosecution and investigating agency can be made out.

83. Learned counsel for the applicants further submits that from a perusal of the FIRs, it is transpires that firstly there is no disclosure by the informant as to how he has come to know about the fact that his PAN Card and Aadhaar Card are linked with a fake firm.

84. The informant has nowhere disclosed about any offence or any loss incurred by him during the alleged commission of offence. From a perusal of entire case diary, no offence can be made, which has been alleged by the informant in regard to commission of any offence whereby recovery of GST from the Government Portal is being made. The allegation about fake IDs and fake accounts being created by the alleged accused is totally on the basis of statements made by other accused persons. No linking material to connect the same has been collected by the Investigating Officer. The applicants have been entangled into this case without any material evidence. They have been falsely implicated in the present case. The

applicant Rakesh Dialani was taken into custody on 06.12.2023 but actual date of arrest is 07.12.2023, whereas the applicant - Pritam Garg is in jail since 15.07.2023.

85. The GST Department has not got registered any FIR against the applicants while fake firms are alleged to have been registered. The primary allegation was with regard to Aadhaar and PAN linked with the Department, which raises fake invoices and by such fake invoices they have received GST returns but the prosecution has failed to show any such recovery from the accused and no such allegation has been levelled against the applicants in this regard.

86. There is no witness or evidence to connect the applicants with the instant case.

87. Mr. Siddharth Srivastava, learned counsel for the applicant – Akash Saini in bail application nos. 50753 of 2023, 8643 of 2024 and 10603 of 2024 submits that they adopt the arguments advanced by learned counsel for the applicant in **Criminal Misc. Bail Application No. 51920 of 2023**⁴⁵.

88. Learned counsels representing the applicants in rest of bail applications have adopted the arguments as placed by learned counsel for the applicants, mentioned above.

89. Sri Manish Goel, learned Additional Advocate General assisted by Sri Nitesh Srivastava, learned AGA and Sri Rishi Kumar, learned Additional Chief Standing Counsel, appearing for the State submits, insofar as involvement of the applicants in the offence is concerned, that they formed a syndicate and their modus operandi configures four segments: (i) assignment of job of collection of SIM

Cards and personal data of people that have been uploaded on the portal of Goods & Service Tax; (ii) to use personal data for creation of fake Firms by uploading it on GST Portal; (iii) there will be one actual Firm which will be working and money transaction will flow to this actual Firm and the input tax will be availed; and (iv) distribution of monetary benefits among all. He has very strenuously argued that to divulge the involvement of the applicants, the dots are required to be joined to examine as to who has done it.

90. It is submitted by Mr. Goel that 2600 fake firms were found to be registered and the input tax credit availed with these 2600 Firms was more than Rs. 40,00,00,00,000/- (Rupees Four Thousand Crore). In the present matter anticipatory bail application was filed and after due consideration the Court has rejected the anticipatory bail of the applicant.

91. In response to the submissions advanced by learned counsel for Dolsy Murjhani that SIM numbers which have been recovered at the relevant point of time do not match, learned counsel for the State submits that there are two statements on the record and Dolsy Murjhani in her confessional statement specifically stated that she was helping her father and is involved in the offence. There are several SIM Cards that were being utilized and only one card recovered at the relevant point of time has not been matched. It is also contended that there are confessional statements of co-accused about involvement of Dolsy Murjhani and her brother Jatin Mujhani, on the basis of which recovery has been made which discourse the fact connecting them in the organized criminal offence.

92. Learned Additional Advocate General has further contended that from the material i.e. statements of Krishna Singh, Deepak Murjhani and from her (Dolsy Murjhani) own statement, it is evident that it is a case where a number of SIM Cards have been utilized, therefore, it is a case where the entire family is involved and if the bail is granted to one person, it will perpetuate illegality. He has drawn attention of the Court to Paragraph-12 of the Counter Affidavit, stating that as to how from IMEI number which has been recovered, Dolsy Murjhani has nexus with the fake firms, of which account has been ceased.

93. The FIR was lodged by one Saurabh Dwivedi, who is a journalist and Editor of The Lallantop Internet News Portal. About unknown GST registrations applied on his PAN showing the addresses of Punjab and Maharashtra. The said GST registrations have been obtained without consensus. It has also been alleged that two registrations are already authenticated for Aadhaar verification whereas as on date no email ID or mobile number is linked with the Aadhar.

94. Learned Additional Advocate General submits that the informant finds his name as a business entity. There are already two registrations for which he has never applied and there are two different addresses which have been shown. The informant in the FIR has emphatically stated that he never applied for such registrations and there is no consensus on his part. It is also stated that similar registration has been applied in the UT of Delhi, however, same has been rejected by the GST authorities.

95. Mr. Goel submits that the argument with regard to applicability of the

provisions of GST Act, the informant levelled allegations of misusing his Aadhaar and PAN Cards for GST registration, thus, FIR has rightly been lodged under the relevant Sections 420, 467, 468, 471 IPC.

96. As regards matter regarding jurisdiction as has been argued by learned counsel for the applicants, the same is demolished by bare reading of the FIR. Addressing the aspect with respect to jurisdictional issue of Gautam Buddh Nagar, learned AAG further submits that the person, who is making complaint, is having his identity of Gautam Buddh Nagar. In the FIR two GST Registration Nos. 03AUSPD7067N1Z3 and 27AUSPD7067N1ZT are mentioned, against which Tam Enterprises and Tam Traders have been registered, which are situated at Punjab and Maharashtra, whereas the complainant has stated that these firms bear his name as legal name of business entity. Thus, on the same GST registrations, name of Saurabh Dwivedi is registered besides the firms shown. Learned Addl. A.G. contends that the matter is as clear as it is there, that both firms have been registered with PAN numbers of Saurabh Dwivedi, hence submission as observed by learned counsel for the applicants has no legs to stand.

97. Learned AAG submits that the third submission of the applicants, which has been made the basis in all bail applications is with respect to the statement of co-accused, which cannot be read. Most of the judgements, placed before this Court, are with respect to cases in trial and not with respect to cases in bail, which say that at the time of consideration of bail application, it is the duty of the Court to examine all the material on record. Once it is duty of the court to examine all material,

it includes the statement of co-accused too. Thus, the parameter for grant of bail is entirely different to that of the parameter taken to be considered under trial. He has relied upon judgements of the Apex Court in the cases of **Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another**⁴⁶, **Masroor v. State of Uttar Pradesh and another**⁴⁷, **State of U.P. Through CBI v. Amarmani Tripathi**⁴⁸, **Mehboob Ali and another v. State of Rajasthan**⁴⁹, **P. Chidambaram v. Directorate of Enforcement**⁵⁰, and **Sunil Kumar v. Stte of Bihar and another**⁵¹.

98. Mr. Goel has drawn attention of the Court to Paragraph-8 of the judgement of the Supreme Court in the case of **Union of India (NCB) etc. v. Khalil Uddin etc.**⁵². Paragraph-8 of the said judgement reads thus:

“8. The answer to said question could be the statement recorded of Md. Nizam Uddin. The statement of Md. Jakir Hussain recorded under Section 67 of the Act has also named his owner accused Abdul Hai. We are conscious of the fact that the validity and scope of such statements under Section 67 has been pronounced upon by this Court in **Tofan Singh vs. State of Tamil Nadu**⁵³. In **State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta & Anr.**⁵⁴, the rigour of law lay down by this Court in Tofan Singh was held to be applicable even at the stage of grant of bail.”

99. It is also contended on behalf of the State that the judgements referred by learned Senior Advocate Mr. Kamal Krishna are also with respect to trial not to bail.

100. With regard to arguments of learned counsel for the applicants that once chargesheet has been submitted in

economic offence, the person should be released, learned AAG contends that each economic offence has distinct parameter while consideration of bail, which can be summarized in three counts: (i) Gravity of Economic Offence, (ii) Impact, if the person is released on bail or the person is detained, and (iii) Interest of the Nation. It is argued that economic offence is not possible at the hands of one person and the present case is organized crime where crores of government money has been siphoned by registration of fake firms in which all applicants are connected in one or the other way.

101. In regard to the case of Dolsy Murjhani, learned AAG for the State submits that she had chip of the SIM Card, hence her involvement cannot be denied. The entire focal point is that the modus operandi was utilized by SIM and Aadhaar for GST registration. SIM Cards that have been recovered, are not mentioned, however, she has made a statement to the effect that her father is the main accused and the entire family was involved in the offence. The said statement has come on the record. Nine SIM Cards were being utilized at the time when she was intercepted, just because one SIM recovered at that point of time, was not being utilized, cannot go to prove her innocence.

102. Mr. Manish Goel next submits that the GST Act does not impliedly or explicitly repeal the provisions of the Indian Penal Code, 1860, or the Code of Criminal Procedure, 1973, hence investigation for offences under the IPC is permissible. In support of his submission, he has relied upon the judgements of the Apex Court in the cases of **Shahzad Alam v. State of U.P.**⁵⁵, and **Govind Agarwal v. State of U.P.**⁵⁶

103. Likewise with respect to economic offences, there are several decisions of the Supreme Court, wherein the Apex Court has held that the statement of co-accused as well as confessional statements are required to be considered while considering bail application of an accused. Learned counsel for the State Mr. Goel further emphasized that in view of the law laid down by the Apex Court, entire material as come in the case diary alongwith other material has to be looked into while considering bail application, thus, it is imperative to take into account all material whether it may or may not have evidential value and the Court should deal with it strictly while hearing economic offence.

104. With respect to consideration of bail in offences related to GST, learned AAG has placed reliance on various judgements of the Apex Court in the cases of **Yogesh Jagish Kanodia v. State of Maharashtra and another**,⁵⁷ **Ajay Khanna v. State Tax Anti Evasion Bureau, Jabalpur (M.P.)**,⁵⁸ **Rajesh Jindal v. Commissioner of Central Tax GST, Delhi (West)**,⁵⁹ **Jagdish Kanani v. Commissioner of CGST & Central Excise, Indore**,⁶⁰ **Ranjeet @ Ranjeet Singh v. Union of India**⁶¹.

105. It has also been argued that the Supreme Court has viewed the matters of economic offences and laid down law while considering bail applications in the cases of **Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation; Central Bureau of Investigation**,⁶² **Central Bureau of Investigation v. Ramendu Chattopadhyay**,⁶³ **Tarun Kumar v. Assistant Director, Directorate of Enforcement**,⁶⁴ **State of Bihar and another v. Amit Kumar alias Bachcha Rai**,⁶⁵ **Nimmagadda Prasad v. Central**

Bureau of Investigation,⁶⁶ **Serious Fraud Investigation Office v. Nittin ohari and another**,⁶⁷ and **State of Gujarat v. Mohanlal Jitmalji Porwal and another**.⁶⁸

106. Learned Additional Advocate General for the interpretation of Section 27 of the Indian Evidence Act, 1872, has placed Section 3 of the said Act, which defines ‘fact’, ‘relevant’, ‘proved’, which are as follows:

“3. ...

*** *** ***

Fact”.—“Fact” means and includes—(1) anything, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

“Relevant”. — One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

*** *** ***

“Proved”.—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”

107. He has also placed Section-4 of the Act, 1872 wherein the words ‘may presume’, ‘shall presume’ and ‘conclusive proof’ have been explained which are as follows:

“4. “May presume”.—Whenever it is provided by this Act that the Court

may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

“Shall presume”.—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

“Conclusive proof”.—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.”

108. From a reading of the aforesaid sections, it is clear that the material collected by the Investigating Officer at this stage is relevant for the purposes of considering that the applicants are involved in the commission of offence as the deposition made by co-accused persons leading to discovery of such information or fact is not required to be proved and is admissible piece of evidence as per Section 27 of the Act, 1872.

109. As argued by Mr. Amit Singh Chauhan, learned AGA-I and Sri Mayank Awasthi, learned Brief Holder, for the State, the following material has been collected to show the involvement of the applicants in the present case:

(i) C.D. Parcha No. 2 bears details of Mobile No. 8800966916 which was used to register the GST firms mentioned in the FIR, its CDR⁶⁹/ CAF⁷⁰ reports were obtained from Surveillance Cell.

(ii) CDR/ CAF reports were received which reveal that accused's location is of Preetampura Delhi, said information forms part of C.D. Parch No. 4, whereafter informer as per CD Parcha No. 5 disclosed the names of Deepak Murjhani

and Yaseen Sheikh found to have been involved in the crime.

(iii) CD-Parcha No. 7 says that on the aforesaid information, police arrested Ashwani Pandey and Yaseen Sheikh along with the recovery of incriminating materials i.e. SIM Cards of different companies, laptops, Aadhaar Cards, PAN Cards. On being checked the laptop, a master file contained in folder at the desktop, names of 1891 GST firms in various names were found, and in another master sheet contained in a separate folder there were details of 680 GST firms. In the said sheet, name of firms mentioned in the the FIR were also found. On the pointing out of Ashwani Pandey and Yaseen Sheikh, the investigating team reached at Madhu Vihar office, where accused Deepak Murjhani, Akash Saini, Vishal Singh, Atul Sengar, Rajiv, Vineet were found and arrested along with huge amount of money and documents relating to fake GST firms. Copy of recovery memo was duly received by the accused persons putting their signatures thereon. The arrested accused persons, in their confessional statements, disclosed names of Anchit Goyal, Pradeep Goyal, Archit Goyal, Mayur alias Mani Nagpal, Charu Nagpal and Deepak Singhal. Consequently, Section 120B IPC was added.

(iv) C.D. Parcha No. 11 shows supplementary statement of accused persons in judicial custody, who said to assist in recovery of incriminating articles from concerned place and persons.

(v) C.D. Parcha No. 14 contains majid-statement of Yaseen Sheikh, Rajiv Jindal and Deepak Murjhani, who disclosed names of Rajiv Maheshwari and Rahul Gupta. In the same parcha the aforesaid accused persons including accused

Ashwani Pandey, Vishal and Akash, all of them disclosed the complicity of Rajiv Maheshwari, Rahul Gupta, Gaurav Singhal and Gurmeet Singh Batra alias Sahil and confessed that they use to generate fake GST bills/ invoices in the names of registered fake firms on the basis of fake SIM and IDs.

(vi) C.D. Parcha No. 15 shows that at the instance and pointing out of Deepak Murjhani, Ashwani Pandey and Yaseen Sheikh, arrested of Gaurav Singhal and Gurmeet Singh Batra was effected on 10.06.2023 from the residence of Gaurav, i.e., House No. 2/214, Sector-16, Rohini, Delhi, along with huge recovery of incriminating articles. Whereafter, the investigating team reached at Gautam Buddh Nagar along with accused taken in police custody remand alongwith arrested accused persons Gurmeet Singh Batra and Gaurav Singhal, from where accused Rahul Gupta and Rajiv Maheshwari were arrested with several SIMs and other incriminating material and the recovery memo was handed over with consent to Rajiv.

(vii) C.D. Parcha No. 16 shows that the accused taken in police custody remain disclosed the names of Atul Gupta, Sumit Garg alias Sumit Chacha, Mannan Singhal, Baldev alias Balli, Ishwar, Praveen, Sanjay Garg, Banti, Archit Goyal. All of them confessed to prepare fake GST invoices against the names of fake firms at the office taken on rent by Deepak Murjhani and Archit Goyal.

(viii) On being reached at the office of Jiwalo India Pvt. Ltd. (Shop No. 1-F/A-16, Gurudwara Road, Madhu Vihar, Delhi), statement of property owner, namely, Sahil Gupta S/o Sri Prakash Chandra Gupta was recorded,

which revealed that the shop was taken on rent by one Rajnish Kumar Jha along with Raj Kumar Jha, for which a rent agreement was executed in the name of Jiwalo India Pvt. Ltd. The landlord identified the photograph of accused Yaseen Sheikh to be of Rajnish Kumar Jha, which shows the accused impersonated himself to be Rajnish Kumar Jha, thus it is a connecting chain in the commission of present offence. The information forms the part of CD Parch No. 17 (12.06.2023).

(ix) In C.D. Parcha No. 18 (13.06.2023) the Investigating Officer found that fake GST firm - Tam Enterprises mentioned in the FIR does not exist at given address of Ludhiyana, Punjab, whereas at the relevant place there exists a shop in the name of Kings Footwear being run by one Prabhujeet Singh.

(x) C.D. Parcha No. 22, dated 23.06.2023, shows arrest of Atul Gupta, Sumit Garg alias Chacha and Mannan Singhal along with recovery at two instance of various fake invoices and cars, from which documents relating to A.K. Enterprises were found. Two separate recovery memos were given to the arrested accused persons which bear their signatures. Statements of aforesaid accused persons were recorded, who revealed names of Goldi, Anchit, Anshul, Pradeep Goyal, Praveen, Banti, Puneet, Ishwar, Vikas Dabbas and Sanjay Garg, Mayur alias Mani Nagpal, Charu Nagpal, Rohit Nagpal, Deepak Singhal, Peetam, Mintu, Montu, Ashish, Nandlal, Mahesh, Gaurav Nagpal and Sahil, and admitted to have been working together in this GST fake registrations and for earning undue monetary benefit.

(xi) In C.D. Parcha No. 24 (29.06.2023) the Investigating Officer found that the fake mobile no. 8800966916, which has been used in registration of GST firms with PAN Number, mentioned in the FIR, was found to have been used in four different mobile sets bearing different IMEI Numbers, therefore, the CDR/CAF report reveals that one of the IMEI in which the aforesaid mobile number was used, it was recovered from the possession of accused Yaseen Sheikh on 01.06.2023 as mobile set Nokia 1423. CDR and CAF reports are enclosed in the parcha, making evident the complicity of accused Yaseen along with all other accused persons.

(xii) Parcha No. 25 shows (11.07.2023) the Investigating Officer found that fake GST firm - Tam Traders mentioned in the FIR does not exist at given address of Maharashtra and the documents shown were found to be forged.

(xiii) Parcha No. 29 shows (07.07.2023) the details of persons in whose names SIM Cards were procured, have been recovered from the accused Yaseen and Deepak Murjhani.

(xiv) Arrest of accused Ajay alias Minti, Amit alias Montu and Mahesh was made, which is mentioned in C.D. Parcha No. 30 (09.07.2023). Recovery of 07 mobile phones, 06 tax invoices, one car and 3 aadhaar cards was made from said accused persons.

(xv) In the C.D. Parcha No. 31 the Investigating Officer found that the registration of vehicle mentioned in the invoices were found to be fake and fabricated.

(xvi) In the C.D. Parcha No. 37 arrest of Preetam Garg alias Chacha is mentioned along with recovery of fake tax

invoices, mobile, aadhaar and voter ID. In his statement, the accused Preetam Garg confessed that he along with his elder brother Sanjay Garg went to Rohini, New Delhi, where he was introduced with Gaurav Singhal, Pradeep, Atul, Mannan, Sumit, Vikas Dabas, Goldi and Nand Lal, at the office of Arjit and Anchit.

(xvii) In the C.D. Parcha No. 39 the Investigating Officer recorded arrest of Jatin Murjhani alias Rohit and Dolsy Murjhani. In their confessional statements, both have stated to have part of the entire transaction by getting commission.

(xviii) In the C.D. Parcha No. 44 the Investigating Officer recorded arrest of accused Nandlal alias Nandu father of co-accused Mahesh and recovery of tablet (notepad). They informed that said tablet and mobile belong to accused Deepak Murjhani and Dolsy Murjhani. During his confessional statement, he has stated that the mobile recovered was to be returned to Deepak Murjhani as it is used for the purposes of obtaining OTP in registration firms, as also used in collection of payment from the customers.

(xix) In the C.D. Parcha No. 49 the Investigating Officer mentioned details of bank accounts of accused persons.

(xx) In the C.D. Parcha No. 53 the Investigating Officer found the tax invoice of Gurmet Singh Batra to be fabricated.

(xxi) C.D. Parcha No. 55 mentions that DGI, Ghaziabad Unit has provided list of 1192 PAN Cards and on verification from the PAN Card holders they denied knowledge of any such registration of firms.

(xxii) C.D. Parcha Nos. 61 to 65 the Investigating Officer recorded statements of affected persons and victims, in whose names fake GST firms have been registered.

(xxiii) C.D. Parcha No. 69 shows that IMEI Numbers of recovered mobile phones from accused persons were sent to respective companies, namely, AirTel, Jio, Vodafone Idea and on being run it was found that said mobiles with certain IMEI numbers were used in registration of a number of fake firms. They provided information that the mobile (IMEI) recovered from accused Yaseen Sheikh was used in 92 GST registration firms, from Vishal Singh and Akash Saini in 53 GST firms, from Atul Sengar in 45 GST firms, and mobile (IMEI) recovered from Deepak Murjhani was used in 139 fake GST firms.

(xxiv) In C.D. Parcha No. 72 the Investigating Officer has referred the letter sent to DGGI²¹, Unit Ghaziabad, in response thereto he had relied that total 2528 GSTIN fake firms were identified which are involved in ITC of Rupees Four Thousand Crore, in respect to the same different Zonal Units have arrested accused, namely, Tushar Gupta, Sanjay Dhingra, Rishabh Jain, Shubham Jindal, Tarun Jindal, A. Suresh Kumar, Sanjay Jindl and Ajay Sharma.

(xxv) In C.D. Parcha No. 75 the Investigating Officer has requested DGGI, Meerut Unit, Ghaziabad to provide entire details along with charge sheet with regard to Sanjay Dhingra, controller of M/s Good Health Industries.

(xxvi) In C.D. Parcha No. 76, a report from DGGI, Meerut Unit was received along with charge sheet filed

against Sanjay Dhingra, which reveals that Inspector, DGGI Office, Ghaziabad has informed that accused persons were arrested by the police of P.S. Sector-20 Noida, Gautam Budh Nagar and from their possession list of 2600 fake GST registration firms was recovered. On thorough inquiry it was found that the forged GST firms YOYO Traders has transferred ITC to fake GST firm AKS Traders, from which it was transferred to M/s Good Health Industries Pvt. Ltd., and both YOYO Traders and AKS Traders were found to be registered on fake documents. A complete report of DGGI office containing 28 pages is enclosed along with the parcha. In the said report it has been found that YOYO Traders and AKS Traders are non-existing firms and mobile numbers have been provided which are used in the registration of fake firms.

(xxvii) C.D. Parcha No. 77 shows that on physical verification Investigating Officer found that both firms, namely, YOYO Traders and AKS Traders are non-existent at the principle place of business.

(xxviii) In C.D. Parcha No. 78, the Investigating Officer mentions that mobile number used in the registration of GST firm YOYO Traders i.e. 9873797648 was found to be used in mobile having IMEI No. 862625043825695, the said mobile was recovered at the initial stage from the accused Deepak Murjani.

(xxix) C.D. Parcha No. 79 shows that I.O. verified about whereabouts of the company but found the company YOYO Traders is non-existent, further it was revealed that at the office of M/s Good Health Industries Pvt. Ltd. situated at F-82, Shivaji Palace, Rajori Garde, Delhi, accused Sanjay Dhingra is not present since

15-20 days and the name of the Company has been changed to Live Light. Thereafter, statements of employees of the Company were recorded. They stated to have never seen Sukhveer Yadav and Rajesh Yadav who are also said to be Director of M/s Good Health and they use to report to Sanjay Dhingra who is owner of the said firm. Further, the complicity of Kanika Dhingra and Mayank Dhingra came to light.

(xxx) In C.D. Parcha No. 81 the I.O. recorded arrest of Ashish Allavadi along with the recovery of driving licence of accused Mannan Singhal and voter I.D. of Baldev. In his statement, Ashish stated that he used to bring payment of GST commissions and he has confessed the names of his cousin brother Amit alias Montu, Arjit, Anchit, Atul, Mannan, Baldev, Nandlal, Ajay, Ishwar, Sanjay Garg, Gaurav Singhal, Peetam Chacha and others in the commission of the offence.

(xxxi) C.D. Parcha No. 82 shows the entry of bank account of accused persons wherein concerned GST ITC transaction was found, as such the accounts were requested to be ceased by the Bank under Section 102(1) Cr.P.C.

(xxxii) In C.D. Parcha No. 84 the I.O. shows arrest of accused Praveen Kumar with the recovery of mobile phone, Debit Card of Atul Gupta and two tax invoices. In his confessional statement he admitted complicity in the offence with other accused persons including Rajiv Jindal. He further disclosed the fact that with regard to the fake invoices GST Department has initiated proceedings against the accused, in which penalty of Rs. 12 lacs was recovered from the company.

(xxxiii) C.D. Parcha No. 85 shows that IMEI of the mobile phones recovered from the accused persons was got run on surveillance of concerned service providers, from where it was found that those IMEI numbers were used in 83 mobile number/ SIMs.

(xxxiv) C.D. Parcha No. 98 refers about the report of one of the DGGI Zonal Units i.e. DGGI Gurugram Zonal Unit. It reveals that from the list of about 2600 fake GST firms which was recovered from the accused persons, out of these 20 companies were found to be common, by which fake ITC claims were received. Further, Annexure-1 of the said report reveals that from these 20 firms, by way of fake tax invoices about Rs. 16,91,74,236/- was misappropriated as a tax claim as such huge loss to the State Exchequer was caused. From Annexure No. 2 it is revealed that fake ITC claims of Rs. 8,57,60,146/- were fraudulently claimed from the fake GST firms. Further, Annexure-3 discloses that fake ITC of Rs. 226.45 crores were claimed in collusion with the accused Sanjay Jindal and Ajay Sharma. The report of DGGI is enclosed along with the said Parcha.

(xxxv) C.D. Parcha No. 105 shows the arrest of accused Rahul Nigam, Piyush Kumar Gupta and Dilip Sharma. They confessed that they use to create fake GST firms and invoices for the accused persons Arjit Goyal alias Adarsh Goyal, Anchit, Pradeep, Vikas Dabas and told that they are somewhere outside but they create fake GST firms and fake invoices on the email i.d. of adarshgoyal129@gmail.com which is still logged-in on his laptop, wherein many fake GST firms are uploaded. Whereafter, 2 boxes containing 40 stamps, 1 box with 2 bank passbooks and 19 various bank' cheque books, 1 box

containing 17 smart mobile phones, 1 box with key-pad mobile phones, 1 box with 20 pendrives, 1 box with one POS machine, and 45 SIM Cards, 12 PAN Cards, 10 Aadhaar Cards and 29 Credit Cards, 1000 fake documents relating to GST firms were recovered and sealed. From the confessional statements of arrested accused, complicity of accused Sachin, Babar, Parmeshwar and Nishant Agarwal came into light.

(xxxvi) C.D. Parcha No. 107 shows the entry of bank account of accused persons wherein concerned GST ITC transaction was found, as such the accounts were requested to be ceased by the Bank under Section 102(1) Cr.P.C.

(xxxvii) C.D. Parcha No. 119 shows the arrest of accused Vikas Dabas and in his confessional statement he disclosed that he along with other persons, at the office of Arjit, Anchit and Pradeep Goyal, used to transfer the said GST firms bills to different places and receive commission thereof. Further, he disclosed the family of Archit and Anchit is mainly involved in this offence and all other accused are involved in different aspects of commission of crime.

(xxxviii) C.D. Parcha No. 125 (09.03.2024) reveals that against the absconding accused (1) Anchit Goyal, (2) Pradeep Goyal, (3) Arjit Goyal, (4) Baldev alias Balli, (5) Rohit Nagpal proceedings of Non-Bailable Warrants, declaration under Sections 82 and 83 Cr.P.C. have been completed and lookout circular (LOC) has been issued as such there is less chances of arrest of the mentioned accused so charge sheet was filed against them under Sections 420, 467, 468, 471, 120-B IPC. Meaning thereby that accused have fled away from

the proceedings of law hence shows their guilt.

(xxxix) C.D. Parcha No. 126 (11.03.2024) shows that during the course of investigation accused Kunal Mehta was in judicial custody as such vide judicial permission the statement of accused Kunal Mehta alias Goldi was recorded in jail, wherein he stated to effect the recovery of forged documents from the office of Balli situated in Rohini, Delhi.

(xl) C.D. Parcha No. 128 (15.03.2024) indicates the recovery of documents relating to fake GST firm from accused Kunal Mehta alias Goldi.

(xli) C.D. Parcha No. 131 (21.03.2024) shows that during investigation it was found that accused Ajay Sharma and Sanjay Jindal, who were arrested by DGGI, Gurugram Unit amongst 8 other persons and also involved in the registration of 2600 fake GST firms, whose information was provided to the police by DGGI Ghaziabad Unit, are in jail, as such the statement of the accused persons were recorded wherein they have confessed their complicity in the present offence and requested the court below for allowing the remand of the accused in the present case crime under Section 420, 467, 468, 471, 120B IPC.

(xlii) In C.D. Parcha No. 135, a letter from DGGI Delhi Unit is submitted by the IO which reveals that the accused Tushar Mehta who was arrested by DGGI Delhi Unit, was involved in recipient of fraudulent ITC to the tune of Rs. 24 crores on the strength of purported invoices issued by the fake GST firm M/s MKJ Enterprises which is a part of Noida fake invoice syndicate.

(xliii) In C.D. Parcha No. 139 (10.04.2024) shows that during investigation it was found that accused Tushar Gupta, who was arrested by DGGI, Delhi Unit amongst 8 persons and also involved in the registration of 2600 fake GST firms, is in jail, as such the statement of the accused persons were recorded wherein they have confessed their complicity in the present offence and requested the court below for allowing the remand of the accused in the present case crime under Section 420, 467, 468, 471 120B IPC.

(xliv) C.D. Parcha No. 146 (01.05.2024) indicates that the accused Sanjay Dhingra along with Mayank Dhingra & Kanika Dhingra was arrested by the police from Delhi on 30.04.2024. At their instance/ possession, 7 mobile phones, 1 tablet, 6 cars, cash of Rs. 1,41,000/- were recovered. Subsequently, in their confessional statement, Sanjay Dhingra along with accused have confessed their guilt in the alleged offence. Moreover, accused Sanjay Dhingra disclosed that fake GST firms were prepared by him along with Deepak Murjhani and others and it is important to point out that Kanika Dhingra who is wife of Sanjay Dhingra has stated that through M/s Radha Krishna Marketing about Rs. 16,35,00,000/- were transferred to her saving bank account. Copy of recover memo was served upon the accused receiving their signatures thereon.

(xlv) C.D. Parcha No.149 (03.05.2024) shows that mobile phones and table which were recovered from the daughter of Deepak Murjhani, namely, Dolsy Murjhani, were sent to Forensic

Science Laboratory, Ghaziabad for examination.

(xlvi) C.D. Parcha No. 156 (13.05.2024) reveals that the data relating to fake GST firms was shared with DGGI Unit, Jaipur, Rajasthan, wherein on 30.08.2023 names of Rishabh Jain, Shubham Jindal and Tarun Jindal came to light in the present offence. The report of DGGI indicates that the computerised data obtained discloses that aforesaid accused persons have received ITC benefits by way of forged GST firms by creating fake bills and invoices.

(xlvii) C.D. Parcha No. 158 (19.05.2024) refers the arrest of accused Rishabh Jain and Tarun Jindal from House No. 105, Prashant Vihar, Rohini, Sector-14 and from their possession recovery of 2 mobile phones, 1 laptop and list of fake GST firms was made. In their confessional statement, said accused stated that they along with Deepak Murjhani, Yaseen, Anchit and Arjit and others have created these forged and fabricated GST firms. In the same parcha, it has been mentioned that accused Shubham Jindal was also arrested from Rajasthan by another team on 18.05.2024, from whose possession 3 mobile phone, 2 laptops and a list of fake GST firms were recovered. It is mentioned that copy of recovery memo was given to accused persons.

(xlviii) C.D. Parcha No. 161 (25.05.2024) shows that confessional statements of accused Anshul Goyal were recorded, wherein he has stated the complicity of the accused persons naming them.

(xlix) C.D. Parcha No. 162 (26.05.2024) reveals that a report from DGGI, Coimbatore which reveals that names of Smt. Suganya Prabhu and Sri Prabhuparam Shivam came to the light in

the complicity of offence, showing huge amount was misappropriated through ITC.

(l) C.D. Parcha No.167 (23.06.2024) details about the arrest of Smt. Suganya Prabhu, her confessional statement was recorded which discloses the complicity in the present case.

(li) C.D. Parcha No.172 (27.06.2024) shows the arrest of accused Babar Khan and recovery of forged tax invoices and other incriminating material and thereafter confessional statement of the accused was recorded.

110. Learned counsel for the State has detailed about the submission of chargesheet against accused persons under Sections 420, 467, 468, 471, 120-B IPC, in respective case crime numbers, which are being summarized in the following chart:

Sl. No	Applicant's Name	Case Crime No.	Date of Chagesheet
1.	Rajiv Jindal	248/2023	29.08.2023
2.	Rajiv Jindal	255/2023	29.08.2023
3.	Rajiv Jindal	203/2023	29.08.2023
4.	Manan Singhal	248/2023	19.09.2023
5.	Manan Singhal	203/2023	19.09.2023
6.	Mahesh	203/2023	03.10.2023
7.	Mahesh	255/2023	03.10.2023
8.	Mahesh	248/2023	03.10.2023
9.	Nand Kishore	203/2023	20.10.2023

10	Nand Kishore	248/2023	20.10.2023
11	Nand Kishore	255/2023	20.10.2023
12	Manan Singhal	255/2023	19.09.2023
13	Sumit Garg @ Chacha	255/2023	19.09.2023
14	Sumit Garg @ Chacha	248/2023	19.09.2023
15	Sumit Garg @ Chacha	203/2023	19.09.2023
16	Dolsy Murjhani	203/2023	10.10.2023
17	Dolsy Murjhani	248/2023	10.10.2023
18	Dolsy Murjhani	255/2023	10.10.2023
19	Jatin Murjani	203/2023	10.10.2023
20	Jatin Murjani	248/2023	10.10.2023
21	Jatin Murjani	255/2023	10.10.2023
22	Gaurav Singh @ Gaurav Singhal	255/2023	06.09.2023
23	Amit @ Moti @ Motu	248/2023	03.10.2023
24	Akash Saini	255/2023	29.08.2023
25	Akash Saini	203/2023	29.08.2023
26	Akash Saini	248/2023	29.08.2023
27	Ajay @ Mintu	248/2023	03.10.2023
28	Ajay @ Mintu	203/2023	03.10.2023
29	Ajay @ Mintu	255/2023	03.10.2023
30	Vishal	203/2023	29.08.2023

31	Vishal	248/2023	29.08.2023
32	Vishal	255/2023	29.08.2023
33	Praveen Kumar	255/2023	27.10.2023
34	Praveen Kumar	248/2023	27.10.2023
35	Praveen Kumar	203/2023	27.10.2023
36	Piyush Kumar Gupta	203/2023	04.03.2024
37	Ashwani	255/2023	29.08.2023
38	Ashwani	203/2023	29.08.2023
39	Ashwani	248/2023	29.08.2023
40	Atul Gupta	255/2023	19.09.2023
41	Pritam Garg @ Chacha	248/2023	10.10.2023
42	Pritam Garg @ Chacha	255/2023	10.10.2023
43	Pritam Garg @ Chacha	203/2023	10.10.2023
44	Gaurav Singh @ Gaurav Singhal	203/2023	06.09.2023
45	Gaurav Singh @ Gaurav Singhal	248/2023	06.09.2023
46	Atul Gupta	248/2023	19.09.2023
47	Amit @ Moti @ Motu	255/2023	03.10.2023
48	Amit @ Moti @ Motu	203/2023	03.10.2023
49	Rakesh Dialani	203/2023	04.03.2024
50	Rakesh Dialani	255/2023	04.03.2024
51	Rakesh Dialani	248/2023	04.03.2024

52	Atul Gupta	203/2023	19.09.2023
53	Dilip Sharma	203/2023	04.03.2024
54	Piyush Kumar Gupta	255/2023	04.03.2024
55	Piyush Kumar Gupta	248/2023	04.03.2024

111. While assisting the Court, Mr. Rishi Kumar, learned Additional Chief Standing Counsel submits that the present case begins with lodging of FIR by Saurabh Dwivedi, wherein allegations for fake GST registration applied in his name with PAN No. AUSPD7067N by anonymous person and got two GST firms registered, thus, the entire case begins with fake GST registration using PAN Card and Aadhaar Card of the informant. During the investigation it was found that larger nexus works for having benefit of input tax credit. The offence has been committed in an organized and synchronized manner, wherein fake and bogus invoices have been created to cover the money trail and goods supply as well as money transactions are there with forged firms. Establishing the entire chain, the accused persons have been found connected with each other and in one or the other way they have been benefited by fake GST registration shown by using Pan Card and Aadhaar Card of the informant.

112. The backbone of goods and services regime is input tax and credit. Under the GST regime, ITC follows supply chain not only intrastate but also interstate supply.

113. It has been established through investigation that crime has been committed by the accused persons by making fraudulent firm by using PAN Card

and Aadhaar Card, Mobile Number for creating fake firms and through fake invoices, they breached supply chain of ITC and got benefit through fake gains which have been created by them. Thus, in so many words, the said case is started with registration of fake firms using Pan Card and Aadhaar Card of the informant for consequential benefits of claiming ITC. Thus, it cannot be said that the proceedings have to be initiated against the applicants under the special Act i.e. Goods and Services Tax Act, where the proper procedure has been laid down and FIR could not have been registered.

114. The next finding in the case of recovery and use of fake PAN Cards has to be understood by analysing the purpose of issuing a PAN Card. The PAN card is issued to keep a track of financial activity of a person and a PAN is integral for all forms of payments. A PAN Card number is located to a needful and contains information such as Aadhaar number, date of birth and address. Similar is the use of Aadhaar Card which is now linked with the account of individual in favour of whom it has been issued. The PAN Card contains details of Aadhaar also. The PAN Card can be used for availing utility connections like electricity, telephone, LPG and internet. Under GST, a registered taxable person is required to issue an invoice containing all relevant information, such as the GSTIN, tax divergence and so on. If a taxpayer issues an invoice that is missing critical information, the invoice may be considered a fake GST invoice. Thus, by forging fake GST number using PAN Card of the informant fake GST invoices have been created for financial benefit, thus, the very basis of the present case is forgery done by the accused persons, on the basis of which

financial gains in terms of ITC have been availed by them.

115. The learned Additional Chief Standing Counsel, in order to show how use of PAN Card in such a manner, is detrimental not only to the interest of the person whose PAN Card has been used but is also detrimental in national interest. He has relied upon a judgement of Bombay High Court in the case of **UTI Infrastructure Technology and Services Limited v. Extra Tech World and Ors.**⁷², wherein the Court has observed thus:

“It cannot be in dispute that the PAN system is of paramount importance on a national scale due to its multifaceted impact on governance, taxation, and financial integrity, and it can be said to be the cornerstone of a robust financial economic system. PAN related services are pivotal in fostering fiscal discipline and ensuring a transparent and accountable economic framework, as apart from being a unique identifier for individuals and entities, it also aim at streamlining the tax recovery and payment process. Government of India has made it mandatory for PAN card holders to link the same to Aadhar Card, which is an acceptable proof of identification in India, and therefore, any potential misuse of the licence/ authorisation to issue PAN cards, would be highly detrimental not only to the interest.”

116. Thus, the offence in the present case is affecting the interest of public at large.

117. I have considered the submissions advanced by learned counsel for the parties and perused the record.

118. Learned counsel for the applicant-Gaurav Singhal has stated that in Case No. 22362 of 2023 lodged under the GST Act with the allegation that the applicant operates a racket for evading the Input Tax Credit by creating fake firms, he has already been granted bail, this Court is of the opinion that the present case is of a forgery and not related to GST, therefore, no benefit of bail granted in the aforesaid case can be given in the present case.

119. To understand the point of jurisdiction as argued by learned counsel for the State, it would be appropriate to quote Section 177 of Cr.P.C., which is as follows:

“177. Ordinary place of inquiry and trial.

Every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed.

120. It is also necessary to understand the meaning of inquiry. The inquiry has been defined under Section 2(g) of Cr.P.C. to mean every inquiry, other than trial, conducted by a Magistrate or a Court. It would also be appropriate to understand the meaning of ‘investigation’ which has been defined under Section 2(h) Cr.P.C. as all the proceedings for collection of evidence conducted by a police officer.

121. ‘Trial’ has not been defined under the Code of Criminal Procedure, 1973. Lexicologically, ‘trial’ means a judicial examination of a case in accordance with law. Hence, for an inquiry or trial, it is the court which is the focal point, whereas for an investigation, it is the police officer. Thus, in the present case, the

arguments as placed by learned counsel for the applicants, on the point of jurisdiction, have no legs to stand.

122. Section 27 of the Indian Evidence Act, 1872 deals with the relevancy of information received from a person accused of any offence while in the custody of the police officer. The Section provides an exception to the general rule that confessions made to the police officers are inadmissible in evidence. From the aforesaid, the scope of Section 27 of the Act, 1872 is that it applies to any information given by the person accused of an offence, which leads to the discovery of a fact. The Section states that "so much information" given by the accused that distinctly relates to the fact discovered may be proved. The exception to rule of admissibility is that normally confessions made to a police officer or while in police custody are inadmissible under Sections 25 and 26 of the Indian Evidence Act, however, Section 27 allows for an exception where information received from the accused leads to discovery of a fact. The Section makes only that part of the statement relevant, which directly leads to the discovery of facts. It does not make the entire statement of the accused inadmissible.

123. The condition for applicability of the aforesaid Section is that the person giving the information must be an accused in police custody. The information provided must lead directly to the discovery of the material fact and only that portion of information which directly leads to the discovery is admissible. For example, if an accused, while in custody, reveals the location of a weapon used in the crime and upon searching that location, the weapon is indeed found, the part of

statement where accused described the location of weapon is admissible in courts as evidence.

124. The rationale behind Section 27 of the Act, 1872 is to strike a balance between protection of the accused from coercive confession and the necessity of law enforcement to discover fact related to a crime. The courts have interpreted Section 27 in various judgements, often emphasizing that it should be applied only to the extent necessity to prove discovery of a fact. The Hon'ble Apex Court has also laid down guidelines to ensure that the information obtained is not the result of any compulsion or coercion.

125. In the case of **Pulukuri Kotayya and others v. King Emperor**⁷³, which is a landmark judgement, the Apex Court has explained the scope of Section 27 of the Act. In the said case it has been held that the phrase "distinctly related to the fact thereby discovered" is crucial, meaning only that part of statement that led directly to the discovery is admissible, and not the entire statement. In the case of **State of Uttar Pradesh v. Deoman Upadhyaya**⁷⁴, the Apex Court has reiterated the aforesaid. Thus, Section 27 is a significant provision under the Indian Evidence Act providing an exception to the inadmissibility of custodial confessions. It allows admissibility of the specific information that leads directly to the discovery of a fact, balancing the needs of criminal investigation with the rights of the accused.

126. In the present case, after registration of the FIR when forgery had been done by using the Aadhaar Card and PAN Card of the informant, fake GST firms were registered, Investigating Officer

proceeded on the information as provided by a secret informer and arrested two accused who disclosed about the office where work of the firm was being done. On the aforesaid information of the arrested accused persons, the Investigating Officer reached the office premises, wherein he found other persons working for the firm of the arrested accused persons. Laptops, mobiles, SIM Cards, fake invoices were recovered, thus, discovering such fact which connected them with the main accused who had got registered the fake firms and the consequential forgery or theft of GST was found. Thus, that part of the discovery of fact is admissible as per Section 27 of the Act. Therefore, argument as placed by learned counsel for the applicants regarding the fact that confessional statements can be taken as a piece of evidence, has no legs to stand.

127. The principal of "bail is the rule, jail is the exception" is a fundamental concept in criminal law, where the criminal justice system recognizes the importance of personal liberty and the presumption of innocence until proven guilty. This principal emphasizes that an accused should ordinarily be granted bail unless there are compelling reasons to detain him in custody. But there are exceptions to the aforesaid principal. While, the general rule favours granting bail, there are several exceptions where courts may deny bail due to specific circumstances. These exceptions are based on factors that indicate a potential risk to society, the judicial process, or the investigation. Some points that should be kept in mind while granting bail are; the nature and gravity of the offence, likelihood of flight risk, risk of tampering with the evidence of witnesses, repeated offenders or habitual criminals, danger to society or the victim, possibility of

committing another offence while on bail, interference with justice, specific statutory provisions like the Narcotic Drugs and Psychotropic Substances Act, 1985, Unlawful Activities (Prevention) Act (UAPA) and the Prevention of Money Laundering Act, 2002 (PMLA), lastly economic offence and white collar crimes.

128. The present case relates to economic offences, such as large scale fraud, money laundering and corruption, are often viewed seriously because they affect the economic fabric of the society. The Courts may deny bail in such cases especially if the accused holds a position of influence or power. In the present case, money trail of crores, which affects the society at large scale, is involved which started from registration of fake firms by using Aadhaar and PAN Cards of the informant who had not applied for such registration.

129. The Apex Court in the case of **Manish Sisodia v. Central Bureau of Investigation, 2023 SCC OnLine SC 1393**, has discussed about the constitutional mandate which is higher law and accordingly it is the basic right of person charged of offence and not convicted be ensured and given a speedy trial, thus, where the trial is not proceeding for the reasons not attributed to the accused, the Court unless there are good reasons may well be guided by exercising power to grant bail. This would be true, the trial would take years.

130. In the present case from the report of the concerned District Judge/ Chief Judicial Magistrate, it is clear that the accused have avoided coming to the court and discharge application of one of the accused has been rejected. One or the other

grounds are being taken by the accused persons in getting the matter adjourned so that the charge is not framed, therefore, they are trying to cause deliberate delay so that the charges may not be framed, hence, interfering in judicial process, thus, giving ample reason of not enlarging them on bail.

131. From the report also it is clear that the discharge application of one of the accused has been rejected and it shows that the charges are proved and once on the basis of material collected chargesheet has been submitted, discharge is rejected, the case of bail is not made out in economic offence where money trail of crores has been found which is a result of registration of fake firms. Offence under the IPC is made out and such accused cannot be dealt with easy hands. In the case of **Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation, (2013) 7 SCC 439**, the Supreme Court has held thus:

“34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial,

reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.”

132. The Apex Court in the case of **Nimmagadda Prasad v. Central Bureau of Investigation, (2013) 7 SCC 466** has formulated some important factors to be taken into consideration while considering bail applications. Relevant paragraph of the said judgement are quoted herein below:

“**24.** While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words “*reasonable grounds for believing*” instead of “*the evidence*” which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.”

133. Hon'ble Apex Court in the case of **Directorate of Enforcement v. M. Gopal Reddy and another, 2022 SCC OnLine SC 1862** has held that in the economic offences which are having great impact on the society, the court must be

slow in exercising discretion under Section 438 of Cr.P.C.

134. Insofar as the argument of learned counsel for the applicants that the cases where the accused are females, they are entitled to be released on bail giving benefit of Section 437 Cr.P.C., the court is of the opinion that the benefit can be given to women who do not have agency and not who themselves are powerful or connected with such powerful persons and the offence is such which is affecting the public at large.

135. In the case of **Tahir Hussain v. The Assistant Director Enforcement Directorate⁷⁵**, the Court has observed that the accused Tahir Hussain was involved in the acts of cheating/ falsification/ forgery of documents which resulted in fraudulent removal of money from the accounts of the three companies (M/s SEAPL, ECPL and EGSPL). On the directions and instructions of Tahir Hussain, huge amount of money was withdrawn from the accounts of the said three companies by way of transfer of funds to entry operators and bogus companies. Tahir Hussain was ultimate beneficiary of the laundered money which he used for fulfilment of ulterior motives. Fake and bogus invoices were created to cover the money trail.

136. The same situation is there in the facts of this case where the crime has started with registration of fake GST firms by using Aadhaar and PAN Card of the informant which amounts to forgery, therefore, offence under the relevant sections is made out and these offences have been properly investigated by the Investigating Officer after lodging of FIRs. The evidences have been collected from the GST Department also.

137. In the case of **Perumal Raja @ Perumal v. State, Rep. By Inspector of Police**⁷⁶, the Court has gone to the extent of clarifying phrase “discovery of a fact” by saying that the same includes the object found, the place from which it was produced and the knowledge of the accused as to its existence, therefore, factum of discovery combines both the physical object as well as mental consciousness of the informant accused in relation thereto. The same has been stated in Paragraph Nos. 22 & 23 of the said judgement, which are thus:

“22. However, we must clarify that Section 27 of the Evidence Act, as held in these judgments, does not lay down the principle that discovery of a fact is to be equated to the object produced or found. The discovery of the fact resulting in recovery of a physical object exhibits knowledge or mental awareness of the person accused of the offence as to the existence of the physical object at the particular place. Accordingly, discovery of a fact includes the object found, the place from which it was produced and the knowledge of the accused as to its existence. To this extent, therefore, factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto. In *Mohmed Inayatullah v. State of Maharashtra*⁷⁷, elucidating on Section 27 of the Evidence Act, it has been held that the first condition imposed and necessary for bringing the section into operation is the discovery of a fact which should be a relevant fact in consequence of information received from a person accused of an offence. The second is that the discovery of such a fact must be deposed to. A fact already known to the police will fall foul and not meet this condition. The third is

that at the time of receipt of the information, the accused must be in police custody. Lastly, it is only so much of information which relates distinctly to the fact thereby discovered resulting in recovery of a physical object which is admissible. Rest of the information is to be excluded. The word ‘distinctly’ is used to limit and define the scope of the information and means ‘directly’, ‘indubitably’, ‘strictly’ or ‘unmistakably’. Only that part of the information which is clear, immediate and a proximate cause of discovery is admissible.

23. The facts proved by the prosecution, particularly the admissible portion of the statement of the accused, would give rise to two alternative hypotheses, namely, (i) that the accused had himself deposited the physical items which were recovered; or (ii) only the accused knew that the physical items were lying at that place. The second hypothesis is wholly compatible with the innocence of the accused, whereas the first would be a factor to show involvement of the accused in the offence. The court has to analyse which of the hypotheses should be accepted in a particular case.”

138. While considering an appeal against the bail cancellation order, the Apex Court in the case of **Gurcharan Singh v. State (Delhi Administration)**⁷⁸, has held that there cannot be an inexorable formula in the matter of granting bail. Paragraph-29 of the said judgement is thus:

“29. We may repeat the two paramount considerations, viz. likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a Court of Justice. It is essential that due and proper

weight should be bestowed on these two factors apart from others. 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.”

139. The Apex Court in the case of **Prahlad Singh Bhati v. NCT, Delhi and another**⁷⁹, has held that while granting bail, the court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, larger interest of the public or State and similar other considerations. Relevant paragraph no. 8 of the said judgement is reproduced hereunder:

“**8.** The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the

bail the legislature has used the words “reasonable grounds for believing” instead of “the evidence” which means the court dealing with the grant of bail can only satisfy it (*sic* itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce *prima facie* evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

140. Law on consideration of the Court to grant or refusal of bail has been settled by the Apex Court in a catena of decisions. In the case of **Kalyan Chandra Sarkar v. Rajesh Ranjan**⁸⁰, the Supreme Court has held that the court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Paragraph-11 of the said judgement is being quoted below:

“**11.** The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for *prima facie* concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of

conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh*⁸¹ and *Puran v. Rambilas*⁸².)”.

141. In the case of **State of U.P. Through CBI v. Amarmani Tripathi**⁸³, the Supreme Court has formulated eight points for consideration of bail application. It would be apposite to quote the relevant paragraph no. 18 of the said judgement:

“**18.** It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. ...”

142. The Apex Court has, in the case of **P. Chidambaram v. Directorate of Enforcement**⁸⁴, held that precedent of another case alone will not be the basis for either grant or refusal of bail though it may have bearing on principle and the consideration will have to be on case-to-case basis on facts involved therein and securing the presence of the accused to

stand trial. Paragraph-23 of the said judgement reads thus:

“**23.** Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of “grave offence” and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the

precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.”

143. Recently the Apex Court in the case of **Satendra Kumar Antil v. Central Bureau of Investigation and another⁸⁵**, has outlined the considerations by the Court in the matter of grant or refusal of bail.

144. As assisted by learned counsel for the State that backbone of Goods Services Tax regime and Input Tax Credit, is that under the GST Regime ITC follows supply chain not only in intra-state but also inter-state supply. Thus, on the ground of jurisdiction as argued by learned counsel for the applicant this Court is of the view that though registration of fake firms were at Punjab and Maharashtra, the complainant is resident of New Delhi and the FIR has been lodged at Gautam Buddha Nagar, the genuineness of complaint questioning the territorial jurisdiction cannot be raised on the basis of occurrence as the same cannot be said to be at one place where the GST firm was registered but its connections with other fake firms are also required to be seen.

145. Having gone through the submissions of learned counsel for the parties, nature of accusation of offence, role of the applicants, I do not find it a fit case for granting bail.

146. The bail applications are rejected.

reason as per requirement of Section 354(3) Cr.P.C. - A balance sheet of aggravating and mitigating circumstances

(2024) 9 ILRA 134
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.09.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Capital Cases No. 10 of 2022
 With

Capital Cases No. 11 of 2022
 With

Criminal Appeal No. 3582 of 2022

Asif Thakur & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
 Sri Araf Khan, Sri Lihazur Rahman Khan

Counsel for the Respondent:
 G.A.

(A) Criminal law - Capital case - Murder and Conspiracy - The Code of Criminal Procedure, 1973 - Section 366 (1) - Reference for confirmation of death sentence awarded to appellants, Indian Penal Code, 1860 - Section 302 r.w 149,120(B),147,148, Arms Act, 1959 - Section 25 - Mitigating circumstances - aggravating circumstances - 'Rarest of Rare' doctrine - If the Court is inclined to award death penalty, then there must of exceptional circumstances warranting imposition of excess penalty - Court should consider probability of reformation and rehabilitation of convict in the society as this is one of the mandates of special

should be drawn while awarding death penalty. (Para - 62,63)

Appeal against conviction and death penalty - incident involved a premeditated murder - accused allegedly conspired to kill the victims due to longstanding enmity - prosecution relied on eyewitness accounts, forensic evidence, and postmortem findings. (Paras 5–20)

HELD: - Accused (Gayasuddin) acquitted for lack of evidence of conspiracy. Death penalty imposed by the Trial Court commuted to life imprisonment for a fixed period of 20 years considering sentencing principles and absence of "rarest of rare" circumstances. (Para - 56,60-62,72)

Appeal Partly allowed. (E-7)

List of Cases cited:

1. Mehraj Singh (L/Nk) Vs St. of UP, (1994) 5 SCC 188
2. Thanedar Singh Vs St. of M.P., (2002) 1 SCC 487
3. Mohd. Muslim Vs St. of U.P., (2023) LiveLaw SC 489
4. Manoj Kumar Soni Vs St. of M.P., 2023 0 Supreme (SC) 703
5. St. of Maha. Vs Nisar Ramzan Sayyed, 2017(2) R.C.R.(Criminal) 564
6. St. of U.P. Vs Ram Kumar & ors., 2017(5) R.C.R.(Criminal)785
7. Chhannu Lal Verma Vs St. of Chhatt., 2019(5) R.C.R.(Criminal) 192
8. Dnyaneshwar Suresh Borkar Vs St. of Maha., 2019(2) R.C.R.(Criminal) 302
9. Manoharan Vs St. by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court) 3746
10. Veerendra Vs St. of M.P., 2022(3)R.C.R. (Criminal) 254

11. St. of Haryana Vs Anand Kindo & anr. etc., 2022(4)R.C.R. (Criminal)735

12. Re: Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R.(Criminal) 571

13. Sundar @ Sundarrajan Vs St. by Inspector of Police, 2023 Cri.L.R.(SC) 473

14. Ravindar Singh Vs The St. Govt. of NCT of Delhi, 2023 AIR (Supreme Court)2220

15. Digambar Vs The St. of Maha., 2023 Cri. L.R. (SC) 564

16. Bhaggi @ Bhagirah @ Naran Vs The St. of M.P., 2024(1) Crimes 121

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. Reference No. 7 of 2022 has been made by the Court of Additional District and Sessions Judge, Court No.3, Aligarh for confirmation of death sentence awarded to appellants, Ahsan, Asif Thakur, Bhoora, Kafeel and Wakeel. The appellants have also filed Jail Appeals i.e. Capital Case Nos. 10 of 2022 and 11 of 2022 challenging the judgment of conviction dated 22.4.2022, holding the appellants guilty of offence under Sections 302 read with Section 149 and 120B, 147 and 148 of IPC, holding appellants Bhoora, Kafeel and Wakeel under Section 25 of the Arms Act and also holding accused-Gayasuddin guilty of offence under Section 302 read with Section 120B of IPC in Sessions Trial Nos.44 of 2016 (State Vs. Ahsan and four others) arising out of Case Crime No.362 of 2015), in Sessions Trial No.51 of 2016 (State Vs. Bhoora) arising out of Case Crime No.377 of 2015, in Sessions Trial No.41 of 2016 (State Vs. Kafeel) arising out of Case Crime No.379 of 2015, in

Sessions Trial No. 36 of 2016 (State Vs. Wakeel) arising out of Case Crime No.378 of 2015 and Sessions Trial Nos. 586 of 2016 (State vs. Gayasuddin) arising out of Case Crime No. 362 of 2015 and the order of sentence dated 25.4.2022 vide which, the appellants were awarded death sentence, to be hanged till death under Section 302 read with Section 149 and Section 120(B) of IPC with a fine of Rs.1,000/- each and in case of default of payment of fine, to undergo further additional imprisonment for one year each; under Section 147 of IPC, the appellants were awarded one year simple imprisonment along with a fine of Rs.1,000/-each and in case of default of payment of fine, to undergo further additional simple imprisonment for six month each; under Section 148 of IPC, the appellants were awarded three years rigorous imprisonment along with a fine of Rs.1,000/- each and in case of default of payment of fine, to undergo further additional simple imprisonment for six months; under Section 25 of Arms Act, the appellants, namely, Kafeel, Wakeel and Bhoora were awarded three years rigorous imprisonment along with a fine of Rs.1,000/-each and in case of default of payment of fine, to undergo further additional simple imprisonment for six months and accused-Gayasuddin who has filed Criminal Appeal No. 3582 of 2022 was awarded life imprisonment under Section 302 read with Section 120B of IPC with fine of Rs.1000/- and in case of default in payment of fine, further to undergo imprisonment for six months. All the sentences were to run concurrently.

2. The Reference and Appeal were admitted. The Trial Court's record is received and paper books are ready.

3. Heard Sri Araf Khan, learned counsel for appellants in Capital Case

No.10 of 2022 and Sri B.A. Khan, learned counsel for appellant in Capital Case No.11 of 2022, Sri Nasiruzzaman, learned counsel for appellant in Criminal Appeal No.3582 of 2022 and the learned AGA for the State and perused the material placed on record.

4. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

5. As per the prosecution, on 25.07.2015, informant- Raja gave a complaint, Ex.Ka.1 to the police which read as under:

“सेवा में,

श्रीमान थानाध्यक्ष महोदय,

थाना देहली गेट, जनपद (अलीगढ़)

महोदय,

निवेदन करना है कि कल दिनांक 24.7.2015 को प्रार्थी के ताऊ की लड़की की शादी थी जिसका भात लेकर प्रार्थी के पिता नौशे व उनके दोस्त चन्दा उर्फ आशिफ गये थे। प्रार्थी के घर की चाबी प्रार्थी के पिता नौशे के पास थी प्रार्थी व प्रार्थी के चाचा रफीक मोटर साइकिल लेकर चाबी लेने गये थे तब समय करीब 11.30 बजे रात वहाँ पर ये बताया कि नौशे व चन्दा को एहसान निवासी करबला व आशिफ ठाकुर निवासी माबूद नगर अपने घर की तरफ लिवा कर ले गये हैं। प्रार्थी व प्रार्थी का चाचा रफीक जैसे ही प्रार्थी शाहिद पॉलिश वालों के मकान के पास पहुँचा तो

देखा कि प्रार्थी के पिता नौशे व उनके दोस्त चंदा को चारो तरफ से घेर कर आशिफ ठाकुर पुत्र नामालूम वा कपिल पुत्र नामालूम वा वकील पुत्र नामालूम व भूरा दूधवाला पुत्र नामालूम अपने हाथों में लिए हुए तमंचे व पिस्टल थे। जान से मारने की नीयत से फायर कर रहे थे। प्रार्थी के पिता नौशे व उनके दोस्त चंदा गोली लगने के बाद जम(का०फटा) पर नीचे गिर गये। जमीन पर गिरने के बाद इन सभी लोगों (का० फटा) प्रार्थी के पिता नौशे व चंदा को ईंटों और पत्थरों से कुचला पड़ोस में शादी होने की वजह से काफी रोशनी हो रही थी। जिसमे मैंने और मेरे चाचा रफीक ने अपनी आँखों से पूरा वाकया देखा है। हमारे शोर मचाने पर यह सब मारने वाले माबूद नगर की तरफ भाग गये। प्रार्थी के पिता नौशे की जमीन की रंजिश गयासउद्दीन सेक्रेटरी वल्द फतेह मौहम्मद निवासी हमदर्द नगर से चल रही है। उन्ही ने सुपारी देकर मेरे पिता व चंदा की हत्या करायी है। चूँकि मारने वाले चीख-चीख कर कह रहे थे। कि साले गयासुद्दीन से रंजिश रखते थे।

अतः श्रीमान जी से प्रार्थना है कि प्रार्थी की रिपोर्ट दर्ज कर कानूनी कार्यवाही करने की कृपा करें। अति कृपा होगी।

ह० राजा
प्रार्थी

राजा पुत्र (का०फटा)

निवासी खैर रोड (का०फटा)
थाना देहली गेट जि (का०फटा)
मोबाइल नं. रहीस (का०फटा)
93582192 (का०फटा)

ता० 25.7.2015”

6. On receiving the complaint, the police registered the chik FIR, Ex.Ka.2 and started the investigation. The Panchayatnama was prepared in which the opinion of Panches read as under:

"राय पंचान

हम पन्चों की राये मे मिरतक नौशे उर्फ जुनेद s/o मुन्ने खाँ की मिरतुयु बदमाशो दुआरा गोली मारने व पथथरो से मुह कुचलने से आई चोटो के कारण हुई है फिर भी मिरतुयु का सही कारण जान्ने हेतु PM करा लिया जाये।"

7. During further investigation, the post-mortem of the deceased was got conducted, the accused were arrested, the weapons of offence were recovered and the incriminating recoveries were sent to FSL, Agra by the Investigating Officer who also recorded the statement of the witnesses under Section 161 of Cr.P.C. Thereafter, he submitted the charge-sheet before the trial court. Later on, the case was committed to the Court of Sessions where the charges were framed against the accused persons under Sections 147, 148, 302/149 read with Section 120-B I.P.C. for committing the murder of Naushe and Chanda by using the firearms.

8. The appellants did not plead guilty and claimed trial.

9. In prosecution evidence, the informant-PW-1- Raja deposed on a line of information given to the police. The operative part of the statement read as under:

"नाम पता गवाह: राजा s/o नौशे उर्फ जुनेद उम्र 22 साल पेशा मजदूरी R/o खैर रोड लाल मस्जिद के सामने थाना देगोट अलीगढ़।

सशपथ ब्यान किया कि: घटना दिनांक 24.7.15 की है। उस दिन मेरे ताऊ की लड़की शादी थी। उस दिन भात लेकर मेरे पिता नौशे उर्फ जुनेद व उनका दोस्त चन्दा उर्फ आसिफ गये थे। शादी 25.7.15 की थी। उस दिन 24.7.15 को मैं घर की चाबी लेने रात्रि के 11-11.30 PM बजे पहुँचा तो वहाँ पर रास्ते में कुछ लोग मिले उन्होंने पाप नौशे उर्फ जुनेद व चाचा चन्दा को आसिफ ठाकुर एहसान अपने घर की तरफ बुलाकर ले गये हैं। मैं व मेरे चाचा रफीक चाबी लेने के लिये मोटर साइकिल से पिता के पास जा रहे थे। जब हम शमशाद के मकान के पास पहुँचे तो उनके यहाँ प्रोग्राम होने की वजह से वहा रोशनी (लाइट) जल रही थी। शमशाद के मकान के थोड़ा आगे प्यारे के मकान के सामने मेरे पिता नौशे उर्फ जुनेद व चन्दा की एहसान, आसिफ ठाकुर, कफील, वकील, भूरा अपने हाथो मे लिये तमंचे व पिस्टल से मेरे पिता व चाचा चन्दा के ऊपर जान से मारने की नीयत से अंधाधुंध फायर कर रहे थे। जिससे मेरे पिता व चाचा चन्दा फायर की चोट लगने से वही गिर पड़े थे। गिरने के बाद आसिफ ठाकुर ने वहाँ पड़ी ईंट उठाकर सिर व चहरे पर मारी मेरे चाचा चन्दा के भूरा ने वही पड़ा पत्थर चेहरे व सिर में

मारा और एहसान ने फेटे मे से छुरा निकाल कर चंदा के गर्दन पर वार किया और सभी मुलजमान तमंचे व पिस्टल लहराते हुये कहा कि किसी ने हमारा नाम लिया तो सभी का यही हाल होगा। और कहा कि ग्यासउद्दीन से पंगा लेने का नतीजा देख लिया वह बहुत बड़ा वकील है। और सैक्रेटरी भी है। जैसे ही मैंने शोर किया और बोले कि यह दोनों मर गये भाग चलो छप्पर वाली मस्जिद की तरफ भागे। यह घटना मैंने व चाचा रफीक ने बिजली की रोशनी में देखी व पहचाना। हाजिर अदालत मुलजमान के देखकर गवाह ने कहा कि यही सब मुलजमान है जिन्होंने मेरे पिता व चाचा की हत्या की थी। मेरे पिता की रंजिश ग्यासुद्दीन सैक्रेटरी से चल रही है। इसने न्यायालय के स्टे के बाद भी मकान को तुड़वा दिया था। जब मैं मुलजमानों के भाग जाने के बाद वहाँ पहुँचा तो मेरे पापा व चाचा घरेलू नाली के पास अलग-2 पड़े थे। मुझे देखते हुये मेरे परिवार के लोग भी आ गये थे। घरवालों ने पुलिस को सूचना दी पुलिस आ गयी थी। और मेरे चाचा व पापा को लेकर अस्पताल पहुँची थी वहाँ पर दोनों को मृत घोषित कर दिया। गवाह ने तहरीर देखकर कहा कि यह वह वही तहरीर जो मैंने लिखकर दी थी। गवाह ने अपने हस्ताक्षर व लेख में दी थी। मैं अपने हस्ताक्षर व लेख कि शिनाख्त करता हूँ। जिस पर प्रदर्श क-1 डाला गया। मेरे पिता व चाचा की हत्या ग्यासउद्दी (काफ्टा) सुपारी देकर करायी थी।"

In cross-examination, this witness stated that till the time the FIR was registered, he did not know the name of the father of the accused. He has reached the

police station for lodging the case at about 1 PM and at that time Naushad, Appu and Rafiq had accompanied him. Prior to making the report with the police, the dead body of his father- Naushe and Chanda was lying in the hospital. He further stated that the dead body of his father and Chanda was not sealed in a parcel in his presence and on 24.07.2015 at about 11-11:30 PM, the police has taken the dead body and he has reached the spot at 11:20 PM. The statement was recorded by the police at the spot and he had given the name of the accused person to the Investigating Officer. He further stated that his statement was recorded on 24.07.2015 at 11:35 PM prior to registration of the FIR and the site plan was prepared as per his instructions. He further stated that on complaint, Ex.Ka.1, he has not made any cuttings and signed it as Raja.

In further cross-examination, this witness denied a suggestion that there was no light at the place of occurrence. He further stated that the blood stained stones, pistol and magazine were lying at the place where the dead bodies were lying in front of house of Pyare and Shamshad which are facing each other. This witness admitted that Naushe @ Junaid has criminal history of criminal cases as admitted in the cross-examination. In further cross-examination, this witness gave a description of the incident, however, denied that his father was having enmity with many persons of the locality. He further stated that accused Gayasuddin had a land dispute with his father and denied a suggestion that the accused have not committed murder of his father- Naushe and Chanda. He also denied a suggestion that he was not present at the spot. In further cross-examination, he stated that the exact time of the incident was not recorded in the complaint which was written by his cousin- Guddu and even in

the statement under Section 161 Cr.P.C., the time of the incident was not recorded by the Investigating Officer. He further stated that his father sustained bullet injury fired by accused- Bhura but this is not recorded in the statement under Section 161 Cr.P.C. He further stated that there was light outside the house of Shamshad as there was marriage ceremony and lighting was done outside the house. He further denied that accused owe Rs. 2,000/- to his mother and therefore, his name has been falsely implicated. In further cross-examination, this witness stated that during the investigation, he has not provided any evidence to the Investigating Officer regarding the enmity on account of land dispute between Naushe and Gayasuddin. He stated that it is correct that after the police reached at the spot and removed the dead body, the complaint was lodged in the concerned police station. He further stated that the Panchayatnama was prepared by the in-charge of the police station who got his signature on many documents and one knife was recovered from Ahsan.

10. PW-2- Rafeeq also stated on the line of the statement made by PW-1 as well as the version in the FIR. He stated that when the accused persons Bhura, Asif Thakur, Ehsan, Vakeel and Kafeel had encircled his brother- Chanda and his friend- Junaid, they were carrying 315 bore pistols and country made pistols and fired upon Chanda and his friend- Naushe @ Junaid. It was at about 11:30 PM at night and there was light outside the house of Shamshad where some marriage ceremony was going on. He stated that accused were exhorting Junaid and Chanda who have developed enmity with Gayasuddin, it will cost them heavily. Asif gave a blow with a stone on the face of Naushe and Bhura gave a stone blow on the face of his

brother- Chanda. Ahsan took out the knife and cut the neck of his brother- Chanda. All the accused persons saying that if any person gave witness against them, he will face the same consequences. Thereafter, the accused ran away and the police reached. In cross-examination, this witness replied to certain queries as under:

"प्रश्न:- यह बात सही है कि इस मुकदमे कि रिपोर्ट इन दोनों मजरूवों को मृत हालत में पुलिस वालों ने मृत हालत में मलखान सिंह में दाखिल करने के बाद रिपोर्ट की थी।

उत्तर:- मेरे भाई व उनके दोस्त के मरने के बाद दूसरे दिन सुबह रिपोर्ट की थी। यह कहना सही है कि रिपोर्ट मलखान सिंह अस्पताल में मृतको को भर्ती करने के बाद किये थे। जब पुलिस वालों ने मृतको को भर्ती कराया तब परीवारी जन व मैं इनके साथ था।

प्रश्न:- क्या आपने उन सिपाहियों के साथ सम्बन्धित डाक्टर को बताया कि हम परीवारी जन हैं।

उत्तर:- हमें मालूम नहीं है।

अस्पताल एक डेढ़ बजे रात पहुंचे थे। अस्पताल में घंटे आध घंटे रुके थे। अस्पताल में मृत शरीर को सरकारी कर्मचारी हिला डुला के देखा था या नहीं यह ध्यान नहीं है। मैं राजा के साथ रिपोर्ट करने थाने पर गया था। थाने पर सुबह 10-11 बजे पहुंचा था। तहरीर राजा ने थाने पर लिखी थी। राजा जहाँ तहरीर लिख रहा था वहाँ पर पुलिस वाले मौजूद थे। नौशे खाँ मेरे भाई के दोस्त थे। राजा मेरा भतीजा लगता है। राजा नौशे खाँ का लड़का है। मकान की चाभी जिसकी तलाश में हम नौशे खाँ व चन्दा के पास

गये थे वह चाभी हमें नहीं मिली क्योंकि वे मर चुके थे। यह बात सही है कि मरे हुये हालत में ये दोनों नालियों में पड़े थे। यह कहना सही है कि ये चोटों के कारण मरे पड़े थे। घटना स्थल पर मृतको से मेरी कोई बातचीत नहीं हुई थी।"

He further denied a suggestion that at the time of preparation of Panchayatnama, names of the accused were not disclosed. This witness after lengthy cross-examination denied a suggestion that he was not present at the spot. He also denied a suggestion that his brother was a known criminal and he was murdered in a gang war.

11. PW-3- Anurudh Kumar stated that on receiving a complaint from informant-Raja, he has registered the chik FIR, Ex.Ka.2 and G.D. Ex.Ka.3. In cross-examination, he stated that the place of occurrence is two kilometer away from the police station and is situated in the densely populated area. He further stated that on 25.07.2015, after the post-mortem was conducted, two envelopes were given to him, carrying bloodstained earth stone, 32 bore magazine which were entered in the G.D. He further stated that in cross-examination that the chik report was prepared through a computer and G.D. was written prior to recording the chik FIR.

12. PW-4- Vinod Kumar, In-charge of Cyber Cell, Agra, stated as under:

"नाम- विनोद कुमार प्रभारी निरीक्षक साइबर सैल आगरा। ने सशपथ बयान किया कि मैं दिनोंक 25-07-2015 को वतौर एस०ओ० थाना देहलीगेट, अलीगढ़ पर तैनात था। उसी दिन मुकदमा अपराध संख्या- 362/15

धारा-147, 148, 149, 120बी, 302 भा०दं०स० राज्य वनाम एहसान आदि की विवेचना मुझे सुपुर्द की गई जिसमें मैंने पर्चा सं०-1 दिनांक 25-7-15 किता किया जिसमें नकल तहरीर हिन्दी वादी, नकल रपट, कायमी मुकदमा, बयान वादी, निरीक्षण घटना स्थल, नकल फर्द बरामदगी मैग्जीन मय तीन जिन्दा कारतूस सम्बन्धित अपराध सं० 362/15 नकल फर्द सादा पत्थर, खून आलूदा पत्थर सम्बन्धित मुकदमा उपरोक्त मृतक नौसे से सम्बन्धित व नकल फर्द सादा पत्थर, खून आलूदा पत्थर सम्बन्धित मुकदमा उपरोक्त मृतक चन्दा से सम्बन्धित, बयान चश्मदीद गवाह रफीक पुत्र रहीस, बयान एफ०आई०आर० लेखक काँ० अनिरुद्ध कुमार अंकित किया गया। पर्चा सं० द्वितीय दिनांक 26-7-15 को किता किया गया जिसमें गवाहों को धारा-160 के नोटिस व बयान गवाह मशकूर अली पुत्र महमूद अली व बयान गवाह नौशाद पुत्र शमशाद अंकित किये गये। पर्चा सं० तृतीय दिनांक 27-7-15 को किता किया गया जिसमें बयान गवाह रहीस पुत्र मुन्ने खाँ व दविश अभियुक्तगण के मसकन व मुखविर मामूर विवरण अंकित है। पर्चा सं०-4 दिनांक 28-7-15 को तलाश व दविश अभियुक्तगण दरस्तयाव नहीं हुए। पर्चा सं०-5 दिनांक 29-7-15 को किता किया गया जिसमें बयान गवाह फर्द श्री असलम पुत्र इकवाल व बयान गवाह फर्द अशफाक उर्फ ननुआ पुत्र अफसर अंकित किए गये व अभियुक्तगण के घरों व सम्बन्धित स्थानों पर दविश देना व दस्तयाव न होना अंकित किया गया। पर्चा सं०-

6 दिनांक 30-7-15 को किता किया गया है जिसमें दविश देना व पतारसी सुरागरसी मय मुखविरान मामूर करने का विवरण अंकित है। पर्चा सं०-7 दिनांक 01-8-15 को किता किया गया है, जिसमें अभियुक्त नूरा, कफील व वकील गिरफ्तारी व उनसे घटना में प्रयुक्त बरामदगी पिस्टल 32 बोर मय एक मैग्जीन व पिस्टल 32 बोर बिना मैग्जीन व तंमचा 315 बोर जिसके सम्बन्ध में मुकदमा अपराध संख्या 377/15 धारा-25 आयुध अधि० वनाम भूरा, मुकदमा अ० सं० 378/15 धारा 25 आयुध अधिनियम बनाम वकील, व मु०अ०सं० 379/15 धारा-25 आयुध अधिनियम बनाम कफील फर्द बरामदगी के आधार पर पंजीकृत करने का विवरण, नकल फर्द बरामदगी दो पिस्टल व तंमचा आदि, बयान अभियुक्त भूरा पुत्र नूरमौहम्मद जुर्म का इकवाल, बयान वकील पुत्र जहीर, बयान अभियुक्त कफील पुत्र मुरसलीन जुर्म का इकवाल अंकित है। पर्चा सं०-8 दिनांक 04-8-15 को किता किया गया जिसने नकल पंचायतनामा मृतक नौसे उर्फ जुनैद, नकल पी०एम० रिपोर्ट मृतक नौसे उर्फ जुनैद, नकल पंचायतनामा चन्दा उर्फ चाँद पुत्र रहीस, नकल पोस्टमार्टम मृतक चन्दा उर्फ चाँद पुत्र रहीस अंकित है व शेष अभियुक्तगण के घरों पर दविश व मुखविर मामूर करने का विवरण, पर्चा सं०-9 दिनांक 08-8-15 को किता किया गया जिसमें बयान पी०एम० कराने वाले कर्मचारी काँ० अजीत व होम० रामभूल शर्मा के बयान अंकित किए गये। पर्चा सं०-10 दिनांक 13-8-15 को किता किया गया जिसमें अभियुक्त

एहसान, आसिफ ठाकुर व ग्यासुद्दीन के घरों पर दविश देना, दस्तयाव नही होना व एन०बी०डब्लू० प्राप्त करने हेतु रिपोर्ट माननीय ए०सी० जे०एम०-9, को प्रेषित करना अंकित। पचा सं०-11 दिनांक 21-8-15 को किता किया गया जिसमें अभियुक्तगण एहसान, आसिफ ठाकुर व ग्यासुद्दीन के एन०बी०डब्लू० प्राप्त होने का विवरण अंकित है। पचा सं० दिनांक 30-8-15 को किता किया गया है जिसमें अभियुक्त आसिफ की गिरफ्तारी का विवरण व बयान जुर्म का इकवाल, घटना में प्रयुक्त तंमचा 315 बोर को दि(अस्पष्ट) जाते समय रात्रि में नहर में फैकना व नहर की जानकारी न होना अंकित है। पचा सं०-13 दिनांक 01-09-15 को किता किया गया जिसमें अभियुक्त एहसान पुत्र सुलेमान की गिरफ्तारी का विवरण अंकित है। बयान अभियुक्त एहसान जुर्म का इकवाल व घटना में प्रयुक्त तंमचे को दिल्ली जाते समय नहर में फैक देना व रात्रि होने के कारण नहर की जानकारी न होना का विवरण अंकित है। पचा संख्या-14 दिनांक 11-09-15 को किता किया गया है जिसमें अभियुक्त ग्यासुद्दीन सैकेट्री की गिरफ्तारी हेतु मसकन व सम्बन्धित स्थानों पर दविश देना व अभियुक्त का न मिलना अंकित है एवं बयान गवाह पंचायतनामा मौ० यूनुस पुत्र मौ० यूसुफ, पप्पन पुत्र मुन्ना खाँ, फरीद पुत्र रहीस का विवरण अंकित है। पचा सं०-15 दिनांक 15-09-15 को किता किया गया है, जिसमें ग्यासुद्दीन की गिरफ्तारी हेतु दविश व बयान पंचायतनामा मृतक चन्दा भरने वाले एस०आई० श्री प्रेमपाल

सिंह, बयान पी०एम० कराने वाले कर्मचारी काँ० धीरेन्द्र सिंह व होम० जयराम के बयान अंकित किए गये हैं। पचा सं०-16 दिनांक 20-9-15 को किता किया गया जिसमें बयान पी०एम० कराने वाले डा०पी० कुमार फिजीशियन पंडित दीन दयाल उपाध्याय अस्पताल अंकित किए गये जिसमें उन्होंने पी०एन० रिपोर्ट का समर्थन किया है। पचा सं०-17 दिनांक 01-10-15 को किता किया गया जिसमें बयान गवाह एस०आई० श्री सूरज प्रकाश शर्मा, एस०आई० श्री तसबुर अली व एस०आई० श्री महताव हसन, एस०आई० श्री तालिव हुसैन अंकित किए गये हैं। पचा सं०-18 दिनांक 12-10-15 को किता किया गया जिसमें फर्द बरामद असलाह व गिरफ्तारी अभियुक्तगण से सम्बन्धित गवाहान काँ० रमेश चन्द्र, काँ० प्रमोद, काँ० प्रवीन कुमार, काँ० शीलेन्द्र सिंह, अंकित किए गये हैं। पचा सं०-19 दिनांक 14-10-15 को किता किया गया जिसमें अभियुक्तगण एहसान पुत्र सुलेमान, आसिफ ठाकुर पुत्र बाबू खाँ, कफील पुत्र मुर्सलीन व वकील पुत्र जहीर, भूरा पुत्र नूर मौहम्मद के विरुद्ध पर्याप्त साक्ष्य संकलन, बयान वादी, बयान गवाहन, निरीक्षण घटना स्थल, बरामदगी आला कत्ल, बयान मुलजिमान से पर्याप्त साक्ष्य संकलन के आधार पर आरोप पत्र संख्या-264/15 धारा-147, 148, 149, 120बी, व 302 भा०दं०सं० प्रेषित किया गया। अभियुक्त ग्यासुद्दीन सैकेट्री के विरुद्ध विवेचना प्रचलित रही। आरोप पत्र मेरे लेख व हस्ताक्षर में है जिसकी मैं शिनाख्त करता हूँ इस पर प्रदर्शक-4 डाला गया। नक्शा नजरी भी मेरे

लेख व हस्ताक्षर में है जिसकी मैं शिनाख्त करता हूँ, इस पर प्रदर्श क-5 डाला गया। फर्द बरामदगी पर भी मेरे हस्ताक्षर हैं, इसकी भी मैं शिनाख्त करता हूँ जिन पर क्रमशः प्रदर्श क-6, 7 व 8 डाला गया।

मुख्य परीक्षा जारी।"

In cross-examination, this witness stated about the details of investigation and the efforts made for the arrest of the accused. He proved the charge-sheet vide Ex.Ka.9. In further examination, he has stated as under:

"दिनांक 20.2.20 से आगे-

ब्यान साक्षी- SHO विनोद कुमार हाल तैनाती थाना इंचार्ज हाइवे मथुरा ने सशपथ ब्यान किया कि उक्त अपराध से सम्बन्धित माल आज न्यायालय में उपलब्ध है। न्यायालय की अनुमति से सील तोड़ी गयी। नमूना मोहर उपलब्ध नहीं है। एक देशी पिस्टल जिस पर मेड इन जापान अंकित है। पिस्टल 32 बोर का है। जिस पर मैगजीन लगी हुई है। पिस्टल के साथ विधि विज्ञान प्रयोगशाला आगरा की एक स्लिप लगी हुई है। जिस पर क्रमांक 2/17-9034-आग्नेय-15 अंकित है। जिस पर भौतिक प्रदर्श-1 डाला गया। दूसरा एक देशी पिस्टल जिसके साथ लगे स्लिप पर 3/17-9034-आग्नेय 15 अंकित है। बिना मैगजीन (अप०) पिस्टल 32 बोर का है। जिसपर भौतिक प्रदर्श-2 डाला गया। तीसरा देशी तमन्चा 315 बोर जिसके साथ मैं लगी स्लिप पर 1/17-9034-आग्नेय 15 अंकित है। जिस पर भौतिक प्रदर्श-3 डाला गया। जिसमें कोई कारतूस नहीं है। और एक मैगजीन जिसमें

तीन कारतूस जिन्दा जिस पर बटे पर भौतिक प्रदर्श-4 डाला गया और कारतूस पर भौतिक प्रदर्श क्रमशः 5, 6, 7 डाला गया। कपड़े पर भौतिक प्रदर्श-8 डाला गया।

X X X Cross by accused-आसिफ,

भूरा, वकील व कफील की ओर से-

यह कहना सही है कि तुलना करने के लिये माल के साथ नमूना मोहर नहीं है। मुल्जिम से मैंने जो पिस्टल बरामदगी दिखायी है। वह बिना मैगजीन की थी। यह कहना सही है कि बिना मैगजीन के पिस्टल चलायी नहीं जाती लेकिन आयुध अधिनियम में आती है। मुझे याद नहीं है कि पिछली बार ब्यान होने पर माल न्यायालय में था या नहीं। थाना देहली गेट के पैरोकार के माध्यम से माल न्यायालय में आया है। मुझे जानकारी नहीं है कि भौतिक प्रदर्श-5, 6, 7 व 8 थाना देहली गेट के मालखाने से कब निकाला गया है। न्यायालय में माल आज ही आया है। मेरी जानकारी में नहीं है कि थाना देहली गेट के माल खाने से माल कब निकला। यह कहना सही है कि मालखाना देहली गेट में माल किस क्रमांक पर है। यह कहना सही है कि फर्द बरामदगी में मैगजीन वाली पिस्टल पर मेड इन जापान लिखा हुआ नहीं है। ये कहना सही है कि अरेस्टिंग मेमो मौके पर नहीं है। ये भी कहना सही है कि आयुध अधि० के 378/15, 379/15, 377/15 लिखे हुए हैं। यह कहना भी सही है कि आयुध अधिनियम के 377/15, 378/15 व 379/15 थाने पर दर्ज नहीं है। उससे पहले ही गिरफ्तारी मीमो में मु०अ०सं० 377/15, 378/15 व 379/15 दर्ज हो गया था। यह भी

कहना सही है कि भौतिक प्रदर्श क-1, क-2 व क-3 का रासायनिक परीक्षण (अपठनीय) करने के लिये नहीं कराया। बैलेस्टिक जाँच के सम्बन्ध में विधि विज्ञान प्रयोगशाला भेजा गया था। यह कहना सही है कि पत्रावली पर इस समय बैलेस्टिक रिपोर्ट नहीं है। थाना देहली गेट रपट न० 55 जो मेरे थाने से रवानगी की है। और उसी के हवाले से मैं गिरफ्तारी करने नादा पुल पहुँचा व तीनों मुलिजमों को गिरफ्तार किया है तो रवानगी पत्रावली पर नहीं है। भौतिक प्रदर्श 1, 2, 3 में लगी जिल्द पर FSL के किसी वैज्ञानिक के मोहर नहीं है। हस्ताक्षर है पर पदनाम नहीं लिखा है। यह कहना सही है कि आज माल पहली बार न्यायालय में प्रस्तुत है। यह कहना सही है प्रदर्श क-1 पर CJM अलीगढ़ व मेरा हस्ताक्षर नहीं है क्योंकि विधि विज्ञान प्रयोगशाला से माल वापस आया है। यह विधि विज्ञान प्रयोगशाला से वापस आने वाले कपड़े का है। यह कहना सही है कि जिस कपड़े में माल सील हुआ वह आज न्यायालय में नहीं है।"

In further cross-examination, he stated that Section 364 of I.P.C. was not made out and he gave minute details of the investigation conducted by him. This witness further stated that the doctor who conducted Postmortem, in his statement has stated that Chanda suffered two bullet injuries whereas the deceased had one bullet injury. He stated that he did not remember if the metallic bullet also retrieved from the body of deceased and was sent to ballistic expert or not. He admitted that deceased Naushe and Chanda had a criminal history in police station-Delhi Gate and they were involved in heinous offences like murder, dacoity etc.

He denied a suggestion that he has not conducted the investigation at the spot and prepared the report while sitting in the police station.

13. PW-5- Dr. P. Kumar, who conducted the post-mortem deposed as under:

"ब्यान साक्षी - डॉ पी. कुमार हाल तैनात पंडित दीन दयाल अस्पताल अलीगढ़ में फिजिसियन के पद पर तैनात हूँ। मैं दिनांक 25.7.2015 को इसी पद पर इसी चिकित्सालय में तैनात था। उस दिन मैंने मृतक नौश उर्फ जुनैद s/o मुन्ने खाँ उम्र लगभग 38 साल नि० लाल मस्जिद के सामने खैररोड थाना देहली गेट अलीगढ़ का 4.30 PM पर शव विच्छेदन किया था जिसे सील हालत में कां० 463 वीरेन्द्र HG 853 जयराम थाना देहली गेट अलीगढ़ सील हालत में लेकर आये थे।

मृत्यु पूर्व चोटे- (1) कुचला व फटा हुआ घाव जो 28 cm x 20 cm x Bone Deep जो पूरे सिर व चेहरे पर था।

(2) फटा हुआ घाव 8 cm x 3 cm जो दाहिने (उपरी भुजा) भुजा पर केहुनी से 2 cm उपर था।

(3) एक अग्नेयास्त्र का प्रवेशी घाव 1.5 cm x 1.5 cm x Cavity Deep जो कमर पर दाहिनी तरफ कंधे की स्केपुला हड्डी से 17 cm नीचे आठ बजे की स्थिति में था जिसके किनारे अन्दर की ओर मुड़े हुये थे बुलेट दाहिने उदर की मांस पेशियों में थी।

बाह्य परीक्षण- मृतक औसत कद काठी का था मृतक के शरीर में अकड़न

(अपठनीय) में अंशिक व दोनों पैरो में पूर्ण रूप से थी।

आन्तरिक परीक्षण- मृतक की खोपड़ी की हड्डियां सभी टूटी हुयी थी। दिमाग की हड्डियां फटी हुई व कुचली हुई थी। दिमाग कुचला व बाहर निकला हुआ था। दाहिना फेफड़ा फटा हुआ था। व चेस्ट केवटी में लगभग एक लीटर खून भरा हुआ था। उपरी व निचले जबड़े टूटे हुये थे पेट में करीब 60 ML पेस्टी फुड था।

मैने मृतक के शरीर से बुलट निकालकर व सीलकर साथ में आये कां० को दे दिये थे। मृत्यु का सम्भावित समय लगभग 18 घंटे पूर्व था मेरी राय में मृतक की मृत्यु सदमा व अधिक रक्त श्राव की वजह से हुयी थी जो मृत्यु पूर्व आग्नेयास्त्र द्वारा व दूसरी अन्य चोटो द्वारा होना सम्भव है। पत्रावली में मौजूद कागज सं० 9 क पी.एम. रिपोर्ट को देखकर बताया कि ये PM रिपोर्ट मेरे लेख व हस्ताक्षर में है जो मृतक नौशे का परीक्षण करते समय तैयार की गयी थी जिस पर प्रदर्श क-9 डाला गया। इसी से सम्बन्धित उसी दिन मैने चाँद उर्फ चन्दा s/o रहीश उम्र करीब 32 वर्ष नि० तेली पाडा शाहजमाल थाना देहली गेट अलीगढ़ का समय 4.00 PM शव विच्छेदन किया था जिसको सील हालत में कां० 67 अजित कुमार, HG जयराम थाना देहली गेट अलीगढ़ सील हालत मे लेकर आये थे।

मृत्यु पूर्व चोटें (1) एक खुर्शट 7 x 3 cm जो चेहरे की बायीं तरफ थी।

(2) एक फटा हुआ घाव 3 cm x 2 cm x mussel deep जो गर्दन पर बायीं तरफ कान से 3 cm नीचे था।

(3) एक आग्नेयास्त्र का प्रवेशी घाव 1.5 x 1.5 cm x Bone Deep जो चेहरे पर बायीं तरफ मूंह से एक cm दूर तीन बजे की स्थिति में था। जिसके किनारे अन्दर की ओर मुड़े हुए व इसका निकासी घाव 5 cm x 3 cm Bone Deep जो चेहरे पर दाहिनी तरफ नीचले जबड़े के कोण्ट पर थी।

(4) एक आग्नेयास्त्र का प्रवेशी घाव जो 1 cm x 1 cm x केवटी Deep जो छाती में बायीं तरफ नीपल से 7 cm ऊपर 1.30 बजे की स्थिति में था जिसके किनारे अन्दर की ओर मूड़े हुये थे चौथी व पांचवी पसली के बीच में था।

(5) एक खुर्शट 10 cm x 10 cm जो बायीं अग्र भुजा के सामने।

(6) एक खुर्शट 5 cm x 5 cm जो दाहिनी अग्र आर्म पर थी। मैने मृतक के शरीर से बुलेट निकालकर व सीलकर साथ में आये कां० को दे दी थी मृत्यु का सम्भावित समय करीब 18 घन्टे पूर्व था।

मेरी राय में मृतक की मृत्यु सदमा व अधिक रक्त स्राव की वजह से हुई थी। जो मृत्यु पूर्व आयी चोटो से सम्भव है। पत्रावली में मौजूद पोस्ट मार्टम रिपोर्ट मृतक चाँद उर्फ चन्दा की रिपोर्ट मेरे हस्तलेख में है जिस पर प्रदर्श क-10 डाला गया।"

In cross-examination, this witness gave the details about the nature of injury sustained by the victim. He stated that in

the post-mortem, Ex.Ka.9 and Ex.Ka.10, the description of injuries sustained by the victims were mentioned. He stated that the bullet referred to Ex.Ka.9 is not produced in the court and even the weapons recovered were not shown to him in the court. He further stated that in Ex.Ka.10, there are three bruises and there is no incised wound. He denied a suggestion that the Ex.Ka.9 and Ex.Ka.10 relates to two male Hindu person.

14. PW-6, Suraj Pal Sharma (S.H.O.), Investigating Officer who conducted the investigation deposed as under :

"बयान साक्षी- SHO श्री सूरज पाल शर्मा थाना राया जिला मथुरासशपथ बयान किया मैं दिनांक 25.07.2015 को बतौर SI थाना देहली गेट पर नियुक्त था तभी वादी मुकदमा राजा s/o नौशे निवासी लाल मस्जिद खैर रोड़ अलीगढ़ ने थाना देहली गेट पर अपने पिता नौशे व उनके दोस्त चन्दा की हत्या किये जाने के सम्बन्ध में तहरीर दी तहरीर के आधार पर मु०अ०सं० 253/2015 धारा 147, 148, 149, 120B, 302 IPC बनाम पहलवान 2. आसिफ ठाकुर 3. कपिल 4. वकील 5. भूरा 6. गयासुद्दीन के विरुद्ध पंजीकृत किया गया। इस सूचना पर थाना हाजा के रपट नं० 2 समय 00.10 बजे रात्रि में SO श्री विनोद कुमार SI प्रेमपाल सिंह SI इकरार हुसैन ASI नत्थू सिंह के साथ रवाना हुआ। थानवा से रवाना होकर शमशाद के घर पास पहुंचा वहाँ पर मृतक नौशे व चन्दा के शव घरेलू नाली में पड़े हैं। मृतक नौशे का शव नाली से निकाल कर रात्रि का वख्त

होने के कारण सुबह उजाला होने तक शव को जिला मलखान सिंह अस्पताल में रखा गया। उजाला होने पर परिजन व मित्रगण के आने पर उनमें से पंचाग नियुक्त कर SHO श्री विनोद की देख रेख में मेरे द्वारा पंचायत नामा भरा गया। भरने के उपरान्त पंचाग के गवाहन के अलामात मेरे द्वारा बनवाये गये थे। शव को गवाहों के समक्ष सील सर्वे मोहर कर मृतक नौशे व जुनैद का शव पी०एम० कराने हेतु कास्टेबल 463 धीरेन्द्र HG जयराम को सुपुर्द कर PM हेतु मेरे द्वारा भेजा गया। मौके पर ये पंचायतनामा तैयार कराया गया। पत्रावली पर मौजूद पेपर सं० 8क/3 पंचायत नामा मेरे लेख व हस्ताक्षर में है। जिस पर पंचाग व गवाहों के हस्ताक्षर मौजूद हैं। जिसकी मैं शनाख्त करता हूँ। जिस पर प्रदर्श क-11 डाला गया।

मौके पर दिनांक 25.7.2015 फर्द बरामदगी जिसमें एक मैगजीन 3 जिन्दा कारतूस व एक फर्द सादा पत्थर व खून आलूदा मृतक चन्दा एवं सादा पत्थर खून आलूदा पत्थर मृतक नौशे उर्फ जुनैद की फर्द SO श्री विनोद कुमार की देखरेख में समक्ष गवाहान अपने हस्तलेख में तैयार की थी। तथा गवाहान के अलामात बनवाये थे ये तीनों फर्द SHO विनोद कुमार यादव के कहने पर मैंने मौके पर तैयार की थी। जिस पर SHO विनोद कुमार व मेरे व गवाहानों के हस्ताक्षर मौजूद हैं। जिसमें पूर्व में प्रदर्श क-6, क-7, क-8 डाला जा चुका है। जिसकी मैं शनाख्त करता हूँ। X X X X X X X बाई रौदान शर्मा ad. सभी के लिए।

पंचनामे के पहले पेज में वादी का नाम नहीं है। यह कहना गलत है कि प्रदर्श क-11 में पंचनामा भरते समय वादी द्वारा लिखाई गयी प्रथम सूचना रिपोर्ट विद्यमान नहीं थी यह कहना गलत। इस मुकदमे की नकल चिक मेरे पास थी और मैंने पढ़ी। नकल चिक में घटना स्थल की दूरी 2 किलो मीटर थी जो चिक FIR में लिखी थी। और प्रदर्श क-11 पंचनामा में मेरे द्वारा घटना स्थल की दूरी 3 किलोमीटर लिखी है। यह कहना सही है पंचनामा प्रदर्श क-11 मलखान सिंह अस्पताल में भरा गया। मलखान अस्पताल की दूरी घटना स्थल से लगभग 4 किलो मीटर है। यह कहना सही है कि मलखान सिंह अस्पताल थाना बन्ना देवी के अधिकार क्षेत्र में आता है। यह कहना सही है कि पंचनामा भरना गवाहन की राय लिखना चालान लाश तैयार व समस्त कार्यवाही मलखान सिंह अस्पताल में ही की थी। घटना स्थल पर नहीं की थी। यह कहना सही है कि पंचनामा के विवरण में अ०सं० 362/2015 का शीर्षक राज्य बनाम आसिफ आदि लिखा है। यह कहना सही है कि नकल चिक में अ०सं० 362/15 का शीर्षक राज्य बनाम एहसान आदि है। इस सम्बन्धित में आसिफ ठाकुर नामजद मुलजिम थे इसीलिए मेरे द्वारा पंचनामा में मुकदमे का शीर्षक राज्य बनाम आसिफ लिखा है। यह कहना गलत है पंचनामा भरते समय तक प्रदर्श क-1 तथा नकल चिक आदि तथ्य नहीं थी। इस कारण से आपने मुकदमे राज्य बनाम आसिफ में लिखा था। पंचनामा की विषय वस्तु में मैगजीन मय 3 जिन्दा कारतूस जुनैद की लाश के पास मिली

थी। यह बात मैंने पंचनामा में लिखी थी। पहले मैंने प्रदर्श क-8 और क-7 लिखी इन दोनों फर्दों में बरामदगी का समय अंकित नहीं है। गवाह पीडब्लू०-2 रफीक, चश्मदीद गवाह ने पंचनामा में अपनी राय में किसी भी मुल्जमान द्वारा गोली मारना नहीं लिखा है। पंचनामा में पंचनामा भरने का समय दिन 12.25 सुबह लिखा है। और पंचनामा शुरू करने का स्थान मामूद नगर लिखा है। मौहल्ला मैहफूज नगर मौ० माबूद नगर और मो० मामूद नगर थाना देहली गेट क्षेत्र के मौहल्ले है। और इन सभी की दूरी मो० मामूद नगर, माबूद नगर मैहफूज की आपस की दूरी 1-1/2 किलो मीटर है। लाश शील करते समय लाश की शील पर क्या इबारत थी मुझे मालूम नहीं। यह कहना भी सही है कि नमूना मौहर जो जुनैद की लाश शील करने में किया गया था। वह पत्रावली पर नहीं है। जो पत्र आरक्षी अधीक्षक (SP) ने CMO को पोस्टमार्टम करने को लिखा उस पर आरक्षी अधीक्षक (SP) के हस्ताक्षर नहीं है। यह कहना सही है कि पोस्टमार्टम संख्या 958/15 बिना पत्र लिखे दे दी है। यह कहना सही है कि जुनैद के चालान लाश में रिपोर्ट करने का दिनांक 24.7.15 समय 00.10 लिखा है। मैंने खाका लाश में चार चोटें दिखाई है यह नहीं पता चोटे किसकी है। मृतक जुनैद पर पंचनामा के समय जुते नहीं थे। यह कहना गलत है कि पंचनामा भरते समय चिक FIR तथा FIR नहीं थी। यह कहना सही है कि पंचनामा कथित घटना स्थल पर नहीं भरा गया। पंचनामा के सम्बन्ध सभी बातें न्यायालय में कह दी है। कोई छिपाई नहीं है।

जुनैद उर्फ नौशे की लाश को घटना स्थल नालो के पास से उठाकर लाये थे। समय याद नहीं। दिनांक 25.7.15 को रात्रि में लाये थे मैं भी साथ था समय मुझे याद नहीं। दिनांक 25.07.15 को सूर्य उदय से पहले लाये थे। और लाश के साथ 32 बोर मैगजीन मय जिन्दा कारतूस³ लाये थे। इस समय मुझे याद नहीं है कि गवाह PW-1, राजा तथा PW-2 रफीक मौजूद थे या नहीं। मैंने घटना स्थल से लाश उठाने की कोई फर्द नहीं बनायी। दिनांक 25.7.15 को समय 00.10 पर थाना देहली गेट थाना अध्यक्ष विनोद कुमार SI प्रेमपाल व अन्य कर्मचारी मौजूद थे जीप से आये थे। और घटना स्थल पर दिनांक 25.7.15 को समय 00.25 पर आ गये थे और उसी समय जुनैद की लाश को उठाकर मलखान सिंह अस्पताल ले गये थे। हमारे यहां मृतक जुनैद आपराधिक इतिहास वाला व्यक्ति था। यह कहना गलत है कि आज इस मुकदमे में झूठी गवाही दे रहा हूँ। यह कहना भी गलत है कि मृतक जुनैद की लाश बिना पुलिस हेड क्वार्टर पहुंचे ही पोस्ट मार्टम संख्या दे दी हो। यह कहना सही है कि मृतक जुनैद की लाश को अलीगढ़ पुलिस मुख्यालय में चालान लाश के द्वारा दिनांक 25.7.15 को 12-1/2 बजे दिन अलीगढ़ मुख्यालय में प्राप्त किया है।

कोर्ट सर्टिफिकेट

सुनकर तस्दीक किया

ह०अप० ह०अप०SHO

ASJ-15”

15. PW-7, Mahtab Hasan, another Investigating Officer deposed about the arrest of the accused persons and the

procedure adopted under Section 82 of Cr.P.C..

16. PW-8, Prem Pal Singh, Sub Inspector, another Investigating Officer gave details about the preparation of Panchayatnama and sending the dead body to mortuary for postmortem. In cross examination, this witness admitted that in the Panchayatnama the date has been changed from 24 to 25 and on the first page, space of the case number was left blank. He admitted that the Panchayatnama was not prepared at the spot where the dead body was recovered and on first page, the name of the person, giving the information is also not mentioned. He stated that the dead body was kept in the custody of two constables and was not sealed. He stated that it was dark due to night, therefore, the Panchayatnama was not written at the spot and the proceedings of Panchayatnama were initiated after the sunrise on the next date. He has also given the description of the recovery affected at the spot. He further stated that it is correct that the Panchayatnama was completed at 12:10 at noon and till the time, the proceedings of Panchayatnama were started, the FIR was not registered and during the proceedings, constable-Mahesh Kumar came along with a copy of FIR. He admitted that while recovering the dead body, country made pistol and cartridges were not sealed at the spot and witness-Rafeeq has not stated that he had seen the occurrence. He admitted that in the Panchayatnama, it is recorded that the deceased was murdered by miscreants by firing upon the deceased persons.

17. PW-9, Sahbeer Singh, another Investigating Officer deposed about recording of the GD Entries and statements of the witnesses. He proved the permission from the District Magistrate for

trial of the accused person under Section 25 of the Arms Act as Exhibit Ka-14 to Ka-16.

In cross examination, he denied the suggestion that the accused persons were arrested from their home. He also denied that no recovery was affected from accused persons.

18. PW-10, Dharendra Singh proved the recovery memo of weapon of offence which was Exhibited as Ka-17. He identified the signature of the In-charge as Exhibit Ka-18. This witness also denied the suggestions that the entire proceeding was prepared at the police station on the direction of S.O.. This witness on further examination proved the memo prepared by S.O. Surya Prakash as Exhibit Ka-19 to Ka-27 which was relating to the investigation of the case.

19. Thereafter the statement of the accused under Section 313 Cr.P.C. was recorded and all the incriminating evidence was put to them. In reply to a question what the accused want to state in their defence, it was stated that no recovery of weapon was affected from them and the prosecution story is false.

20. In defence evidence, DW-1 Shahid Quayoom appeared and stated that on the date of incident at about 12:30 at night, he was present near his house which is situated on the corner of 'Amar Masjid Wali Street' after leaving two houses is the house of Shamshad. While hearing noise in the street, he came out, it was pitch dark and nothing was visible. There was no marriage programme on that date, he heard noise of fight near the house of Shamshad but nothing was visible and after one and a half hours, police came and took dead bodies of two persons who were later on found to be of two history sheeters namely

Naushe @ Junaid and Chanda @ Chanda and they were murdered by some unknown persons. No one has witnessed the incident. In cross examination, he denied the suggestion that there was a function at the house of Shamshad. He also denied that he was not present on the spot.

21. DW-2 Pyara Khan also stated that on the date of incident it was pitch dark and on hearing the noise of fire, he woke up and had seen from the window that 5-6 persons were running in the street, who ran away towards another 'Chapparwali street'. After one and a half hours police came and took the bodies of two persons. On that day, there was no marriage function as it was scheduled for the next date.

22. In cross examination, this witness stated that the assailants were having muffled faces and he did not go out of his house and had seen from the window. However, he admitted that there was marriage of son of Shamshad but he denied the suggestion that there was lighting on his house on that night.

23. Thereafter, the Trial Court held the appellants guilty of offence under Section 302 read with Section 149 of I.P.C, Section 120(B) of I.P.C and section 25 of Arms Act and awarded death sentence and life imprisonment as noted above.

24. The paper book is ready. The Trial Court record is received and entire evidence is re-appreciated with the assistance of learned counsel for appellant and the learned AGA for the State.

25. Counsel for the appellant Ahsan has argued that as per the prosecution witnesses, on 27.7.2015 at 00:25 AM, inquest of deceased Naushe @ Junaid was

started and completed at 12:30 PM, as per Ex.Ka-11 and similarly as per Ex.Ka-12 inquest of Chand @ Chanda was also prepared at the same time. It is further submitted that postmortem of both the dead bodies were conducted from 4:00 PM to 4:30 PM of Chand @ Chanda and from 4:30 PM to 5:00 PM of Naushe @ Junaid. It is thus submitted that there is no explanation of the delay in reporting the matter to the police and registration of the FIR.

26. Counsel argued that according to the prosecution version, the incident took place on 24.7.2015 at about 11:30 PM and place of occurrence is about 2 Kilometer away from the police station whereas, the report was lodged with the police station on the next day i.e. 25.7.2015 at 10 AM by Raja (PW-1), the first informant. It is submitted that the case was initially registered as Case Crime No. 253 of 2015 but later on it was changed to 362 of 2015 and the prosecution has failed to explain this discrepancy. It is next argued that from the statement of PW-1, the first informant, who is son of deceased Naushe @ Junaid, it has come that there was indiscriminate firing on the deceased persons but as per the postmortem report of the deceased Naushe @ Junaid, he received one fire arm injury and Chand @ Chanda received two fire arm injuries and, therefore, PW-1 is not an eye witness. It is also argued that as per PW-1, the first informant, the appellant Ahsan has inflicted knife injury on the neck of the deceased Chand @ Chanda but as per the postmortem report, PW-5, the doctor who conducted the postmortem stated that, there is no incised wound on his neck.

27. It is next argued that PW-1 stated that he reached at the spot after the miscreants has fled away and found that the dead bodies of his father Naushe @ Junaid

and Chand @ Chanda were lying near a Nali (drain), but as per site plan prepared by the Investigating Officer, dead bodies were found inside Nali (Drain) near the door of one Pyare, who appeared as PW-2. It also show that PW-1 is not an eye witness.

28. Counsel next argued that PW-1, the first informant, stated that on 25.7.2015 at about 12:20 – 12:30 AM, he went to police station for lodging the FIR which was registered within 10 minutes of reaching there. It is submitted that perusal of the FIR show that it was registered at 00:10 AM which shows that the FIR is anti timed. The counsel has also referred to certain discrepancies with regard to the time given by PW-1 regarding reaching the police station for lodging of FIR and submits that genesis of the occurrence as well as timing of the lodging of the FIR is highly discrepant which prove that PW-1 is not an eye witness. Counsel has further challenged the credibility of PW-1 on the ground that the name of the accused persons were not disclosed in the statement of PW-1 and therefore, name of the accused persons are mentioned as after thought improvements.

29. It is argued that both PW-1 and PW-2 are closely related with the deceased persons and are highly interested witnesses. There are many contradiction in their statements and therefore, their testimonies cannot be relied on.

30. Counsel submits that while preparing the Panchayatnama, which was prior to the registration of the FIR, in the opinion of the Panches, some miscreants have committed murder of Naushe @ Junaid and Chand @ Chanda. It is submitted that PW-1, first informant, has

admitted that his father and uncle, both the deceased, were harden criminal of the area and they were facing trials in number of cases, an admitted fact which was put to him during the cross examination.

31. The counsel argued that, in fact, both the deceased were having enmity with the persons of the locality and they were murdered by some unknown persons and the appellants have been made scape goat by the informant.

32. Counsel next argued that the incident took place at a place where it was pitch dark at about 11:30 PM and nobody has seen the occurrence. Both PW-1 and PW-2 are planted as eye witness next day when the FIR was registered.

33. It is submitted that the statement of PW-2 is also contradictory with the statement of PW-1.

34. Counsel has argued that during cross examination PW-2 was not able to give correct description of the place of occurrence and the manner of assault which also proves that even PW-2 was not eye witness. The counsel submits that there are cuttings and improvements in the column of date and time, in both the inquest reports which suggests that the FIR was not registered on the alleged date and time as suggested by the prosecution.

35. Counsel submits that the prosecution has failed to prove that there was any motive behind occurrence and therefore, participation of the appellant Ahsan in the absence of any motive is not proved.

36. Counsel lastly argued that it is not a rarest of rare case where the death penalty has been awarded.

37. Counsel for the other appellants have further argued that as per the FSL report, Ex.Ka-29, the weapon of offence recovered from the accused was never sent for examination. For ready reference report is as under :-

"प्रेषक,

संयुक्त निदेशक,

विधि विज्ञान प्रयोगशाला,

उ०प्र०,

15 ताज रोड, आगरा-282001

सेवा में,

क्षेत्राधिकारी नगर प्रथम

अलीगढ़।

पत्रांक- 9444/सीरो/158

दिनांक:

अ०स०: 362/15

राज्य बनाम:- एहसान

धारा:- 147,148,149,302,120B IPC

थाना:- देहली गेट

आपका पत्र संख्या:

दिनांक:- 27/12/15

उपर्युक्त मामले से सम्बन्धित प्रदर्श प्रयोगशाला में दिनांक 28/12/15 को विशेष वाहक द्वारा प्राप्त हुये।

सील का विवरण

एक वस्त्रावृत समुद्रित बण्डल जिस पर ("MONOGRAM SI UPP" मुद्रा बण्डल पर नमूनानुसार) की छाप अक्षत थी।

प्रदर्श का विवरण

(1)- टुकड़े पत्थर (खूनालूदा) | मृतक चान्द उर्फ
चन्दा से संबंधित |

टुकड़े पत्थर (सादा) | दो अलग अलग समुद्रित
डिब्बों में। | एक बण्डल में।

(2)- टुकड़े पत्थर (खूनालूदा) | मृतक नौसे से
संबंधित, |

टुकड़े पत्थर (सादा) | दो अलग अलग समुद्रित
डिब्बों में। |

परीक्षण परिणाम

वस्तु (1) व (2) पर रक्त पाया।

रक्त के प्रारम्भिक परीक्षण हेतु बेन्जीडीन
परीक्षण प्रयोग में लाया गया।

रक्त की पुष्टि के लिए क्रिस्टल परीक्षण
प्रयोग में लाया गया।

वस्तु (1) व (2) पर रक्त वियोजित
(डिसइन्टीग्रेटिड) पाया गया। अतः मूल
निर्धारण न हो सका।

ह० अपठनीय

14.01.2020

ह० अपठनीय

14/01/2020

ज्येष्ठ वैज्ञानिक सहायक वैज्ञानिक अधिकारी
विधि विज्ञान प्रयोगशाला
15, ताज रोड आगरा।"

38. It is argued that even as per PW-1, a bullet and magazine was recovered at the spot but the same was never sent to the Forensic Science Laboratory by the Investigating Officer.

39. Counsel submits that even the two blood stained stone which related to deceased Chand @ Chanda and Naushe @ Junaid, as per Ex.1 and 2, the FSL report states that since the blood was disintegrated

therefore, its source could not be ascertained. It is argued that in the light of the FSL report, no offence is proved.

40. Counsel for the appellants submitted that accused Gayasuddin has been convicted in the aid of Section 120-B IPC read with Section 302 IPC for life imprisonment though as per the prosecution version, he was not present at the spot. He further argued that no evidence of conspiracy has come on record except that PW-1 has stated that Gayasuddin has got murder of his father and uncle done by giving 'Supari'.

41. Counsel further submits that in cross examination of PW-1 it is only stated that there was a land dispute between Gayasuddin and the deceased persons, however, this witness has also admitted that he has not provided any evidence to the Investigating Officer regarding any land dispute and, therefore, motive against the appellant Gayasuddin is not proved.

42. Counsel for the appellant Asif Thakur has also raised similar argument. It is submitted that both the deceased were history sheeters having many criminal history as admitted by PW-1 and PW-2 and it has come in the statement of two defence witness DW-1 and DW-2 that some unknown persons have killed the deceased.

43. Counsel appearing for Gayasuddin has also argued that there is no evidence of conspiracy on record. It is submitted that PW-1 has admitted that he has no provided any document regarding any litigation of his father and Gayasuddin and therefore, in the absence of any such evidence, the case of prosecution that with a motive and conspiracy Gayasuddin by paying 'supari' got murder of the assailants

is false and there is no evidence except bald statement of informant.

44. In reply, counsel for the informant as well as counsel for the State have argued that both the eye witnesses PW-1 and PW-2 have duly supported the witness. It is submitted that in a calculated conspiracy, two persons Naushe @ Junaid and Chanda @ Chand were murdered by the accused persons. It is also submitted that recovery of blood stones, pistol and magazine with cartridges were also recovered on the spot. It is also submitted that after the arrest of the accused persons they had made disclosure that they have thrown their respective weapons and therefore same could not be recovered. It is submitted that there was sufficient light at the spot as it was a marriage function in the house of Shamshad and the prosecution witness have seen the occurrence in the light and have identified the accused persons as the assailants. It is also argued that all the accused persons were assigned to fire arm weapon and as per the post mortem report both the deceased persons have suffered injuries in a manner as explained by prosecution witnesses.

45. It is thus argued that appeal be dismissed.

46. In reply, the counsel for the appellant has argued that prosecution has failed to prove any connection of the accused persons with their respective arms as per post mortem report. It is also submitted that it came in the statement of the doctor that two bullets were retrieved from the dead body, however, same were never sent for examination in the Forensic Science Laboratory. It is also submitted that the deceased have long criminal history in the area and the

motive for hatching the conspiracy are not proved.

47. It is also argued that the reasons for delay in sending the first information report to the concerned Magistrate has not been explained as PW-3 has stated that he don't know which official has taken report (Ex.Ka-3) to the Chief Judicial Magistrate. It is also argued that PW-1 and PW-2 are not the eye witnesses as they being the son and nephew of the deceased did not try to save them and even did not ...attend the deceased persons as there is no blood stained on their clothes. It is submitted that in both the inquest reports, it is stated that some unknown criminals have murdered the deceased persons and at that time PW-1 and PW-2 never named the appellant as the assailant.

48. It is argued t hat three First Information Reports in Crime No. 377, 378 and 379 of 2015 were registered. Prior to preparation of recovery weapons and therefore, the weapons were not sent for ballistic examination alongwith bullets recovered from the dead bodies.

49. Counsel has relied upon the judgment in the case of **Mehraj Singh (L/Nk) Vs. State of UP; (1994) 5 SCC 188**, where the Supreme Court has held that the delay in sending FSL report to the Magistrate or failure to sent copy of the FIR to the Medical Officer alongwith the post mortem report, in the absence of any reference in the inquest report give rise to inference that the FIR is anti times. Similar view is taken in the case of **Thanedar Singh Vs. State of MP; (2002) 1 SCC 487**.

50. Counsel has also relied upon the judgment in the case of **Mohd. Muslim Vs.**

State of UP; (2023) LiveLaw SC 489, wherein the Supreme Court has held that if the credibility of the eye witness of the incident is not proved, a benefit of doubt be given to the accused persons.

51. Reliance is also placed upon the judgment in the case of **Manoj Kumar Soni Vs. State of MP; 2023 0 Supreme (SC) 703**, wherein the Supreme Court has held as under :-

“38. It is intriguing that among all five accused persons, only Kallu has been convicted for criminal conspiracy under Section 120-B, IPC. At this stage, we cannot help but wonder: can a single individual conspire with oneself? We cannot but disagree. It logically follows that one person alone can never be held guilty of criminal conspiracy because one cannot conspire with oneself. As per *Black’s Law Dictionary (8th Edn)*, ‘conspiracy’ is an “agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective, and action or conduct that furthers the agreement”. The wordings of Section 120-A, IPC make it abundantly clear—the offence of criminal conspiracy is committed only when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. The position in English law too is well-settled. In *The King vs. Plummer*¹⁰, the King’s Bench, speaking through Lord Justice Bruce, held:

It logically follows from the nature of the offence of conspiracy that, where two or more persons are charged in the same indictment with (1902) 2 KB 339 conspiracy with one

another, and the indictment contains no charge of their conspiring with other persons not named in the indictment, then, if all but one of the persons named in the indictment are acquitted, no valid judgment can be passed upon the one remaining person. (page 343)

39. In *I.G. Singleton v. King-Emperor*¹¹, the Calcutta High Court further clarified the law related to criminal conspiracy:

The rule of English law that is now well settled is that where two persons are indicted for conspiring together and they are tried together, both must be acquitted, or both convicted. (page 265)

40. The decision of this Court in *Topandas* (supra) affirmed the aforesaid position and held:

14. ... on the charge as it was framed against the Accused 1, 2, 3 and 4 in this case, the Accused 1 could not be convicted of the offence under Section 120-B of the Indian Penal Code when his alleged co-conspirators Accused 2, 3 and 4 were acquitted of that offence.

41. Having regard to the position of law as aforesaid, the conviction of Kallu under Section 120-B, IPC stands completely vitiated because of the simple reason that one cannot alone conspire. There is no evidence to even remotely suggest that there existed any agreement between Kallu and the co-accused while none of the others, except Kallu, has been convicted for criminal conspiracy.”

52. The counsel submits that in view of arguments raised, the conviction of the appellant Gayasuddin stands vitiated as there is no evidence that he had any

agreement with the co-accused to commit offence.

53. After hearing the learned counsel appearing on behalf of accused- appellants as well as learned AGA for State and perusal of lower court record, paper book and re-appreciation of evidence, we find merits so far the case of accused- Gayasuddin is concerned.

Appellant-Gayasuddin is tried in the aid of Section 120B IPC as in the FIR the informant/ PW-1 has stated that after committing the offence, the assailants were shouting that since the deceased were having enmity with accused-Gayasuddin, they have killed them. However, while in the cross examination, PW-1 (Raja) has admitted as under:

“यह बात सही है कि मेरे पिता नौशे को मारने के लिये किसी व्यक्ति से मेरे सामने गयासुद्दीन ने बात नहीं की थी। मुझे याद नहीं है कि मैंने अपनी तहरीर में यह बात लिखाई थी या नहीं कि मुल्जिम गयासुद्दीन ने मेरे वालिद नौशे को मारने की बात की थी याद नहीं है। यह बात सही है कि दौरान विवेचना मैंने किसी भी विवेचना अधिकारी या किसी व्यक्ति या अधिकारी को जमीनी रंजिश नौशे व गयासुद्दीन के जमीनी रंजिश के बाबत कोई भी दस्तावेजी साक्ष्य इस बाबत उपलब्ध नहीं कराया था कि उक्त रंजिश किसी प्लाट खेत व मकान आदि के बाबत थी मुझे ध्यान नहीं है।”

54. Similarly, second eye witness i.e. PW-2 Rafeeq has even gone to the extent that he had not heard any accused naming Gayasuddin that he was having enmity with

deceased Naushe and Chanda. However, while in the cross examination, PW-2 (Rafeeq) has admitted as under:

“मैंने गयासुद्दीन के बाबत किसी भी मुल्जिम के द्वारा यह बात करते नहीं सुना था कि नौशे व चंदा से मेरी रंजीस है, इन्हें खत्म कर दो। मैंने दोनों मृतको को उठाया नहीं था न ही उलट पलट कर चोटो को देखा था। मुझे पहले से यह बात नहीं मालूम थी कि गयासुद्दीन व एहसान अभियुक्त से गयासुद्दीन की कोई रंजीश मृतक चंदा व नौशे से रही हो और न ही मृतको ने कभी मुझे बताया था।”

Therefore, except the bald statement made in the FIR that the assailants / accused, Ahsan, Asif Thakur, Bhoora, Kafeel and Wakeel were having any meeting of minds with accused- Gayasuddin or that Gayasuddin has paid any amount for killing the two accused persons, namely, Naushe and Chanda, nothing has come in the evidence.

55. The cross examination of PW-1 (Raja) & PW-2(Rafeeq) is clear that in their statement recorded under Section 161 Cr.P.C., both these witnesses have not named Gayasuddin as a principal conspirator and even in cross examination they have not levelled the allegations of conspiracy against Gayasuddin, therefore, in view of judgment of Supreme Court in **Manoj Kumar Soni's Case (supra)**, the conviction of Gayasuddin under Section 120B IPC stands completely vitiated as there is no evidence even remotely to suggest that there existed any agreement between Gayasuddin and other co-accused.

56. Accordingly, the appeal filed by accused Gayasuddin is accepted and he is acquitted of charge.

57. The appellant Gayasuddin is in custody since 22.4.2022 and, therefore, he will be released forthwith, if he is not required in any other case.

58. So far as the accused Ahsan, Asif Thakur, Bhoora, Kafeel and Wakeel are concerned, there is no merits in their appeals for the following reasons :

A. One of the primary defence taken by the accused-appellants is that at the place of occurrence it was pitch dark as the occurrence took place around 11-11:30 p.m. However, both PW-1 and PW-2 are consistent that the occurrence took place in front of house of one Shamsad where there was a marriage function and lighting were done outside his house.

B. Even the defence witnesses, PW-2(Rafeeq) has admitted that there was marriage of the son of Shamsad but stated that it was scheduled on the next day, therefore, putting up the lights outside the house of Shamshad on account of marriage of his son is duly proved not only by PW1 & PW-2 but by DW-1 as well.

C. Both, PW-1 & PW-2 have named all the accused persons as assailants and have given complete description, the manner in which they have committed offence of murder of Naushe and Chanda.

D. The next argument raised by the counsel for appellant that the deceased were having criminal history and they were murdered by unknown assailants as it noticed in the inquest report is of no avail as the panches of inquest report are not the eye witness. PW1 & PW-2 have consistently given the name of accused persons as the assailants and in lengthy cross examination, their testimony could not be shattered.

E. The argument raised by learned counsel for appellants that PW-1 &

PW-2 are not the eye witnesses is also without any merit as they are being the son and nephew of the deceased are the natural witnesses who have stated that they were present at the spot when the incident took place and have witnessed the occurrence in the light. The minor contradictions in the time and manner of preparation of inquest report and sending the dead body to the hospital for postmortem do not prove that the FIR was ante time. The prosecution has proved recovery of three firearms i.e. 314 bore country made pistol from Bhoora, 32 bore pistol and empty magazine from Wakeel and 34 bore pistol without magazine from Kafeel which are exhibited by the Investigating Officer and, therefore, assailants were armed with deadly weapons which were used for committing the offence. Even at the time of conducting the postmortem, one bullet each was retrieved from the dead body of the victim.

F. The argument raised by counsel for appellants that these bullets were not sent for examination to the Ballistic Expert, though may be a lapse on the part of the Investigating Officer but do not make the prosecution case doubtful as the eye witnesses have deposed that the assailants were armed with firearm weapon and the Investigating Officer / PW-4 has duly proved the recovery effected from the accused persons i.e. the firearms which were duly exhibited.

G. The bloodstained earth and stones recovered from the spot, though as per FSL report were found having human blood but it was opined that same is disintegrated as per the cause of death as opined by the Doctor who conducted the postmortem both the deceased died because of firearms injuries and the crush injury sustained on the face and head also corroborate the version of PW-1 and PW-2 that after giving firearms injuries, the

accused with the help of stones have crushed the heads of the deceased.

In their statement under Section 313 Cr.P.C., the accused persons could not give any valid explanation to contradict the incriminating evidence which was put to them except that they have been falsely implicated.

H. As noticed above, both the defence witnesses have admitted that on the date of incident, there was marriage function in the house of one Shamsad. Therefore, the place of occurrence has described by the PW-1 and PW-2 to be outside the house of Shamsad is also proved by the prosecution.

58. In view of above, we find no merits in the appeal filed by accused-appellants Ahsan, Asif Thakur, Bhoora, Kafeel and Wakeel and their conviction as per the judgment of Trial Court is upheld. However, so far the death penalty awarded by the Trial Court to the aforesaid appellants is concerned, this Court finds merit that it is not 'rarest of rare' cases where death penalty should be awarded to the appellant.

59. The Supreme Court in the case **State of Maharashtra Vs. Nisar Ramzan Sayyed, 2017(2) R.C.R.(Criminal) 564**, has held that in case where a pregnant woman who along with a minor child was murdered, there are various circumstances pointing out certain lacuna, the death penalty should not be awarded and the judgment of Trial Court was modified to life imprisonment till natural life of the accused.

60. The Supreme Court in **State of U.P. Vs. Ram Kumar and others, 2017(5) R.C.R.(Criminal)785**, has held that taking consideration of facts and circumstances of

the case, the capital punishment is to be converted into life imprisonment.

61. The Supreme Court in **Chhannu Lal Verma Vs. State of Chhattisgarh, 2019(5) R.C.R.(Criminal) 192**, has discussed the aggravating circumstances as well as mitigating circumstances which read as under : -

"Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

Mitigating circumstances: In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) *That the offence was committed under the influence of extreme mental or emotional disturbance.*

(2) *The age of the accused. If the accused is young or old, he shall not be sentenced to death.*

(3) *The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*

(4) *The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.*

(5) *That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.*

(6) *That the accused acted under the duress or domination of another person.*

(7) *That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."*

In this case, after upholding the conviction of the accused who were held guilty of committing murder of four persons with a knife, the Supreme Court commuted the death penalty to life imprisonment.

62. In ***Dnyaneshwar Suresh Borkar Vs. State of Maharashtra, 2019(2) R.C.R.(Criminal) 302***, it is held by Supreme Court that if the Court is inclined to award death penalty, then there must of exceptional circumstances warranting imposition of excess penalty. The Court should consider probability of reformation and rehabilitation of convict in the society as this is one of the mandates of special reason as per requirement of Section 354(3)

Cr.P.C. It is also held in the judgment that when the DNA report is not done, an adverse inference should not be drawn. It is also held that the antecedents of the convict or that the pendency of one or more criminal cases against the convict, cannot be a factor of consideration for awarding death sentence and, therefore, has held that looking to the conduct of the convict, the capital sentence can be commuted .

63. The Supreme Court in ***Manoharan Vs. State by Inspector of Police, Variety Hall Police Station , Coimbatore, 2019AIR (Supreme Court) 3746***, has held that a balance sheet of aggravating and mitigating circumstances should be drawn while awarding death penalty and in doing so mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances while exercising judicial discretion. The Supreme Court while commuting death sentence to life imprisonment till his natural death without remission by upholding the conviction.

64. In ***Veerendra Vs. State of Madhya Pradesh, 2022(3)R.C.R.(Criminal) 254***, the Supreme Court while upholding conviction under Section 364A, 376(2)(i), 302, 201 IPC regarding murder and rape of a minor girl, commuted the death sentence to life imprisonment with stipulation that the convict is not entitled to premature release or remission before undergoing imprisonment of thirty years.

65. In ***The State of Haryana Vs. Anand Kindo & Another etc., 2022(4)R.C.R. (Criminal)735***, the Supreme Court has again held that if there is any circumstance favouring the accused such as lack of intention to commit the

crime, possibility of reformation, young age of the accused, accused not being a menace to the society and his clearly criminal antecedents, the death sentence can be commuted to life for a actual period of thirty years.

66. In *Re: Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences, 2023(1) R.C.R.(Criminal) 571*, the Supreme Court while deciding the issue regarding the same day sentence of capital sentence, held that the conviction will not be vitiated, however held that the hearing under Section 325(2) Cr.P.C., requires the accused and the prosecution, at their option, be given the meaningful opportunity which in usual course is not conditional upon time or dates granted for the same and should be qualitatively and quantitatively.

67. In *Sundar @ Sundarrajan Vs. State by Inspector of Police, 2023 Cri.L.R.(SC) 473*, the Supreme Court held that it is the duty of the Court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty. It is also held that even though the crime committed by the accused is unquestionably grave and unpardonable, it will not be appropriate to affirm the death sentence as 'rarest of rare' doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation.

68. In *Ravindar Singh Vs. The State Govt. of NCT of Delhi, 2023 AIR (Supreme Court)2220, Digambar Vs. The State of Maharashtra, 2023 Cri. L.R. (SC) 564, Bhaggi @ Bhagirah @ Naran Vs.*

The State of Madhya Pradesh, 2024(1) Crimes 121, the Supreme Court has commuted the death sentence despite holding that the offence committed was brutal or barbaric, however, considering the mitigating circumstances, the capital sentence was commuted to life for a fixed term of sentence.

69. As noticed above, it has been held by the Supreme Court in *Nisar Ramzan Sayyed Case (Supra), Ram Kumar and others, Chhannu Lal Verma, Dnyaneshwar Suresh Borkar, Manoharan Case (Supra), Veerendra Case (Supra), Anand Kindo & Another Case (Supra), Ravindar Singh Case (Supra), Digambar's Case (Supra) and Bhaggi @ Bhagirah @ Naran's Case (Supra)* that if the Court is inclined to award death penalty, there must be exceptional circumstance warranting imposition of excessive death penalty which cannot be reversed.

70. In the light of the judgment of Supreme Court (supra), there is no aggravating circumstances as the Trial Court has not recorded any satisfaction that in case the life imprisonment awarded to the accused persons, there will be a security threat to the society as the accused persons have no criminal history.

71. The Trial Court has also not considered the age of the accused while awarding death penalty. All the accused persons are married persons having their family to support and this aspect have also not considered by the Trial Court rather there are mitigating circumstances in favour of the appellants as considering their age, there is probability that the accused can be reformed and rehabilitated as they have no criminal history.

72. Accordingly, while upholding the judgment of conviction of accused-appellants, namely, Ahsan, Asif Thakur, Bhoora, Kafeel and Wakeel, we partly allowed the appeal and convert the death penalty to life imprisonment for a fixed period of 20 years. They are in custody and will continue to serve remaining punishment. The finding recorded by the Trial Court regarding the imposition of fine is also upheld.

73. Record and proceedings be sent back to the Trial Court forthwith.

(2024) 9 ILRA 160
APPELLATE JURISDICTION
CRIMINAL APPEAL
DATED: LUCKNOW 13.09.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Appeal No. 878 of 2019

Hafeez Khan **...Appellant**
Versus
State of U.P. **...Respondents**

Counsel for the Appellant:

Manoj Kumar Singh, Arvind Kumar, Indu Prakash Singh, Rakesh Kumar Tripathi, Vishwa Nath Singh

Counsel for the Respondents:

Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 374(2) - Appeal - Indian Penal Code, 1860 - Sections 302, 201, 498-A, 323, 304-B, 504 & 506 - Dowry Prohibition Act, 1961- Sections 3/4 - Burden of proof lies on prosecution - Admissibility of evidence - Indian Evidence Act, 1872 - Section 63, 106 - Secondary evidence - Burden of proving fact especially within knowledge -

Principles of hostile witness testimony - Basic principle of dispensation of criminal justice - In a criminal trial, it is the prosecution which has to prove the guilt of the accused person and that too, beyond any reasonable doubt - Accused is not required to prove his innocence - Failure of the accused to provide evidence cannot solely result in conviction.(Para - 45)

Appellant was convicted for murdering his alleged wife - identity and marriage to the appellant were not conclusively established - trial court relied on hostile witnesses, unproven secondary evidence, and speculation about marriage and guilt - Identity of the body was not scientifically or conclusively established.(Para 3-22 ,40)

HELD: - There was no incriminating material against the appellant. Prosecution has failed to produce any evidence to prove the guilt of the accused – appellant. Appellant acquitted of all charges. Judgment and conviction set aside. Court directed the release of the appellant and awarded compensation of ₹1,00,000 for wrongful incarceration of over 7.5 years. (Para 57,59,60-63)

Appeal allowed. (E-7)

List of Cases cited:

1. Ramnaresh Vs St. of Chandigarh, AIR 2012 SC 1357 = (2012) 4 SCC 257
2. Phula Singh Vs St. of H.P., (2014) 4 SCC 09
3. Ramesh Vs St. of Har., AIR 2016 SC 5554 = (2017) 1 SCC 529,
4. Khachar Dipu @ Dilipbhai Nakubhai Vs St. of Guj., 2014 AIR SCW 466 = (2013) 4 SCC 322,
5. Koli Lakshmanbhai @ Chana Bhai Vs St. of Guj, AIR 2000 SC 210 = (1999) 8 SCC 624
6. S.C. Goyal Vs St. of Har., 2017 CRLJ SC 536 = (2016) 13 SCC 258
7. Ramesh Vs St. of Har., (2017) 1 SCC 529

8. Khachar Dipu Vs St. of Guj., (2013) 4 SCC 322

9. Koli Lakhmanbhai Chanabhai Vs St. of Guj., (1999) 8 SCC 624

10. S.C. Goel Vs St., (2016) 13 SCC 258

11. Ramnaresh Vs St. of Chhattisgarh, (2012) 4 SCC 257

12. Phula Singh Vs St. of H.P., (2014) 4 SCC 9

13. Parasa Raja Manikyala Rao Vs St. of A.P., (2003) 12 SCC 306 : 2003 SCC OnLine SC 1142

(Delivered by Hon'ble Subhash Vidyarthi J.)

1. Heard Shri Indu Prakash Singh, the learned counsel for the appellant and Shri R.S. Dwivedi, the learned Additional Government Advocate for the State.

2. By means of the instant appeal filed under Section 374 (2) of Cr.P.C., the appellant has challenged validity of the judgment and order dated 27.03.2019 passed by Sri Nand Pratap Ojha, the learned V Additional Sessions Judge, Bahraich in Sessions Trial No.110 of 2017, arising out of Case Crime No.215 of 2017 under Sections 498-A, 323, 304-B, 201, 504, 506, 302 I.P.C. and 3/4 Dowry Prohibition Act registered at Police Station-Risiya, District Bahraich, to the extent that it holds the appellant guilty of committing offences under Sections 302, 201 I.P.C. and sentences him to undergo simple imprisonment for life and pay Rs.50,000/- as fine and on failure to pay fine, to undergo simple imprisonment for a further period of 3 years for the offence under Section 302 I.P.C. The appellant has been sentenced to undergo simple imprisonment for 5 years and pay Rs.10,000/- fine and in case of failure to pay fine, to undergo

simple imprisonment for a further period of one year for the offence under Section 201 I.P.C.

3. Briefly stated, facts of the case are that on 15.01.2017, the informant Shabana, daughter of Azmat Khan, had given a written complaint to the Station House Officer, Risiya stating that her sister Sayra Bano had got married to the appellant - Hafeez Khan on 11.05.2016. Merely a few days after marriage, her sister informed her telephonically that the appellant, his mother - Zakrun Nisa, her maternal aunt Shahjahan and his grand-father Buddhu used to beat her for demanding dowry. Thereafter, the informant took her sister to her home. After some days, the appellant visited the informant's home, apologized for his fault and assured that such things would not recur. The informant sent her sister with the appellant on 12.12.2016. After a few days, the informant's sister informed her telephonically that all the aforesaid four persons had again started beating and harassing her for demanding dowry. The informant tried to contact her sister through phone, but her phone was switched off. On 15.01.2017, she went to her sister's home at Makoliya where all the aforesaid four accused persons abused and threatened her and they turned her out of their home. The informant expressed a suspicion that the aforesaid four persons had made her sister disappear for demanding dowry.

4. The Investigating Officer claims that some informer told him that the appellant had killed his wife and had buried the dead body in the grave of one Kennoo, whereupon the appellant was taken into custody. The grave of Kennoo was dug out and a dead body was exhumed after digging upto a depth of merely about two feet. The inquest proceedings conducted at

the spot of recovery of the dead body was witnessed by (1) the informant Smt. Shabana, (2) the informant's sister Smt. Parveen, (3) Achhan son of Kennoo, (4) Abdul Naushad and (5) Pappu. It mentions that a red colour Kurta and salwar was there on the dead body and a *Duppatta* like sheet was wrapped around its neck. It mentions that the informant Smt. Shabana and her sister Smt. Parveen had identified the dead body as belonging to Sayra.

5. The postmortem examination of the dead body was conducted on 19.01.2017 itself and the postmortem report also makes a mention of the clothes and a black thread with *Tabeez* present on the dead body. The report mentions that the face of the body was not recognizable. Skin had peeled off with grayish dis-colouration, ligaments were loosened, nails, hairs easily pulled out, teeth loosened from their sockets and soft parts were changing into black mass. Eyeballs were missing and eye-tor orbit was filled with mud. The postmortem examination report mentioned some injuries on the dead body, including an incised wound of 8x2 cm, cervical vertebra deep over front of neck, trachea and cervical vertebra out, hyoid bone and trachea partially missing. The cause of death was opined to be shock and hemorrhage due to anti-mortem injury. The time of death was opined to be about 8 weeks ago.

6. The police claim to have recovered a knife wrapped in an old cloth kept on a loft in the appellant's house on his voluntary pointing out. The recovery is said to have been witnessed by the informant Shabana, her sister Parveen and the appellant, besides some police personnel. The test report given by the Forensic Science Laboratory, U.P., Lucknow, mentions presence of blood on

major parts of the knife, but the blood had been disintegrated and its group could not be ascertained.

7. On 10.04.2017, a charge-sheet was submitted against the applicant for offences under Sections 498-A, 323, 304-B, 201, 504, 506, 302 I.P.C. and 3/4 Dowry Prohibition Act and the Chief Judicial Magistrate took cognizance of the offences on 15.04.2017 and committed the matter to the Sessions Judge on the same date. The case was registered as Sessions Trial No.110 of 2017 and it was transferred to the Court of the learned Additional Sessions Judge/Fast track Court-I, Bahraich.

8. The record reveals that the appellant had filed an application for his release on bail, which was rejected by the trial Court by means of an order dated 02.05.2017 and he continued to remain in custody through the entire trial and he is in custody even at present.

9. The trial Court framed charges by means of an order dated 03.07.2017 regarding offences under Sections 498-A, 323, 304-B, 201, 504, 506 IPC and Sections 3/4 Dowry Prohibition Act and an alternative charge for commission of offence under Section 302 I.P.C. was also framed.

10. The prosecution examined nine witnesses.

11. PW-1 Smt. Shabana, who was the informant, reiterated the F.I.R. version. She further stated that she had got the complaint scribed by some unnamed person and had put her thumb impression thereon. This complaint was proved by PW-1 as exhibit-A1.

12. In her cross-examination, PW-1 stated that her sister Sayra Bano had got

married about 3 – 3½ years ago to a person named Munna, who was resident of Bahraich City. Sayra stayed with him for about two years and thereafter one day Munna informed that Sayra had gone missing from her home. Munna had also told her that Hafeez Khan son of Subrati Khan resident of Makoliya (the appellant) was his friend and he used to visit Munna's place. Munna had expressed a suspicion that Hafeez was involved in Sayra Bano having gone missing. Thereafter, the informant had gone to the appellant's house along with Munna but the appellant had abused them and turned them away from his home stating that he did not know about the informant's sister. Thereafter, the informant's brother-in-law Munna had taken her to the police station and got the complaint scribed by a person by dictating it himself. He got the informant's thumb impression on the complaint and handed it over to the police.

13. PW-1 categorically stated that all the things written in the complaint were wrong and the same were got scribed by her brother-in-law Munna to save himself by getting a case registered against the appellant whereas the truth is that her sister never got married to the appellant and the appellant never harassed her sister or demanded dowry. The Investigating Officer had detained the appellant at the police station since the day the FIR was lodged. The appellant had expressed ignorance about Sayra Bano. The Investigating Officer had asked Munna to search for Sayra Bano and after 3-4 days, Munna had given information about dead body of her sister having been found in the grave yard. Upon this, the informant, her elder sister Parveen, her younger sister Saher Bano, Pappu and Dilawar, who are also residents of the informant's village, had gone to

Bahraich and thereafter, all of them went to Makoliya along with Munna. A dead body of a lady was lying in the Makoliya grave yard. The informant and her sisters saw the dead body and told that it did not belong to their sister Sayra Bano but her brother-in-law Munna said that the dead body was of Sayra Bano and believing his statement, the informant and her sister had put their thumb impressions on the inquest report. PW-1 categorically stated that the dead body was not of her sister; that the appellant had not confessed about killing Sayra Bano or hiding her dead body in the grave and that no dead body was recovered from the pointing out of the appellant. An unidentified dead body of a woman had been exhumed from a grave and was lying in the grave yard. She believed that her brother-in-law Munna had made her sister disappear and he had falsely implicated the appellant.

14. PW-2 Saher Bano was a cousin of the deceased and she stated that the deceased Sayra Bano had got married to Munna @ Hafeez. Sayra Bano used to live in her matrimonial home happily and she did not make any complaint regarding demand of dowry. She denied having given any statement given under Section 161 Cr.P.C. to the police. She was declared to be hostile. In her cross-examination, she stated that Sayra Bano had got married about 4-5 years ago to Munna resident of Bahraich and she did not ever get married to the appellant.

15. PW-3 Pappu stated that the informant was related to him. He had come to the matrimonial home of the deceased upon information given by Munna. When he reached there, the dead body was lying there in the grave yard. In his cross-examination, PW-2 stated that the

informant did not ever get married to the appellant and she was married to Munna, resident of Bahraich. He further stated that he and the other persons had reached the grave yard on an information given by Munna and after seeing the dead body, all of them had stated that the dead body was not of Sayra Bano but Munna had insisted that the dead body was of the Sayra Bano and the police acted as per the statement given by Munna and prepared the inquest report accordingly.

16. PW-4 Smt. Parveen was the elder sister of the deceased. She also stated in her cross-examination that the deceased had got married to Munna and she never got married to the appellant. Munna had told them about the dead body having been found in the grave yard and she and the other persons had stated that the dead body was not of her sister Sayra Bano but Munna insisted that the dead body was of Sayra Bano. She stated that she did not know whether her sister Sayra Bano was alive or not but the dead body recovered was not of her sister Sayra Bano.

17. PW-5 Dilawar was father-in-law of Parveen - sister of the informant Shabana and deceased Sayra Bano and he was also declared to be hostile.

18. PW-6 Constable Umesh Kumar Yadav proved some signatures of some police officers.

19. The statement of a Doctor has been recorded as PW-6. Apparently he has erroneously been marked as PW-6 when Constable Umesh Kumar was also marked as PW-6. The doctor stated that he was present at the time of postmortem examination of the deceased and he had signed the postmortem examination report

of the deceased along with other Doctor, who had conducted the postmortem examination.

20. PW-7 was the Doctor who had conducted the postmortem examination of the dead body and he stated that the face of the dead body was not recognizable and the deceased had died about eight weeks ago due to shock and hemorrhage.

21. PW-8 was the Station House Officer, who stated that during the investigation of the case, information had been received from a Mukhbir that dead body of Sayra Bano had been hidden in an old grave of Kennoo Khan. He proved the memo of recovery of *knife* from the house of the appellant.

22. In his statement recorded under Section 313 Cr.P.C., the appellant denied that he ever got married to Sayra Bano. He denied that the dead body of Sayra Bano was recovered on 19.10.2017 from a grave yard in Village Makoliya and that a knife was recovered from his house on his pointing out. He denied that the deceased died in his home. He further stated that Sayra Bano had got married to Munna resident of Bahraich, she ran away from the house of Munna and he was falsely implicated at the behest of Munna. The dead body which was recovered, could not be recognized.

23. The trial Court proceeded on an assumption that the appellant was present with the deceased at the time of her death, which took place inside the appellant's house and, therefore, the burden to prove the circumstances in which Sayra Bano died, lied on the appellant. The trial Court has observed that the appellant had relied on prosecution witnesses, who stated that

the deceased had got married to some person named Munna, on whose information the prosecution witnesses had come to Makoliya Village but the accused did not get this person Munna examined as a defense witness and he did not establish the existence of any person named Munna from any other oral or documentary evidence.

24. Relying on the decisions of the Hon'ble Supreme Court in the cases of **Ramnaresh v. State of Chandigarh**; AIR 2012 SC 1357 = (2012) 4 SCC 257 and **Phula Singh v. State of Himachal Pradesh**; (2014) 4 SCC 09, the trial Court held that the failure of the appellant in giving a clarification in his statement recorded under Section 313 Cr.P.C. regarding marriage of Sayra Bano with Munna and offence having been given effect to by Munna or any other person gives rise to a basis for drawing an adverse inference against an accused. The trial Court further held that as per the provisions contained in Section 106 of the Evidence Act, the burden to prove the circumstances in which Sayra Bano died, lied on the appellant. Although the appellant had stated in his statement under Section 313 Cr.P.C. that Sayra Bano had got married to Munna resident of Bahraich and she ran away from the house of Munna and thereafter he was falsely implicated at the behest of Munna, the appellant did not adduce any evidence to establish the reason of animosity between him and Munna and he did not disclose the parentage and address of Munna.

25. Relying on the decisions of the Hon'ble Supreme Court in the case of **Ramesh v. State of Haryana**; AIR 2016 SC 5554 = (2017) 1 SCC 529, **Khachar Dipu @ Dilipbhai Nakubhai v. State of**

Gujrat; 2014 AIR SCW 466 = (2013) 4 SCC 322, **Koli Lakshmanbhai @ Chana Bhai v. State of Gujrat**; AIR 2000 SC 210 = (1999) 8 SCC 624 and **S.C. Goyal v. State of Haryana**; 2017 CRLJ SC 536 = (2016) 13 SCC 258, the trial Court held that the prosecution witnesses had turned hostile because of a 'hostile culture' to save the accused person and their testimony cannot be discarded entirely. Portion of their statements which support the prosecution case, can be read against the accused.

26. The trial Court concluded that the following facts were established by the prosecution evidence:-

i. The appellant got married to Sayra Bano regarding which a contract was executed on 11.05.2016,

ii. On the date and time of the incident, the deceased was present in the house of the appellant in village Makoliya,

iii. The appellant killed Sayra Bano by assaulting her on her neck with *knife* and he had hidden the dead body in the grave of Kennoo Khan,

iv. The dead body was recovered after digging a grave up to a depth of 2 feet,

v. The weapon used in commission of the offence was recovered from the appellant's house on his pointing out and,

vi. The appellant had stated that the deceased had got married to one Munna but he did not produce Munna in defense evidence and he did not disclose the father's name and address of Munna. He could not establish the existence of Munna from any oral or documentary evidence.

27. As per the trial Court, the aforesaid facts establish that the appellant had killed Sayra Bano and had hidden the

dead body in the grave of Kennoo Khan. The other accused persons Zakrun Nisa and Shahjahan were acquitted and the appellant was convicted for offences under Sections 302 and 201 IPC while acquitting him for the offences under Sections 498-A, 323, 304-B, 504 & 506 I.P.C. and 3/4 Dowry Prohibition Act.

28. Now we proceed to examine the correctness of all the aforesaid conclusions drawn by the trial Court. The first point decided by the trial Court that the appellant got married to Sayra Bano regarding which a contract was executed on 11.05.2016, is based on a photocopy of a notarized marriage agreement dated 11.05.2016, the original whereof was not brought on record. Photocopy of the document being a secondary evidence, was not admissible in evidence unless any of the circumstances mentioned in Section 63 of the Evidence Act, 1872 justifying admissibility of secondary evidence were established, which has not been done in the present case. The photocopy of the marriage agreement dated 11.05.2016 was not admissible in evidence. No witness has made any statement to prove the marriage agreement dated 11.05.2016. No question was put to the appellant regarding this document in his examination under Section 313 Cr.P.C. Therefore, we are of the considered view that the photocopy of the marriage agreement dated 11.05.2016 was not admissible in evidence and the trial Court has committed a patent error in relying upon the photocopy of the marriage agreement dated 11.05.2016.

29. PW-1 had stated that her sister Sayra Bano had got married to Munna and she did not get married to the appellant. The learned A.G.A. has drawn attention of the Court towards the examination-in-chief

of PW-2 Saher Bano, who was a cousin of the deceased. PW-2 stated in her examination-in-chief that the deceased Sayra Bano had got married to Munna @ Hafeez. However, in her cross-examination, PW-2 stated that Sayra Bano had got married about 4-5 years ago to Munna resident of Bahraich City and she did not ever get married to the appellant.

30. PW-3 Pappu also categorically stated that Sayra Bano did not ever get married to the appellant. PW-4 Smt. Parveen was the elder sister of the deceased. She also stated that the deceased had got married to Munna and she never got married to the appellant. There was no evidence to prove that the deceased had got married to the appellant. Therefore, the first finding of the learned trial Court that the appellant got married to Sayra Bano regarding which a contract was executed on 11.05.2016, is perverse.

31. The trial Court has concluded that on the date and time of the incident, the deceased was present in the house of the appellant in village Makoliya. In this regard it is relevant to take note of the facts that PW-1 had stated that her sister Sayra Bano had got married to Munna, who was a resident of Bahraich City. She stayed with him for about two years and thereafter one day Munna informed that Sayra had gone missing from her home. Munna had also told her that the appellant was his friend and he used to visit Munna's place. Munna had expressed a suspicion that Hafeez was involved in Sayra Bano having gone missing. Munna had given information about dead body of her sister having been found in the grave yard but she and the other witnesses had not identified the dead body as being of Sayra Bano. As per the post mortem examination, the dead body

was not recognizable and the victim had died about 8 weeks ago.

32. There is absolutely no evidence to prove that the informant's sister Sayra Bano has been killed, nor has any date, time and place of the alleged killing been established. Except for the suspicion allegedly expressed by Munna, there is no evidence to prove that Sayra Bano was living with the appellant. Therefore, the conclusion drawn by the trial Court that on the date and time of the incident, the deceased was present in the house of the appellant in village Makoliya, is perverse.

33. Now we proceed to examine the correctness of the third conclusion drawn by the trial Court that the appellant killed Sayra Bano by assaulting her on her neck with a *knife* and he had hidden the dead body in the grave of Kennoo Khan. The informant - PW-1 stated that her sister Sayra Bano had got married to Munna, who was resident of Bahraich City. Sayra stayed with him for about two years and thereafter one day Munna informed that Sayra had gone missing from her home. Munna had also told her that the appellant was his friend and he used to visit Munna's place. Munna had expressed a suspicion that the appellant was involved in Sayra Bano having gone missing. The informant's brother-in-law Munna had taken her to the police station and got the complaint scribed by a person by dictating it himself. He had got the informant's thumb impression on the complaint and had handed it over to the police.

34. PW-1 categorically stated that all the things written in the complaint were wrong and the same were got scribed by her brother-in-law Munna to save himself by getting a case registered against the appellant

whereas the truth is that her sister never got married to the appellant. The Investigating Officer had detained the appellant at the police station since the day the FIR was lodged and he had asked Munna to search for Sayra Bano. After 3-4 days, Munna had given information about dead body of her sister having been found in the grave yard. When PW-1 and other persons had reached the grave-yard, a dead body of a lady was lying there. The informant and her sisters had told that it did not belong to their sister Sayra Bano but her brother-in-law Munna said that the dead body was of Sayra Bano and believing his statement, the informant and her sister had put their thumb impressions on the inquest report.

35. PW-1 further categorically stated that the dead body was not of her sister; that the appellant had not confessed about killing Sayra Bano or hiding her dead body in the grave and that no dead body was recovered from the pointing out of the appellant. An unidentified dead body of a woman had been exhumed from a grave and was lying in the grave yard. She believed that her brother-in-law Munna had made her sister disappear and he had falsely implicated the appellant.

36. PW-3 Pappu stated that he had gone to Makoliya grave-yard upon information given by Munna. When he reached there, a dead body was lying there in the grave yard. After seeing the dead body, all the persons had stated that the dead body was not of Sayra Bano but Munna had insisted that the dead body was of the Sayra Bano and the police acted as per the statement given by Munna and prepared the inquest report accordingly.

37. PW-4 Smt. Parveen was the elder sister of the deceased. She also stated that the deceased had got married to Munna and

she never got married to the appellant. Munna had told them about the dead body having been found in the grave yard and she and the other persons had stated that the dead body was not of her sister Sayra Bano but Munna insisted that the dead body was of Sayra Bano. She stated that she did not know whether her sister Sayra Bano was alive or not but the dead body recovered was not of her sister Sayra Bano.

38. The post mortem examination report states that the face of the dead body was not recognizable, skin had peeled off with grayish dis-colouration, ligaments were loosened, nails, hairs easily pulled out, teeth loosened from their sockets, soft parts were changing into black mass, eyeballs were missing and eye-tor orbit was filled with mud. PW-7, the Doctor who had conducted the postmortem examination, stated that the face of the dead body was not recognizable and the deceased had died about eight weeks ago.

39. The book titled “Modi – A Textbook of Medical Jurisprudence and Toxicology” is widely considered to be an authority on the subject. Chapter 14 of the 27th edition of the book deals with Exhumation. It is written therein that “*In case of bodies, which have been underground for a sufficiently long time and undergone putrefaction, an attempt should be made to determine the sex, stature and marks of identification. A photograph of the exhumed body may also help in identification. If necessary, an X-ray examination of the cadaver should be undertaken. Hair found on the body should be preserved in a dry, clean glass bottle for subsequent identification and chemical analysis. All these bottles or jars should then be closed with well-fitted glass stoppers and forwarded, duly labeled and*

sealed, to the Forensic Science Laboratory.”

40. In the present case, the prosecution did not take any of the aforesaid steps to ascertain the identity of the dead body by any scientific evidence.

41. It is significant to note that as per the inquest report and also as per the post mortem examination report, some clothes, a thread and a tabeez were present on the dead-body, but the prosecution remained silent about those articles and no question was put to any witness about those articles so as to connect the same with the informant’s sister Sayra Bano so as to identify the dead body.

42. Thus there was no evidence to prove that Sayra Bano had been killed and the dead body was of Sayra Bano. In these circumstances, the only irresistible conclusion that we can draw is that the trial Court has concluded that the appellant killed Sayra Bano by assaulting her on her neck with *knife* and he had hidden the dead body in the grave of Kennoo Khan, without there being any evidence to support this conclusion and, therefore, this conclusion is perverse.

43. The fourth conclusion drawn by the trial Court that the dead body was recovered after digging a grave up to a depth of 2 feet, whereas the prosecution witnesses have merely stated that when they had reached the grave-yard, a dead body was lying there and no witness has stated that the dead body was exhumed from any grave in her or his presence. The dead-body is said to have been recovered from the grave of Kennoo and the recovery memo mentions that the recovery had been witnessed by Achchhan son of Kennoo

also, but Achchhan son of Kennoo has not been produced as a prosecution witness. Therefore, the finding that the dead body was recovered after digging a grave up to a depth of 2 feet, is also perverse.

44. Regarding the fifth conclusion of the trial Court, that the weapon used in commission of the offence was recovered from the appellant's house on his pointing out, suffice it to say that the alleged recovery is said to have been witnessed by the informant Shabana and her sister Parveen, besides some police personnel. Except for the S.H.O. – PW-8, no witness has given any evidence to prove the recovery of knife. The test report given by the Forensic Science Laboratory, U.P., Lucknow mentions presence of blood on major parts of the knife, but the blood had been disintegrated and its group could not be ascertained. In these circumstances, it cannot be said that the blood found on the knife was of Sayra Bano. The appellant had denied the alleged recovery of knife in his statement recorded under Section 313 Cr.P.C. Therefore, there was no evidence to prove that any knife had been recovered from the appellant's house on his pointing out and that the knife had been used in commission of the offence and this conclusion drawn by the trial Court is also perverse.

45. Lastly, the trial Court has held that the appellant had stated that the deceased had got married to Munna but he did not produce Munna in defense evidence and he did not disclose the father's name and address of Munna. He could not establish the existence of Munna from any oral or documentary evidence. While recording the aforesaid statement, the trial Court has acted against the basic principle of dispensation of criminal justice that in a criminal trial, it is the

prosecution which has to prove the guilt of the accused person and that too, beyond any reasonable doubt. The accused is not required to prove his innocence. In case the prosecution fails to discharge its burden to prove beyond any reasonable doubt that the accused is guilty, the accused has to be acquitted and he cannot be held guilty merely because he has not adduced any evidence to prove his innocence. It appears that the trial Court has proceeded to hold the appellant guilty under a patent misconception about the aforesaid basic principles of justice dispensation.

46. On the basis of the aforesaid conclusions, the trial Court has held that the appellant had killed Sayra Bano and had hidden the dead body in the grave of Kennoo Khan and has convicted the appellant for offences under Sections 302 and 201 IPC. As all the aforesaid conclusions have already been held to be perverse, the consequential finding of guilt of the appellant is also perverse.

47. As the trial Court has placed reliance on some judgments to hold that the accused can be held guilty even where the prosecution witnesses turn hostile, it is necessary to examine whether the principles laid down in those judgments warrant conviction of the appellant.

48. In **Ramesh v. State of Haryana**, (2017) 1 SCC 529, a dying declaration had been recorded in which the deceased had categorically stated that her husband had set her ablaze but the trial Court had acquitted the accused as the deceased's brother had stated that the accused was not involved in killing the deceased. The High Court had reversed the judgment of acquittal. In appeal, the Hon'ble Supreme Court held that: -

“20. The High Court, in the impugned judgment, has found fault with the aforesaid analysis, approach and the manner in which the dying declaration has been dealt with by the trial court. According to the High Court, the veracity of the dying declaration could not be examined with reference to the other evidence. It has held that the approach of the trial court was blemished. According to the High Court, the trial court was required to appreciate as to whether the statement of the deceased was given in a fit state of mind; and whether it was voluntarily given without being influenced by any extraneous circumstances and without any tutoring. If that was so and the dying declaration of the deceased passed the muster of the aforesaid test and was to be believed, the conviction could be based solely on such a dying declaration. The High Court then examined the dying declaration in the aforesaid perspective and found that the doctor had declared her fit to make a statement on the basis of which the Judicial Magistrate recorded the statement and even after recording of the statement, the doctor again gave endorsement that the deceased remained fit during the period her statement was recorded. In such circumstances, statement of the Judicial Magistrate (PW 11) in the Court that he could not say whether the deceased was semi-conscious when her statement was recorded, was of no consequence as he had acted on the basis of the medical opinion.

* * *

30. We have already noticed above, the reasons recorded by the trial court while discarding the dying declaration. Admittedly, no weightage is given by the trial court to the opinion of the doctor certifying that the deceased was in a fit state of mind. Likewise, no reasons were

given by the trial court as to why the testimony of the Judicial Magistrate, who recorded the statement, be disbelieved.”

49. Thus it is clear that in **Ramesh** (Supra) there was sufficient evidence in the shape of dying declaration and statement of the doctor to establish the guilt of the accused, which is not the case here.

50. In **Khachar Dipu v. State of Gujarat**, (2013) 4 SCC 322, the Hon’ble Supreme Court relied upon some precedents which hold that “It is well settled in law that the evidence of the hostile witness can be relied upon by the prosecution as well as by the defence”. After examining the facts of that case, the Hon’ble Supreme Court found that: -

18. On a careful scrutiny of the testimonies of the said two witnesses PWs 20 and 21, it is seen that both of them have categorically deposed that the motor vehicle involved in the accident had dashed against the cycle of the deceased as a result of which he had fallen down. It is interesting to note that in cross-examination by the accused, they have not paved the path of variance in this regard. In our opinion, their evidence supports the prosecution version that the motor vehicle had dashed against the cycle. We may note with profit that one of the witnesses has not identified the accused in the court but the other witness, PW 20 Shantibhai Lakhmanbhai has identified him. That apart, as far as the identification of the accused is concerned, there is ample evidence on record to support the same. The singular purpose of referring to the testimonies of these two witnesses is that the incident did occur and the accused had dashed the vehicle against the cycle.”

51. Thus in **Khachar Dipu** (Supra) the accused was convicted because there was ample evidence to prove his guilt.

52. In **Koli Lakhmanbhai Chanabhai v. State of Gujarat**, (1999) 8 SCC 624, the High Court had relied upon some part of the evidence of a hostile witness, PW 7 who had not supported the prosecution story in its entirety, but his evidence established the prosecution case with regard to the time, place and weapon of offence being the knife and also that the person having the knife was Accused 2. Some part of his evidence was corroborated by PWs 11 and 12. It has come on record that PW 7 had immediately informed PW 11 and PW 12 about the incident. PW 12 had also stated that PW 7 had informed that Laxman Chana had inflicted knife-blow. This witness was cross-examined in detail with regard to this aspect but nothing could be found out from the cross-examination. Extensively bloodstained bush shirt, banian and other clothes were seized from the accused. Bush shirt and banian contained human blood of 'A' group, which was the blood group of the deceased. The High Court had relied upon the discovery of a knife at the instance of the appellant, which was hidden beneath the ashes of the fireplace in the kitchen of the appellant. The said knife also contained blood having 'A' group. For that purpose the High Court had relied upon the panch witness PW 20. In the aforesaid peculiar factual background of the case, the Hon'ble Supreme Court held that: -

"5. From the aforesaid evidence on record, in our view, it cannot be said that the High Court erred in relying upon some portion of the evidence of PW 7 who was cross-examined by the prosecution. It is settled law that evidence of a hostile

witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence (Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389] and Sat Paul v. Delhi Admn. [(1976) 1 SCC 727]. In the present case, apart from the evidence of PW 7, the prosecution version that he saw that the appellant was having a knife in his hand and was quarrelling with the deceased gets corroboration from the evidence of PWs 11 and 12 to whom he disclosed the incident immediately. On the basis of the said information, within one hour, FIR was lodged disclosing the name of the appellant as the person who had inflicted the knife-blow. A number of incised wounds are found as per the post-mortem report. The prosecution version gets further corroboration from discovery of Muddamal knife containing human blood Group 'A'. Further the bush shirt and banian which were put on by the accused at the time of incident were having extensive bloodstains which were also found containing human blood Group 'A'. Learned counsel for the appellant, however, contended that the accused is also having Blood Group 'A' and that he was having injury on the thigh as per the evidence of the doctor. In our view, there is no substance in his contention because as per the medical evidence, the injuries caused to the accused were minor and that because of such injuries, there would not be extensive bloodstains on the bush shirt and banian put on by the accused. In his Section 313 statement also, the accused has not explained how he got bloodstains on his bush shirt and banian. He has also not denied the recovery of the said bush shirt

and banian from his person at the time of his arrest.”

53. Thus in **Koli Lakhmanbhai Chanabhai** (Supra) also, there was ample evidence to prove the guilt of the accused in spite of a witness having been declared to be hostile, whereas there is absolutely no evidence against the accused in the present case.

54. In **S.C. Goel v. State**: (2016) 13 SCC 258, the Hon’ble Supreme Court upheld the conviction of the appellant for offences under Section 7 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 recorded by the trial Court and affirmed by the High Court after recording a satisfaction that PW 5 had clearly and categorically stated that the demand of Rs. 10,000/- was made. Merely because PW 5 was declared hostile with regard to certain other aspects of the evidence tendered by him, the entire evidence cannot be discarded. The evidence tendered by the said witness with regard to the demand in question can be accepted if the same is otherwise worthy of trust. Admittedly the marked currency notes were recovered from the accused. PW 9 (panch witness) had proved the aforesaid recovery and also the test conducted by dipping the fingers of the accused in chemical solution of sodium bicarbonate. In such circumstances and taking into account the totality of the facts of the case, the Hon’ble Supreme Court held that the prosecution had succeeded in proving the demand of bribe and the acceptance and recovery of the offending bank notes from the posSessions of the accused. This case was also decided on the basis of the peculiar facts of the case, which are in no manner similar to the present case.

55. In **Ramnaresh v. State of Chhattisgarh**: (2012) 4 SCC 257, the Hon’ble Supreme Court found that PW-6 had clearly narrated how the offence was committed by the accused and there was nothing abnormal and inconsistent in his testimony. His statement was fully corroborated by medical evidence and the testimony of PW 12. The confirmation of blood on the piece of saree used for gagging the mouth of Rajkumari, the confirmation of presence of semen and human spermatozoa on the vaginal slides of the victim, the findings during autopsy duly proved by PW 7 and the corroboration of other witnesses including that of the investigating officer leave no room for any doubt that the appellants had committed house trespass in the house of the victim, raped and strangled her. In these circumstances, the mere fact that some of the witnesses, who were not the eye-witnesses of the incident, had turned hostile, would not affect the prosecution case.

56. In **Phula Singh v. State of H.P.:** (2014) 4 SCC 9, it was an admitted fact that the appellant had no relationship or acquaintance, whatsoever, with the complainant and the appellant failed to furnish any explanation about his visit and staying in the house of the complainant. The appellant had not denied visit to the house of the complainant. More so, he did not furnish any explanation in respect of the recovery of Rs. 1000/- from the pocket of his pants nor could he furnish any information as to how his fingers turned pink on being washed with sodium carbonate solution as the currency notes already found in the pocket of his pants had been treated with phenolphthalein. On being washed, part of his pants also turned pink. In light of these undisputed facts, the Hon’ble Supreme Court held that: -

“11. The accused has a duty to furnish an explanation in his statement under Section 313 CrPC regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 CrPC is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law.”

57. In the present case, there was absolutely no incriminating material against the appellant and, therefore, in absence of any incriminating material, the aforesaid principles would not apply to the facts of the present case and no adverse inference of the appellant's guilt can be raised merely because the appellant did not establish the existence of Munna, regarding whom the Prosecution witnesses had stated that he was the husband of the victim and that he was instrumental in the victim having gone missing and in false implication of the appellant.

58. Since the trial Court has relied upon numerous precedents, none of which was based on facts which were in any manner similar to the facts of the present case where the prosecution has failed to produce any evidence to establish the guilt of the appellant, it would be appropriate to reiterate the basic principles to be observed while relying upon precedents, as explained in the following words by the Hon'ble Supreme Court in the case of **Parasa Raja Manikyala Rao v. State of A.P.**, (2003) 12 SCC 306 : 2003 SCC OnLine SC 1142: -

“9. Each case, more particularly a criminal case, depends on its own facts and a close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.”

59. In none of the judgments relied upon by the learned trial Court the accused was held guilty in spite of the prosecution having failed to adduce any evidence to establish his guilt and all the matters, the Hon'ble Supreme Court came to conclusion that the accused person's guilt was proved by relevant and admissible evidence, which is not the case here. Therefore, the principles laid down in the judgments referred by the learned trial Court would not apply to the facts and circumstances of the present case, where the prosecution has failed to produce any evidence to prove the guilt of the accused – appellant.

60. In view of the foregoing discussion, we are of the considered view that the judgment and order passed by the learned trial Court is unsustainable in law and it is liable to be set aside.

61. Accordingly, the appeal is **allowed**. The judgment and order dated 27.03.2019 passed by Sri Nand Pratap Ojha, the learned V Additional Sessions Judge, Bahraich in Sessions Trial No.110 of 2017, arising out of Case Crime No.215 of 2017 under Sections 498-A, 323, 304-B, 201, 504, 506, 302 I.P.C. and 3/4 Dowry Prohibition Act registered at Police Station-

Risiya, District Bahraich, to the extent that it holds the appellant guilty of committing offences under Sections 302, 201 I.P.C. and sentences him to undergo simple imprisonment for life and pay Rs.50,000/- as fine and on failure to pay fine, to undergo simple imprisonment for a further period of 3 years for the offence under Section 302 I.P.C. and to undergo simple imprisonment for and 5 years and pay Rs.10,000/- fine and in case of failure to pay fine, to undergo simple imprisonment for a further period of one year for the offence under Section 201 I.P.C., is set aside. The appellant is acquitted of all the charges.

62. The appellant is languishing in jail and he is directed to be released forthwith unless he is wanted in any other case, subject to the condition that he shall file a personal bond and two sureties within a period of three weeks from the date of his release from custody, to the satisfaction of the trial Court under Section 437-A Cr.P.C.

63. The appellant was taken into custody soon after lodging of the F.I.R. on 15.01.2017 and he continues to remain in custody till date. Now that this Court has found that there was absolutely no evidence against him, it is a fit case for awarding costs of litigation as also to order payment of compensation for the confinement of the appellant for a period exceeding 7½ years without any evidence to prove his guilt cannot be fully compensated in terms of money but as a token of compensation for the injustice done to the appellant, we order that the State shall pay Rs.1,00,000/- to the appellant towards compensation for the period spent by him in custody.

64. Let a copy of this judgment and order and the original record of the trial

court be transmitted to the trial court concerned forthwith for necessary information and compliance as also to Sri Nand Pratap Ojha, the Presiding Officer who had passed the impugned judgment. The office is further directed to enter the judgment in compliance register maintained by the Court.

(2024) 9 ILRA 174

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 04.09.2024

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Appeal No. 1059 of 1986

Gorelal Alias Shyam Narain & Ors.

...Appellants

Versus

State of U.P.

...Respondent

Counsel for the Appellants:

R.C. Singh, Balendra Kumar Singh

Counsel for the Respondent:

A.G.A.

(A) Criminal Law - appeal against conviction - Indian Penal Code, 1860 – Section 302 – murder, Section 147, 148, 149 - Common Object - Dying Declaration – Contradictions – Reliability - "Nemo Moriturus Praesumitur Mentiri" - "No one on the point of death is presumed to lie." - when a conviction is to be done under Section 149 of I.P.C. the identification of common object is essential and when the common object is not identified, the accused cannot be, in any manner, be convicted under the substantive offence with the assistance of Section 149 of I.P.C. . (Para -15)

Deceased son (first informant) filed a First Information Report - accusing seven others -

investigation led to charges under Sections 148, 302 and 149 IPC - trial court convicted all seven and sentenced them to life imprisonment, with the appellants - challenging the conviction under appeal. **(Para - 1 to 6)**

HELD: - Prosecution's case was weakened by dying declaration. Other accused were falsely implicated by P.W. -1(First Informant) due to enmity. First Informant's statements were inconsistent and unreliable. Post-mortem reports showed firearm injuries of only one size, contradicting multiple shooters. Contradictions in prosecution witnesses' statements made them unreliable. Conviction under Section 149 of the Indian Penal Code (IPC) requires establishing a common object among accused persons, and mere presence at the crime scene is insufficient. Judgment and order quashed and set aside for appellants 2, 6 & 7, who are acquitted of the charges. **(Para -17,18)**

Criminal appeal allowed. (E-7)

List of Cases cited:

Vinubhai Ranchhodbhai Patel Vs Rajivbhai Dudabhai Patel & ors., AIR 2018 SC 2472

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Ram Manohar Narayan Mishra, J.

1. The present criminal appeal has been filed against the judgement and order dated 24.3.1986 passed by the 3rd Additional Sessions Judge, Fatehpur, in Session Trial No. 416 of 1983 convicting and sentencing the appellants under Section 302 read with Section 149 IPC for life imprisonment, under Section 148 IPC for three years rigorous imprisonment and under Section 147 IPC for two years with rigorous imprisonment. All the sentences were directed to run concurrently.

2. When the alleged incident took place on 6.5.1983 at around 8:30am a first information report was got lodged by the son of the deceased Pramod Kumar Gupta

at 9:25 am on the very same day. In the first information report, there was a specific averment that Gorelal son of Badku, Sheo Ram son of Bajrang, Shatrughan Singh son of Ganga Singh, Ompal Singh, Rajendra Singh and Narendra Singh with their guns and Shiv Singh who was empty handed had reached the shop where Gopi Krishan was running his shop. Thereafter, Gorelal had fired upon the deceased- Gopi Krishna Gupta. The firing done by Gorelal was followed by an indiscriminate firing by Sheoram, Shatrughan, Ompal Singh, Rejendra Singh and Narendra Singh.

3. Upon the lodging of the first information report, the police got into action and investigation followed. A panchayatnama was prepared stating that the incident was got reported in the police station at 9:25am on 6.5.1983 and that the panchayatnama proceeding commenced on 6.5.1983 at 10:00am and it also stated that on the very same day at 11:00am the panchayatnama proceeding got concluded. After the panchayatnama was concluded, the dead body of the deceased was sent for post mortem which was conducted on 6.5.1983 at 4:15PM. It may be mentioned that the first informant at the time of getting the F.I.R. lodged had not reported that the deceased Gopi Krishna had died. It had only stated that he was lying in an injured state at his shop. The F.I.R. was also, therefore, followed by an injury report dated 6.5.1983 and was allegedly said to have been prepared at 8:45am. Not only this, from the record it can be found that there was a dying declaration also of the deceased numbered as exhibit – kha 6 which was recorded 8:45am again on the same day i.e. on 6.5.1983 by Dr. S.N. Tripathi. This dying declaration had categorically stated upon a question being asked by the Doctor that who exactly was

responsible for the firing and the injured Gopi Krishna had stated that Gorelal was the person who had fired on him and he had also stated while giving the dying declaration that with Gorelal he had no enmity. The Doctor in the dying declaration itself had mentioned that the S.D.M. of Bindki Court was called but he could not appear and the patient had expired at 9:00am. Dr. S.N. Tripathi was not produced by the prosecution but was produced by the defence as D.W. - 4.

4. A recovery memo of two empty cartridges of 12 bore which were found from the place of incident was also prepared and was exhibited as Exhibit - ka23. The police had also taken the plain soil and the soil with blood and the recovery memo of it was marked as exhibit ka-24. Upon investigation having got completed, the police submitted its report and the Court thereafter took cognizance of the case and framed charges against six persons, namely, Gorelal @ Shyam Narain Singh, Sheoram Singh, Shatrughan Singh, Rajendra Singh, Narendra Singh and Ompal Singh for charges under Sections 148, 302 read with 149 IPC. The charges were framed on 23.6.1984 and they were read over to the accused persons and when they did not plead guilty, the case was put to trial.

5. A separate charge sheet was prepared for the accused Shiv Singh on 23.6.1984 itself and the charges in it were three in number. Firstly, the charge was with regard to the death of Gopi Krishna Gupta under Section 147 IPC and under Section 302 IPC read with Section 149 IPC and the other set charge was with regard to one more deceased Ram Gopal whose dead body was recovered at a little distance away and was under Section 302 read with Section 149 IPC.

6. The Trial Court after recording all the evidence of the prosecution and after going through the evidence on record, convicted Gorelal, Sheoram Singh, Shatrughan Singh, Rajendra Singh, Narendra Singh, Shiv Singh and Ompal Singh under Sections 302 read with 149 IPC. Vis-a-vis Shiv Singh, the charge under Section 302 read with Section 149 along with Section 147 was also held to have been proved and he was also held guilty. All the seven accused persons were sentenced with rigorous imprisonment under Section 302 read with 149 IPC. With regard to the conviction under Section 148 IPC, the punishment of two years with rigorous imprisonment was awarded. However with regard to murder of Ram Gopal, all the accused persons were acquitted.

7. Aggrieved by the judgement and order of the Additional Sessions Judge, Fatehpur, dated 24.3.1986, the instant appeal has been filed.

8. Sri V.P. Srivastava, Senior Advocate, assisted by Sri Jitendra Singh, Sri Rajiv Nayan Singh and M/sNija Srivatava was heard for the appellants, namely, Sheoram Singh, Shiv Singh and Ompal Singh. The appeal vis-a-vis Gorelal, Shatrughan Singh, Rajendra Singh and Narendra Singh had abated on account of the fact that they had died during the pendency of the appeal and no near relatives of theirs had filed any application for continuing the appeal.

9. Learned counsel for the appellants took the Court through the statements of the witnesses of fact i.e. the first informant Pramod Kumar Gupta who had appeared in the witness box as P.W. - 1 and Somdutt as P.W. - 2. He had also drawn the attention of the Court to the statement of P.W.-3 Dr. S.K. Srivastava who had proved the post

mortem report. P.W. - 4, Shiv Mohal Singh, was the head constable of Police Station – Bindki. He had proved the exhibit ka-1 i.e. the chik which was prepared by him. P.W. - 5, Madan Singh, was the investigating officer whose statement was also read out to the Court.

10. Learned counsel for the appellants also had drawn the attention of the Court to the deposition of Dr. S.N. Tripathi who was produced by the defence as D.W.-4.

11. P.W. 1, in his statement has stated that he had known Gorelal, Shatrughan Singh, Shiv Ram Singh, Rajendra Singh, Narendra Singh, Ompal Singh and Shiv Singh from before and that he was also recognizing them and he had stated that they were all of the same party. He has also stated that the accused had enmity with his father. He has given various reasons on account of which the accused persons were inimical to the father of the first informant. In his examination in chief, the first informant had categorically stated that when the incident had occurred, the first shot which was fired by Gorelal- accused had hit his father and he had fallen down in the shop itself and, thereafter, the other accused, excepting Shiv Singh, had with their firearms aimed at his father and fired. When there was a hue and cry raised by the first informant then Somdutt, Smt. Ram Kumari, Om Prakash Goswami and Balbindra came on the spot. Upon reaching of the various persons from the neighbourhood, the accused persons ran away towards the Nehru Inter College. He has stated that his father was still breathing but he could not speak. Thereupon, he stated that on his dictation, Ram Lakhani Tiwari had transcribed the first information report and he has also proved the first information report which he had given to

the police. After the dictation was over, the police had reached the spot and in that Jeep, the first informant had taken the injured father to the Bindki Hospital where the Doctor had examined his injuries. He has further stated that he had given the representation to Mohan Singh Daroga in the Jeep itself and the Daroga had given the report to another policeman who was along with him. He had, therefore, gone to the police station after leaving his father at the hospital.

12. Upon coming to know that his father had passed away, he once again rushed to the hospital. The panchayatnama was done in the hospital itself. The first informant has stated that later on when he came to know that because of the firing another person by the name of Ram Gopal about 100 yards away had also died.

13. The prosecution had cross-examined the witnesses wherein the first informant had stated that the Daroga had come to the site in question but he had not seen anything from the inside of the shop. In paragraph no. 24 of his cross-examination, he has stated that he had, later on, come to know on the basis of a rumour in public that the father of the first informant had died and this effect he had got recorded his statement. He has categorically stated that his uncle Durga Prasad (who was a witness of the panchayatnama) had not informed the first informant about the dying declaration. He has stated that he had not signed the first information report. So far as the P.W. - 2 is concerned, he has stated in his statement-in-chief that the thrust of the bullets was to the extent that after having hit the deceased Gopi Krishna, the pellets had rebounded and had also hit the Neem Tree. In his cross examination, he had stated that he had

reached the spot because he had gone to Bindki market to buy some clothes. He has also stated in paragraph no. 6 of the cross-examination that he had been informed by his wife that the police had called him and, therefore, he had gone straight to the police station where his statement under Section 161 Cr.P.C. was recorded.

14. In paragraph no. 10 of the cross-examination, he had stated that there were other criminal cases pending against him. Dr. S.K. Srivastava, the P.W.-3, in his examination has proved the post mortem report and he has stated that all the injuries were of the same size i.e. 1/2-1/2 inch and that they were three in number. P.W. - 4 has proven the chik. P.W. -5, the Investigating Officer has stated that on 6.5.1983 at around 8:30am, he had got a telephone call from Durga Prasad Gupta that on the crossing of the bus stand firing had taken place. Thereafter with all the police force he had reached the spot, where they found that Gopi Krishna was lying, injured at his shop and, therefore, he had taken the injured Gopi Krishna on his own jeep. He has stated that in the hospital, the son of the deceased Pramod Kumar Gupta had handed over to him the first information report and, thereafter, he had directed the head moharrir to lodge the first information report. He has stated that he was there along with the injured at the hospital and, thereafter, the injured had died. He has stated in the examination in chief that it was during this time that he also received information that one more dead body had been found in the neighbourhood and, therefore, he went to the place where the other dead body was lying. He has stated that the dead body was identified as that of one Ram Gopal. D.W. - 4, Dr. S.N. Tripathi, the Deputy Chief Medical Officer, has stated on oath that on

6.5.1983, he was the Medical Officer at Bindki and that the deceased Gopi Krishna had been brought to him in an injured state by the police and he had at 8:45am after he had come to the hospital died at 9:00am. The Doctor, D.W.- 4, had stated that he had made all efforts to get the Magistrate before recording the dying declaration of Gopi Krishna but the Magistrate came after the statement was recorded and after the deceased had passed away. He has proved the exhibit kha-6.

15. Learned counsel for the appellants has while challenging the judgement and order dated 24.3.1986 passed by the Additional Sessions Judge made the following submissions:

(i) Learned counsel for the appellants has submitted that the dying declaration is such a declaration which cannot be lightly done away with. Relying upon the famous maxim *Nemo Moriturus Praesmitur Mentiri* submitted that the prosecution, conscious of the fact that the deceased had only mentioned that Gorelal was present at the spot and had fired upon the deceased and that the injured had not mentioned that there was any enmity between Gorelal and any of the accused, had not relied upon that document i.e. the dying declaration which was brought in by the defence as Exhibit Kha-6. Learned counsel for the appellants states that the prosecution had not made any effort to prove the dying declaration. This, learned counsel for the appellants states, was done because only Gorelal was the person who was responsible for the death of the deceased while the other co-accused persons namely Shiv Ram Singh, Shatrughan Singh, Rajendra Singh, Narendra Singh, Ompal Singh and Shiv Singh were not even present at the spot.

Learned counsel for the appellants relying upon the statement of PW-1 has stated that these persons were known to the PW-1, Pramod Kumar Gupta, and they were also known of having enmity with Pramod Kumar Gupta and Gopi Krishna Gupta and, therefore, the first informant PW-1 had falsely implicated all of them. Learned counsel for the appellants, therefore, states that it was an absolute case of false implication of all the other co-accused persons other than Gorelal. Learned counsel for the appellants has further submitted that in the first information report the first informant, Pramod Kumar Gupta, had stated that Gorelal had fired upon the deceased and thereafter the other co-accused persons had also fired upon him and that after he was injured, he was lying at the shop where the incident had occurred. This first information report, learned counsel for the appellants states, was got lodged on 06.05.1983 at 09:25 AM whereas the PW-1 in his statement before the Court has submitted that in fact when the incident had occurred, the Police had reached the spot and thereafter the injured was put into the jeep of the Police and they had taken the injured to the Bindki Hospital. He has stated that he had also accompanied his father to the hospital. He has thereafter stated that the first information report was got transcribed by Ram Lakhan Tiwari at the place of incident and the first informant had handed over the first information report to Madan Singh, Daroga, who was also sitting in the jeep, and thereafter the first informant alongwith Madan Singh, Daroga had gone to the Police Station to get the first information report lodged. Learned counsel for the appellants, therefore, states that the first informant was in fact not there at the spot at all and after he had got the information about the fact that Gorelal was made an

accused by the deceased in his dying declaration and was held responsible of having had shot on him, he had come up with the whole story. Learned counsel for the appellants states that the other accused persons were also implicated in the case as their names were known to the first informant and they were inimical to him and also his father.

(ii) Learned counsel for the appellants thereafter states that if the injury report and the postmortem reports are seen, it would become evident that all the injuries with firearm injuries which were three in number were $\frac{1}{2} \times \frac{1}{2}$ inches and he, therefore, states that all the injuries were by one firearm and the other co-accused persons had not at all fired upon the injured/deceased.

(iii) Learned counsel for the appellants thereafter states that there were contradictions in the statements of PW-1 with what he had stated in the first information. He has stated that in the first information report there was a statement of the first informant that the father of the first informant was lying in an injured state in the shop when the incident had occurred whereas in the statement-in-chief he had stated that after the incident had occurred a Police jeep had come and the first informant alongwith the Police had headed towards the hospital and while going to the hospital the first information report was handed over to Madan Singh, Daroga. Definitely, therefore, he states that the story which had been reported in the first information report and was got lodged as a definite first information, was a concocted story. Learned counsel for the appellants further states that if the statement of PW-1 is compared with the statement of PW-5 then it becomes evident that the case as was being put forth by the prosecution was not a reliable one. Learned counsel for the

appellant states that the PW-5 had stated that the son of the deceased, the first informant, in the hospital got transcribed the first information report which was Exhibit Ka-1 and he had directed the Head Muharrir to get the first information report lodged. Learned counsel for the appellants, therefore, states that there is contradiction between the statements of the PW-5 and the PW-1. Still further learned counsel for the appellants states that when there was a definite recording of statement done by D.W.-4 and he had also proved the dying declaration then it did not lie in the mouth of PW-5 to say that he had taken the injured/deceased to the hospital, where he was throughout with the injured and after the injured had died he had left the spot to investigate into the other death which had taken place i.e. the death of Ram Gopal.

(iv) Still further learned counsel for the appellants states that PW-2, Somdutta, whose name was not mentioned in the first information report allegedly was not there at the spot as had been stated by the PW-1 in his statement-in-chief. In fact the statement of PW-2 is absolutely unreliable inasmuch as he himself states that in fact his wife had told him to go to the Police Station where he had given his statement. Learned counsel for the appellants, therefore, states that he was only a chance witness who was brought in by the prosecution to make the case of the prosecution stronger.

(v) Learned counsel for the appellants states that in the first information even though the PW-1 had not stated anything about any eye-witnesses but in the statement before the Court he had stated that apart from Somdutta, Smt. Ram Kumari, Om Prakash Goswami and Balvindra Singh were also there. He, however, states that none of the persons mentioned in the statement of PW-1 apart from Somdutta (whose evidence

is absolutely not believable) were not produced before the Court.

(vi) Learned counsel for the appellants, therefore, states that if the case as a whole is looked into, it becomes evident that there was a dying declaration which was proved by the doctor who had recorded the same and in the dying declaration there was only one name mentioned i.e. of Gorelal and the injured who was getting his dying declaration recorded, had categorically stated that he had no enmity with Gorelal. Learned counsel for the appellants, therefore, states that the other co-accused persons who had been named by the first informant in the first information report were not there on the spot and only to implicate certain persons, who were inimical to the first informant and the deceased, their names were mentioned in the first information report. Learned counsel for the appellants, therefore, states that absolutely there was no ingredient of section 149 of I.P.C. present. The co-accused persons could not be said to have had any common object as is defined under Section 141 of I.P.C., to be with Gorelal. Learned counsel for the appellants relying upon the judgment of Supreme Court in **Vinubhai Ranchhodbhai Patel vs. Rajivbhai Dudabhai Patel & Others** reported AIR 2018 SC 2472 states that when a conviction is to be done under Section 149 of I.P.C. the identification of common object is essential and when the common object is not identified, the accused cannot be, in any manner, be convicted under the substantive offence with the assistance of Section 149 of I.P.C. To bolster his case, learned counsel relied upon paragraphs 30, 31 and 32 of the judgement which are being reproduced here as under:

30. The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as

distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in our opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); merely on the ground that the injuries inflicted by such members are relatively less serious and non fatal.

31. For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence by the members of the assembly is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed.

32. The identification of the common object essentially requires an assessment of the state of mind of the members of the unlawful assembly. Proof of such mental condition is normally established by inferential logic. If a large number of people gather at a public place at the dead of night armed with deadly weapons like axes and fire arms and attack another person or group of persons, any

member of the attacking group would have to be a moron in intelligence if he did not know murder would be a likely consequence.

16. Sri Amit Sinha, learned A.G.A. assisted by Ms. Mayuri Mehrotra, however, supported the judgment. Learned AGA submitted that eye-witness account could not be brushed aside lightly. He further submitted that when even if dying declaration had mentioned just one name it mattered little as there were definite evidence of the fact that the other accused persons were involved in the crime. Learned AGA still further submitted that if there were some minor contradictions in the statement of the prosecution witnesses then also they ought to be ignored, looking to the other evidence which was led in the case.

17. Having heard the learned counsel for the appellants Sri V.P. Srivastava, Senior Advocate, assisted by Sri Jitendra Singh, Sri Rajiv Nayan Singh and M/s Nija Srivastava and the learned AGA Sri Amit Sinha assisted by Ms. Mayuri Mehrotra counsel for the State, this Court is of the view that definitely the prosecution case becomes weak when one looks into the dying declaration. In the dying declaration, the deceased had mentioned that Gorelal alone was present at the place and he had fired upon the injured deceased. However, even in the dying declaration, the injured deceased had mentioned that there was no enmity between Gorelal and the injured/deceased. We find that the prosecution realizing fully well that its case would become weak had not tried to prove the dying declaration. It was also not exhibited in the trial and in fact the defence brought it as exhibit kha-6. We are also convinced that the names of the other co-

accused which never found place in the dying declaration were mentioned by the P.W.-1, the first informant only to settle scores with them. It appears that the P.W. - 1 was inimical to the other co-accused persons and, therefore, while he was lodging the first information report with regard to the murder of his father, he had mentioned those names as well. Also, we are of the view that P.W. - 1 Pramod Kumar Gupta was not sure as to how the incident had occurred and he gives stories which are at variance with each other. This convinced the Court that the petitioner no. 1 was, in fact, not at the spot. Also, from the post-mortem report, we find that firearm injuries were only of one size and if the other co-accused also fired then there would have been injuries of different sizes and, therefore, this also falsifies the case of the prosecution. Needless to mention that the contradictions were such that the statements of the various prosecution witnesses become highly unreliable. Also, we find that Somdutt, the P.W. - 2, was not at the spot as he, in fact, has mentioned in his statement that he had gone to the police station when his wife had sent him and the P.W. - 1 in his statement in chief had definitely stated that P.W. - 2 was not there at the spot. Also, we find that P.W. - 1 had tried to improve the case which he had taken in the first information report at the time of getting his statement recorded in the Court. He had stated that Smt. Ram Kumari, Om Prakash Goswami and Balbindra were also there on the spot. The Court finds that they were never produced as prosecution witnesses in the Court. Also, we find that when the other co-accused were not there at the spot and when there was no meeting of mind with regard to any common object then the various co-accused persons could not be implicated under Section 149 IPC.

18. Under such circumstances, the instant criminal appeal is allowed and the judgement and order dated 24.3.1986 passed by the 3rd Additional Sessions Judge, Fatehpur, in Session Trial No. 416 of 1983 is quashed and set aside vis-a-vis appellant no. 2 Sheoram Singh, appellant no.6 Shiv Singh and the appellant no. 7 Ompal Singh. The appellants No. 2, 6 and 7 are acquitted of the charges on the basis of which the trial had proceeded. Since the appellants no. 2, 6 and 7 are on bail, the bail bonds and sureties are discharged. With regard to the appellants no. 1, 3, 4 and 5, the appeal had already abated.

(2024) 9 ILRA 182

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 24.09.2024

BEFORE

**THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.**

Criminal Appeal No. 1397 of 2020

With

Criminal Appeal No. 388 of 2020

With

Criminal Appeal No. 2001 of 2020

Babli & Ors.

...Appellants

Versus

State of U.P.

...Respondent

Counsel for the Appellants:

Ayank Mishra, Shatrughan Yadav, Vinod Singh

Counsel for the Respondent:

G.A.

A. Criminal Law - Criminal Procedure Code,1973-Section 374(2)-Indian Penal Code,1860-Sections 302/34, 498A, & 3/4 D.P. Act-the deceased was set ablaze by her in-laws due to dowry demands-the

prosecution relied on dying declaration from the victim, statements from the victim's family and neighbors, investigation reports including site plan and medical documentation- Later, key witnesses (father, mother, brother of the deceased) turned hostile, stating that there was no dowry demand- The court held that dying declaration needs corroboration given the inconsistencies and procedural gaps- witnesses' credibility issues arose as key prosecution witnesses did not support the case- no recovery of evidence to substantiate the prosecution's claims (e.g., burnt clothes, forensic reports)- A dying declaration must be voluntary, truthful and reliable to form the sole basis of conviction- benefit of doubt in criminal cases goes to the accused. (Para 1 to 51)

The appeals are allowed. (E-6)

List of Cases cited:

1. Irfan & Naka Vs St. of U.P. (2023) AIR SC 4129
2. Jayamma Vs St. of Kar (2021) AIR SC 2399
3. Irfan & Naka Vs St. of U.P. (2023) AIR SC 4129

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. These appeals have been filed by the appellants challenging the judgment of conviction dated 10.01.2020, passed by learned Additional Sessions Judge, FTC, Court No.2, Bulandshahar holding the appellants Babli, Jaiprakash, Vimla, Raju and Kamal guilty of offence punishable under Sections 302/34 I.P.C., and appellants Babli, Jaiprakash, Vimla, Raju under Sections 498A of IPC and Section 3 & 4 of Dowry Prohibition Act and order of sentence of the same date sentencing appellants for life imprisonment under Section 302/34 of IPC with fine of Rs.20000/- each and in case of default in payment of fine, further to undergo six months simple imprisonment each, under Sections 498A, appellants Babli, Jaiprakash,

Vimla, Raju, three years rigorous imprisonment with fine of Rs. 3000/- each and in case of default in payment of fine, further to undergo one month's simple imprisonment, under Section 3 of Dowry Prohibition Act, appellants Babli, Jaiprakash, Vimla, Raju, three years rigorous imprisonment with fine of Rs. 3000/- each and in case of default in payment of fine, further to undergo one month's simple imprisonment and under Section 4 of Dowry Prohibition Act, appellants Babli, Jaiprakash, Vimla, Raju, two years rigorous imprisonment with fine of Rs. 2000/- each and in case of default in payment of fine, further to undergo 20 days simple imprisonment.

2. It is worth noticing that against rejection of bail application, the accused Kamal had filed Petition(s) for Special Leave to Appeal (Crl.) No(s). 9146 of 2022 in Criminal Appeal No.388 of 2020 which was disposed of on 14th December, 2022 with a direction to the High Court to dispose of the appeal expeditiously as expeditiously as possible and therefore, the arguments on all connected appeals are heard on priority basis.

3. Heard Mr. Bipin Kumar Tripathi, Mr. Sailesh Narain Pathak, Ms. Pukhraj, Ms. Richa Sharma, learned counsels for the appellants, Ms. Muskan Pandey, learned Amicus Curiae appointed by this Court on behalf of accused-appellant, Kamal, and learned A.G.A. for the State.

4. As per the prosecution, informant- Munesh submitted a complaint as Ex.Ka.1, which read as under:

"सेवा में

श्रीमान प्रभारी निरीक्षक

महोदय

थाना पहासू

महोदय निवेदन है कि मेरी भतीजी नीलम पुत्री फकीरा नि० सदरपुर थाना सलैमपुर की शादी लगभग पांच साल पूर्व ग्राम अनौना के राजू एस/ओ जय प्रकाश के साथ की थी राजू व उसके परिवार की मां श्रीमति विमला व उसके पिता जय प्रकाश व उसकी बहन बबली तथा राजू का दोस्त कमल एस/ओ धनपाल नि० अछेजा सब मिलकर नीलम को कम दहेज लाने व गाड़ी शादी में ना मिलने के कारण दुखी रखते थे जिसका मेरी भतीजी ने घर आकर मेरे व भाई फकीरा व परिवार के लोगों के सामने कई बार जिक्र किया जिस संबंध में एक मुकदमा भी दहेज का चल रहा था दिनांक 23.6.14 को फिर मांफी मांगकर फिर नीलम को ग्राम अनौना (का० फटा) आये लेकिन इनके मन से दहेज में गाड़ी ना देने (का० फटा) बात नहीं निकली और फिर तरह-2 से नीलम को (का० फटा) व अत्याचार करने लगे। जिसकी सूचना नीलम हमें देती रही लेकिन हमने सोचा कि चलो इ(का०फटा) जाम करके गाड़ी भी दे देगे लेकिन आज दिनांक 2.7.2014 को फिर दहेज में गाड़ी ना मिलने व अपने मां बाप से गाड़ी न दिलाने के कारण राजू व जयप्रकाश व

श्रीमति विमला कु०बबली (का०फटा) मल ने मिलकर नीलम के ऊपरह मिट्टी का तेल डालकर जान से मारने की नीयत से आग लगा दी गांव अनौना से ही सूचना मिली कि तुम्हारी लडकी को जला दिया गया है। जब तक हम बुलन्दशहर जिला अस्पताल में जहां वह भर्ती करायी गयी थी उससे भी पूछताछ की तो उसने भी यही बताया कि गाड़ी न मिलने के कारण व दहेज की मांग पूरी न होने के कारण राजू जय प्रकाश विमला बबली व कमल उपरोक्त ने मिट्टी का तेल डालकर जान से मारने की नियत से उसे जलाया है। मेरी भतीजी को जिला अस्पताल से दिल्ली हायर सेन्टर के लिए रेफर कर दिया है मैं रिपोर्ट को आया हूँ रिपोर्ट लिखकर कानूनी कार्यवाही करने की कृपा करे यह घटना आज सुबह लगभग 10 बजे दिन ग्राम अनौना में राजू के घर के अन्दर की है। जय प्रकाश के पिता का नाम होडल सिंह है।

लेखक

प्रार्थी

सतीश कुमार एस/ओ छिद्दा सिंह

ह० मुनेश

ग्राम-सदरपुर

मुनेश पुत्र काले सिंह

थाना - सलैमपुर
 ग्रा० सदरपुर
 8650308264

थाना - सलैमपुर
 दिनांक 2.7.2014
 जि० बु० शहर
 9675989380
प्रदर्श क-1"

5. On the basis of complaint, chik FIR was registered as Ex.Ka.9.

6. The police started the investigation and the statement/dying declaration of the victim was recorded as Ex.Ka.2 on 03.07.2014 which read as under:

"नीलम डब्लू /ओ राजू आर /
 ओ गांव सधरपुर, पोस्ट ऑफिस-
 शिवाली, जिला बुलन्द शहर (UP) Age-
 22 वर्ष Burn ward Bed no-2

ब्यान किया की मैं पता
 उपरोक्त पर मेरे माता-पिता के साथ
 रहती थी मेरी शादी फरवरी 2010 में
 राजू पुत्र श्री जयप्रकाश आर/ओ ग्राम-
 अनौना, थाना- पासउ, जिला- बुलन्दशहर,
 उत्तर प्रदेश के साथ हिन्दू रीति रिवाज
 से की थी। मेरी शादी मेरे माता-पिता ने
 अपनी आर्थिक हैसियत के अनुसार की
 थी। परन्तु शादी के बाद से ही मेरे पति
 राजू व उसके मां- विमलेश पिता
 जयप्रकाश व ननद बबली व मेरे पति

के दोस्त कमल ये सभी लोग मुझे
 रोजाना मोटर साइकिल के लिए कहते हैं
 कि तेरे बाप से हमें मोटर साइकिल
 दिला यदि तुम मोटरसाइकिल नहीं
 लेकर आयी तो तुझे जान से मार देंगे।
 मेरे माता व पिता बहुत गरीब हैं उनकी
 आर्थिक स्थिति बहुत खराब है। मेरे
 तीन भाई हैं वो भी महन्त मजदूरी
 करके अपने परिवार का मुश्किल से
 पालन-पोषण कर पाते हैं। मुझे शादी के
 एक साल तक इन्होंने कई बार मेरे
 साथ मारपीट करते तथा मेरे माता-पिता
 के पास भगा देते थे। पिछले तीन साल
 से मैं मेरे माता व पिता के साथ रहती
 थी। मेरे पति राजू व उसके परिवार
 वालों ने मेरे साथ मारपीट करके मेरे
 ऊपर गहने चोरी का कैस डाल दिया।
 तब से ही मैं मेरे मां- पिता के पास रह
 रही थी। कोर्ट के आदेश के तहत मुझे
 मेरा पति व उसके परिवार वाले दिनांक
 23.6.14 को उनके साथ लेकर गये तथा
 इन्होंने कोर्ट में एक शपथ पत्र दिया की
 हम इसे अच्छी तरह से रखेंगे। परन्तु
 उसके बाद मेरे पति राजू व मेरी सास
 व ससुर व ननद सभी लोग दुबारा से
 उनकी वही मांग दुबारा ? होने लगी
 दिनांक 2.7.14 को सुभम मुझसे कहने
 (का० फटा) तू मोटर साइकिल लेकर

आयेगी या नहीं मैंने उन्हें फिर भी बोला की (का० फटा) माता व पिता बहुत गरीब हैं उनकी इतनी हैसियत नहीं है। इत (का० फटा) मेरे पति राजू के दोस्त ने मिट्टी के तेल की कट्टी से मिट्टी तेल छि (का० फटा) तथा मेरे ससुर जयप्रकाश सास- विमलेश व ननद बबली ने मुझे पकड़ लिया व मेरे पति राजू ने माचिस की तीली से आग लगा दिया मैं जोर-जोर से चिल्लाने लगी, मैं जैसे तैसे कर (का० फटा) बरामदे में आ गयी। मेरी चिल्लाने की आवाज सुनकर मेरे, (का० फटा) में रहने वालों ने मेरी आग को बुझाया परन्तु उस समय मुझे (का० फटा) नहीं था कि किसने मेरी आग को बुझाया तथा जब मुझे होश आया तो मैं बुलन्दशहर के सरकारी अस्पताल में भर्ती थी। इसकी सूचना मेरे पिता जी को किसी आदमी ने दी की आपकी बेटी बुलन्दशहर के सरकारी अस्पताल में भर्ती है। मेरा वहां की पुलिस ने कोई ब्यान दर्ज नहीं किया वहां से मेरे पिताजी बड़ी भाभी व छोटा भाई सुधीर वहां से लेकर हम जी०टी०वी अस्पताल दिल्ली लेकर आये जहां मेरा इलाज चल रहा है। मेरी आपसे विनती है कि मेरे पति राजू, उसके माता-पिता जय प्रकाश व विमलेश, ननद बबली व

मेरे पति के दोस्त कमल के खिलाफ शख्त से शख्त कानूनी कार्यवाही करके मुझे न्याय दिलाया जाये। यह ब्यान मैंने पूरे होशो हवास में बिना किसी दबाव के दिया है जो मुझे पढ़कर सुना दिया है

ठीक है। एल०टी०आई० नीलम

Statment may be handed over
Statement noted own hand
to ASI Naresh, P.S. G.T.B.
writing at Burn ward, Bed No-
Enclave, Delhi for further
2, G.T.B. Hospital on 3/7/14 necessary
action as per law.
11.30AM to 12.30 PM.

ह० अप०
3.7.14

VED PRAKASH MEENA
VEDPRAKASH MEENA
ExecutiveMagistrate(Seemapuri)
ExecutiveMagistrate (Seemapuri)
DC Office Complex, Nand Nagr
DC Office Complex, Nand Nagr
Delhi-110093
Delhi-110093

प्रदर्श क-2"

7. The victim died on 9.7.2014 and her post-mortem was conducted. During the investigation, the police prepared panchayatnama, also effected certain recoveries from the place of occurrence, arrested the accused persons, recorded the statement of the witnesses under Section 161 of Cr.P.C and thereafter, submitted the final report against five accused persons, namely, Raju, Vimlesh, Jayprakash, Babli

and Kamal. The case was committed to the Court of Sessions and the charges were framed as under:

"में ध्रुव कुमार तिवारी, अपर जिला एवं सत्र न्यायाधीश (त्वरित न्यायालय) न्यायालय संख्या-०२, बुलन्दशहर आप राजू श्रीमती विमला पत्नी जयप्रकाश, बबली पुत्री जयप्रकाश व को निम्न आरोपो से आरोपित करता हूँ।

प्रथम- यह कि वादी मुनेश की भतीजी नीलम पुत्री फकीरा की शादी दिनांक ०२.७.२०१४ से पाँच वर्ष पूर्व ग्राम अनौना के राजू पुत्र जयप्रकाश के साथ सम्पन्न हुयी थी। लेकिन शादी के उपरान्त से ही वादी की भतीजी नीलम के ससुरालवाले कम दहेज व गाडी न मिलने के कारण नीलम को तंग व परेशान करते थे। दिनांक २३.६.२०१४ को माफी मांग कर वादी की भतीजी नीलम के ससुराल वाले नीलम को अपने ग्राम अनौना ले आये। आप लोगो ने अतिरिक्त दहेज में गाडी की मांग पूरी न होने पर पुनः वादी की भतीजी नीलम को शारीरिक व मानसिक रूप से प्रताडित किया। इस प्रकार आप लोगो ने भारतीय दण्ड संहिता की धार 498ए के अन्तर्गत दण्डनीय अपराध कारित

किया, जो इस न्यायालय के प्रसज्ञान में है।

2- यह कि दिनांक 02.07.2014 को समय सुबह लगभग 10.00 बजे दिन घर स्थित राजू के घर के अन्दर ग्राम अनौना में आप लोगो ने अतिरिक्त दहेज में गाडी की मांग की पूर्ति न होने पर सात वर्ष के भीतर वादी की भतीजी नीलम के ऊपर मिट्टी का तेल डालकर जान से मारने की नीयत से आग लगाकर हत्या की। इस प्रकार आप लोगो ने भा०दं०सं की धारा 304बी/34 के अन्तर्गत दण्डनीय अपराध कारित किया, जो इस न्यायालय के प्रसज्ञान में है

विकल्प में

यह कि उपरोक्त दिनांक व समय व स्थान पर आपने सामान्य आशय की पूर्ति में साशय व जानपूर्वक एक राय होकर वादी की भतीजी नीलम के ऊपर मिट्टी का तेल डालकर हत्या कर दी। इस प्रकार आप लोगो ने भारतीय दण्ड संहिता की धारा ३०२ सपठित धारा ३४ के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसज्ञान में है।

3- यह कि उपरोक्त दिनांक व समय व स्थान पर आप लोगो वादी की

भतीजी नीलम से शादी के उपरान्त से अतिरिक्त दहेज में गाड़ी की मांग की। इस प्रकार आपने दहेज प्रतिषेध अधिनियम की धारा ३/४ के अन्तर्गत दण्डनीय अपराध कारित किया, जो इस न्यायालय के प्रसजान में है।

एतद द्वारा मैं आपको निर्देशित करता हूँ कि उपरोक्त आरोपों में आप लोगों विचारण इस न्यायालय द्वारा किया जाये।

दिनांक-२५.०४.२०१६

D. K. Tuwari /25.4.2016

(ध्रुव कुमार तिवारी)

जिला एवं सत्र न्यायाधीश (त्वरित न्यायालय)

न्यायालय संख्या-02, बुलन्दशहर।

उपरोक्त आरोप अभियुक्तगण को

पढ़कर सुनाये व समझाये गये।

अभियुक्तगण ने आरोपों से इंकार किया

तथा विचारण की मांग की।

दिनांक-२५.०४.२०१६

D. K. Tuwari /25.4.2016

(ध्रुव कुमार तिवारी)

अपर जिला एवं

सत्र न्यायाधीश (त्वरितन्यायालय)

न्यायालय संख्या-02, बुलन्दशहर"

8. Identical charges were framed against accused Kamal. The accused did not plead guilty and claimed the trial.

9. In prosecution evidence, PW-1- Munesh appeared and deposed on the line of the FIR. The operative part of the examination-in-chief read as under:

"मुनेश एस/ओ काले सिंह उम्र 30 साल पेशा- मजदूरी निवासी गांव सदरपुर थाना सलैमपुर जिला बुलन्द शहर ने शपथ पूर्वक ब्यान किया कि- मृतका नीलम मेरी भतीजी लगती थी घटना से करीब 7 वर्ष पूर्व उसकी शादी राजू के साथ हुई थी। शादी अच्छी हुई थी मेरे भाई ने खूब पैसा लगाया था। जो शादी में दिया था उससे नीलम की ससुराल वाले राजू पति, जय प्रकाश ससुर, बबली नन्द, विमला सास और कमल जो इनके परिचित हैं खुश नहीं थे। कमल राजू के दोस्त हैं और राजू के साथ आते जाते थे। और ये लोग कहते थे कि शादी में गाड़ी नहीं दी और इस बात को लेकर लड़की के साथ मारपीट करते थे और परेशान, तंग करते थे। ये बात हमें जब पता लगी जब हम लड़की को लिवा कर लाये थे तब लड़की ने यह

बताया था कि ससुराल वाले उसे गाड़ी की मांग को लेकर तंग परेशान करते हैं। इस सम्बन्ध में लड़की के पिता ने एक दहेज के खिलाफ ससुराल वालों के खिलाफ मुकदमा डाला। मुकदमा डालने के एक डेढ़ साल बाद नीलम के ससुराल वाले आये थे इन्होंने कहा कि अब हम तंग परेशान नहीं करेंगे। उनकी बात पर हमने लड़की उनके साथ भेज दी और लड़की अपनी ससुराल आ गयी उसके आने के करीब 5-7 दिन बाद उपरोक्त मुल्जिमानों ने नीलम के उपर मिट्टी का तेल डाल कर आग लगा दी, ये बात आज से करीब पौने दो साल पहले की है। इस बारे में हमारे पास अनौना गांव से फून आया था। यह कहा था कि तुम्हारी लड़की को आग लगा दी है पहासू थाने आ जाओ। लेकिन इस सूचना पर हम पहासू थाने नहीं गये। एक दूसरे फोन की सूचना पर हम सरकारी अस्पताल बुलन्द शहर आये थे। जहां पर हमें लड़की मिली थी हमारी लड़की से बात हुई थी।

हमने पूछा लाली क्या हुआ। उसने बताया कि चाचा जी कमल, राजू, विमलेश, बबली, जय प्रकाश ने मेरे उपर मिट्टी का तेल डालकर आग लगा दी क्योंकि आग इसलिए लगायी थी कि दहेज नहीं दिया गया था। जो कि गाड़ी के रूप में मांगा गया था। फिर हमारी भतीजी दिल्ली रैफर यह कहकर कर दी थी कि इसका इलाज यहां नहीं हो पायेगा। हम करीब 11-11.30 पर यहां आये थे। तो पता करने पर 11 बजे आग लगने का पता चला इस घटना की रिपोर्ट मैंने अपने ही गांव के सतीश कुमार से बोल-बोल कर लिखायी थी। और बाद में मैंने उसके पढकर सुनाने पर उस पर हस्ताक्षर किये थे। साक्षी ने पत्रावली पर उपलब्ध तहरीर को देखकर कहा कि यह वही तहरीर है जो मैंने सतीश कुमार को बोल-2 कर लिखायी थी इस पर मेरे हस्ताक्षर हैं। इस पर प्रदर्श क-1 डाला गया।"

In cross-examination, this witness stated that accused Kamal is resident of different village-Accheja in District Bulandshahar.

He further stated that on account of demand of dowry, the relationship of the deceased and her husband were strained and father of the deceased has got registered the police complaint regarding demand of dowry. He further stated as under :

"अस्पताल में और लोगों की बाते नीलम से हुई थी हमें तो डाक्टर ने कहा था कि उसे दिल्ली ले जाओ मुझे पता चला था कि नीलम बोलने में असमर्थ थी।

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अपने घर का मुखिया होने के कारण शादी ब्याह फकीरा ने तय किया था। मुझसे दहेज मांगने सम्बंधित कोई बात ना तो ससुराल वालों ने की ना ही नीलम ने मुझे बताया और ना ही फकीरा ने मुझे बताया कि उसकी बेटी नीलम को दहेज के लिये तंग करते थे व दहेज मांगा हो। यह बात सही है। कि शादी के बाद लड़की गांव आती जाती रहती थी मैं भी उससे मिला था। कभी उसने मुझसे कभी कोई शिकायत नहीं की थी यह बात सही है कि नीलम का पति राजू

भी गांव आता जाता था। कभी राजू (नीलम) को ले आता था कभी नीलम के घर वाले ले आते थे। गुरु तेग बहादुर में नीलम के साथ अधिकतर सुधीर व उसकी भाभी नीलम डब्लू/ओ नरेश रहती थी यह बात सही है कि मेरे साथ मेरे भाई फकीरा आज न्यायालय आये हैं।"

10. PW-2- Fakira- father of deceased Neelam, did not support the prosecution version and stated as under:

" नाम साक्षी फकीरा एस ओ काले सिंह आयु 55 साल पेशा मजदूरी आर/ओ सदरपुर साईवैली पी०एस० सलैमपुर जि० बुलन्दशहर ने सशपथ ब्यान किया कि- मेरे इस समय 3 लड़के व 2 लड़की है। एक लड़की खत्म हो गयी थी मेरी लड़की नीलम की उम्र मृत्यु पूर्व 24-25 साल थी। मैंने नीलम की शादी लगभग 7 साल पहले राजू के साथ की थी। राजू अनौना ग्राम का पी०एस० पहासू जिला बुलन्दशहर का रहने वाला है। मैंने अपनी लड़की नीलम की

शादी मैंने एक रुपये की शादी थी जो मुझ पर बना मैंने सभी कुछ दिया था। शादी के समय ससुराल वाले खुश थे पहले दहेज प्रथा लगी थी। सास विमलेश ससुर जयप्रकाश मेरी लड़की से खुश नहीं थे दहेज की कोई मांग नहीं थी सास बहू में कहन सुनन होने लगी थी। ये बात मुझे, मेरी पन्ति व अपने भाई के कहन सुनन वाली बात बताई थी इससे सम्बन्धित दहेज उत्पीडन का मुकदमा बुलन्दशहर न्यायालय में चला था। मेरी लड़की को मरे करीब 3 साल हुए हैं शादी को सात आठ साल हो गये हैं। मेरी लड़की नीलम को मुलजिमान राजू जयप्रकाश विमलेश, बबली व कमल को दहेज के लिये नहीं मारा था। दिल्ली जी०टी०वी० अस्पताल में मैं अपनी लड़की को लेकर गया था लड़की की सूचना गांव वालों ने दी थी मैं मेरा लड़का नीलम को एम्बुलेंस से दिल्ली अस्पताल ले गये थे। उसके बाद जी०टी०वी० अस्पताल में भर्ती (का० फटा) एफ०आई०आर० मेरे भाई मुनेश

ने लिखाई थी। एफ०आई०आर० मेरे भाई मुनेश ने थाने पर बैठकर लिखी थी मैं दिल्ली था। मुझे नहीं पता मेरे भाई ने एफ०आई०आर० में क्या लिखाया था।

Declare hostile on the request of ADGC."

In cross-examination by ADGC, he denied that he has made a statement before C.O. regarding demand of dowry. He pleaded ignorance about the contents of the complaint filed for demand of dowry. He also denied about the dying declaration made by the deceased in the hospital. In cross-examination by accused Kamal, he stated that Kamal is not from the family of the accused persons and is resident of the different village. He further stated that when they were in the hospital, he did not ask anyone as to how a victim suffered burn injuries. He further stated that in a period of six days, he along with Sudhir, Sudhir's sister-in-law-Neelam stayed in the hospital and as the deceased was admitted in a Ladies Ward, Neelam (sister-in-law) stayed with her. During the treatment, the victim was unconscious and when the cremation of his daughter was done, Jayprakash (father-in-law) and other villagers attended the same. He further stated that he did not know how his daughter sustained burn injuries and admitted a suggestion that Raju, Jayprakash, Vimlesh, Babli and

Kamal have not committed the murder of his daughter.

11. PW-3- Sudhir Kumar, brother of deceased Neelam also did not support the prosecution version and rather stated that his sister sustained accidental burn injuries from stove while cooking food.

In cross-examination, this witness also stated that till the time his sister was in the hospital, she was unconscious and he along with his sister-in-law Neelam were attending her. He stated that the informant of the case is uncle who residing separately and her father-in-law Jayprakash and 2-3 other persons attended the cremation of his sister. He admitted a suggestion that his sister died because of accidental stove burn injuries. The operative part of cross examination read as under :

"जब हम बुलन्दशहर अस्पताल में आये थे तब हमारी बहन बेहोश थी। जी०टी०बी० अस्पताल दिल्ली में वो महिला वार्ड में रही थी। मैं व मेरी भाभी नीलम उसकी तीमार दारी में रहे थे यह बात सही है कि वह जिस जले वार्ड में भर्ती रही वह पूरा महिला वार्ड था उसमें आदमी लोग मरीज को केवल देख सकते थे रह नहीं सकते थे नीलम मेरे

बड़े भाई नरेश की पत्नि है। वो ही उसके पास तीमार दारी में रहती थी। मेरी बहन जितने दिन जी०टी०बी० अस्पताल में जीवित रही वह उतने दिन बेहोश रही। डाक्टर साहब जो भी दवा का पर्चा लिखकर जाते थे मेरी भाभी नीलम मुझे देती थी मैं बाहर से लाकर दवा देता था जो भी कोई रिश्तेदार या अन्य नीलम के पास आता था तो मेरी भाभी नीलम ही उसे बताती थी क्योंकि वह बोलने की स्थिति में नहीं थी।

इस वार्क की रिपोर्ट मेरे चाचा ने लिखाई थी जो हमारे परिवार से अलग रहते हैं। और उनका मकान भी हमसे अलग है। मैं अपने चाचा के साथ रिपोर्ट कराने थाने नहीं गया था। मेरे पिता मेरे परिवार के मुखिया हैं। बेटे बेटियों की शादी लेना देना सब मेरे पिता करते हैं। बहन को शादी में जो भी खर्च किया वह मेरे पिता ने किया अपनी इच्छा से किया शादी के समय कोई मांग जांच नहीं थी। मुझसे भी व्यक्तिगत रूप से

कोई मांग जांच नहीं थी। शादी के बाद जो भी रस्में होती हैं वह सब राजी खुशी हुई थी। और लड़की का शादी के बाद आना जाना था कभी हम ले आते थे कभी वह स्वयं लाते थे। कमल मुलजिम दूसरे गाँव का रहने वाला है। राजू मेरा बहनोई पंखे बनाने का मिस्त्री है। हमारी बहन स्वयं अपनी राजी से अपने पति राजू के साथ गयी थी। मुझसे सी०ओ० साहब ने कोई पूछताछ नहीं की थी। मेरी बहन के दाह संस्कार में मेरी बहन के ससुर जय प्रकाश व दो चार लोग अनौना के शामिल हुए थे। यह बात सही है कि मेरी बहन स्टोव से आग लगने के कारण जल कर मरी थी।"

12. PW-4- Ved Prakash Meena, Executive Magistrate stated that on the direction of S.D.M. Seemapuri, he has visited the G.T.B. Hospital for recording the statement of Neelam, where he met A.S.I. Naresh Kumar and he then went for recording the statement of victim. The doctor gave his opinion that the victim is fit to make her statement and he recorded the statement, the dying declaration, which Ex.Ka.2. In cross-examination, this witness stated

that he cannot tell the difference between fitness to speak and stability in fitness to speak. He stated that the statement of the victim as Ex.Ka.2 is of 40 lines, which were recorded at the time when doctor was not present. He took one hour in recording the statement. He stated that he has no written order of S.D.M. and only on his oral order, he has recorded the statement. He further stated that he had no knowledge if the Investigating Officer has recorded his statement. He stated on Ex.Ka.2 at the beginning, there is a signature but he did not know, who had signed it. He also stated that he did not get the signature of the attendant of the victim. He further stated that the victim was 90% burnt and only doctor can tell whether she was in a position to speak. The operative part of cross examination read as under :

"पत्रावली पर एम०एल०सी० जो लगी है वह दिनांकित 2.7.14 की है मेरा रिकार्ड ब्यान दि० 3.7.14 का है। प्रदर्श क-2 पर डा० का कोई सर्टिफिकेट नहीं है वह सर्टिफिकेट एम०एल०सी० पर है। जिस पर दिनांक 3.7.14 ब्यान के लिये फिट लिखा है। मैं इस पोस्ट पर करीब 8-10 महीने से ब्यान लिखे जाने से पहले नियुक्त हुआ था मैं ग्रेजुएट हूँ Fitness to speak & stability &

Fitness (स्ट्रेविलिटि & फिटनेस) में अन्तर नहीं जानता डाक्टर बता सकता है। प्रदर्श क-2 ब्यान मृतका का 40 लाईन का है। जब मैंने 40 लाईन लिखी उस समय डाक्टर मेरे पास मौजूद नहीं था। ब्यान प्रदर्श क-2 में अंकित है कि रोजाना मोटर साईकिल की मांग करते थे। इसे लिखने में मुझे एक घन्टे का समय लगा था। मैं एस०डी०एम० साहब के आदेश से ब्यान लेने गया था। उन्होंने मुझे मौखिक आदेश दिया था। प्रदर्श क-2 में एस०डी०एम० साहब के मौखिक आदेश का कोई तस्करा ब्यान में नहीं है। इसका कोई रिकार्ड नहीं है। मैं तहसीलदार हूँ उस वक्त मैं तहसीलदार/ एक्जीक्यूटिव मजिस्ट्रेट था।

मैं नीलम पीड़िता को व्यक्तिगत रूप से नहीं जानता था। मुझे पुलिस ने सूचित किया था कि पीड़िता नीलम का ब्यान लेना है। ए०एस०आई० नरेश जी०टी०बी० अस्पताल में मिले थे। उनके साथ ही मैं वर्न वार्ड में गया था जहां पीड़िता वैड नं०

2 पर भर्ती थी। मुझे ध्यान नहीं है। कि इस केस के विवेचनाधिकारी ने मेरा कोई ब्यान लिया था या नहीं। प्रदर्श क-2 जहां से ब्यान लिखना शुरू किया है वहां एक दस्तखत है मुझे नहीं पता कि वे दस्तखत किसके हैं। यह कहना गलत है कि यह प्रदर्श क-2 मैंने वादी पक्ष से प्रभावित होकर लिखा हो झूठा लिखा हो और नीलम ने मुझे कोई ब्यान नहीं दिया हो। वह वर्न वार्ड में भर्ती थी। मैंने उसके किसी रिश्तेदार या तीमार दार के इस पर हस्ताक्षर नहीं कराये। दि० 8.7.14 को नीलम की मृत्यु हुई थी। पीड़िता 90 प्रतिशत जली थी बोलने की स्थिति में नहीं थी। यह बात डाक्टर साहब बतायेगे मुझे जानकारी नहीं है।"

13. PW-5- Naresh Kumar, A.S.I. stated that he got the post-mortem of Neelam conducted and handed over the dead body to her brother and father. He recorded the statement of some of the witnesses vide Ex.Ka.3. The dead body was handed over as per order of Executive Magistrate. He obtained the thumb impression of Fakir Chand as Ex.Ka.4. Panchayatnama is Ex.Ka.6.

In cross-examination, he admitted that he has not signed the documents i.e. Ex.Ka.3 to Ex.Ka.6. Even on the Panchayatnama as Ex.Ka.6, he has not signed and no time is mentioned on these documents. However, as per his memory, these were prepared on 09.07.2014. The examination-in-chief of PW-5 is read as under :

"दि० 9.7.2014 को बतौर ए०एस०आई० जि०टी०बी० एन्कलेव तैनात था उस दिन मैंने नीलम डब्लू/ओ राजू का पी०एम० कराकर उसकी वोडी उसके भाई व पिता के सुपुर्द की थी तथा नीलम के निशानी अंगूठा लगवाया था तथा भाई सुधीर के दस्तखत कराये थे मेरे द्वारा शिनाख्ती (sic) सुधीर कुमार व फकीर चन्द कराये थे जो पत्रावली पर पेपर सं० 7ए/4 है ब्यान मेरे हस्तलेख में अंकित परन्तु हस्ताक्षर एकजीक्यूटिव मजिस्ट्रेट के हैं मैं अपने हस्तलेख की शिनाख्त करता हूँ जिस पर प्रदर्श क-3 डाला गया। इसी तरह मैंने निशानी अंगूठा फकीर चन्द का लिया था कागज सं० 7ए/5 मेरे हस्तलेख में है जिस पर प्रदर्श क-4 डाला गया।"

पंजायतनामा कागज सं० 7ए/1 (Request of P.M.) मेरे हस्तलेख में जिस पर मजि० साहब का आदेश है (प्रदर्श क-5) को पी०एम० कराने के बाद वोडी सुपुर्द कर दी जाये। पंचायतनामा पत्रावली पर 7ए/2 है जो मेरे हस्तलेख में है जिस पर प्रदर्श क-6 डाला गया।"

14. PW-6- Rafal Singh Tomar, C.O., another I.O. also gave details of the investigation conducted, recording the statement of the victim and the manner in which the arrest of the accused persons was done. He prepared the charge-sheet as Ex.Ka.7 which was filed in the court and the supplementary charge-sheet regarding Jayprakash as Ex.Ka.8.

In cross-examination, this witness stated that accused Kamal is resident of village- Accheja whereas other accused is resident of village- Ananua and there is a difference of 20kms. He stated that he asked from the accused if Kamal is their relative. The case was initially registered under Sections 498A, 307 of I.P.C. and Section 3/4 of D.P. Act. Later on, Section 304B of IPC was added.

15. PW-7- Virma, mother of the deceased Neelam stated that there was no demand of dowry from the accused side and she has no knowledge how her daughter

Neelam died. This witness was also declared hostile.

In cross-examination, she stated that when she visited the hospital, her daughter Neelam was not in a position to speak. She admitted a suggestion that Neelam never raised any objection that there was any demand of dowry from her in-laws.

16. PW-8- Manish Kumar, Constable stated that he has recorded the G.D. entry and chic FIR as Ex.Ka.9 and Ex.Ka.10. In cross-examination, he admitted that in the chic FIR as Ex.Ka.9, the C.J.M. under his seal has put the date as 10.7.2014 whereas the incident is of 2.7.2014. He denied a suggestion that FIR is ante-time.

17. PW-9- Jay Prakash Upadhyay, another I.O. stated that he has prepared the site plan as Ex.Ka.11 and recorded statement of witnesses as Ex.Ka.12 and Ex.Ka.13. After the death of the victim, section 304B of IPC was added.

18. PW-10- Alok Kumar, working in G.T.B. Hospital, has produced on record the death summary prepared by Dr. Swathi as Ex.Ka-1.

In cross-examination, he stated that he had no knowledge where Dr. Swathi is presently working. He further stated that the cause of death was septicemia and the deceased died on 9.7.2014.

19. Thereafter, the statements of accused persons under Section 313 of Cr.P.C. was recorded and all the incriminating evidences were put together. It was stated on behalf of the accused Kamal that he has no connection with the family of accused Raju and he was not present at the spot and he has been falsely implicated. The other accused also in their statements under Section 313 of Cr.P.C., stated that neither there was any demand of dowry nor the deceased was harassed. The victim was admitted in Govt. Hospital by Vimlesh and Raju. Jaiprakash had stayed in the hospital and had borne all the expenses of medical treatment including medicine. He also attended the cremation of the deceased. In reply to Question No.5, a specific reply is given that the statement of Neelam (sister-in-law of victim Neelam) is made base of Dying Declaration.

20. In defence evidence, DW-1, Dr. Sachin, was examined who stated that on 2.7.2014, Neelam was brought by Raju s/o Jaiprakash. Neelam was having 95% burn injuries and she did not tell him about the cause of sustaining injuries as she was not in a position to speak. After her medical examination, she was sent to better institution for further medical treatment.

21. The right foot impression of the injured was taken on the medico legal report as Ex.Kha.1. In cross-examination, he has stated

that witness was not in a position to speak.

22. Thereafter, the trial court vide impugned judgment of conviction, held the appellants guilty of offence under Sections 302/34 of I.P.C. and further awarded life imprisonment along with fine to all the accused persons.

23. Heard learned counsel for the appellants and the paper book and the Trial Court's Record is perused. The entire evidence has been re-appreciated.

24. Learned counsel for the appellant-Kamal has primarily argued that the appellant-Kamal is resident of a different village and is not related to the other accused and he has been falsely nominated in the F.I.R. only because he is named in the Dying Declaration.

25. It is next argued that PW-2, father of deceased, PW-3, brother of deceased and PW-7, mother of the deceased, have not supported the prosecution version and have not named appellant-Kamal for his involvement in the incident.

26. It is also argued that all the three witnesses of fact have also not supported the allegation against the other accused.

27. It is next argued that no motive is attributed towards the appellant and even no motive is attributed to the other accused regarding demand of dowry or maltreatment at any stage.

28. The common argument raised by counsels for all accused persons is that the Dying Declaration is a doubtful document as the opinion of the Doctor that the victim was in a fit state of mind is not obtained on the Dying Declaration and only on the OPD Notes, it is mentioned that the victim is fit to give statements though a day prior, it was reported that she was unfit to make statements.

29. Counsel submits that the Doctor Sudipta who was treating the victim was the best witness to depose whether victim was in a fit condition to speak or not, however, Dr. Sudipta of G.T.B. Hospital, Shahdara, Delhi was not examined by the prosecution.

30. It is next argued that the deceased had suffered 90 to 95% of burn injuries and she was on seductive medication and nothing has come on record that she was not given seductive medication for pain and, therefore, it is not proved that she was in a fit mental condition to record the statement.

31. Counsel argued that even PW-4 before recording the Dying Declaration has not asked any questions to the victim, in order to satisfy himself that she was in fit mental condition to depose. In cross examination, PW-4 has stated that he was not sure whether the victim was in a fit condition to speak and rather stated that only the Doctor can tell whether she was in a fit condition to speak or not

and, therefore, subjective satisfaction of the Executive Magistrate is missing.

32. It is next argued that the Dying Declaration contains two pages and as per PW-4, was recorded in time span of one hour. Therefore, the manner in which, the Dying Declaration, was recorded raises a doubt whether the victim was in fit mental condition as she was in a deep pain due to 90-95% of burn injuries which included injuries on her face, therefore, she was not in a position to speak.

33. Reliance is placed on **Irfan @ Naka Vs. State of U.P., AIR 2023 SC 4129** where the Supreme Court has held as under :

“62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? *“Rule of First Opportunity”*

(iii) Whether there is any reasonable suspicion to believe the

dying declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly?

(vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in

the dying declaration as the assailant.”

34. It is argued that except the Dying Declaration, there is no other corroborating evidence to prove the charges against the appellants and, therefore, the Dying Declaration cannot be made the sole basis for convicting the appellants.

34. It is argued that except the Dying Declaration, there is no other corroborating evidence to prove the charges against the appellants and, therefore, the Dying Declaration cannot be made the sole basis for convicting the appellants.

35. Reliance is placed on the decision of the Supreme Court in **Jayamma Vs. State of Karnataka, AIR 2021 SC 2399**. Operative part of the judgment read as under :

“22. Having meditated over the issue to the extent it is possible, and on a minute examination of the original document Ex.P5 (without understanding its contents as it is in Kannada language except that the endorsement of the doctor is in English) read with its true translation placed on record, we do not find it totally safe to convict the appellants on the basis of the said document alongwith its corroboration by PW11 and PW16. We say so for several reasons as summarised hereinafter:

Firstly, the narration of events in the dying declaration is so accurate, that even a witness in the normal state of mind, cannot be expected to depose with such precision. Although it is stated that deceased was questioned by the Police officer, the purported dying declaration is not in a questions and answers format. The direct or indirect dominance of the Police Officer appears to have influenced the answers only in one direction.

Secondly, the injured victim was an illiterate old person and it appears beyond human probabilities that she would have been able to narrate the minutes of the incident with such a high degree of accuracy.

Thirdly, there is sufficient evidence on record that the victim had been administered highly sedative painkillers. Owing to 80% burn injuries suffered by the victim on all vital parts of the body, it can be legitimately inferred that she was reeling in pain and was in great agony and the possibility of her being in a state of delusion and hallucination cannot be completely ruled out. We say so at the cost of repetition that the doctor (PW16) made the endorsement that the victim was in a fit state of mind to make the statement ‘after’ the statement was recorded and not ‘before’ thereto — being the normal practice. It further appears to us that faculties of the injured had been drastically impaired and instead of making statement in an informative form she had apparently endorsed what the Police Officer (PW11) intended to.

True it is that the Police Officer (PW11) had no axe to grind or a motive to implicate the appellants, but his overenthusiasm to solve a criminal case within no time seems to have swayed the Police Officer (PW11) so much that he appears to have not asked the doctor to make an endorsement of fitness of the victim before recording the statement. He also did not deem it appropriate to call a Judicial or Executive Magistrate to record such statement, for the reasons best known to himself.

Fourthly, there is a serious contradiction between the statement of Dr. A. Thippeswamy (PW16) on one hand and the police officer K.V. Mallikarjunappa (PW-11) on the other, in respect of the nature of burn injuries suffered on different body parts of the victim. While the doctor acknowledges that burn injuries included the hands of the victim, the police officer claims that her hands were safe and she could put her thumb impression. We have seen the thumb impression very scrupulously and the same appears to be absolutely natural. If that is so, the medical officer, whose statement should carry more weightage in respect of the nature and gravity of injuries, stands belied.

Fifthly, and most importantly the police officer K.V. Mallikarjunappa (PW11) candidly admits that he did not seek an endorsement from the doctor as to whether the injured was in a fit state of mind to make a statement, before he proceeded to record the statement. Both the police officer

as well as the doctor have tried to cover up this serious lacuna by referring to the purported oral endorsement of the doctor. It appears that the police officer was in full command of the situation and with a view to fill up the legal lacuna, he later on secured the endorsement from the doctor (PW-16) on the available space of the paper, which is *ex facie* unusual and not in line with settled legal procedure.

Sixthly, the alleged motive for the homicidal death is highly doubtful. There is not an iota of evidence, and the prosecution has made no effort to verify the truth in the statement that the appellants poured kerosene and lit the victim on fire only because her son had assaulted the husband of Appellant No.1 and the accused were insisting on payment of Rs.4,000/ which was spent on the treatment of the said assault-victim. Not much can be said when the deceased's own son and daughter-inlaw have denied this incident and rather claimed that their mother/motherinlaw committed suicide.

The **Seventh** reason to dissuade us from harping upon Ex.P5 is the conduct of the parties, i.e., a natural recourse expected to happen. Had it been a case of homicidal death, and the victim's son (PW2) and her daughterinlaw (PW5) had witnessed the occurrence, then in all probabilities, they would have, while making arrangement to take the injured to hospital, definitely attempted to lodge a complaint to

the police. Contrarily, the evidence of the doctor and the police officer suggest that while the son, daughter-in-law and neighbour of the deceased were present in the hospital, none approached the police to report such a ghastly crime. It is difficult to accept that the son and daughter-in-law of the deceased were won over by the accused persons within hours of the occurrence. This unusual conduct and behaviour lends support to the parallel version that the victim might have committed suicide.

The **Eighth** reason which makes us reluctant to accept the contents of purported dying declaration (Ex. P-5), is the fact that victim, Jayamma was brought to the Civil Hospital at 12.30 a.m. on 22.09.1998. She succumbed to her burn injuries after almost 30 hours later at 5:30 am on 23.09.1998. It is neither the case of prosecution nor has it been so stated by PW-11 or PW-16 that soon after recording her statement (Ex. P-5) she became unconscious or went into coma. The prosecution, therefore, had sufficient time to call a Judicial/Executive Magistrate to record the dying declaration. It is common knowledge that such Officers are judicially trained to record dying declarations after complying with all the mandatory pre-requisites, including certification or endorsement from the Medical Officer that the victim was in a fit state of mind to make a statement. We hasten to add that the law does not compulsorily require the presence of a Judicial

or Executive Magistrate to record a dying declaration or that a dying declaration cannot be relied upon as the solitary piece of evidence unless recorded by a Judicial or Executive Magistrate. It is only as a rule of prudence, and if so permitted by the facts and circumstances, the dying declaration may preferably be recorded by a Judicial or Executive Magistrate so as to muster additional strength to the prosecution case.

23. The other important reason to depart from the High Court's view re. conviction of the appellants is that the power of scrutiny exercisable by the High Court under Section 378, CrPC should not be routinely invoked where the view formed by the trial court was a 'possible view'. The judgment of the trial court cannot be set aside merely because the High Court finds its own view more probable, save where the judgment of the trial court suffers from perversity or the conclusions drawn by it were impossible if there was a correct reading and analysis of the evidence on record. To say it differently, unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with. This self-restraint doctrine, of course, does not denude the High Court of its powers to re-appreciate the evidence, including in an appeal

against acquittal and arrive at a different firm finding of fact.”

36. It is further argued that the sister-in-law of the deceased whose name is also Neelam, as per the prosecution version, had attended her in the Burn Ward of the Hospital was not examined and even her statement was not recorded by the Investigating Officer which raises a suspicion and, therefore, material witness has not been examined by the prosecution.

37. It is next argued that it has come in the statement of Investigating Officer that he has not recovered the burnt clothes of the accused-appellant who tried to save her for verifying that there was kerosene residue and, therefore, the Investigating Officer has failed to conduct a fair, impartial and proper investigation.

38. It is lastly argued that there is no eye-witness of the incident and even PW-1, the uncle of the deceased, who is the informant, in cross examination, has not supported the prosecution version.

39. It is additionally argued on behalf of other co-accused who are the husband, sister-in-law, mother-in-law of the deceased that the deceased had not reported any incident of cruelty or harassment to her parents prior to her death to prove the motive of committing the offence.

40. It is argued that in fact it was a case of accidental fire as a kerosene stove exploded while cooking the food as stated by PW-3, brother of the deceased.

41. Counsel has further submitted that though PW-1, Munesh, who is the first informant and uncle of the deceased has stated that on previous occasion, a case was registered against the accused for harassment and demand of dowry, however, there is nothing on record to prove this fact as no complaint or order of any Court is produced by prosecution.

42. It is further submitted that PW-2, Fakira, the father, PW-3, Sudhir Kumar, the brother, PW-7, Virma, the mother of the victim, have unequivocally failed to support the prosecution version and rather stated that the appellants have not made any demand of dowry immediately prior to the death of the deceased. PW-3 has even stated that the deceased died as a result of accident as the kerosene stove exploded.

43. It is argued that in fact the IO has recorded the dying declaration later on taking statement from Neelam (who is wife of brother of victim as she shares the same name as of victim) and Trial Court has misread the evidence as the Trial Court has wrongly taken the statement of Neelam to the statement of victim-Neelam. It is argued that Neelam is sister-in-law of victim-Neelam who as per prosecution was present at the

hospital but was never examined by the prosecution and an important right of accused to put up their defence in this regard to her in cross examination is denied.

44. It is submitted that DW-1, Dr. Sachin, who examined the victim at the first instance, has stated that the victim suffered 95% of burn injuries and was not in a position to speak or communicate and Dr. Sudipta who, gave the opinion on the MLC at the first instance on 2.7.2014 that the victim was not in a fit state of making statement and on the next date the opinion was that the victim was in fit condition to make statement, was never examined. Counsel submits that even the Dying Declaration was not attested by any of the said Doctor to prove that statement was either recorded after seeking her opinion or was recorded in her presence.

45. In reply, learned A.G.A. for the State has argued that in the operating notes of the treating Doctor, Dr. Sudipta, on 2.7.2014 at 7.30 PM, she gave opinion that Patient is not fit for making statement as she is not totally conscious, oriented and in sound state of mind. However on the next date i.e. 3.7.2014 at 11.30 AM she gave opinion that Patient is fit for giving statement as she is conscious, oriented and in sound state of mind. It is submitted that only after this opinion was given, PW-4 recorded dying declaration of the victim on the same date.

46. It is next argued that even as per the MLC of the Doctor of District Hospital, Bulandshahr, it is reported that the burn percentage is about 95% and smell of kerosene oil is coming from the body and the patient is reported to be conscious.

47. Learned A.G.A. has further argued that in the Dying Declaration, the victim has given the details of incident and manner in which she was burnt to death and, therefore, the Dying Declaration is proved in accordance with law.

48. It is submitted that PW-4 had gone to record the statement of the victim as per the order of the Sub Division Magistrate of the area and, therefore, he was duly authorized to record the Dying Declaration.

49. After hearing the counsel for the appellants and upon perusal of the paper book and on re-appreciation of the entire evidence, with the assistance of learned Counsels for the appellants and learned A.G.A. for the State and in view of the decisions in **Irfan @ Naka's Case** and **Jayamma's Case (Supra)**, we find merits in these appeals for the following reasons :

A. The three witnesses of facts i.e. Fakira (PW-2/father of the deceased), Sudhir Kumar (PW-3/brother of the deceased) and Virma (PW-7/mother of the deceased) did not support the prosecution version and were

declared hostile. All the three witnesses have stated that the accused persons have not killed victim-Neelam for demand of dowry.

PW-3 has even stated that the deceased died in an accidental fire due to bursting of kerosene stove. He further stated in his cross examination that his father is the head of the family and his uncle Munesh (PW-1/Informant) is residing separately and marriages of all the sons and daughters were performed by his father Fakira (PW-2). Therefore, there is nothing on record to suggest that the victim was harassed on account of demand of dowry immediately prior to her death. Even PW-1 (informant/real uncle of deceased), in cross examination, has stated that accused persons have not harassed the victim and there was no demand of dowry and he do not know how the victim died.

B. Munesh (PW-1/informant) in the complaint (Ex.Ka-1) which is base of the F.I.R. (Ex.Ka-2) has stated that he had gone to the hospital at Bulandshahr where he met the victim and she told that the accused persons by pouring kerosene oil lit the fire because the demand of dowry was not met.

The only source of information given in the complaint is that the victim had told PW-1 about this fact. However, DW-1, Dr. Sachin, who first attended the victim in the Government Hospital, Bulandshahr and had prepared the Medico Legal Report has categorically stated that victim-

Neelam was having 95% of burn injuries and she did not tell him about the cause of sustaining injuries as she was not in a position to speak. Therefore, the statement of PW-1 that on visiting the hospital, the victim told him about the role of the accused persons is not proved as the Doctor who attended her in the same hospital has stated that she was not in a position to speak. Even in cross examination, PW-1 has not supported the prosecution version and, therefore, no reliance can be placed on the statement of PW1.

C. The conviction of the appellants is based on the Dying Declaration which was recorded by PW-4, Ved Prakash Meena, the Executive Magistrate. However, on a careful perusal of the Dying Declaration and the statement of PW-4 on oath, the same cannot be relied upon for the following reasons :

(i) PW-4 has admitted that he had gone to the hospital on the oral orders of the Sub District Magistrate Seemapuri and, there is no written order to record the statement.

(ii) PW-4 stated that he met ASI Naresh and then recorded the statement of victim, however, the signature of ASI Naresh are not taken on the Dying Declaration.

(iii) This witness has even stated that after recording the statement he has handed over the Dying Declaration to ASI Naresh Kumar but not in a sealed cover, though there is endorsement that the same is handed over to ASI Naresh Kumar. Their endorsement

is not signed by ASI Naresh Kumar and one of the Investigating Officers i.e. ASI Naresh Kumar (PW-5), Rafal Singh (PW-6) and Jai Prakash Uadhyay (PW-9) have stated that they have received the Dying Declaration from PW-4 after it was recorded by him.

(iv) PW-4 further stated that the doctor has given opinion that victim was in fit state of mind to make statement on MLC and, thereafter, he recorded the statement. However, he admitted that no such opinion was taken on the Dying Declaration and the doctor never signed this document to prove that the victim was in a fit mental condition to make statement.

(v) PW-4 further stated that he cannot tell the difference between fitness to speak and the stability in fitness to speak. He further stated that only doctor can tell whether the victim was fit mental condition to make statement.

(vi) PW-4 did not ask any preliminary questions to the victim to satisfy himself that she was in a fit mental condition to make statement.

(vii) PW-4 has also admitted that there were attendants of victim in the ward, however, no signature of any of the attendants as witness was taken on the Dying Declaration.

(viii) PW-4 further stated that it took about one hour to record the statement of the victim as it was a long statement running into two pages containing 45 lines and nothing is on record that the

victim remained in conscious state of mind throughout as seductive pain killer were given to her as she sustained 90-95% burn injuries.

(ix) In the absence of the statement being recorded in presence of doctor, recording of such detailed statements just on the line of allegation contained in the FIR, raises a suspicion as all the accused in their statements under Section 313 Cr.P.C. have stated that, in fact, it was a statement of Neelam, the wife of brother of deceased-Neelam (both have same names), which was recorded by the Investigating Officer and it is not the statement made by the victim and, therefore, it is doubtful if victim has given statement voluntarily.

(x) The statement bears left foot impression of Neelam whereas, in the Medico Legal Report prepared by DW-1 Dr. Sachin in District Hospital, Bulanshahr the right foot impression was obtained and it has come in the evidence of this witness that she suffered 90-95% burn injuries and, therefore, in the absence of any witness to the Dying Declaration, the marking of left foot impression also raises suspicion.

(xi) From the statement of PW-4-Ved Prakash Meena, it is proved that considering the nature of burn injuries i.e. 90-95%, the victim was not in a position to make deposition especially when it has come in the statement of DW-1, Dr. Sachin who treated the victim at the first instance on 2.7.2014 that she was not in a

position to speak due to 90-95% burn injuries.

(xii) PW-4 has stated that the doctor has given a fitness certificate in her operating notes on 3.7.2014 that she is fit to give statement. A perusal of Exhibit Ka-2, the operating notes which were proved by an employee of G.T.B. Hospital creates a doubt about it. PW-4 has nowhere given the name of doctor from whom he has sought the opinion. Exhibit Ka-2 refers to the name of Dr. Sudipta whereas PW-10- Alok Kumar, an employee of G.T.B. Hospital has produced the notes by naming one Dr. Swathi and, therefore, it is not proved that which doctor has given the fitness certificate.

(xiii) The prosecution has withheld the material witness i.e. Dr. Sudipta or Dr. Swathi who had treated the victim at the time of admission and subsequently when she was referred to the Burn Ward, the treatment given to her, therefore, the accused-appellants were denied the important right of cross examination of the doctor who had treated the victim (Neelam) in G.T.B. Hospital, to put their defence that the victim was not in a fit position to make statement on account of burn injuries sustained by her.

(xiv) Another important witness, Neelam (who share the name of victim Neelam), the Bhabhi i.e. (sister-in-law of the victim) who as per the Investigating Officer was an attendant throughout was also not examined by the prosecution witness and even her statement

under Section 161 Cr.P.C. was also not recorded.

(xv) The appellants have taken a categorical stands in their statement under Section 131 Cr.P.C. that in fact PW-4 had recorded the statement of this attendant-Neelam and not the victim-Neelam and, therefore, the Investigating Officer did not examine her so that the material questions may not be put to her in cross examination in this regard.

D. All the witness of fact have not supported the prosecution version though the marriage of the victim with accused-Raju, as per the prosecution were performed about seven years ago but no child was born by this wedlock and allegation of demand of dowry as stated by PW-1 are not corroborated by PW-2, PW-3 & PW-7.

E. PW-1 has stated that there was a dispute between the husband and wife regarding the demand of dowry and some complaint was also given to police however, during investigation no such complaint was given to the Investigating Officer to prove this allegation and thus nothing has come on record to prove it.

F. As noticed earlier, PW-1 has given complaint on the basis of alleged information given by the victim after she was admitted in District Hospital, Bulandshahr that accused poured kerosene oil and lit the fire due to non fulfilment of demand of dowry. However, DW-1-Dr. Sachin who treated her in District Civil Hospital, Bulandshahr has categorically

stated that the victim was not in fit mental condition to speak as she sustained 90-95% burn injuries on entire body.

G. As per deposition of three witnesses of fact i.e. PW-2- Fakira- father of deceased Neelam, PW-3 - Sudhir Kumar, brother of deceased Neelam and PW-7- Virma, mother of the deceased Neelam, there was no demand of dowry by the accused immediately before the incident and PW-3, brother of the deceased has even stated that she sustained incidental injury due to bursting of stove. This witness has also stated that PW-1 is his uncle and he is residing separately. Even as per statement of PW-5, Investigating Officer, it has not come on record that he has either recorded the statement of PW-4, Executive Magistrate, who recorded the alleged dying declaration or that the same was handed over to him in a sealed cover. Though, the dying declaration, there was an endorsement that same is handed over to PW-5, Sub Inspector- Naresh but there is no signature on this endorsement by PW-5 as receipt of the same which also raises a suspicion.

H. The dying declaration runs in 45 lines and the narration of events is given so accurately that even a witness in normal state of mind is not expected to depose with such precession specially when the PW-4 has stated that he took about one hours in recording the statement.

H. Even from the statement of other two witness, PW-6-Rafal

Singh Tomar, C.O., second I.O., it has not come that during investigation the dying declaration recorded by PW-4 was made part of the investigation. Similar is the statement of PW-9- Jay Prakash Upadhyay, another Investigating Officer who arrested the accused persons and submit the charge sheet as it is not stated by him that he received the dying declaration from PW-5, S.I.-Naresh. Therefore, dying declaration is doubtful and is not a reliable document and the benefit of doubt has to be given to the accused persons.

I. The trial court has not held the appellant Kamal guilty of offence under Section 498A IPC and 3/4 of Dowry Prohibition Act which is alleged in the dying declaration, to conspire with other accused who are the husband and family members of the in-laws of the deceased and, therefore, his conviction under Section 302 of IPC solely on the dying declaration is not sustainable when it is admitted by the prosecution witnesses that he does not belong to the family of husband Raju and his resident of a different village. Thus, the motive against appellant- Kamal is otherwise not proved.

50. In view of above, the impugned judgment of conviction and order of sentence are set aside. The appellant- Raju is in custody since the time of registration of FIR and his custody is more than ten years of actual sentence and twelve years with remission. The other accused were on bail during the trial and after the judgment of

conviction dated 10th January, 2020, they are in judicial custody and have undergone total period of custody of about five years and six months actual and more than six years and six months with remission. All the accused appellants have no criminal history. All the accused – appellants namely, Babli, Jaiprakash, Vimla, Raju and Kamal, are acquitted of the charges and they be released forthwith from the judicial custody.

51. All the appeals are accordingly allowed.

52. Record and proceedings be sent back to the Trial Court forthwith.

53. Ms. Muskan Pandey, learned Amicus Curiae be paid the requisite fee by High Court Legal Services Committee.

(2024) 9 ILRA 208

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 20.09.2024

BEFORE

**THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SAMIT GOPAL, J.**

Criminal Appeal No. 1872 of 2015
With other cases

**Jhande Yadav @ Jhundu @ Shiv Kumar
...Appellant
Versus
State of U.P. ...Respondent**

Counsel for the Appellant:

Adarsh Kumar, Ashutosh Pandey, Bansh Narain Rai, Kaushlendra Singh, R.S. Tewari, Rajesh Kumar Mishra, Tribhuwan Singh

Counsel for the Respondent:

G.A., Rakesh Dubey

A. Criminal Law – Criminal Procedure Code, 1973 – Section 374(2) – Appeal against conviction and Sentence – Evidence of one witness is based on hearsay – Other witnesses, except one, have been declared hostile – Effect – Testimony of single witness, who is the complainant – Reliability – Held, the case as it rests on the testimony of a single witness the same has to be wholly reliable. The testimony of PW-1 Babu Yadav cannot be in any manner said to be of sterling quality and he cannot be treated to be a witness wholly reliable. There has been falsehood stated by him, improvements in his statement and also variations which go to the root of the matter and in any event he cannot be trusted as a wholly reliable witness – High Court found sole eye witness namely Babu Yadav (PW-1) not a trustworthy witness and hence set aside the conviction order. (Para 47 and 63)

B. Criminal Trial – Criminal Procedure Code – Section 164 – Confession – Non-compliance of S. 164 – Effect – Duty of Magistrate clarified – Bhukin's case relied upon – A Magistrate recording a confession ought to question the accused merely with a view to discovering whether the proposed confession is voluntarily or on account of any inducement or threat and the Magistrate should not question the prisoner so as to get answers from him regarding the occurrence which would be inculpatory. The prisoner should be allowed to state whatever he wants and the confession should be recorded in his own words. (Para 59)

Criminal Appeal allowed. (E-1)

List of Cases cited:

1. Vaidvelu Thevar Vs St. of Madras; AIR 1957 SC 614

2. St. of Rajasthan Vs Bhola Singh; AIR 1994 SC 542

3. Lallu Manjhi Vs St. of Jharkhand ; (2003) 2 SCC 401

4. Bibin Kumar Mondal Vs St. of W.B.; (2010) 12 SCC 91

5. Takhaji Hiraji Vs Thakore Kubersing Chamansing; (2001) 6 SCC 145

6. Rajesh Yadav Vs St. of Uttar Pradesh; (2022) 12 SCC 200

7. Kashmira Singh Vs St. of M.P.; AIR 1952 SC 159

8. Kuthu Goala Vs St. of Assam; 1980 SCC OnLine Gau 21 : 1981 Cri LJ 424

9. Bhukin Vs King Emperor; 1947 SCC OnLine MP 81 : AIR 1948 Nag 344

10. Sarwan Singh Vs St. of Punj.; AIR 1957 SC 637

11. Kehar Singh Vs State (Delhi Admin.); AIR 1988 SC 1883

12. Mahabir Singh Vs St. of Har.; AIR 2001 SC 2503

(Delivered by Hon'ble Samit Gopal, J.)

1. These criminal appeals are connected together as being of co-accused persons which have been preferred against the judgement and order dated 15.4.2015 passed by the Additional District and Sessions Judge, Court No. 2, Kanpur Nagar in Session Trial No. 07 of 2003 (State vs. Indra Bahadur Singh and 8 others) whereby the accused-appellants Lalli Singh, Virendra, Jhande Yadav @ Jhundu @ Shiv Kumar, Chaloo Yadav @ Ram Chandra Yadav, Ghanshyam Singh, Jay Karan Singh, Jhallar Singh, Shivnath Yadav and Indra Bahadur Singh have been convicted

and sentenced under Section 147 I.P.C. to 01 year rigorous imprisonment and a fine of Rs.5,000/- each and in default of payment of fine to 01 month additional imprisonment, under Section 148 I.P.C. to 01 year rigorous imprisonment and a fine of Rs.5,000/- each and in default of payment of fine to 01 month additional imprisonment, under Section 302 read with 149 I.P.C. to life imprisonment and a fine of Rs.10,000/- each and in default of payment of fine to 02 months additional imprisonment. The sentences have been ordered to run concurrently and benefit of set off under Section 428 Cr.P.C. has been ordered to be extended to the convicted accused persons.

2. A First Information Report has been lodged against Harnam Singh, Indra Bahadur, Ghanshyam, Virendra, Lalli, Jaikaran and Jhallar, all being residents of village Sipai, Police Station Bindaki, District Kanpur Nagar.

3. During investigation complicity of Shiv Nath Yadav, Pappu Yadav, Chaloo Yadav @ Ram Chandra Yadav and Jhande Yadav @ Jhundu @ Shiv Kumar came to light and as such they were also made accused in the present matter. The investigation concluded and a charge sheet no. 129 of 2001 dated 05.8.2001 was filed against Lalli Singh, Jai Karan Singh, Jhallar Singh, Pappu Yadav @ Karpuri and Shiv Nath Yadav. Further Charge Sheet No. 129A of 2001, dated 20.09.2001 was submitted against Chaloo Yadav @ Ram Chandra @ Balbir and also against Jhande Yadav @ Jhundu @ Shiv Kumar as an absconder.

4. The accused Indra Bahadur Singh, Ghanshyam Singh, Harnam Singh and Virendra who were named in the F.I.R.

were exonerated by the Investigating Agency. They were subsequently summoned under Section 319 Cr.P.C.

5. In so far as Harnam Singh, son of Mani Singh is concerned, his trial stood abated vide order dated 16.10.2007 of the trial court. The trial of Pappu Yadav @ Karpuri also stood abated vide order dated 06.07.2013 of the trial court.

6. The prosecution case as per the F.I.R. lodged on 10.07.2001 at 07:45 a.m. by Babu son of Jagmohan of which Shyam Sunder is the scribe, against 07 named persons namely Harnam Singh, Indra Bahadur, Ghanshyam, Virendra, Lalli, Jaikaran and Jhallar is that around 02 months back Rs.50/- was to be taken from Desi Darji by the persons of sanger group and milk of Desi Darji used to be given to Babu Yadav and then the said persons demanded Rs.50/- of Desi Darji from him, on which he refused giving money and stated that he will only give it when Desi Darji tells him to return, on which the said persons scolded his son Narendra in Sidhi Bazar. His son had beaten Dinesh@Topilal the grandson of Harman Singh with kicks and fists. Due to this reason Sangers entered inside his house with lathi and dandas and assaulted them. The village persons intervened and got the matter settled but the said persons regularly used to extend death threats to them. Today on 09.07.2001 at mid-night his son Azad, like regular days, was at the tube-well for ensuring its safety wherein at about 11:00 p.m. Harnam Singh exhorted to murder him and then stated that he would take care of everything, after which his sons Indra Bahadur, Ghanshyam with Virendra, Lalli, Jai Karan, Jhallar and others armed with Barchhi and country-made pistols started moving ahead in which Virendra and Indra

Bahadur were carrying country-made pistols and Ghanshyam, Lalli, Jai Karan and Jhallar were carrying Barchhi with them. On suspicion, he and his brother namely Babu son of Jagmohan and Raj Bahadur son of Jagmohan proceeded from the village and as soon as they reached the tube-well and saw the said persons had already committed murder. Both the brothers have witnessed it and identified the accused persons well. On their shouts the accused persons while abusing ran away. They were seen in the moon-light and very well identified but due to fear he could not come to the police station earlier but now he has come to give an information.

7. The said F.I.R. was lodged as Case Crime No. 149 of 2001, under Sections 147, 148, 149, 302/34 I.P.C., Police Station- Bindaki, District Kanpur Nagar.

8. Investigation in the matter started and blood stained earth and plain earth, blood stained and plain ropes of cot were taken by the police and sealed on 10.07.2001 and memo of it was prepared. One pair of 'hawai chappal' of the deceased was also taken by the police and a recovery memo of the same was also prepared on 10.07.2001. The inquest on the body of the deceased was conducted on 10.07.2001.

9. Post mortem examination of the deceased Azad was conducted on 11.07.2001 at 01:00 p.m. by Dr. Somnath/P.W.-2. The following injuries were found on his body: -

“1. Multiple punctured wound in area 14cm X 13cm on the front and left side of chest, size 1.5cm x 1.5 cm x chest cavity deep, 12 in numbers, each wound

being 5cm in size. Margin sharp everted, 8cm below 8cm at notch, 6cm from Right nipple at 9 o'clock position, 8cm below left axilla.

2. Multiple punctured wound, 3 in numbers in area 16cm x 7cm x abdominal cavity deep. Margin sharp everted, 13cm above pubic symphysis 6cm from umbilicus at 10 o'clock position.

3. Stab wound 3 in numbers in area 9cm x 7cm x 2cm x trachea deep front and right side neck, 7cm above sternal notch. Cut at 3 side 6cm below chin, margin sharp everted.

4. Stab wound 3cm x 2cm x bone deep underlying maxilla cut, margin sharp on the right side face 1cm below right eye.

5. Lacerated wound, 4cm x 1.5cm on the right side forehead just above right eyebrow."

Cause of death was opined as haemorrhagic shock as a result of ante mortem injuries.

10. Blood stained earth, plain earth, blood stained ropes and plain ropes of cot were sent to chemical analyst for analysis who through his report dated 13.12.2001 opined that plain earth and blood stained earth appears to be of the same nature and plain rope of the cot and blood stained rope of the cot also appear to be of the same nature.

11. Investigation concluded and a Charge Sheet No. 129 of 2001 was submitted under Sections 147, 148, 149, 302/34 I.P.C. against Lalli Singh, Jaikaran Singh, Jhallar, Pappu Yadav@Kapoore and Shivrath Yadav.

12. Subsequently another Charge Sheet No. 129A of 2001 dated 20.09.2001 was submitted under Sections 147, 148, 149, 302/34 I.P.C. against Chaloo Yadav@Ram Chandra Yadav. In so far as

Jhande Yadav @ Jhundu@Shiv Kumar is concerned, he was charge sheeted as an absconder.

13. Vide order dated 09.07.2003 the Additional Sessions Judge, Court No. 5, Kanpur Nagar framed charges against Lalli Singh, Jai Karan Singh, Jhallar Singh, Pappu Yadav @ Karpuri, Shiv Nath Yadav, Chaloo@ Ram Chandra Yadav and Jhande Yadav under Sections 147 I.P.C., 148 I.P.C. and 302/149 I.P.C. The charges were read to the accused and explained to them who pleaded not guilty and claimed to be tried.

14. Vide order dated 05.08.2004 passed by the Additional Sessions Judge, Court No. 5, Kanpur Nagar, charges under Sections 147 I.P.C., 148 I.P.C. and 302/149 I.P.C. were framed against Harnam Singh, Indra Bahadur Singh, Ghanshyam Singh and Virendra. The said accused also were read and explained the charges, who pleaded not guilty and claimed to be tried.

15. The prosecution in order to prove its case produced the following witnesses:--

P.W.-1	Babu Yadav (first informant)
P.W.-2	Dr. Shobh Nath
P.W.-3	Virendra Yadav
P.W.-4	Constable Chandra Prakash
P.W.-5	S.I. Dal Chandra (Investigating Officer)
P.W.-6	Ram Asre
P.W.-7	Gautam Dhanuk
P.W.-8	Awadhesh Trivedi
P.W.-9	Virendra Singh@Neta son of Purushottam

16. With regards to the documentary evidence, the prosecution produced the following documents to prove charges against the accused, these are marked as under:

Ex.	Written report.

Ka-1	
Ex. Ka-2	Post Mortem Report
Ex. Ka-2A	Death report of Harnam Singh given by Gram Pradhan.
Ex. Ka-3	Chik F.I.R.
Ex.- Ka-4	Report regarding destruction of G.D.
Ex. Ka-5	Certified carbon copy of G.D. of registration of case.
Ex. Ka-6	Panchayatnama
Ex. Ka-7	Photograph of dead body
Ex. Ka-8	Challan of dead body
Ex. Ka-9	Letter of C.M.O.
Ex. Ka-10	Sample of seal
Ex. Ka-11	Recovery memo of plain and blood stained earth and plain and blood stained rope of cot.
Ex. Ka-12	Recovery memo of one pair of Hawai Chappal
Ex. Ka-13 and 15	Site plan
Ex. Ka-14	Report of Forensic Science Laboratory
Ex. Ka-15A	Charge Sheet against Lalli Singh and others
Ex.Ka-16	Memo of Attachment of accused Chaloo Yadav@Ram Chandra @ Balwan
Ex. Ka-17	Memo of attachment of accused Jhande@Jhandu Yadav
Ex. Ka-18	Charge Sheet against Jhande Yadav and Chaloo Yadav (as an absconder)

17. The material exhibit produced by the prosecution are as under:

Material Ex. -1 and 2	Slippers of deceased
Material Ex.-3	Blood stained earth
Material Ex.-4	Plain earth Clothes of deceased

Material Ex.-5	

18. The accused Jaikaran Singh, Jhallar Singh were produced before the Metropolitan Magistrate-IV, Kanpur Nagar on 02.08.2001 and their confessional statements under Section 164 Cr.P.C. were recorded. The accused Lalli Singh was produced on 25.07.2001 before the Metropolitan Magistrate-IV, Kanpur Nagar and his confessional statement was also recorded under Section 164 Cr.P.C.

19. Amongst the prosecution witnesses Birendra@ Neta and Awadhesh Trivedi were produced on 24.07.2001 before the Metropolitan Magistrate-IV, Kanpur Nagar and their statements under Section 164 Cr.P.C. were recorded. Further Gautam and Shivram the alleged witnesses were produced on 25.07.2001 before the Metropolitan Magistrate-IV, Kanpur Nagar and their statements under Section 164 Cr.P.C. were recorded.

20. Amongst the persons whose statements were recorded under Section 164 Cr.P.C. Shivram whose statement was recorded on 25.07.2001, was not produced in the trial.

21. Babu Singh Yadav P.W.-1 the first informant of the matter, reiterated the version stated by him in the F.I.R. and he states that the deceased Azad is his son. The incident is about 05 years and 04 months old. At about 11:30 p.m. he

was getting milk filled at the door of his house. His son Narendra used to bring milk from village after getting it miltched which used to be collected and then sold in the market. He was getting the same milk filled. The doors of his house and the doors of the shop of the accused Lalli are in front of each other. Harnam Singh was telling the other accused persons that they would finish Azad today as he has gone to sleep at tube-well. All the accused persons had collected at the shop of Lalli Singh. 2-3 months ago Dinesh the grandson of Harnam Singh who is also called Topilal and his son Narendra had a fight at Sidhi Bazar in which Narendra had assaulted him with kicks and fists. On the saying of Harnam Singh all the accused persons had entered into his house and assaulted ladies, him and his son with lathi and danda but the people of village had intervened and saved them. They had accepted their fault and had apologized for it by saying that they are not having the status to fight with them since they are only house of the caste in the village, but his son Azad did not extend apology. The accused persons even before the present incident used to threaten him of murdering him. The said incident was prior to the present incident. In the night of the present incident Harnam Singh told the other accused persons to murder Azad and after sometimes the accused persons were not seen and then he thought that they must have gone to his tube-well. He and his son Brijendra went to the tube-well.

They were carrying torches in their hands and night was also bright. Indra Bahadur Singh and Virendra Singh threatened them by putting country-made pistols on them and told them that if they move forward they will be murdered. Lalli, Jai Karan, Jhallar and Ghanshyam were assaulting his son Azad with Barchhi. Jhande, Pappu Yadav, Chaloo and Shiv Nath were carrying lathis and were standing nearby. When the accused persons after assaulting Azad, moved away towards 'nahar' then they picked up Azad and saw him to be dead. He states that report of the incident was dictated by him to his cousin brother Shyam Sunder at about 06:00 a.m. at that place and whatever he had written he had dictated to him, the same was read to him, he had put his thumb impression and then went to the Police Station and lodged it. After lodging of his report, S.H.O. reached the place of occurrence. The incident is of 09th and the report was lodged on 10th. He does not remember the month and the year since he is illiterate. The accused persons have murdered his son Azad as there was a prior incident of beating between Narendra and Dinesh.

In his cross-examination he states that he and his brother Raj Bahadur had gone at the place of occurrence. He states that previously he had stated that he and his son Brijendra had gone to the tube-well but the same is incorrect. His brother Raj Bahadur had gone with him. Brijendra had reached

the place of occurrence after half an hour of the incident. He states of dictating the report to Shyam Sunder. He states that he is an eye witness of the incident. He states that he has stated of 11 accused persons in the matter but in the F.I.R. name of only 07 accused persons have been given since he remembered their names only at the relevant time. He states that he saw Lalli, Jaikaran, Ghanshyam and Jhallar assaulting his son Azad with 'Barchhi'. He does not remember how many blows were given. In the morning when all the people collected, then the injuries on the body were counted which were found to be about 42 in number. There was no firearm used on the deceased. Virendra Singh and Indra Bahadur Singh did not fire but they had threatened him and his brother Raj Bahadur with their country-made pistols and assaulted them with fists on their chest and threatened them that if they moved forward they will be murdered. When his son Brijendra reached at the place of occurrence, by that time the accused persons had left the place and had proceeded towards the tube-well. He did not see the incident. The accused Shiv Nath, Jhande, Pappu and Chaloo were armed with lathis and were standing at that place but did not assault anyone or did any act with it. When he and his brother Raj Bahadur reached the place of occurrence at that time the accused persons were assaulting Azad and after their assault, when he went near Azad he found him to be dead. He then picked up Azad in his lap

and saw him, by that time the accused persons had moved out from that place. He states that after he and his brother Raj Bahadur were threatened with country-made pistols by Virendra and Indra Bahadur Singh, they did not try to run away as no one would run away at that time. They were not having any fear but still the accused did not assault them. They were pushing them back and stopped them to proceed further. They used to proceed further and then accused used to push them back. This carried on for about 15 minutes. In the said 15-20 minutes no accused assaulted him or Raj Bahadur. He states that he went to the Police Station along with Rajendra, Shyam Sunder and his brother Raj Bahadur. They went there on bicycle. They reached the police station at about 08.00 p.m. on the next day of the incident. He states that his statement under Section 161 Cr.P.C. was recorded on the day of incident. His brother Raj Bahadur was present in his house near the house of witnesses. He went to some distance from his house and then called his brother and told him that they have to come to the house. He called him from a distance of about 10 steps from the house of Raj Bahadur. The house of Raj Bahadur is about 30 steps away from his house. He states that he did not see the accused going to the place of occurrence. When he reached the place of occurrence then he saw the accused there. The accused did not go to tube-well in front of him. His tube-well is situated at a distance of about 4-10

furlong south of village. His tube-well is in the field where there is an orchard. He had told the Investigating Officer that Virendra and Indra Bahadur were stating to them to not come forward and pushed them back. This carried for about 15-20 minutes. If the investigating officer has not written this in his statement, he cannot tell the reason for it. He states to suggestion that it is incorrect that the accused persons are witnesses against him in a case and due to village enmity and political reasons he is falsely implicating them. Further he denies the suggestion that he has not seen the incident and on receiving information in the morning he found the dead body of his son Azad. He further states that Raj Bahadur is his brother and it is incorrect to state that he has not taken name of the person going with him but had stated that Brijesh was going with him.

22. P.W.-2 Dr. Somnath was posted on postmortem duty on 11.07.2001 at V.H.M., Kanpur Nagar. On that date he conducted the postmortem examination of Azad Yadav aged about 27 years. The injuries as noted by the doctor have already been mentioned above and as such are not being mentioned herein as being repetitive.

In his cross-examination he stated that there were 15 piercing injuries in all. He further stated that the injuries could have been caused by a hasia or any pointed weapon if it is used in a straight manner. He

further states that the incised wounds could have been caused by one weapon. They are likely to have been caused by a knife. He clarifies further after being recalled that in the postmortem in column of date he has incorrectly mentioned 07.11.2001 in place of 11.07.2001 and further in the column relating to the death he has wrongly mentioned 09.11.2001 in place of 09.07.2001.

23. P.W.-3 Virendra is the son of the first informant Babu and elder brother of the deceased Azad. His testimony is on the basis of hearsay evidence. He states that the incident is of 09.07.2001 at about 11 pm. He was at his house. Around 03 months ago his brother Narendra had a fight on Sidhi Itara. The fight was with Topilal @ Dinesh the grandson of Harinam with regards to the fact that he was taking milk of Desi Darji and his father had a due of Rs. 50/- on him. Topilal had demanded the money at Sidhi Itara Bazar. His brother Narendra said if Desi Darji tells him to give money then he would give him. Narendra was beaten by Topilal after which Narendra also beat him. He states that on 09.07.2001 at about 8 pm when he and other persons were filling milk then all the accused came in his house and entered inside and started assaulting everyone. They apologized to them but his brother did not. His brother had brought milk from Sone Gadaria. Lalli Singh caught hold of the hand of his brother and said that whoever has named him as Azad, he would

be finished. His father was sitting outside the house and after sometime all the accused persons were seen going towards his field on which his father became suspicious and his father took his uncle Bahadur with him and went towards the field where they saw all the accused persons assaulting. When his father came back home then he told them that Azad has been murdered. In the morning his father lodged a report at Police Station Bidhnoo. Due to the said enmity his brother has been murdered.

In his cross-examination he states that his brother Azad had gone to the tube-well at about 9 pm. He did not see the accused going to the tube-well. His father saw them going. He saw the accused coming to his house in the evening but after that did not see them going anywhere. When his father and uncle Bahadur went he was sleeping. He states that he was at the house and sleeping. His father came to the house at about 12 midnight and woke him up and told him about the incident. He lives in a separate house from his father but the same is also besides the house. His father told him that the accused persons have murdered Azad and told him about their names. As there was no facility of conveyance, report could not be lodged on the same day. On the next morning he went with his father for getting a report lodged along with uncle Shyam Bahadur. He states that he did not tell the Investigating Officer that in the

morning when his father and uncle came home then they told him that Azad has been murdered. He states that he had told the Investigating Officer that there is a suspicion that the persons who had come in the evening have murdered his brother. He went at the place of occurrence later. He is not an eye-witness of the incident. He states that when his father told him of the incident in the night he did not tell to anyone in the village. People gathered in the morning. He did not see his father and uncle going towards the field. The incident has been witnessed by Ghanshaym and his brother Vishram Singh. He states that it is incorrect that he is giving evidence against the accused since they are witnesses against them. He further denies the suggestion that his father and uncle went to the place of occurrence at 11 p.m. and came back in the morning. He states that he did not give the statement to the Investigating Officer that his father and uncle when came back in the morning then told him that Azad has been murdered. The said fact was told to him in the night. He had told the Investigating Officer about the names of the persons involved in the incident three months back. He had told the name of Topilal but did not tell the name of anyone else. He told the Investigating Officer that the persons who had fought three months back have been murdered. He is giving evidence on the basis of information given to him by his father and uncle.

24. P.W.-4 Chandra Prakash is the Head Constable who lodged the

first information report, prepared its chik and also prepared the corresponding GD of it. He states that the original GD of the same has been weeded out, a report of which has been given by the Record Keeper, Police Office which has been filed by him and marked as Exb: Ka-4. He proves the said documents and also proves the writing of Constable Kaushal Kishore.

25. P.W.-5 Dalchandra is the Investigating Officer of the matter. He states that after lodging of the first information report he took up the investigation himself and proceeded to the place of occurrence. He investigated the spot. The inquest on the body of the deceased was conducted and the relevant papers were prepared after which the dead body was sealed and sent for postmortem examination. The plain earth blood stained earth, plain rope of cot and blood stained cot rope were taken into custody and a memo of the same was prepared. A pair of hawai chappal of the deceased was also taken into possession and a memo of the same was prepared. In the presence of the informant he investigated the place of occurrence and prepared the site plan. He then recorded the statement of witnesses of inquest and that of other witnesses. He then raided the house of the accused. The material as collected from the place of occurrence was sent by him to the Forensic Science Lab and a report of the examination was received which is on record. On 16.07.2001

accused Harnaam Singh was arrested by him and his statement was recorded. On 22.07.2001 the accused Lalli Singh and Pappu were arrested and their statements were recorded. Both the accused gave their confessional statements under Section 164 Cr.P.C. for which they were sent to the court concerned and their statements were recorded. He then states to have conducted an inspection of the place of occurrence on the basis of pointing out of the accused and their confessional statement and prepared the site plan of it which is Exb: Ka-15. On 23.07.2001 accused Lalli Singh, witness Ram Asrey, Neta @ Virendra, Shivram, Gautam, Awdhesh and Pramod Pandey were interrogated and their statements under Section 164 Cr.P.C. were recorded. He states of filing of two charge-sheets which are dated 05.08.2021 and 20.09.2021. The details of the charge-sheets have also been mentioned above.

In his cross-examination he states that the place from where he collected the blood stained earth, the plain rope of cot, blood stained rope of cot and one pair of chappals is shown in the site plan dated 10.07.2001 which is Exb: Ka-13. It is the place where the tube-well of the informant is situated. On 22.07.2001 he states to have prepared another site plan which is of the place of murder of the deceased Azad. The place where murder was committed is the field of Monau Kumar. He did not get any blood stained earth at the said

place. The place where the body was thrown after murder is situated at about 92 steps away. He states that he interrogated the informant Babu in a question answer form and in the first question he asked about Shiv Nath Yadav and Pappu Yadav etc. coming out of his house in the evening and having a fight there on which he stated that Shiv Nath Yadav, Chalu Yadav and Lalli Yadav had come. On asking the names of the accused he stated that he has named all since he has enmity with them. He further states that during investigation he finds the name of Harnaam Singh, Indra Bahadur Singh, Ghanshaym Singh and Virendra Singh to be false and as such did not charge-sheet them.

In his cross-examination he states that Jhande Singh, Pappu, Shivrath, Ramchandra @ Chalu were not stated to have participated in the incident and to have been present therein. He states of recording the statement of Virendra on 14.07.2001. He states that the statement of Lalli Singh and Jai Karan Singh was recorded under Section 164 Cr.P.C. by the IVth Metropolitan Magistrate. He states that he and the Metropolitan Magistrate were of the same batch and for one year worked in the police department. He denies the suggestion that on his saying without the accused giving their confessional statement the Magistrate concerned has written their statements in his chambers in the presence of the said witnesses as they were known to each other and then the accused were made to sign on it and the accused persons

have not given any statement before the Magistrate concerned.

26. P.W.-6 Ram Aasrey is a resident of the same village as that of the first informant. He states that in the night at about 12 midnight he and Neta @ Virendra were going for making a call to Unnao where his relatives live. At the side of the road beneath a mango tree some people were talking on which he flashed his torch and saw 07 people namely Shiv Nath Yadav, Pappu, Jhande, Chahlu, Lalli, Jai Karan, Jhallar. They were conversing that if anyone tells about this murder then they will also let him meet the same fate. Due to fear he and the other person came back. In the morning they came to know in the village that Azad Yadav has been murdered in the night. On hearing about it he reached the place of occurrence where he saw the mother of the deceased crying and saying that Shiv Nath Yadav, Pappu, Jhande, Chahlu have murdered her son. He gave his statement to the Investigating Officer and also in the Court. Shiv Nath Singh was carrying a barchi in his hand, Jhande and Chahlu were also carrying barchi and Pappu was carrying a torch. Whatever he had heard the accused talking, he told the father of Azad about it.

In his cross-examination he states that he had seen the accused persons about four fields away from the tube-well of Azad. He told the father of Azad about the incident of the night at his door. He

did not give torch which he was carrying to the Investigating Officer and neither did the Investigating Officer see it. He even did not ask for it from him. He did not show the tree where the accused were talking to the Investigating Officer as the Investigating Officer told him that he has seen it. He states that he did not see the incident and cannot tell as to who committed the incident. He states to have given his statement under Section 164 Cr.P.C. on the saying of the Investigating Officer. He had given the same statement under Section 164 Cr.P.C. as to what he had given to the Investigating Officer. He denies the suggestion that since he has enmity with the accused he is giving a false evidence.

27. P.W.-7 Gautam Dhanuk is a resident of the same village as that of the first informant / P.W.-1 and his house is situated near the house of the informant. He states that on the day of incident at about 8-9 pm he heard shouts and abuses at the house of Babu Yadav. On hearing the same he went there. The lantern was burning at the place. He saw people fighting there but there were no talks with regards to Azad. The said witness was declared as hostile by the trial court.

In his cross-examination he states that he did not see Jhande Yadav, Chalu Yadav, Shiv Nath Yadav and Pappu Yadav at the door of Babu Yadav abusing. Lalli Yadav was also not present there. His statement was recorded by the

Investigating Officer. He had told him about the incident of abusing. He had told him that they were saying that Azad had not returned the money and insults them and they would see him. He states that on the next date he came to know that Azad has been murdered but he did not see it himself. He denies his statement as produced before him under Section 164 Cr.P.C. and states that he did not give any such statement.

28. P.W.-8 Awdhesh Trivedi is also a resident of the same village as that of the first informant / P.W.-1. He states that accused Pappu Yadav has died. He further states that on 15.07.2001 at about 5 pm accused Jhande, Shiv Nath, Chalu and Pappu did not come to him and neither did they talk of anything about the murder of Azad with him and also did not tell him about collectively murdering with Jhallar, Lalli Singh and Jai Karan. The said persons did not ask for any help from him. This witness was declared hostile.

In his cross-examination he states that he came to know that Azad has been murdered. He states that the Investigating Officer did not enquire anything from him about the murder. He denies that any such statement under Section 164 Cr.P.C. was recorded in Court on 25.07.2001. On being confronted with the said statement he states that he did not sign on the said pages before the Magistrate but the Investigating Officer got him signed on the papers. He

completely denies of recording of any such statement under Section 164 Cr.P.C.

29. P.W.-9 Virendra @ Neta is also a resident of the same village as that of the first informant / P.W.-1. He states that on 09.07.2001 he was not present in his village. On the said night Azad was murdered. He did not hear the accused persons talking and conspiring for the murder of Azad. He did not see them. He was declared hostile by the trial court.

In his cross-examination he states that he is illiterate. On showing his statement under Section 164 Cr.P.C., he states that he does not know as to who has affixed his thumb impression on it. He denies giving any statement before the Magistrate.

30. Shiv Shankar Verma was produced as C.W.-1 who testifies regarding death of the accused Harnaam Singh. He is a police personnel who at the time of the incident was posted at the Police Station Bidhnoo. He states that a report was called for regarding the death of Harnaam Singh and after taking a certificate from the Village Pradhan a report was sent to the court about it. In the said report it was mentioned that accused Harnaam Singh Sengar has died on 29.05.2007.

31. Pramod Kumar Pandey C.W.-2 is a resident of the same village as that of the first informant / P.W.-1. He states that he knows

the deceased. He states that he does not know when the present incident took place. He further states that he does not know anything about murder of Azad and as to who committed the same. He was declared hostile by the trial court.

In his cross-examination he states that he was not enquired by the Investigating Officer. His statement under Section 164 Cr.P.C. was shown to him to which he states that he did not give any such statement. He states that he does not know as to when and how the Investigating Officer has recorded the same. To a suggestion that he has colluded with the accused, he denies the same.

32. The accused in their statements under Section 313 Cr.P.C. denied the entire prosecution case and stated of being falsely implicated in the matter due to enmity. They state that the witnesses are giving testimony against them due to village party bandi.

33. The accused namely Lalli Singh, Jai Karan Singh and Jhallar whose statements under Section 164 Cr.P.C. have been recorded have denied the entire investigation and also stated of false implication.

34. The trial court thus after recording of the evidence has convicted the accused persons as stated above.

35. Heard Shri Bimla Prasad, Shri Ashutosh Pandey, Shri Rajesh

Mishra, Shri Mritunjay Datt Tiwari, Shri Awadh Bihari Pandey, learned counsels for the respective accused-appellants, Shri Rakesh Dubey, learned counsel for the complainant/first informant and Shri Jitendra Kumar Jaiswal, learned A.G.A. for the State in all the criminal appeals and perused the record and also the trial court records.

36. Learned counsels for the appellants submitted as under:

i) The appellants have been falsely implicated in the present case.

ii) The implication of Shivnath Yadav, Babu Yadav, Chaloo Yadav @ Ram Chandra @ Balwan and Jhande Yadav @ Jhundu @ Shiv Kumar in the present matter is an afterthought as the same has seen the light of the day during investigation. They are not named in the First Information Report.

iii) The accused Indra Bahadur Singh, Ghanshyam Singh, Harnam Singh and Virendra Singh were exonerated by the police as they were found to be falsely implicated who were later on summoned under Section 319 Cr.P.C. vide order dated 06.01.2004 of the court concerned. Their implication thus in the present matter is also false as the Investigating Agency did not find them involved in the matter.

iv) PW-1 Babu Yadav the first informant and father of the deceased Azad Yadav is a totally non reliable witness. He did not see

the occurrence. He although states to have followed the accused persons with his brother Raj Bahadur but in his statement in Court he initially states that he went to the place of occurrence with his son Virendra but later on states that he called Raj Bahadur and went with him. His movement and the person accompanying him is in variance.

v) There is an inordinate delay in lodging of the FIR inasmuch as the incident is stated to have taken place on 09.07.2001 at about 11:00 pm but the FIR was lodged on 10.07.2001 at 07:45 am by PW-1 Babu Yadav wherein the distance from the place of occurrence and the police station is only 12 kilometres.

vi) The conduct of PW-1 is totally an unnatural conduct. He states of going to the place of occurrence with one person accompanying him and is present at the place of occurrence to witness the murder of his son but he does not make any effort effectively to save his son. He states of being a witness to the murder and then returns back to the house and informs the other house members and then proceeds of lodging of the FIR on the next day morning.

vii) Raj Bahadur the brother of Babu Yadav PW-1 has not been produced before the Court. He is stated by Babu Yadav PW-1 to be the person who was accompanying him in the night to the place of occurrence and the said two persons are the only alleged eye witnesses of the incident but he has

not been produced in Court to give his testimony.

viii) The non production of Raj Bahadur before the trial court is an important and relevant fact and would go to show that the prosecution is concealing some relevant material from the court and as such an adverse inference should be drawn against the prosecution for the said conduct.

ix) The evidence of PW-3/Virendra Yadav the brother of the deceased and son of Babu Yadav is based on hearsay evidence. He gives a totally new story about the incident by introducing a fact before the court that before the present incident in the evening the accused persons entered inside his house and assaulted him and the other family members. The said fact is not in the prosecution version at any place. He also is a totally unreliable witness even though his evidence for the present incident is based on hearsay evidence.

x) PW-6 Ram Asre is not an eye witness of the incident. He also names four accused persons namely Shivnath Singh, Jhande, Chaloo and Pappu Yadav in the present matter despite the fact that they were not named in the FIR and states of the said persons along with other accused persons talking about committing the murder.

xi) PW-7 Gautam Dhanuk, PW-8 Awadhesh Trivedi and PW-9 Virendra Singh @ Neta although were also produced before the Magistrate and their statements under Section 164 Cr.P.C. were recorded but they have totally

disowned the prosecution version and have stated of not being a witness to any event. They have been declared hostile by the trial court.

xii) The motive as has been brought forward by the prosecution is a very weak motive since the same is stated to be some incident between Narendra the son of the first informant and Dinesh @ Topilal the grandson of co-accused Harnam Singh for Rs. 50/- of charges of milk of Desi Darzi but even Desi Darzi has not been produced and examined in the matter.

xiii) The present incident has taken place at the tube-well of the first informant in his fields which is away from abadi area. The incident appears to have taken place in the night which was noticed in the morning and then the same was reported by PW-1 at the police station in the morning at about 7.45 am.

xiv) The confessional statements of accused Jaikaran, Jhallar and Lalli Singh recorded under Section 164 Cr.P.C. cannot be given any credence as the same has been recorded against the procedures prescribed for it which has been affirmed by the courts. The said accused were not warned of the consequences of the said statements and were even not told of the procedure and warned in explicit words before recording of the same about the fact that the same may be read against them. The said statements cannot be given credence. Even otherwise the prosecution evidence has to be

tested and if found totally reliable then the statement of the accused under Section 164 Cr.P.C. if recorded as per the procedure and law can be seen to corroborate the prosecution version.

xv) The accused persons have been falsely implicated in the present case and the present case rests only on the testimony of PW-1 who is also not trustworthy at all and thus the present appeals deserve to be allowed and the accused-appellants deserve to be acquitted.

37. Learned counsel for the first informant submitted as under:

i) PW-1 Babu Yadav is a wholly reliable witness. He has given the details of the incident as witnessed by him in detail which is in no manner is false and unbelievable. He is the father of the deceased who went to the place of occurrence along with his brother Raj Bahadur after hearing talks of the accused persons and they have witnessed the incident.

ii) Raj Bahadur the brother of PW-1 went with him to the place of occurrence. He has been discharged by the prosecution on 30.08.2008 since the request of the prosecution was allowed by the Court and adverse inference regarding his not being produced before the Court cannot be drawn.

iii) The injuries as received by the deceased Azad Yadav and noted in the postmortem examination report corroborate with the prosecution case. The assault on the deceased is stated by

four persons with barchi. The injuries received by him are of the weapon as stated by the prosecution.

iv) The version of PW-1 as given in the court also corroborates with the medical evidence. The same thus shows that he was present at the place of occurrence and is an ocular witness to the same who has given a natural version of the incident.

v) The statements under Section 164 Cr.P.C. of accused persons Jaikaran, Jhallar and Lalli Singh would go to show that the concerned court after recording of their statements has made a note that it has made the said persons to understand that he is not being compelled to give the statement but if he does so then the said statement may be used as evidence against him and has then recorded its finding that the said statement has been recorded on the free will of the said accused persons. The said statements thus corroborate with the prosecution version and can be looked into.

vi) There is no delay in lodging of the FIR as the incident is of 11:00 pm of 09.07.2001 after which at 06:00 am the first informant got the report transcribed by the Shyam Sanehi and then proceeded on a bicycle to the police station which is at a distance of 12 kilometres and reached there and then the FIR was lodged at 07:45 am which is without unreasonable delay.

vii) The first informant has stated that due to fear he did not proceed in the night for lodging of

the FIR which is a reasonable explanation for not lodging the report in the night itself.

viii) The prosecution has succeeded in proving the case beyond reasonable doubt against the accused-appellants and as such their appeals be rejected and the judgment and order of the trial court be affirmed.

38. Learned counsel for the State has submitted as under:

i) There is no unreasonable delay in lodging of the FIR. The distance between the place of occurrence and the police station is 12 kilometres and the incident being in the night in a dare devil manner had put the first informant in fear and as such he proceeded to the police station in the morning at the earliest for lodging of the report.

ii) PW-1 Babu Yadav the first informant and father of the deceased is a wholly reliable witness and a natural witness. His version of the incident and also his movement which enabled him to become a witness of the incident is having no suspicion and improbabilities.

iii) The arguments of learned counsel for the first informant are reiterated.

iv) The prosecution has proved the case beyond reasonable doubt after which the trial court has convicted the accused-appellants with a well reasoned judgment and order which does not call for any interference in the same. The appeal be thus dismissed.

39. After having heard learned counsels for the parties and perusing the records, it transpires that Azad Singh the son of the first informant Babu Yadav is the deceased in the matter. The occurrence as per the FIR is stated to have taken place on 09.07.2001 at about 11:00 pm at the tubewell in the field of Babu of which the FIR was lodged on the next day i.e. 10.07.2001 at about 07:45 am. The distance between police station and the place of occurrence is 12 kilometres. The First Information Report states of the first informant going behind the accused persons along with his brother Raj Bahadur and then being a witness to the said murder. He states of dictating the First Information Report to Shyam Bahadur in the morning and then proceeding to police station for its lodging. The FIR was lodged against seven accused namely Harnaam Singh, Indra Bahadur, Ghanshyam, Virendra, Lalli, Jaikaran and Jhallar. During investigation, four other accused namely Shivnath Yadav, Pappu Yadav, Chaloo Yadav @ Ram Chandra Yadav and Jhande Yadav @ Jhandu @ Shiv Kumar were made as accused. After investigation, Harnaam Singh, Indra Bahadur Singh, Ghanshyam and Virendra were exonerated who were then summoned under Section 319 Cr.P.C. The first informant during trial initially states that he went behind the accused to the place of occurrence in the night with his son Virendra Yadav, later on states that he went with his brother Raj Bahadur. He further

states that he and Raj Bahadur were trying to proceed towards the deceased but the accused persons were pushing them back and threatening them of not proceeding further which stopped them from reaching the deceased.

40. Amongst the other witnesses examined in the trial, Virendra Yadav PW-3 although is the son of the first informant Babu Yadav/PW-1 and brother of the deceased but his evidence is based on hearsay basis.

41. Further the other witness of fact namely Ram Asre PW-6 has stated that he did not see the incident and as such he is not an eye witness of the incident.

42. In so far as the three other witnesses namely Gautam Dhanuk PW-7, Awadhesh Trivedi PW-8 and Virendra Singh @ Neta PW-9 are concerned they have totally disowned the prosecution case including their statements given to the Magistrate under Section 164 Cr.P.C. They have been declared hostile by the trial court. They are not of any help to the prosecution.

43. The case thus rests on the sole testimony of Babu Yadav PW-1 who is the first informant and the father of the deceased.

44. The Investigating Officer has although prepared a second site plan on the pointing out of the accused and has stated that the dead body was found at about 92 steps away from the tubewell but

the same is not reliable inasmuch as there was nothing found at the place where the dead body was found and even initially the site plan was prepared in which body was shown to be found at the tubewell. Moreover the second site plan was prepared on the pointing out of the accused which cannot be trusted and relied upon.

45. Raj Bahadur the brother of the first informant Babu Yadav who was the person stated by Babu Yadav to have accompanied him in the night to the place of occurrence and had witnessed the incident was an important and a relevant witness. For the reasons best known to the prosecution they did not produce him before the trial court and claimed his discharge which was allowed. The evidence thus of an important and a relevant witness was thus withheld and suppressed by the prosecution.

46. The confessional statements of the accused Jaikaran Singh, Jhallar and Lalli Singh recorded under Section 164 Cr.P.C. cannot be given credence. The said accused were not warned by the concerned Magistrate prior to recording of their statements. They were even not made to understand before recording of their statements that the same can be read against them and were not given time to think over and then depose. The reading of the statement goes to show that the statements were recorded in a mechanical manner and then the Magistrate concerned made a note therein that he had

warned the accused and had made him to understand the consequences but they volunteered to give their statements.

47. The case as it rests on the testimony of a single witness the same has to be wholly reliable. The testimony of PW-1 Babu Yadav cannot be in any manner said to be of sterling quality and he cannot be treated to be a witness wholly reliable. There has been falsehood stated by him, improvements in his statement and also variations which go to the root of the matter and in any event he cannot be trusted as a wholly reliable witness.

The law with regards to appreciation of evidence of a solitary witness

48. In the case of **Vadivelu Thevar Vs. State of Madras : AIR 1957 SC 614**, the Apex Court while examining the case of solitary witness, held as follows:

“11.....Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness,

incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.
.....”

49. In the case of **State of Rajasthan Vs. Bhola Singh: AIR 1994 SC 542** the Apex Court held as under:

“5. From the abovestated facts, it can be seen that the case rested entirely on the solitary evidence of PW 1. The High Court has pointed out several infirmities in the evidence of PW 1. **It is well settled that if the case rests entirely on the sole evidence of the eyewitness, such testimony should be wholly reliable.** In this case, the occurrence admittedly took place in the darkness. The two accused were also sleeping in the courtyard along with the other family members, out of whom three were unfortunately killed on the fateful night. PW 1 categorically stated that she woke up only when her mother-in-law was beaten by one of the accused but yet she added that she saw her father-in-law and husband who were sleeping in the courtyard of the house being murdered by the miscreants. This is a clear infirmity in her evidence. That apart, it is highly doubtful that there was any light with the help of which she could have identified the accused.

On the other hand, a story was built up that an electric bulb was burning, in support of which there is no material.”

50. In the case of **Lallu Manjhi Vs. State of Jharkhand : (2003) 2 SCC 401** it has been held by the Apex Court as under:

“10. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. (See: Vadivelu Thevar v. State of Madras [AIR 1957 SC 614 : 1957 Cri LJ 1000].)”

51. The Apex Court in the case of **Bibin Kumar Mondal Vs. State of West Bengal : (2010) 12 SCC 91**, examined the sole testimony of a witness and the following observations has been made:

“31. In Sunil Kumar v. State (Govt. of NCT of Delhi) [(2003) 11

SCC 367 : 2004 SCC (Cri) 1055] this Court repelled a similar submission observing that : (SCC p. 371, para 9)

“9. ... as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But, if there are doubts about the testimony the courts will insist on corroboration.”

In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise.”

Adverse inference

52. On the issue of non-examination of material witness, in **Takhaji Hiraji Vs. Thakore Kubarsing Chamansing : (2001) 6 SCC 145** the Apex Court held as under:

“19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a

gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses...”

(Emphasis supplied)

53. In **Rajesh Yadav Vs. State of Uttar Pradesh : (2022) 12 SCC**

200 on the issue of non-examination of witness, it was held by the Apex Court as under:

“Non-examination of witness

34. A mere non-examination of the witness per se will not vitiate the case of the prosecution. It depends upon the quality and not the quantity of the witnesses and its importance. If the court is satisfied with the explanation given by the prosecution along with the adequacy of the materials sufficient enough to proceed with the trial and convict the accused, there cannot be any prejudice. Similarly, if the court is of the view that the evidence is not screened and could well be produced by the other side in support of its case, no adverse inference can be drawn. Onus is on the part of the party who alleges that a witness has not been produced deliberately to prove it.”

164 Code of Criminal Procedure

54. Section 164 of the Code of Criminal Procedure, 1973 reads as follows:

“164. Recording of confessions and statements.- (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the

commencement of the inquiry or trial:

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.

Magistrate."

(5) Any statement (other than a confession) made under subsection (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried."

55. The law with regards to confession is trite. In the case of **Kashmira Singh Vs. State of M.P. : AIR 1952 SC 159** it has been held by the Apex Court as under:

"A confession cannot be made the foundation of a conviction and can only be used in "support of other evidence."

56. In the case of **Kuthu Goala Vs. State of Assam : 1980 SCC OnLine Gau 21 : 1981 Cri LJ 424** it was held that a Magistrate must take care to see that the requirements of law. It was held as under:

"15. The act of recording confessions under Section 164, Cr. P.C. is a solemn act, and in discharging his duties under the said section, the Magistrate must take care to see that the requirements of law under Section

164, Cr. P.C. must be fully satisfied. It would be necessary in every case to put the questions prescribed by the High Court circular, but the questions intended to be put should not be allowed to become a matter of mere mechanical enquiry and no element of casualness should be allowed to creep in. The Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary. The whole object of putting questions to an accused who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise, having reference to the charge against the accused, as mentioned in Section 24 of the Evidence Act.”

In the judgment of **Kuthu Goala (Supra)** Lahiri, J. while dealing with the question of voluntariness of a confession observed as under:

“26. What ought to be the presumption as to the state of mind of an accused who has just committed a gruesome offence like murder? The author of confession belongs to a class of persons known as criminals. Does it really stand to scrutiny that of criminal having committed murder can keep his composure, retain his mental faculty intact; retain his receptive capacity to understand the implications of the warnings. A confession must be “perfectly voluntary” otherwise the Court should reject it. The term “voluntary” means one who does anything of his own free will it

must be made spontaneously on his own volition. After commission of such a crime the existence of state of mind cannot be normal. Therefore, is the need to establish that the state of mind of the author was fit enough to make a voluntary incriminatory statement comprehending the implications of his admission. The warnings set forth in S. 164 of the Code are merely illustrative and not exhaustive. In my opinion, a Magistrate recording confession must make inquisitorial enquiry and make adequate exercise to ascertain the impelling reason of the prisoner to confess his guilt. Penitence, qualms of conscience, remorse etc. might be the ready and prepared answers. He must find out the real motive behind making the confession. If he finds that the reason to be well-grounded and the prisoner has a real, genuine and impelling motive to make a clean breast of his crime, he must proceed to record the confession. However, if the answers are halting, incoherent and do not appear to be cogent, the recording Magistrate should cry a halt. The basic object to entrust the serious business of recording confession upon the judicial officers is that they must exercise their judicial knowledge and wisdom to find out whether it is a voluntary confession or not. To adjudge voluntariness, in my opinion, two basic factors should be taken note of. First, the existing mental condition of the prisoner. The Magistrate ought to proceed with the assumption that the prisoner is labouring under

mental agony or disorder having arrayed as an accused of a crime. A man in peril undergoing distress and torture, worry and strain is ordinarily not mentally fit person to make a statement to endanger his life and liberty. The Prosecution must confirm that the judicial mind of the recording officer was satisfied, by some objective tests; that a mentally disabled person coming from a criminal class was mentally fit enough to understand the implications of the warnings and to make a fatal statement. Secondly, the Magistrate must satisfy the court by documentary or oral evidence that he had fully exercised his judicial mind to get the real motive or the impelling factor which prompted the prisoner to make the confession. Failing, a confession ought not to be accepted as voluntary?"

(Emphasis supplied)

57. The rule of prudence for Magistrates to typically adhere to certain guidelines to ensure the voluntary nature of confessions are as under:

(a) After issuing warnings to the individual making a confession under subsection (2), the Magistrate should allow ample time for reflection. There's no strict rule regarding the duration, but it's crucial that the confessor's mind is free from any potential police influence. Typically, if the individual is transferred from police custody, they are held in jail custody for at least a day before their confession is recorded.

(b) In every inquiry, the accused must be questioned about their custody prior to appearing and their custody afterward, as well as the treatment they received. This inquiry ensures no external influence, particularly from sources favouring the prosecution, is lingering in the accused's mind. If there are any injuries on the accused, they should be asked how they sustained them.

(c) If the accused is handcuffed, the Magistrate should order their removal, and any individuals likely to influence the accused should be asked to leave, creating a free atmosphere.

(d) The accused should be assured, explicitly, of protection from any potential torture or pressure from external agents such as the police if they decline to make a statement. Additionally, subsection (3) prohibits remanding the accused to police custody if they express unwillingness to confess when brought before the Magistrate.

(e) The accused should be asked about the reason for making a statement that goes against their self-interest during the trial. They should also be informed that even if they retract the confession later, it remains admissible as evidence against them. Failure by the Magistrate to inquire about the accused's reason for confessing was deemed a non-compliance, curable under Section 463.

(f) The Magistrate recording the confession must understand their role as a judicial officer, ensuring the statement is made

voluntarily. They should pose questions to ascertain voluntariness, and the record of the confession should reflect these inquiries. While it's necessary to ask the questions prescribed by the High Court Circular, it's crucial that the inquiry isn't mechanical, and there's no hint of casualness. The Magistrate must be fully satisfied that the confession is truly voluntary, ensuring it's not induced by threats, promises, or inducements referenced in Section 24 of the Evidence Act.

(g) A confession must be entirely voluntary; otherwise, the court should reject it. The Magistrate should make an inquisitorial inquiry to understand the prisoner's compelling reason to confess. If the reason appears well-grounded, genuine, and compelling, the confession should be recorded. However, if the answers are hesitant, incoherent, or lack cogency, the recording Magistrate should stop the process.

(h) To assess voluntariness, the Magistrate should consider two factors: the accused's mental state and the Magistrate's own judicial assessment of the motive behind the confession. The Magistrate must ensure that mentally disabled individuals understand the implications of the warnings and the confession they're making.

(i) The Magistrate must provide documentary or oral evidence demonstrating their full exercise of judicial mind to understand the motive behind the confession. (j) If the prisoner can write, they may be asked to write

their own confession. This ensures the confession is in the prisoner's own words and confirms their mental capability to translate thoughts into writing. The inability to write the confession, despite being otherwise capable, suggests mental incapacity to express thoughts in writing, a point emphasised in the Kuthu Goala case (1980 SCC OnLine Gau 21).

Non-Compliance of Section 164 Cr.P.C.

58. Some of the legal ramifications of non-compliance with the provisions of Section 164 Cr.P.C. is of the individual making the confession might not have been cautioned as required by Section 164(2) Cr.P.C., the Magistrate might have failed to record the confession or statement in accordance with Section 164(4) Cr.P.C. or in the manner provided by Section 281 Cr.P.C. or the Magistrate might have omitted to make a memorandum as required by Section 164(4) Cr.P.C.. Section 463 Cr.P.C. aims to address some of these defects and irregularities in the recording of confessions or statements of the accused under Section 164.

59. In the case of **Bhukin Vs. King Emperor : 1947 SCC OnLine MP 81 : AIR 1948 Nag 344** it was held that a Magistrate recording a confession ought to question the accused merely with a view to discovering whether the proposed confession is voluntarily or on account of any inducement or

threat and the Magistrate should not question the prisoner so as to get answers from him regarding the occurrence which would be inculpatory. The prisoner should be allowed to state whatever he wants and the confession should be recorded in his own words.

60. Further in the case of **Sarwan Singh Vs. State of Punjab : AIR 1957 SC 637**, the Apex Court held as under:

“ the questions intended to be put under sub-s.(3) of 164 should not be allowed to become a matter of a mere mechanical enquiry”. “The whole object of putting questions to an accused person who offers is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having, reference to the charge against the accused person as mentioned in Sec.24 of Indian Evidence Act”. “That in ordinary circumstance an interval of twenty four hours may be regular as reasonable time for reflection is not to be taken as an absolute rule and as laying down that, whatever the circumstances, a confession recording without allowing time for reflection is to be rejected as a confession that is not voluntary”. “ The act of recording confession u/s.164 is a Solemn Act and in discharging his duties, under that section, the Magistrate must take care to see that the requirements of law must be fully satisfied”...

61. In the case of **Kehar Singh Vs. State (Delhi Admin.) : AIR 1988 SC 1883** it was held as under:

“Where the confessional statement neither points out the warning against the making of the confession, nor does it show that the confession was made voluntarily not sufficient time was given to the person making the confession to have a cool reflection, the confessional statement is liable to be rejected”.

62. In the case of **Mahabir Singh Vs. State of Haryana : AIR 2001 SC 2503** it was held as under:

“As the confession recorded by PW-2 cannot be brought under Section 164 of the Code it is an idle exercise to consider whether it was voluntary or true. We may again point out, PW-2 has not stated that before taking down the confession he explained to Ranbir Singh that he was not bound to make the confession, and that if he did so, such confession might be used as evidence against him. This is sine qua non for recording a confession. Further a Magistrate is forbidden from recording any such confession until he gets satisfaction that the person is going to make a voluntary confession. There is nothing in the evidence of PW-2 that he had adopted such precaution. For all those reasons we keep that document out of the ken of consideration in this case”.

63. Looking to the facts of the case, the law on the subject and the nature of evidence produced, the sole eye witness Babu Yadav PW-1 is not a trustworthy witness, the appeal thus succeeds and is **allowed**.

64. The judgment and order dated 15.04.2015 passed by Additional District and Sessions Judge, Court No.2, Kanpur Nagar of Sessions Trial No. 07 of 2003 is hereby set aside.

65. The appellants are acquitted of the charges levelled against them. The appellants are on bail. Their bail bonds are cancelled and sureties discharged.

66. Office is directed to transmit the trial court records along with a copy of this judgment to the trial court forthwith for its compliance and necessary action.

(2024) 9 ILRA 234

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 02.09.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 1992 of 2015

Durvesh @ Pappu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:

Muskan Pandey, Arvendra Singh, Shashi
Kumar Mishra

Counsel for the Respondent:

Govt. Advocate

A. Criminal Law - Criminal Procedure Code, 1973-Section 374(2)-Indian Penal Code, 1860-Sections 376 & 3/4 POC SO Act-the victim initially supported the prosecution's version during the trial, describing the assault and identifying the

accused-later in cross-examinations she retracted her earlier testimony, claiming no assault occurred and attributing her injuries to other causes(e.g. a bull's horn)-the victim's father also contradicted his earlier statement, stating no assault occurred-Held, in cases of sexual assault, an initial consistent testimony by the victim corroborated by medical and forensic evidence can form the basis for conviction, even if later testimony retracts or contradicts earlier statements-Injuries consistent with sexual assault corroborated by forensic evidence(e.g. presence of spermatozoa), hold decisive evidentiary value in proving guilt beyond reasonable doubt-The court upheld the conviction-However, life imprisonment sentence was modified and reduced to 14 years of rigorous imprisonment-The fine was enhanced from Rs.50,000 to 1,00,000 payable to the victim.(Para 1 to 37)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Suresh Kumar Vs St. of U.P & anr. CRLA NO. 3309/2020
2. Sonu Kanoujia Vs. St. of U.P. & anr. ,Jail Appeal No. 75 of 2021
3. T.K. Gopal Vs. St. of Kar.(2000) 6 SCC 168
4. Bhaggi @ Bhagirath @ Naran Vs. St of M.P.(2024) 5 SCC 782
5. Ravada Sasikala Vs. St. of A.P.(2017) AIR SC 1166
6. Jameel Vs. St. of U.P.(2010) 12 SCC 532
7. Guru Basavraj Vs. St. of Kar.(2012) 8 SCC 734
8. Sumer Singh Vs. Surajbhan Singh(2014) 7 SCC 323
9. St. of Punj.Vs. Bawa Singh (2015) 3 SCC 441
10. Raj Bala Vs. St. of Har.(2016) 1 SCC 463

(माननीय डा० न्यायमूर्ति गौतम चौधरी
द्वारा पारित न्याय- पत्र)

1. वर्तमान दण्डिक अपील अपीलार्थी/अभियुक्त दुर्वेश उर्फ पप्पू की ओर से मु०अ०सं० 100/2013 अंतर्गत धारा 376 भा.दं.सं. एवं 3/4 पॉक्सो एक्ट थाना किशनी, जिला मैनपुरी से उद्भूत सत्र परीक्षण सं. 367/2013 में अपर सत्र न्यायाधीश, न्यायालय सं. 01, मैनपुरी द्वारा पारित निर्णय दिनांक 24.03.2015, जिसके द्वारा अपीलार्थी को धारा 376 भा.द.वि. के अपराध के लिए आजीवन कारावास व 30 हजार रुपये अर्थदण्ड तथा धारा 3/4 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अपराध के लिए 10 वर्ष के कठोर कारावास एवं 20 हजार रुपये अर्थदण्ड से दण्डित किया गया है, के विरुद्ध दायर की गयी है।

2. वाद के सुसंगत तथ्य संक्षेप में इस प्रकार है कि वादी/प्रार्थी वीरेन्द्र सिंह द्वारा एक लिखित तहरीर थानाध्यक्ष किशनी को इस आशय की दी गयी कि प्रार्थी ग्राम भोजपुर वंजारा, थाना किशनी का निवासी है। दिनांक 03-04-13 को वह अपने घर पर मौजूद था, उसकी पुत्रियाँ, रतन सिंह पूर्व माध्यमिक

विद्यालय भोजपुर चौकोना के सामने कंडे पाथ रही थी, वहीं पर उसका लड़का प्रदीप कुमार खड़ा था, तभी गाँव का पप्पू उर्फ दुर्वेश पुत्र जवाहर सिंह आया और उसकी सबसे छोटी पुत्री (पीड़िता) उम्र करीब 8 वर्ष को टॉफी देने की कहकर अपने साथ स्कूल से आगे को लिवाकर ले गया। थोड़ी देर बाद समय करीब 9-00 बजे पीड़िता की चीख-पुकार सुनाई दी, तब कंडे पाथ रही प्रार्थी की अन्य पुत्रियाँ तथा पुत्र प्रदीप कुमार चीख पुकार आने की तरफ भाग कर गये, उन्होंने देखा कि महाराम सिंह निवासी जमसिंहपुर के अरहर के खेत में पप्पू उर्फ दुर्वेश उसकी पुत्री पीड़िता के साथ बुरा काम (बलात्कार) कर रहा था। प्रार्थी के पुत्र व पुत्रियों को देखकर अभियुक्त मौके से भाग गया। पीड़िता का गुप्तांग फटकर काफी लहलुहान हो रहा था, जिसे प्रार्थी तथा उसका दामाद राजवीर सिंह तथा परिवार वाले उपचार हेतु अस्पताल ले जा रहे थे कि 108 नम्बर गाड़ी ऊसराहार में मिल गई उससे पीड़िता को सरसई नावर अस्पताल ले गये, वहाँ के डाक्टर साहब ने पीड़िता की हालत गम्भीर होने के कारण जिला अस्पताल इटावा के लिये रेफर कर दिया। पीड़िता को प्रार्थी के

दामाद राजवीर सिंह व परिवार वाले लेकर गये हैं, जिसका उपचार इटावा में हो रहा है । अतः रिपोर्ट लिखकर कार्यवाही किया जावे ।

विद्वान अपर सिविल जज (अवर वर्ग) / न्यायिक मजिस्ट्रेट, कोर्ट नं०-5, मैनपुरी द्वारा पत्रावली सेशन सुपुर्द किया गया ।

3. प्रार्थी की उक्त तहरीर थाना किशनी में अपराध संख्या 100/13. धारा 376 भा० दं० वि० में दर्ज कर मामले की विवेचना की गयी । विवेचना के दौरान सम्बन्धित जिला महिला चिकित्सालय इटावा से पीड़िता का मेडिकल परीक्षण रिपोर्ट तथा पूरक परीक्षण रिपोर्ट प्राप्त किया गया । सामुदायिक स्वास्थ्य केन्द्र सरसई नावर की रिपोर्ट प्राप्त की गयी। घटना स्थल का मानचित्र बनाया गया, साक्षियों के कथन अंकित किये गये । घटना स्थल से खून आलूदा मिट्टी व सादी मिट्टी तथा पीड़िता की शर्ट व स्कर्ट खून आलूदा कब्जे पुलिस में लेकर फर्द तैयार किया गया। अभियुक्त दुर्वेश उर्फ पप्पू का कच्छा बरामद कर फर्द तैयार किया गया । विवेचनोपरान्त अभियुक्त दुर्वेश उर्फ पप्पू के विरुद्ध प्रथम दृष्टया धारा 376 भा०दं०वि० व धारा 3/4 पोक्सो अधिनियम का अपराध साबित पाये जाने पर आरोप पत्र विचारण हेतु न्यायालय में प्रेषित किया गया ।

4. अभियुक्त दुर्वेश उर्फ पप्पू के विरुद्ध दिनांक 10-09-13 को धारा 376 भा०दं०वि० व 3/4 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अपराध के लिये आरोप विरचित किया गया। अभियुक्त द्वारा अपराध अस्वीकार करते हुये विचारण की माँग की गयी ।

5. अभियोजन द्वारा अपने कथन के समर्थन में अभियोजन साक्षी सं० 01 पीड़िता, अभियोजन साक्षी सं० 02 वीरेन्द्र सिंह, अभियोजन साक्षी सं० 03 काँ० 815 जितेन्द्र सिंह, अभियोजन साक्षी सं० 04 डा० श्रीमती स्मिता सिंह, अभियोजन साक्षी सं० 05 डा० मोहम्मद अजहर सिद्दीकी, अभियोजन साक्षी सं० 06 डा० के० के० तिवारी, अभियोजन साक्षी सं० 07प्रभारी निरीक्षक राजबहादुर शर्मा तथा अभियोजन साक्षी सं० 08 भगवान सिंह का परीक्षण न्यायालय के समक्ष कराया गया। दस्तावेजीय साक्ष्य में अभियोजन की ओर से तहरीर प्रदर्श क-1, चिक प्रथम सूचना रिपोर्ट प्रदर्श क-2. जी०डी०

संख्या 19 समय 11.30 बजे प्रदर्श क-3, जी० डी० संख्या 37 समय 22.00 बजे प्रदर्श क-4, तथा जी०डी० प्रदर्श क-5, मेडीकल रिपोर्ट प्रदर्श क-6. पूरक मेडीकल रिपोर्ट प्रदर्श क-7, अधीक्षक सामुदायिक स्वास्थ्य केन्द्र सरसई नावर द्वारा थानाध्यक्ष किशनी को लिखे पत्र प्रदर्श क-8, डा० के० के० तिवारी जिला चिकित्सालय इटावा की रिपोर्ट प्रदर्श क-9, नक्शा नजरी प्रदर्श क-10, फर्द लेने कब्जे पुलिस खून आलूदा व सादी मिट्टी प्रदर्श क-11, फर्द लेने कब्जे पुलिस शर्ट व स्कर्ट पीड़िता प्रदर्श क-12, फर्द वावत् लेने कब्जे पुलिस एक कच्चा अभियुक्त दुर्वेश उर्फ पप्पू प्रदर्श क-13, आरोप पत्र प्रदर्श क-14 तथा विधि विज्ञान प्रयोगशाला की रिपोर्ट 36-अ प्रस्तुत किया गया ।

6. **अभियोजन साक्षी सं० 01-** पीड़िता ने विचारण न्यायालय के समक्ष दिये गये कथन में बताया कि उसके साथ बुरा काम हुआ था। **साक्षी ने पीछे देखकर कहा कि अभियुक्त दुर्वेश जो हाजिर अदालत है ने उसके साथ सुबह बुरा काम किया था । उक्त अभियुक्त ने उसके साथ खेत में बुरा काम किया था, बुरा काम के समय उसके शरीर से**

खून निकला था । इसके बाद उसका इलाज अस्पताल में चला था, जिस खेत में उसके साथ बुरा काम किया गया था उस खेत में अरहर की फसल खड़ी हुयी थी । अभियुक्त द्वारा बुरा काम करते समय वह चिल्लाई थी, चिल्लाने पर चाचा आ गये थे, चाचा ने पूछा कि तुम्हारे साथ किसने बुरा काम किया तब उसने बताया कि दुर्वेश ने बुरा काम किया है ।

इस साक्षी ने दिनांक 17-01-14 को अपने प्रतिपरीक्षण में दिये गये कथन में बताया कि आज वह अपनी मम्मी पापा के साथ आई है । हाजिर अदालत मुल्जिम रिश्ते में उसका चाचा लगता है, हाजिर अदालत मुल्जिम दुर्वेश उर्फ पप्पू उसे अरहर के खेत में नहीं ले गया था और ना ही अरहर के खेत में टॉफी आदि कुछ खाने को दिया था, बुरा काम का मतलब गाली देने से होता है। मुल्जिमान ने उसका कच्चा व स्कर्ट नहीं उतारी थी, मुल्जिमान ने अपनी पेशाब का रास्ता उसके पेशाब के रास्ते में नहीं डाली ली। भैंस के सींग मार देने से उसकी पेशाब के रास्ते में चोट आई थी। पुलिस ने उससे कोई पूछताछ नहीं किया था, उसके पिता ने क्या रिपोर्ट

लिखाई उसे नहीं मालूम । इस स्तर पर इस साक्षी को ए०डी०जी०सी० फौजदारी द्वारा पक्षविरोधी घोषित करते हुये न्यायालय की अनुमति से प्रतिपरीक्षण किया गया । इस साक्षी ने अपने प्रतिपरीक्षण में दिये गये कथन में बताया कि उसका इलाज जिला इटावा में चला था 10-12 दिन अस्पताल में भर्ती रहकर उसका इलाज चला था, वह आज से पूर्व इसी अदालत में बयान देने आई थी और सही बयान दिया था ।

7. **अभियोजन साक्षी सं० 02-** वीरेन्द्र सिंह ने विचारण न्यायालय में बयान दिया है कि पीड़िता उसकी पुत्री है, घटना के समय उसकी उम्र 8 वर्ष थी । आज से 10-12 माह पहले की घटना है, समय दिन के 8-00 बजे का था वह अपने घर पर मौजूद नहीं था उसकी पुत्री अर्चना और पीड़िता विद्यालय के पास कण्डे पाथ रही थी, उस समय उसका लड़का प्रदीप वहाँ नहीं था पीड़िता को कोई भी व्यक्ति टॉफी देने के बहाने नहीं ले गया था । पीड़िता के साथ हाजिर अदालत मुल्जिम पप्पू उर्फ दुर्वेश द्वारा कोई भी बुरा काम (बलात्कार) नहीं किया गया था। वह दस्तखत करना जानता है कागज संख्या

53/3 को देखकर कहा कि इस पर उसके हस्ताक्षर हैं जिस पर प्रदर्श क-1 डाला गया ।

इस स्तर पर इस साक्षी को ए०डी०जी०सी० फौजदारी द्वारा पक्षद्रोही घोषित करते हुये प्रतिपरीक्षण में सवाल पूछे गये । साक्षी ने बताया कि भगवान सिंह वंजारा उसका भतीजा है प्रदर्श क-1 उसके भतीजे भगवान सिंह का लिखा हुआ है उसने भगवान सिंह को कुछ नहीं बोला था वह तथा भगवान सिंह थाना किशनी नहीं गये थे । प्रदर्श क-1 न तो उसने अपने घर पर और न ही थाना किशनी में लिखवाया था उसे अस्पताल इटावा से पुलिस लेकर आई तब थाने में रिपोर्ट लिखाई थी । इटावा से उसे थाना किशनी की पुलिस लेकर आई थी, पुलिस वाले एक मार्शल में थे, पुलिस वालों को इटावा इलाज कराने की बात गाँव वालों ने झूठा फोन करके बता दिया था । उसकी पुत्री को टाफी देने वाली बात तथा उसके साथ बुरा काम करने वाली बात दरोगाजी ने लिखवाई थी । उसने प्रदर्श क-1 दरोगा जी द्वारा झूठा लिखाने वाली बात की शिकायत मौखिक अथवा लिखित किसी भी प्रशासनिक अधिकारी, न्यायिक

अधिकारी, पुलिस अधिकारी को नहीं की थी। वह घटना के दिन घर पर नहीं था, वह घटना के 2-3 दिन बाद घर पर आया था, वह पीड़िता को इलाज हेतु स्वयं नहीं ले गया था, गाँव वाले ले गये थे। घटना के 2-3 दिन बाद पीड़िता के इलाज होने वाले अस्पताल गया था। जिस दिन अस्पताल पहुँचा उसी दिन शाम को दरोगा जी अस्पताल से थाने लाये थे। उसकी पुत्री पीड़िता भैंस के पास से गोबर उठा रही थी, भैंस घर पर बंधी थी, उसे नहीं पता कि पीड़िता खड़े होकर गोबर उठा रही थी अथवा बैठकर। दरोगा जी से उसकी कोई लड़ाई नहीं थी और न ही पप्पू उर्फ दुर्वेश से उसकी कोई लड़ाई थी। इस साक्षी ने अपने कथन में यह भी बताया कि उसके बयानों में अभियुक्त पप्पू उर्फ दुर्वेश द्वारा बलात्कार कर चोटें पहुँचाने वाली बात गलत लिखी है, जिसकी कोई वजह नहीं बता सकता। इस साक्षी ने अपने कथन में यह भी स्वीकार किया कि उसकी पुत्री पीड़िता का इलाज इटावा में 8 दिन चला था।

8. **अभियोजन साक्षी सं० 3-** काँ० 815 जितेन्द्र सिंह एक औपचारिक साक्षी है जिसने अपने द्वारा की गयी

कार्यवाही के संबंध में बयान दिया है तथा आवश्यक फर्द प्रदर्श आदि को साबित किया है।

9. **अभियोजन साक्षी सं० 4-** डा० साक्षी श्रीमती स्मिता सिंह ने अपने कथन में बताया कि दिनांक 03-04-13 को वह डा. बी० आर० ए० ज्वॉइंट हास्पिटल फीमेल इटावा में चिकित्सा अधिकारी के रूप में तैनात थी, उस दिन उसने पीड़िता उम्र 7 वर्ष पुत्री वीरेन्द्र सिंह निवासी भोजपुर जिला-मैनपुरी का समय 11.45 ए०एम० पर जिसे ई०एम०टी० मुकेश कुमार गाड़ी संख्या 108 यू०पी०41 जी /633 सरसई नावर लेकर आया था और पीड़िता की शिनाख्त की थी का परीक्षण किया था। उसकी राय में शुक्राणु होने का कारण दिनांक 03-04-14 को सुबह करीब 9-00 बजे पीड़िता के चोट जबरदस्ती बलात्कार किये जाने से आना सम्भव है। पूरक रिपोर्ट उसके लेख व हस्ताक्षर में है इस पर प्रदर्श क-7 डाला गया।

10. **अभियोजन साक्षी सं० 5-** डा० मोहम्मद अजहर सिद्दीकी ने अपने कथन में बताया कि दिनांक 03-04-13 को वे सामुदायिक स्वास्थ्य केन्द्र सरसई

नावर पर तैनात थे। उस दिन पीड़िता पुत्री वीरेन्द्र सिंह उम्र 8 वर्ष ग्राम भोजपुर थाना किशनी को समय 10-10 ए०एम० पर गम्भीर हालत में उसके परिवारीजन द्वारा सरकारी एम्बुलेन्स संख्या 108 द्वारा लाया गया था उसके परिवारीजनों ने बताया कि पीड़िता के साथ बुरा काम (बलात्कार) हुआ है। **उसने उसे देखा, पीड़िता के गुप्तांग से रक्त-श्राव हो रहा था।** पीड़िता की गम्भीर हालत को देखते हुये उसे प्राथमिक उपचार देने के बाद जिला अस्पताल इटावा को रेफर किया था । कागज संख्या 17-अ सूचना उसने थाना किशनी को भिजवाई थी, जो उसके बोलने पर फार्मासिस्ट द्वारा लिखा गया था, इस पर उसने अपने हस्ताक्षर किये थे, इस पर प्रदर्श क-8 डाला गया।

11. अभियोजन साक्षी सं० 6- साक्षी डा० के० के० तिवारी ने अपने कथन में बताया कि दिनांक 03-04-13 को वह जिला चिकित्सालय इटावा में वरिष्ठ परामर्शदाता के पद पर तैनात थे, उस दिन उसने पीड़िता की योनि से शुक्राणु परीक्षण की जाँच हेतु डा० स्मिता सिंह द्वारा पीड़िता पुत्री वीरेन्द्र सिंह निवासी भोजपुर थाना किशनी की स्लाइड सील

बंद हालत में भेजी गई थी, उसने दौरान परीक्षण उसमें कुछ शुक्राणु मृत पाये थे तथा कहीं-कहीं कुछ शुक्राणु जीवित पाये थे । रिपोर्ट वरवक्त परीक्षण तैयार की थी इस पर उसके हस्ताक्षर हैं । इस पर प्रदर्श क-9 डाला गया । यह कहना सही है कि पीड़िता के साथ दिनांक 03-04-13 को सुवह करीव 9-00 बजे बलात्कार होना सम्भव है।

12. अभियोजन साक्षी सं० 7- साक्षी प्रभारी निरीक्षक रामबहादुर शर्मा एक औपचारिक साक्षी है जिसने अपने द्वारा की गयी कार्यवाही के संबंध में बयान दिया है तथा आवश्यक फर्द प्रदर्श आदि को साबित किया है।

13. अभियोजन साक्षी सं० 8- साक्षी भगवान सिंह ने अपने कथन में बताया कि वह कक्षा-8 तक पढ़ा है, प्रदर्श क-1 को देखकर कहा कि यह उसके हाथ का लिखा है इस पर उसके हस्ताक्षर हैं। उसने यह प्रार्थना पत्र पुलिस स्टेशन में लिखा था, इस पर वादी वीरेन्द्र सिंह के भी हस्ताक्षर हैं। प्रदर्श क-1 दरोगा जी ने बोलकर लिखाया है ।

14. दस्तावेजीय साक्ष्य:- पीड़िता का चिकित्सीय परीक्षण रिपोर्ट

सामान्य बाह्य परीक्षण:-

ऊँचाई 140.5 से०मी० दाँत 14 X 14 उसकी हालत

गम्भीर थी। उसकी पहिनी हुई स्कर्ट तथा दोनों टाँगे खून से पूरी तरह सनी हुई थी ।

आन्तरिक परीक्षण:-

गुप्तांग (योनि) से गम्भीर खून निकल रहा था । हाईमन झिल्ली फटी हुई थी तथा ताजा खून आ रहा था। वेजाइनल स्मेयर की स्लाइड तैयार कर सील मुहर कर पैथोलोजिस्ट जिला अस्पताल भेजी गई थी तथा पेरीनियल हिस्से में एक से० मी० टीयर (फटा हुआ) पोस्ट वेजाइनल वाल पर था। यूरेथिबल हिस्से में कोई चोट नहीं थी, कागज संख्या 11-अ उसने वरवक्त मुआयना अपने हस्तलेख में तैयार की थी। पीड़िता के पहिचान चिन्ह अंकित किये थे तथा उसका आर. टी. आई. लगवाया था। रिपोर्ट उसके द्वारा लिखित व हस्ताक्षरित है, इस पर प्रदर्श क-6 डाला गया तथा पूरक रिपोर्ट उसने पैथोलौजी रिपोर्ट मिलने के बाद तैयार की थी, जिसमें पैथोलौजी की रिपोर्ट 23/13 थी जिसमें शुक्राणु कुछ जीवित तथा कुछ मृत पाये गये थे।

15. अभियोजन साक्षियों के बयान के आधार पर अभियुक्त का धारा 313

दं.प्र.सं. के अंतर्गत बयान लिया गया, जिसमें उसने बताया कि वह निर्दोष है उसके विरुद्ध झूठा मुकदमा चलाया गया है, डॉ द्वारा झूठी रिपोर्ट तैयार की गयी, विवेचक द्वारा झूठी कार्यवाही की गयी तथा पीड़िता एवं वादी वीरेन्द्र सिंह ने उसके विरुद्ध कोई साक्ष्य नहीं दिया है अन्य साक्षियों ने झूठी गवाही दिया है।

16. सत्र न्यायाधीश ने मामले में दिये गये तथ्यों एवं साक्ष्यों के आधार पर यह अभिमत व्यक्त किया है कि:-

(1) पीड़िता ने अपने मुख्य परीक्षण में दिये गए कथन में अभियोजन कहानी का पूरी तरह से समर्थन किया है, किन्तु लगभग दो माह पश्चात बचाव पक्ष द्वारा इस साक्षी को फोड़ लिए जाने के कारण इस साक्षी ने अभियोजन कहानी से इंकार किया है, किन्तु इस साक्षी ने अपने कथन में स्वीकार किया कि उसने उक्त तिथि से पूर्व जो न्यायालय में बयान दिया है, वह सही दिया है। सत्र न्यायाधीश ने पीड़िता के इस बयान को इस आधार पर स्वीकार किया है कि न्याय दृष्टान्त 2005 (53) ए. सी. सी. पृष्ठ 553 (इलाहाबाद उच्च न्यायालय) मुन्ना सिंह

तथा अन्य बनाम उत्तर प्रदेश राज्य में उच्च न्यायालय द्वारा साक्षी के प्रतिपरीक्षण में दिए गए कथन को स्वीकार न करते हुए इसके मुख्य परीक्षण में दिये गये कथन को सत्य व विश्वसनीय पाते हुए लिखित रिपोर्ट को विश्वसनीय माना गया। माननीय उच्च न्यायालय का उक्त न्याय दृष्टान्त प्रस्तुत मामले में लागू होता है।

(2) सत्र न्यायाधीश ने यह भी अभिमत व्यक्त किया है कि न्याय दृष्टान्त 2015 (88) ए. सी. सी. पृष्ठ 139 (इलाहाबाद उच्च न्यायालय) अल्ताफ बनाम उत्तर प्रदेश राज्य में यह कहा गया है कि उक्त मामले की अवयस्क बालिका से बलात्कार के मामले में पीड़िता पी०डब्लू०-1 ने न्यायालय के समक्ष मुख्य परीक्षण में दिये गये कथन में अभियोजन कहानी का समर्थन करते हुये बताया कि अपीलार्थी/ अभियुक्त द्वारा उसके साथ बलात्कार किया गया, किन्तु उक्त तिथि को साक्षी का प्रतिपरीक्षण स्थगित किया गया और यह साक्षी आगामी तिथि पर जब प्रतिपरीक्षण हेतु उपस्थित हुयी तब इस साक्षी ने यूटर्न लेते हुये अभियोजन कहानी का समर्थन नहीं किया। इस साक्षी के प्रतिपरीक्षण में दिये गये

कथन से स्पष्ट हुआ कि यह साक्षी सफेद झूठ बोल रही है, क्योंकि वादी पक्ष और अभियुक्त के मध्य अवैध रूप से समझौता हो गया था या डर या भय के कारण पीड़िता ने प्रतिपरीक्षण में दिये गये कथन में मुख्य परीक्षण से अलग हटकर कथन किया । तब माननीय उच्च न्यायालय द्वारा कहा गया कि विचारण न्यायालय द्वारा सही ढंग से साक्षी के मुख्य परीक्षण में दिये गये कथन को विश्वसनीय मानते हुये अभियोजन कहानी मेडिकल साक्ष्य, विधि विज्ञान प्रयोगशाला की रिपोर्ट तथा विवेचना अधिकारी के कथन से सम्पुष्ट होने के कारण अभियुक्त को उचित आधार पर दोषसिद्ध किया गया। इस कारण माननीय उच्च न्यायालय द्वारा अपील को निरस्त कर दिया गया । माननीय उच्च न्यायालय का उक्त न्याय दृष्टान्त प्रस्तुत मामले में लागू होता है ।

(3) प्रस्तुत मामले में घटना दिनांक 03.04.2013 को सुबह के लगभग 09 बजे की बतायी गयी है जिसमें अभियुक्त द्वारा लगभग 8 वर्षीय पीड़िता के साथ बलात्कार करना कहा गया, जिसके फलस्वरूप उसका गुप्तांग फटकर काफी लहुलुहान हो

गया। पीड़िता के भाई-बहन एवं रिश्तेदारों द्वारा उसे अस्पताल ले जाया गया अस्पताल में पीड़िता का उचित इलाज किया गया तथा वेजाइना से ब्लीडिंग होने के कारण उक्त स्वास्थ्य केन्द्र पर महिला चिकित्सक न होने के कारण जिला अस्पताल इटावा को रेफर कर दिया गया, चिकित्सक द्वारा पुलिस को लिखित तहरीर भेजी गयी तथा डाक्टर एवं पुलिस अधिकारियों द्वारा समस्त प्रदर्शों को साबित किया गया।

(4) विवेचक द्वारा प्रथम सूचना रिपोर्ट दर्ज होने के पश्चात मौके पर जाकर घटना स्थल अरहर के खेत से खून अलूदा व सादा मिट्टी साक्षियों के समक्ष कब्जे में लेकर फर्द तैयार की गयी, जिला महिला चिकित्सालय इटावा जाकर पीड़िता का खून अलूदा कपड़े शर्ट व स्कर्ट जिसमें काफी मात्रा में खून के धब्बे लगे थे को साक्षियों के समक्ष कब्जे पुलिस में लेकर मौके पर सील मुहर करके फर्द तैयार की गयी, वादी मुकदमा विरेन्द्र सिंह का कथन केस डायरी में अंकित किया गया तथा अन्य साक्षियों का भी बयान लिया गया तथा सभी प्रदर्शों को संबंधित साक्षियों द्वारा साबित किया गया है तथा उन्होंने उपलब्ध साक्ष्यों के आधार पर यह भी

पाया है कि वादी मुकदमा विरेन्द्र सिंह व तहरीर लेखक भगवान सिंह द्वारा अभियुक्त दुर्वेश उर्फ पप्पू के प्रभाव में आकर न्यायालय के समक्ष असत्य कथन किया गया है।

(5) विधि विज्ञान प्रयोगशाला आगरा की रिपोर्ट 36-अ में इस बात का स्पष्ट रूप से उल्लेख है कि पीड़िता के स्कर्ट पर शुक्राणु व मानव वीर्य पाये गए, खून अलूदा मिट्टी तथा पीड़िता के शर्ट में रक्त के धब्बे पाये गये। जो संबंधित चिकित्सक द्वारा प्रमाणित किया गया है।

(6) इस प्रकार दस्तावेजीय व मौखिक साक्ष्यों से स्पष्ट है कि घटना दिनांक 03.04.2013 को 09.00 बजे प्रातः पीड़िता के साथ अरहर के खेत में निश्चित रूप से बलात्कार किया गया था जिससे उसका गुप्तांग फट गया था। समस्त दस्तावेजीय साक्षियों द्वारा प्रमाणित किये गये हैं जिनसे स्पष्ट है कि घटना के दिनांक को पीड़िता के भैंस के सींग मार देने से उसके योनि में चोटें नहीं आई, बल्कि उसके 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।

(7) पीड़िता के साथ उक्त बलात्कार की घटना अभियुक्त दुर्वेश उर्फ पप्पू के द्वारा ही कारित की गयी है यह पीड़िता के मुख्य परीक्षण में दिये गये बयान से साबित है क्योंकि उसने न्यायालय के समक्ष कटघरे में पीछे मुड़कर देखकर बताया है कि उसके साथ बुरा काम इसी अभियुक्त ने अरहर के खेत में किया था। अरहर के खेत में फसल खड़ी थी, वह चिल्लाई तब उसके चाचा आ गये थे, चाचा के पूछने पर उसने बताया था कि दुर्वेश ने उसके साथ बुरा काम किया था।

17. उपरोक्त आधारों पर सत्र न्यायाधीश ने यह पाया अभियोजन पक्ष ने अपना मामला उचित संदेह से परे स्थापित किया है, जिसके आधार पर अपीलार्थी/अभियुक्त को धारा 376 भा०दं०वि० के अपराध के लिये आजीवन कारावास व 30 हजार रुपये के अर्थ दण्ड तथा धारा 374 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम के अपराध के लिए दस वर्ष के कारावास व बीस हजार रुपये के अर्थ दण्ड से दण्डित किया गया है।

18. अपीलार्थी के विद्वान अधिवक्ता श्री शशि कुमार मिश्रा एवं

विद्वान अपर शासकीय अधिवक्तागण श्री विकास गोस्वामी एवं उच्च न्यायालय विधिक सेवा प्राधिकरण की ओर से सुश्री मुस्कान पाण्डेय विद्वान अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

19. 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, कथित पीड़िता ने न्यायालय के समक्ष अपने प्रतिपरीक्षण में दिये गये कथन में बताया कि "मुल्जिम रिश्ते में उसका चाचा लगता है, हाजिर अदालत मुल्जिम दुर्वेश उर्फ पप्पू उसे अरहर के खेत में नहीं ले गया था और न हीं अरहर के खेत में टॉफी आदि कुछ खाने को दिया था, बुरा काम का मतलब गाली देने से होता है। मुल्जिमान ने उसका कच्चा व स्कर्ट नहीं उतारी थी, मुल्जिमान ने अपनी पेशाब का रास्ता उसके पेशाब के रास्ते में नहीं डाली ली। भैंस के सींग मार देने से उसकी पेशाब के रास्ते में चोट आई थी। पुलिस ने उससे कोई पूछताछ नहीं किया था, उसके पिता ने क्या रिपोर्ट लिखाई उसे

नहीं मालूम” इस स्तर पर उसे विचारण न्यायालय द्वारा पक्षद्रोही घोषित किया गया है, यद्यपि प्रश्नगत प्रकरण में पीड़िता अवयस्क है, किंतु पीड़िता के पिता/अभियोजन साक्षी 02 द्वारा भी न्यायालय के समक्ष अपने परीक्षण में दिये गये कथन में बताया कि "आज से 10-12 माह पहले की घटना है, समय दिन के 8-00 बजे का था वह अपने घर पर मौजूद नहीं था उसकी पुत्री अर्चना और पीड़िता विद्यालय के पास कन्डे पाथ रही थी, उस समय उसका लड़का प्रदीप वहाँ नहीं था पीड़िता को कोई भी व्यक्ति टॉफी देने के बहाने नहीं ले गया था । पीड़िता के साथ हाजिर अदालत मुल्जिम पप्पू उर्फ दुर्वेश द्वारा कोई भी बुरा काम (बलात्कार) नहीं किया गया था।”

20. इस प्रकार प्रश्नगत प्रकरण के मुख्य अभियोजन साक्षी 01 एवं अभियोजन साक्षी 02 को पक्षद्रोही घोषित किया जा चुका है। उनका यह भी कथन है कि आवेदक एक नवयुवक है व अत्यंत ही गरीब पारिवारिक पृष्ठभूमि से है। अपीलार्थी द्वारा कारित यह प्रथम अपराध है, इसके पूर्व का उसका अन्यत्र आपराधिक इतिहास

नहीं है। इसलिए अपीलार्थी को दण्डित सजा के मामले में नरम रुख अपनाते हुए उसके द्वारा अब तक कारागार में बितायी गयी निरुद्धि अवधि को पूर्ण मानते हुए उसे कारागार से मुक्त कर दिया जाय, अन्यथा आजीवन कारावास की सजा से अपीलार्थी का संपूर्ण जीवन अंधकारमय हो जाएगा। उन्होंने अपने तर्क के समर्थन में **Criminal Appeal No. 3309/2020 (Suresh Kumar vs State of U.P and Another)** में इस न्यायालय द्वारा पारित निर्णय दिनांक 30.11.2023 तथा **Jail Appeal No. 75/2021 (Sonu Kanoujia vs State of U.P. and Another)** में इस न्यायालय द्वारा पारित निर्णय दिनांक 27.05.2022 की ओर न्यायालय का ध्यान आकृष्ट किया।

21. विद्वान अपर शासकीय अधिवक्ता द्वारा अभियुक्त के विद्वान अधिवक्ता के तर्कों पर आपत्ति करते हुए कथन किया गया कि अभियुक्त द्वारा लगभग 8 वर्षीय मासूम पीड़िता के साथ जबरदस्ती दुराचार किया गया, जिसके कारण एक अबोध/अवस्यक लड़की 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। 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।

22. उच्च न्यायालय विधिक सेवा प्राधिकरण की ओर से विद्वान अधिवक्ता सुश्री मुस्कान पाण्डेय ने तर्क प्रस्तुत किया कि तथाकथित घटना कि प्रथम सूचना रिपोर्ट बिना किसी विलम्ब के दर्ज करायी गयी है, अभियुक्त का परीक्षण विचारण न्यायालय में किया गया जिसमें अभियोजन द्वारा लगाये गये आरोपों की पूर्णतः पुष्टि हुई है, एफ.एस.एल रिपोर्ट अभियोजन द्वारा बखूबी साबित किया गया है जिसमें पीड़िता के कपड़ों पर Spermatozoa (Few dead and occasional alive spermatozoa are seen) पाया गया व चिकित्सीय साक्ष्य में जिसे अभियोजन द्वारा पूर्णतः साबित किया गया, पीड़िता ने अपने बयान में अभियोजन कथानक का समर्थन किया है। अभियुक्त/अपीलार्थी द्वारा एक जघन्य अपराध "पीड़िता उम्र मात्र 7 वर्ष" के

साथ किया गया है, अभियुक्त कारित अपराध एक जघन्य एवं घृणित किस्म का अपराध है, यदि " इस तरह के अपराधी को वर्तमान में समाज में खुला छोड़ा जाना न्यायहित में व समाज के वर्तमान परिवेश में उचित नहीं होगा। ताकि इस उम्र के अबोध बालको को अपना बचपन स्वच्छन्द रूप से जी सके।" उन्होंने अपने तर्क के समर्थन में न्यायालय का ध्यान निम्नलिखित नजीरों की ओर आकृष्ट किया:-

(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

23. 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।

24. प्रस्तुत मामले में घटना दिनांक 03.04.2013 को सुबह के लगभग 09 बजे की बतायी गयी है जिसमें अभियुक्त द्वारा लगभग 8 वर्षीय पीड़िता के साथ बलात्कार करना कहा गया, जिसके फलस्वरूप उसका

गुप्तांग फटकर काफी लहुलुहान हो गया। पीड़िता के भाई-बहन एवं रिश्तेदारों द्वारा उसे अस्पताल ले जाया गया अस्पताल में पीड़िता का उचित इलाज किया गया तथा वेजाइना से ब्लीडिंग होने के कारण उक्त स्वास्थ्य केन्द्र पर महिला चिकित्सक न होने के कारण जिला अस्पताल इटावा को रेफर कर दिया गया, चिकित्सक द्वारा पुलिस को लिखित तहरीर भेजी गयी तथा डाक्टर एवं पुलिस अधिकारियों द्वारा समस्त प्रदर्शों को साबित किया गया।

25. विवेचक द्वारा प्रथम सूचना रिपोर्ट दर्ज होने के पश्चात मौके पर जाकर घटना स्थल अरहर के खेत से खून अलूदा व सादा मिट्टी साक्षियों के समक्ष कब्जे में लेकर फर्द तैयार की गयी, जिला महिला चिकित्सालय इटावा जाकर पीड़िता का खून अलूदा कपड़े शर्ट व स्कर्ट जिसमें काफी मात्रा में खून के धब्बे लगे थे को साक्षियों के समक्ष कब्जे पुलिस में लेकर मौके पर सील मुहर करके फर्द तैयार की गयी, वादी मुकदमा विरेन्द्र सिंह का कथन केस डायरी में अंकित किया गया तथा अन्य साक्षियों का भी बयान लिया गया तथा सभी प्रदर्शों को संबंधित साक्षियों द्वारा

साबित किया गया है तथा उन्होंने उपलब्ध साक्ष्यों के आधार पर यह भी पाया है कि वादी मुकदमा विरेन्द्र सिंह व तहरीर लेखक भगवान सिंह द्वारा अभियुक्त दुर्वेश उर्फ पप्पू के प्रभाव में आकर न्यायालय के समक्ष असत्य कथन किया गया है।

26. विधि विज्ञान प्रयोगशाला आगरा की रिपोर्ट 36-अ में इस बात का स्पष्ट रूप से उल्लेख है कि पीड़िता के स्कर्ट पर शुक्राणु व मानव वीर्य पाये गए, खून अलूदा मिट्टी तथा पीड़िता के शर्ट में रक्त के धब्बे पाये गये। जो संबंधित चिकित्सक द्वारा प्रमाणित किया गया है।

27. इस प्रकार दस्तावेजीय व मौखिक साक्ष्यों से स्पष्ट है कि घटना दिनांक 03.04.2013 को 09.00 बजे प्रातः पीड़िता के साथ अरहर के खेत में निश्चित रूप से बलात्कार किया गया था जिससे उसका गुप्तांग फट गया था। समस्त दस्तावेजीय साक्षियों द्वारा प्रमाणित किये गये हैं जिनसे स्पष्ट है कि घटना के दिनांक को पीड़िता के भैंस के सींग मार देने से उसके योनि में चोटें नहीं आई, बल्कि उसके 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।

28. पीड़िता के साथ उक्त बलात्कार की घटना अभियुक्त दुर्वेश उर्फ पप्पू के द्वारा ही कारित की गयी है यह पीड़िता के मुख्य परीक्षण में दिये गये बयान से साबित है क्योंकि उसने न्यायालय के समक्ष कटघरे में पीछे मुड़कर देखकर बताया है कि उसके साथ बुरा काम इसी अभियुक्त ने अरहर के खेत में किया था। अरहर के खेत में फसल खड़ी थी, वह चिल्लाई तब उसके चाचा आ गये थे, चाचा के पूछने पर उसने बताया था कि दुर्वेश ने उसके साथ बुरा काम किया था।

29. पीड़िता के प्रति परीक्षण में भैंस के सींग से चोट लगने की बात सर्वथा झूठ लगती है क्योंकि यदि अगर ऐसा होता तो पीड़िता के वरजाइन स्मियर और कपड़ों में स्परमैटोजोआ का पाया जाना असंभव था। इससे ऐसा परिलक्षित है कि बाद में पीड़िता एवं अभियोगी पर अनुचित प्रभाव एवं दबाव से उन्होंने बाद में गलत बयान दिलवाया गया।

30. अभियोजन पक्ष के अनुसार तथा कथित घटना दिनांक 03.04.2013 को 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।

31. 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 है:-

“[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.”

32. 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 विधिव्यवस्था 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।

33. अपीलार्थी के विद्वान अधिवक्ता ने पूरकशपथ पत्र के माध्यम से न्यायालय का ध्यान वरिष्ठ कारागार अधीक्षक सेन्ट्रल जेल फतेहगढ़ की

आख्या दिनांक 24.07.2023 की ओर आकृष्ट किया जिसके अनुसार अभियुक्त दुर्वेश उर्फ पप्पू दिनांक 24.07.2023 तक कुल 12 वर्ष 06माह 15 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 कारागार में निरूद्ध रह चुका है। इसप्रकार दोनों का योग करने पर आज की तिथि तक वह 13 वर्ष, 08 माह, 13 दिन कारागार में अपनी सजा भुगत चुका है।

34. सजा के प्रश्न पर विचार करने के स्तर पर हम पाते हैं कि विचारण न्यायालय ने अभियुक्त/अपीलार्थी को भारतीय दण्ड संहिता की धारा 376 के तहत आजीवन कारावास की सजा सुनाई है। भारतीय दण्ड संहिता की धारा 376 के तहत सजा सात 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। हमें ऐसा कोई कारण नहीं मिला की जिसका खुलासा विचारण न्यायालय ने

किया हो अन्यथा हम पाते हैं 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 दण्डिक 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 हैं, जो निम्नवत हैं:-

“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 & reformatory 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 reculturation. Therefore, the focus of interest in penology is 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 reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory 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 reformatory 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, 'reformatory 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 reformatory approach underlying in criminal justice system. ”

35. संपूर्ण साक्ष्यों पर विचार करने के पश्चात् हमारा मानना है कि भारतीय दण्ड संहिता के धारा 376 के तहत अभियुक्त/अपीलार्थी को आजीवन कारावास की सजा दिया जाना न्यायोचित नहीं है और यदि अभियुक्त को भारतीय दण्ड संहिता के धारा 376 के तहत न्यूनतम 14 वर्ष की सजा दी जाय तो न्याय की पूर्ति संभव होगी।

36. अतः यह दण्डिक अपील आशिक रूप से स्वीकार की जाती है तथा अभियुक्त/अपीलार्थी को भारतीय दण्ड संहिता के धारा 376 के अंतर्गत अभियुक्त /अपीलार्थी को विचारण न्यायालय द्वारा दी गयी आजीवन कारावास की सजा को संशोधित करते हुए अभियुक्त को धारा 376 भा.दं.वि. के अन्तर्गत 14 वर्ष की सजा देते हैं तथा धारा 3/4 लैगिक अपराधों से बालको का संरक्षण अधिनियम के अंतर्गत 10 वर्ष के कठोर कारावास की सजा को बहाल रखते हैं एवं इसमें कोई संशोधन

नहीं किया जाता ह यहां पर यह स्पष्ट किया जाता है कि विचारण न्यायालय द्वारा अभियुक्त को धारा 376 भा.दं.वि. एवं 3/4 लैगिक अपराधों से बालकों का संरक्षण अधिनियम इन दोनों धाराओं में अभियुक्त के विरुद्ध अधिरोपित कुल अर्थदण्ड की धनराशि रुपया 50,000/- को भी संशोधित करते हुए उसे कुल रु. 1,00,000/- (एक लाख रुपया) किया जाता है। अर्थदण्ड की उक्त संशोधित धनराशि अदा न करने पर अभियुक्त को 14 वर्ष के उपरान्त 01 वर्ष का अतिरिक्त कारावास का दण्ड भुगतना होगा। वसूल की गयी अर्थदण्ड की सम्पूर्ण धनराशि पीड़िता को प्रदान किया जाये। दोनों धाराओं में दी गयी सजाएं साथ-साथ चलेगी।

37. अभियुक्त/अपीलार्थी को कारागार में 14 वर्ष की सजा भुगतने तथा 01 लाख रुपया अर्थदण्ड की धनराशि अदा करने पर जेल से अवमुक्त कर दिया जाय। उपरोक्त संशोधित अर्थदण्ड की धनराशि अदा न करने पर उसे एक वर्ष का अतिरिक्त कारावास भुगतने के पश्चात कारागार से मुक्त किया जाये।

38. सुश्री मुस्कान पाण्डेय, जो उच्च न्यायालय विधिक सेवा प्राधिकरण की

ओर से उपस्थित हुई है, वे नियमानुसार अपना शुल्क प्राप्त करने की अधिकारिणी है।

39. 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।

(2024) 9 ILRA 253
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.

Criminal Appeal No. 2163 of 1983

Ram Babu **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:
D.S. Tiwari

Counsel for the Respondent:
D.G.A.

(A) Criminal Law - Appeal against conviction for murder and disposal of evidence - Indian Penal Code, 1860 – Section 302 r.w. Section 201 - Murder - Causing disappearance of evidence of offense - Ante-timed FIR - chance witness - failure to recover material evidence - doubt in prosecution story - Evidence of a chance witness requires a very cautious

and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence - Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded - Conviction cannot be sustained if the prosecution story has lapses and if chance witnesses are not credible or adequately explain their presence.(Para - 12 ,14,15,16)

Accused convicted for allegedly killing deceased during a gambling dispute – deceased won money in gambling - refused to return it - leading to his murder by accused and co-accused using an axe and throttling - FIR lodged following morning - stated eyewitness accounts, including seeing the body being dragged to a well - prosecution relied on eyewitnesses PW-3 and PW-4 - who claimed to have seen incident in torchlight. **(Para - 1 to 9)**

HELD: - There are any number of lapses in the prosecution story and the prosecution case thus becomes doubtful. Nowhere was the currency etc., which it was alleged was won in the gambling by the deceased, recovered. Charges as were framed against the accused appellant were not proved beyond reasonable doubt and, therefore, the accused cannot be held guilty. Accused-appellant was acquitted of all charges as the prosecution failed to prove the case beyond reasonable doubt. (Para -16 to 18)

Appeal allowed. (E-7)

List of Cases cited:

1. Manoj & ors. Vs St. of U.P., (2023) 2 SCC 352
2. Manoj & ors. Vs St. of M.P., (2003) 2 SCC 353
3. Harbeer Singh Vs Sheeshpal & ors., (2016) 16 SCC 418
4. Jarnail Singh & ors. Vs St. of Punj., (2009) 9 SCC 719
5. Bahal Singh Vs St. of Har.,1976 Criminal L.J. 1568

(Delivered by Hon'ble Siddhartha Varma, J.)

1. This criminal appeal has been filed against the judgment and order dated 23.05.1983 passed by the Sessions Judge, Jalaun at Orai by which the appellant Ram Babu was convicted under Section 302 of the Indian Penal Code (*henceforth called the "IPC"*) read with Section 201 IPC and punished the appellant under Section 302 IPC with life imprisonment and under Section 201 IPC with a rigorous imprisonment of two years.

2. The brief facts of the case are that upon an incident which allegedly occurred on 21.8.1982 at around 7.30 to 8.00 PM, a First Information Report (*henceforth called the "FIR"*) was lodged in that regard on 22.11.1982 at 7.05 AM. As per the FIR, the brother of the first informant namely Jagram, who was gambling with the accused persons Ram Babu and Kisna, was killed in the house of Ram Babu because the deceased Jagram had won in the gambling and Ram Babu and Kisna had asked for the return of their money. When Jagram had refused to return that money, then, it is alleged, the accused persons Ram Babu and Kisna had killed the deceased. It has been stated that Kisna had used an axe to kill the deceased while Ram Babu was responsible for throttling the deceased. As per the FIR, when Jagram shouted upon being attacked at 8.00 pm, then Laxman Singh and Mulayam Singh had seen the incident in the light of their torches. It has been stated in the FIR itself that the dead body of Jagram, after he was killed, was dragged by the assailants and taken to a well which was situated in the land of one Sri Dixit and that the assailants had thrown the dead body into the well.

3. The FIR was scribed by Mulayam Singh on the dictation of the first informant

Takdeer Singh. Upon the FIR having been lodged, the police got into action and investigation commenced. The panchayatnama proceedings which commenced at around 11.15 am on 22.11.1982 states that the Constable Prem Shanker Shukla reached the spot and he after seeing the trail which had been created because of the pulling of the dead body by the accused towards the well had traced out the dead body. It has been stated that thereafter the panchayatnama was prepared and completed at 12.30 PM. The memo Ka-1 as was prepared by the investigating police had stated that they had only seen the torch of Mulayam Singh which had three cells in it. The police had also taken it into its custody. The police had also recovered a Sadari and Angochha (the clothes worn by the deceased) which were blood stained which were exhibited as Exhibit Ka-2. As per the Exhibit Ka-3 which was the memorandum prepared by the police, the plain soil and the blood stained soil were taken into custody. After the panchayatnama was completed, the dead body was sent for post mortem and the post mortem report was prepared on 23.11.1982. The investigation having got completed, the police submitted its report. Since the accused Kisna was absconding, charges were framed only viz.-a-viz. Ram Babu under section 302/201 IPC. When the accused pleaded not guilty, trial commenced.

4. The prosecution produced five witnesses in the Court.

5. PW-1 was the first informant Takdeer Singh. In his testimony before the Court, he has stated that Kashi Singh and Harmohan Singh had seen his brother Jagram gambling. It has been stated by the PW-1 that Kashi Singh and Harmohan

Singh in fact had asked his brother not gamble but neither did Jagram nor did the assailants Ram Babu and Kisna stop gambling. He has stated that when the sun set and it became dark, the three who were gambling, came out on the western side to gamble and when Jagram had won a substantial amount of money, then Ram Babu and Kisna asked him to return the money. When, however, Jagram refused to return the money then Kisna assailed him by an axe while Ram Babu had throttled the deceased. Upon being attacked when the deceased started shouting, then Laxman Singh and Mulayam Singh who were easing themselves in the open agricultural field saw the incident in the light of their torches. In the examination in chief, the PW-1 has stated that Kisna and Ram Babu had pulled the dead body down to the well and had thrown the dead body in there. PW-1 has stated that he was at his house and when he heard the shouting, then he had also reached the spot and over there Laxman Singh and Mulayam Singh had narrated the incident to him and had told that Kisna and Ram Babu had killed the brother of the PW-1. He has also stated that when the two eye-witnesses namely Laxman Singh and Mulayam Singh were following the accused persons, they heard a sound which clearly meant that the dead body had been thrown into the well. However, because of the fear of the accused persons, it has been stated in the examination in chief, the two eye-witnesses and the PW-1, did not go near the well. He has stated that the FIR was scribed by Mulayam Singh on his dictation and whatever he had told, was scribed by Mulayam Singh in the FIR. In the cross examination, he has stated that he had not seen the two accused persons and the deceased actually gambling. He has only stated that when he had reached the spot

then Kisna and Ram Babu, the accused persons, had pulled the dead body of the deceased towards the well. He has also stated that when he had reached the place of incident then Mata Prasad, Jahar Singh, Mukat Singh, Ram Babu son of Kandhai, Vasdev and a few others had reached the place of incident. He has stated that they were all without any arms etc. He has also stated that the well was situate in the south-west of the village. The house of the accused Ram Babu was in the western direction of the village whereas the house of the first informant was in the northern direction. At the time of the incident, in the house of Ram Babu where gambling was going on, the wife of the accused Ram Babu, his two sisters and two younger brothers were also staying with him and at the time when the gambling was going on, they were all present in the house. He has emphatically stated that since he was not there at the place of incident, he had no knowledge of the entire incident. He has stated that on the next date at around 7.00 AM he had gone to the police station to lodge the report. He has also in the cross-examination, upon a question being asked as to whether he tried to search out the dead body of Jagram, he had categorically stated that he had not tried to search out the dead body. In fact, he has stated that he had not even gone near the well. He has stated that the entire FIR was scribed with the help of Mulayam Singh at his house. After the FIR was lodged, the police had come to the spot at around 8.00 AM and had got the dead body pulled out from the well. Upon a further question being asked as to whether the accused Ram Babu was into the business of crackers, he told that he was not aware. He has also categorically stated that for the first time, he saw the dead body when the same was pulled out from the well. He has very categorically stated that

the well, situate in the land of Sri Dixit, was around 250 steps away from the agricultural fields of Mulayam Singh. He has also stated that Laxman Singh and Mulayam Singh were not his family.

6. PW-2 was Kashi Prasad son of Gyan Singh who had stated that he had seen the deceased and the two accused gambling in the room of Ram Babu. He has stated that he had not actually entered the place where gambling was going on but while passing through the house of Ram Babu, he had seen the three i.e. the deceased Jagram and the two accused were playing cards and he assumed that they were gambling.

7. PW-3 was the eye-witness Mulayam Singh. He is also the scribe of the first information report. He had stated that he was easing in the fields at around 8.00 PM and when he heard some noises from the southern side of the village, then with the help of his torch, he saw that the accused Ram Babu and Kisna were beating up Jagram. He had stated that Laxman Singh, the another eye-witness, was also near him. When the sounds were heard of beating etc., Laxman Singh had enquired as to what was going on and to this, the accused persons had threatened the two eye-witnesses with dire consequences. He has stated that he had seen the accused persons dragging the dead body towards the well. However, since it was night, they had gone to their houses. He has also stated that the FIR was written by him on the dictation of Takdeer Singh and had proved the FIR which was Exhibit Ka-1. In the cross-examination, he has stated that the FIR was written by him on the dictation of Takdeer Singh and whatever Takdeer Singh had dictated, he had written. He had also very categorically stated that in between the incident which had occurred and the

lodging of the FIR, he had not talked to Takdeer Singh. He has, upon a question being asked as to whether both, he himself and Laxman Singh were easing themselves at a close distance, he had, at one point, stated that Laxman was easing himself in the fields of Ramdayal and then he had stated that in fact Laxman was easing himself in the fields of Santram Mishra and thereafter he had stated that he was around 4-6 steps away from him. He has stated that Laxman Singh had reached the fields to ease himself before he had gone. After they had eased themselves, they heard the sounds which were created because of the scuffle which was going on between the deceased and the accused persons. He has stated that the place of incident was around 30-40 steps away from the place where they were easing themselves. He has thereafter upon a question being asked as to whether he had seen the entire incident from where he was easing himself, he had replied that in fact he had not seen the incident from the place where he was easing. He further stated that when he had reached the place where Laxman Singh was easing himself, then from there he had seen the incident which was around 25 steps away from the place of incident. He has again stated that he had not brought the torch which he was using on that date. He has also stated that the axe was being used by Kisna whereas the other accused Ram Babu had actually throttled the deceased to death.

8. PW-4 is the eye-witness, Laxman Singh and he, in his examination-in-chief, has stated that he had known Ram Babu, the accused, from before. He has also stated the same story with regard to the fact that he had seen the incident from a distance while he had gone to ease himself in the late hours of 21.11.1982. He has stated that

in fact he had seen Kisna assailing the deceased by an axe and Ram Babu throttling the deceased to death and he had also stated in his examination-in-chief that the accused persons were making it clear that if anybody went near them then they would also be done to death. He has stated that he had also seen the accused persons dragging the dead-body of Jagram. He has also stated that when a hue and cry was raised by the eye-witnesses then Rajendra, Takdeer Singh, Bhagirath, Samrath Singh and a few others had also reached the place of incident. He has stated that he had himself told about the entire incident to the first informant, Takdeer Singh. He has also stated that when they had followed the accused persons then they had heard something been thrown into the well and thereafter they had stopped the pursuit of apprehending the accused persons. In the cross-examination, he has stood affirm with what he had stated in the examination-in-chief. When a question was being asked as to whether there was any enmity between the PW-3 and the deceased because of some business of crackers etc., then he had denied the same. He has stated that his torch had got damaged and, therefore, he had not brought it. He had also stated that when the dead-body was being dragged towards the well, he himself alongwith 10-15 people had followed the accused persons. After they had tried to follow the accused for around a furlong, they had dropped the idea as it was a dark night. He has also stated that the well was around two furlong away from the agricultural fields of Mulayam Singh.

9. PW-5 Kailash Nath Tiwari was the Investigating Officer who had scribed the chick and had also proven the same.

10. Thereafter, the statement of the accused, Ram Babu was recorded under Section 313 Cr.P.C. and he had denied that he was not responsible for the crime.

11. Upon the conclusion of the trial, when the Sessions Judge, Jalaun at Orai on 23.05.1983 convicted the accused Ram Babu under Section 302 read with Section 201 IPC and punished the appellant under Section 302 IPC with life imprisonment and under Section 201 IPC with a rigorous imprisonment of two years, the instant Criminal Appeal was filed.

12. Sri Rajiv Nayan Singh, who was appointed as an Amicus Curiae to argue the case on behalf of the appellant, has argued that the appellant Ram Babu was innocent. He has made the following submissions :-

(i) Learned Amicus Curiae has submitted that the FIR was an ante-dated one. He has submitted that in the FIR itself the first informant had made a statement that the dead-body was thrown into the well and this he had stated on the information being given by Mulayam Singh and Laxman Singh. However, learned Amicus Curiae has drawn the attention of the Court to the Panchayatnama which is annexed at page no. 30 of the paper book and he has read out the statements made in the Panchayatnama that the Constable Prem Shankar Shukla had come to the spot and he upon tracking down till the well with the help of the marks which were made on the ground because of the dragging of the dead body, had found out the body. Learned Amicus Curiae, therefore, states that it was for the first time that the dead-body was traced out i.e. when the Police Official Prem Shankar Shukla had come to the village. Learned Amicus Curiae states that wrongly in the FIR, it had been stated that the first informant was aware of the fact

that the dead-body had been dragged down from the place of incident to the well. Learned Amicus Curiae states that it was for the first time, the prosecution had got information as to where exactly the body was lie when the Police had come and had tracked down the dead body with the help of the marking which was there on the ground which started from the alleged place of incident and ended at the well and, therefore, learned counsel for the appellant states that it was impossible for the first informant to have known at the alleged time of lodging the FIR that he had known about the fact that the dead-body was thrown into the well. Had the FIR been in existence then the Police which had come on 22.11.1982 after the lodging of the FIR at 07:05 AM, would not have endeavoured to search out the dead-body. They would have, as per the first informant, immediately reached the well which was situate in the fields of Sri Dixit and would have found out the dead-body. Learned Amicus Curiae further states that if the FIR was being scribed on the dictation of the first informant Takdeer Singh by Mulayam Singh, then the language as was there in the FIR would have been slightly different. In the FIR, the eye-witness Mulayam Singh who himself had scribed the FIR, would not have contained such averments which were being known for the first time by the eye-witness Mulayam Singh.

(ii) Learned Amicus Curiae further states that Mulayam Singh who was an educated person and had known about the incident on the night of 21.11.1982, would not have waited till the next day for the brother of the deceased to have got the FIR lodged. He would himself have reached the Police Station and would have lodged the FIR.

(iii) Learned Amicus Curiae further states that no material relating to the

incident was at all found. The torch was nowhere to be seen. The playing cards, which allegedly were being used for gambling, were also not recovered.

(iv) Learned Amicus Curiae has thereafter stated that the PW-3 and PW-4 were also not the eye-witnesses. They were only chance witnesses. To bolster his case, learned Amicus Curiae has stated that a chance witness is such a witness who is only planted by the prosecution to prove a point. In the instant case, if the eye-witnesses had been there on the spot and had they seen the incident, as they had narrated in the statement-in-chief before the trial Court, then they would themselves have taken action upon seeing the murder having taken place in the village but since they had actually not seen the incident, they were planted by the prosecution to only prove the point that the implicated persons had actually committed the murder. Learned Amicus Curiae relied upon a decision of the Supreme Court in **(2023) 2 SCC 352 : Manoj and Ors. vs. State of U.P.** and has submitted that a chance witness cannot be taken to be a reliable witness and, therefore, the testimony of a chance witness could not be in any manner used to convict the accused. Learned counsel for the appellant states that as per the law laid down by the Supreme Court a testimony of a chance witness should be utilised by the prosecution very cautiously. He submits that the evidence of the chance witness requires a very cautious and strict scrutiny and if there was any slackness in the explanation about the presence of the chance witness at the place of incident then his deposition ought to be rejected. Since learned counsel for the appellant relied heavily on paragraphs 102, 103 and 104 of the judgment reported in **(2003) 2 SCC 353 : Manoj & Ors. vs. State of Madhya Pradesh**, the same are being reproduced here as under :-

"102. A chance witness is one, who appears on the scene suddenly. This species of witness was described in *Puran v. State of Punjab* (AIR 1953 SC 459), in the following terms:

"Such witnesses have the habit of appearing suddenly on the scene when something is happening and then of disappearing after noticing the occurrence about which they are called later on to give evidence."

103. This court has sounded a note of caution about dealing with the testimony of chance witnesses. In *Darya Singh v. State of Punjab* (AIR 1965 SC 328), it was observed that:

"...where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, Courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence.....If the criminal Court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised."

104. In *Jarnail Singh v. State of Punjab* [(2009) 9 SCC 719] again, this Court held that:

"22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (*Satbir v. Surat Singh* (1997) 4 SCC 192 30, *Harjinder Singh v. State of*

Punjab (2004) 11 SCC 253, *Acharaparambath Pradeepan and Anr. v. State of Kerala* (2006) 13 SCC 643 and *Sarvesh Narain Shukla v. Daroga Singh* (2007) 13 SCC 360). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (*vide Shankarlal v. State of Rajasthan* (2004) 10 SCC 632)."

Since the learned counsel for the appellant also relied upon paragraphs 22 to 24 of the judgment reported in **(2016) 16 SCC 418 : Harbeer Singh vs. Sheeshpal & Ors.**, the same are being reproduced here as under :-

"22. The High Court has further noted that there were chance witnesses whose statements should not have been relied upon. Learned counsel for the respondents has specifically submitted that PW5 and PW6 are chance witnesses whose presence at the place of occurrence was not natural.

23. The defining attributes of a "chance witness" were explained by Mahajan, J., in *Puran v. State of Punjab*, AIR 1953 SC 459. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.

24. In *Mousam Singha Roy v. State of W.B.*, (2003) 12 SCC 377, this Court discarded the evidence of chance witnesses while observing that certain glaring contradictions/omissions in the evidence of PW 2 and PW 3 and the absence of their names in the FIR has been very lightly discarded by the courts below. Similarly, *Shankarlal v. State of Rajasthan*, (2004) 10 SCC 632 and *Jarnail Singh v. State of Punjab*, (2009) 9 SCC 719, are authorities for the proposition that deposition of a chance witness, whose

presence at the place of incident remains doubtful, ought to be discarded. Therefore, for the reasons recorded by the High Court we hold that PW5 and PW6 were chance witnesses and their statements have been rightly discarded."

Similarly, paragraphs 20 to 23 of the judgment of the Supreme Court in **Jarnail Singh & ors. vs. State of Punjab** reported in (2009) 9 SCC 719 are also being reproduced here as under :-

"20. After considering the oral as well as documentary evidence on record, the High Court came to the conclusion that the statement of Gurcharan Singh (PW-18) in respect of the fact of hatching of a conspiracy by Balbir Singh and Gurdip Singh, at the Bus-stand Bassi Pathana on 21-6-2000 at 7.30/8.00 p.m. was not worthy of credence. Gurcharan Singh (PW-18), a chance witness could not explain under what circumstances he was present at the bus-stand at the said time.

21. In *Sachchey Lal Tiwari v. State of U.P.* (2004) 11 SCC 410, this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and passerby had deposed that he had witnessed the incident, observed as under:

"If the offence is committed in a street only a passer-by will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there."

The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are

less formal and more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (*Satbir v. Surat Singh* (1997) 4 SCC 192; *Harjinder Singh v. State of Punjab* (2004) 11 SCC 253; *Acharaparambath Pradeepan & Anr. v. State of Kerala* (2006) 13 SCC 643; and *Sarvesh Narain Shukla v. Daroga Singh and Ors.* (2007) 13 SCC 360). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide *Shankarlal v. State of Rajasthan* (2004) 10 SCC 632).

23. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident. (vide *Thangaiya v. State of Tamil Nadu* (2005) 9 SCC 650). Gurcharan Singh (PW-18) met the informant Darshan Singh (PW-4) before lodging the FIR and the fact of conspiracy was not disclosed by Gurcharan Singh (PW-18) and Darshan Singh (PW-4). The fact of conspiracy has not been mentioned in the FIR. Hakam Singh, the other witness on this issue has not been examined by the prosecution. Thus, the High Court was justified in discarding the part of the prosecution case relating to conspiracy. However, in the fact situation of the present case, acquittal of the said two co-accused has no bearing, so far as the present appeal is concerned."

Paragraph 10 of the judgment reported in 1976 Criminal L.J. 1568 : **Bahal Singh vs. State of Haryana** is also being reproduced here as under :-

"10. As to the presence of P. Ws. 4 and 5 at the time and place of occurrence the trial Court entertained grave doubts. If

by coincidence or chance a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness. And if such a person happens to be a relative or friend of the victim or inimically disposed towards the accused then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but does require cautious and close scrutiny. In the instant case, P.Ws. 4 & 5 were agnatic relations of the deceased-one of them a close one. The reason given by them for being at the place of occurrence did not appear to be true to the trial Court. There was not any compelling or sufficient reason for the High Court to differ from the evaluation of the evidence of the two chance witnesses. It may well be as remarked by the High Court that the respondent was also their collateral but they appeared to be partisan witnesses on the side of the prosecution and hence their testimony was viewed with suspicion by the trial Judge."

13. Sri Amit Sinha, learned Additional Government Advocate has, however, supported the judgment of the trial court and submitted that the case was that of a direct evidence based on the eye-witness account of PW-3 and PW-4 and the eye-witness account could not be done away lightly.

14. Having heard Sri Rajiv Nayan Singh, learned Amicus Curiae and Sri Amit Sinha, learned Additional Government Advocate, we find upon the assessment of all the evidence that definitely the FIR was an ante-timed FIR. Had the prosecution known about the fact that the dead-body had been dragged from the spot 'B' and 'C', as had been given in the site plan, to the village well marked as point 'F' which

was around 440 yards (two furlongs) away, then there was absolutely no requirement for the Investigating Police to have come to the spot after the FIR was lodged and thereafter searched for the dead-body as had been stated in the inquest report. Further we are of the view that had the incident which has been narrated in the FIR been definitely witnessed by the eye-witnesses, then the FIR itself would have been lodged only under Section 302 IPC and there would not have been any doubt with regard to the fact as to where the dead-body had been thrown and, therefore, the FIR would not have been lodged under Section 201 IPC.

15. In the instant case, we do not hesitate to conclude that till such time as the Police had come, it was not known to anyone as to where the dead-body was and after the investigation had taken place and Police had recovered the dead-body, the FIR was lodged and, thereafter, pursuant to a definite conference between the first informant and the Police, the accused appellant was named in the FIR. It is just possible that there was some dispute with regard to some accounting with regard to the cracker business which was being done by the deceased and therefore, the first informant and the two eye-witnesses namely Laxman Singh and Mulayam Singh had ganged together to implicate the appellant in the instant case. We are definitely of the view that when all the eye-witnesses were mentioning that quite a few people of the village had collected at the place of incident and in fact PW-1 had taken the names of Mata Prasad, Jahar Singh, Mukut Singh, Ram Babu Singh S/o Kandhai, Vasdev and other villagers and PW-4 had taken the names of Rajendra, Takdeer Singh, Bhagirath, Samrath Singh but none of these villagers who were as per

PW-1 and PW-4, eye-witnesses present had come to the witness box. We do find that Mulayam Singh, Laxman Singh and the first informant though were not of the same family but definitely were close to each other and, therefore, they had ganged together to implicate the accused, Ram Babu. Further, we are of the view that when the investigation was being done and it was alleged that gambling was done with the help of playing cards then at least an effort ought to have been made to recover the playing cards and to keep them in police custody. Neither the playing cards had been taken into custody nor any of the torches in the light of which the incident was seen, were taken into custody.

16. We are definitely, therefore, of the view that there are any number of lapses in the prosecution story and the prosecution case thus becomes doubtful. Also, we find that nowhere was the currency etc., which it was alleged was won in the gambling by the deceased, recovered.

17. Under such circumstances, the charges as were framed against the accused appellant were not proved beyond reasonable doubt and, therefore, the accused cannot be held guilty and, therefore, we acquit him of all the charges levelled against him.

18. The appeal therefore, stands allowed. The impugned judgment and order dated 23.05.1983 passed by the Sessions Judge, Jalaun at Orai is set-aside. The appellant, Ram Babu, is on bail. He need not surrender. The sureties and the bail bonds are discharged.

19. We do appreciate the hard work done by the learned Amicus Curiae Sri Rajiv Nayan Singh and provide that he

would be paid a fee of Rs.25,000/- by the High Court Legal Services Authority. The Registrar General of this Court to see that this order for the payment of the fee to the learned Amicus Curiae is complied with.

(2024) 9 ILRA 262

**APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.09.2024**

BEFORE

**THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.**

Criminal Appeal No. 2217 of 2023

**Kamal K.P. ...Appellant
Versus
State of U.P. & Anr. ...Respondents**

Counsel for the Appellant:

Sheeran Mohiuddin Alavi, Harsh Vardhan Kediya

Counsel for the Respondents:

G.A.

(A) Criminal Law - The National Investigation Agency Act, 2008 - Section 21(4) - Appeal - Indian Penal Code, 1860 - Sections 153-A, 295-A, 124-A & 120-B - The Unlawful Activities (Prevention) Act, 1967 - Section 17 & 18 , The I.T. (Amendment) Act, 2008 - Section 65 & 72, The Code of Criminal Procedure, 1973 - Section 167(2) - Default bail - Statutory Right -Indefeasible Right - Article 21 - Liberty - Right of default bail under Section 167(2) of CrPC is not only a statutory right but is a right that flows from Article 21 of the Constitution of India - It is an indefeasible right, nonetheless it is enforceable only prior to the filing of the challan or the charge-sheet and does not survive or remain enforceable on the challan being filed, if already not availed of - Right to life & personal liberty can only be confined by following due

procedure but it cannot be taken away.(Para -19,40)

(B) The Code of Criminal Procedure, 1973 - Section 167(2) – Right of default bail - If the right of default bail has been availed by an accused by moving a bail application and the period of 90 days has expired and is not extended further and even if the said bail application has not been disposed by the court and remained pending for a long time and the litigation travels to the higher forum and in between charge-sheet has been filed by the investigation agency within the statutory time, the right of the accused to be released on default bail will not be extinguished or defeated. (Para - 23)

Appellant arrested on March 3, 2023 various IPC, UAPA, and IT Act sections - remanded to judicial custody on March 6, 2023 - Investigation custodial remand was granted from April 2-4, 2023 - subsequent judicial custody remands until June 2, 2023 - Despite 90 days of custody expiring on June 1, 2023, the investigating agency sought and received an extension under Section 43-D(2) of the UAPA - appellant filed a default bail application on June 2, 2023 - rejected on June 26, 2023 - charge sheet was eventually filed on July 20, 2023, within the extended 180-day period – subsequent filing of the charge sheet nullified his right to bail - hence appeal challenging the rejection of default bail application.(Para - 2 to 8)

HELD: - Subsequent extension of time of investigation after 02.06.2023 or filing of charge-sheet on 30.07.2023 may not cure, suppress, vitiate or extinguish the right of the appellant/accused, to be released on default bail, which had already accrued in favour of the appellant in the midnight of 01/02.06.2023 when the same has also been acted upon/availed by the appellant by filing a default bail application on 02.06.2023. Special Court committed material illegality in rejecting the default bail application. Appellant entitled to default bail. **(Para -31 to 34)**

Appeal allowed. (E-7)

List of Cases cited:

1. Enforcement Directorate, G.O.I. Vs Kapil Wadhwan & anr., 2023 SCC Online SC 972
2. Gautam Navlakha Vs N.I.A., (2022) 13 SCC 542
3. Judgebir Singh @ Jasbir Singh Samra @ Jasbir & ors. Vs N.I.A., 2023 SCC Online SC 543
4. Judgebir Singh & ors. Vs N.I.A., MANU/SC/0501/2023,
5. C.B.I. Vs Kapil Wadhawan & ors., MANU/SC/0058/2024
6. Hitendra Vishnu Thakur & ors. Vs St. of Maha. & ors. , (1994) 4 SCC 602
7. Sanjay Dutt Vs St. through C.B.I., Bom., (09.09.1994 - SC) : MANU/SC/0554/1994
8. Uday Mohanlal Acharya Vs St. of Maha., MANU/SC/0222/2001
9. RITU CHHABARIA Vs U.O.I. & ORS.2023 LiveLaw (SC) 352

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

(1) Heard Shri Sheeran Mohiuddin Alavi & Shri Harsh Vardhan Kediya, learned counsels appearing for the appellant and Shri Shiv Nath Tilhari, learned Additional Government Advocate for respondents and perused the record.

(2) The instant criminal appeal under Section 21(4) of the N.I.A. Act, 2008 has been filed by the appellant- **Kamal K.P.** against the impugned order dated 26.06.2023 passed by the Additional District and Sessions Judge-5/Special Judge, NIA/ATS, Lucknow, in Bail Application No. 5048 of 2023, arising out of Case Crime No. 199 of 2020, under

Sections 153-A, 295-A, 124-A, 120-B I.P.C. & Section 17 and 18 of the Unlawful Activities (Prevention) Act, 1967 [here-in-after referred to as 'UAPA' and Section 65 & 72 of the I.T. (Amendment) Act, 2008, Police Station Manth, District Mathura, Uttar Pradesh, whereby his application for default bail moved under Section 167(2) of the Code of Criminal Procedure, 1973 (hereafter referred as 'Cr.P.C.') read with Section 43-D(2) of the UAPA has been rejected.

(3) Learned counsel for the appellant submits that appellant was arrested on 03.03.2023 and was produced before the learned Magistrate at Kerala on 04.03.2023 whereon his transit remand was granted and thereafter he was produced before the Special Judge, (NIA/ATS), at Lucknow on 06.03.2023 and was remanded to judicial custody for 14 days.

(4) It is further submitted that appellant was also taken on Police Custody Remand (P.C.R.) for three days from 02.04.2023 to 04.04.2023 where after he was again remanded to judicial custody.

(5) It is further submitted that the investigation of the case remained pending even after completion of 90 days and in this regard the appellant preferred an application under Section 167 (2) Cr.P.C. on 02.06.2023 for his release on statutory bail and the same was fixed for 05.06.2023 and the same was ultimately rejected vide impugned order dated 26.06.2023 on the ground that the period of investigation has already been extended by means of order dated 05.06.2023 and the charge-sheet has already been filed within 180 days of first remand of the appellant.

(6) It is vehemently submitted that the reasoning given by the Special Court in rejecting the prayer of default bail of the appellant is not tenable in the eyes of law as the period of investigation was extended on 05.06.2023 after expiry of 90 days while the application under Section 167 (2) Cr.P.C. for grant of default bail had already been moved on 02.06.2023, thus an indefeasible right had accrued in favour of appellant, which could not be defeated by filing the charge- sheet subsequently.

(7) It is further submitted that the Special Court has committed manifest illegality in rejecting the default bail application of the appellant as the appellant had become entitled to the default bail when the period of extension of investigation period was extended only on 05.06.2023 while the same had expired in the midnight of 01/02.06.2023.

(8) It is further submitted that since an indefeasible right to be released on bail had accrued in favour of the appellant by non-filing of charge-sheet by the Investigating Agency within 90 days and as the period of 90 days had expired on 02.06.2023 and the period of extension of investigation has been enlarged on 05.06.2023 and the application for statutory bail was moved on 02.06.2023, the appellant should have been released on default bail and, thus, the Special Court has committed patent illegality in rejecting the bail application of applicant, therefore, the impugned order passed by the Special Court is required to be set-aside and the appellant is entitled to be released on default bail.

(9) Learned counsel for the appellant has relied on the following case laws:-

(i) *Enforcement Directorate, Government of India Vs. Kapil Wadhwan and Another* reported in **2023 SCC OnLine SC 972**

(ii) *Gautam Navlakha Vs. National Investigation Agency* reported in **(2022) 13 SCC 542**; and

(iii) *Judgebir Singh alias Jasbir Singh Samra alias Jasbir and others Vs. National Investigating Agency* reported in **2023 SCC Online SC 543**

(10) Shri S. N. Tilhari, learned A.G.A. relying on the short counter affidavit as well as the supplementary counter affidavit filed by the State vehemently opposes the prayer of default bail of the appellant and submits that the appellant was arrested on 03.03.2023 from Malappuram, Police Station Melattur, Kerala in connection with this case and by producing him before the local Magistrate, a transit remand was obtained on 04.03.2023 and on 06.03.2023 the appellant was again produced before the Special Judge, (NIA/ATS), Lucknow and his judicial custody remand was allowed for 14 days and which was subsequently extended vide order 20.03.2023 till 03.04.2023.

(11) It is further submitted that on 31.03.2023 an application was filed for taking the accused on Police Custody Remand which was allowed from 02.04.2023 to 04.04.2023 and vide order dated 04.04.2023 remand was further allowed till 03.05.2023.

(12) It is also submitted that vide order dated 03.05.2023 the judicial remand of the appellant was further allowed till 17.05.2023 and the same was again extended to 02.06.2023 vide order dated 17.05.2023.

(13) It is vehemently submitted that before expiring of 90 days' time i.e. on

01.06.2023 Public Prosecutor had moved an application before the learned Special Judge, (NIA/ATS), Lucknow for extension of time of investigation from 90 days to 180 days, as provided under Section 43-D(2) of the UAPA and vide order dated 01.06.2023 the application was directed to be listed on 02.06.2023 and the appellant/accused was summoned from District Jail and on 02.06.2023 the remand period was extended till 05.06.2023. The Public Prosecutor filed another application before the Special Court on 05.06.2023 for extension of time for investigation for further 60 days and vide order dated 05.06.2023 the period of investigation was extended for 50 more days and the remand of the appellant was granted up to 03.07.2023 and vide order dated 03.07.2023 the remand was further allowed till 20.07.2023 and ultimately the charge-sheet against the appellant/accused was filed on 20.07.2023 i.e. within 180 days, as provided under Section 43-D(2) of the U.A.P.A. Thus, it is submitted that the extension of time to complete investigation was extended by the Special Court within 90 days i.e. on 02.06.2023 and 05.06.2023 and charge-sheet has also been filed within 180 days of the first remand of the appellant and, therefore, no indefeasible right for release on default bail had ever occurred in favour of the appellant/accused. Thus, it is submitted that there is no illegality in the order passed by the Special Court and appeal is liable to be dismissed.

(14) Having heard learned counsel for the parties and having perused the record it appears to be appropriate that before considering the rival submissions of the learned counsels for the parties, it will be useful to look into the relevant statutory provisions and legal precedents pertaining to the matter in issue.

(15) Section 167(2) of Code of 1973 which is relevant for the disposal of present case, existing as of now is being reproduced as under:

"167(2). The Magistrate to whom an Accused person is forwarded under this Section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the Accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the Accused to be forwarded to a Magistrate having such jurisdiction:

Provided that,-

(a) the Magistrate may authorise the detention of the Accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the Accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the Accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention of the Accused in custody of the

police under this Section unless the Accused is produced before him in person for the first time and subsequently every time till the Accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the Accused either in person or through the medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police."

(16) Section 43-D of the UAPA operates as a special provision vis-a-vis the applicability of rights granted Under Section 167(2)(a) of the Code of Criminal Procedure. Section 43D is also reproduced here-in-below:

"43D. Modified application of certain provisions of the Code.-(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of Clause (c) of Section 2 of the Code, and "cognizable case" as defined in that Clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in Sub-section (2),-

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:

Provided further that if it is not possible to complete the investigation within the said period of ninety days, the

Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the Accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that-

(a) the reference in Sub-section (1) thereof

(i) to "the State Government" shall be construed as a reference to "the Central Government or the State Government.";

(ii) to "order of the State Government" shall be construed as a reference to "order of the Central Government or the State Government, as the case may be"; and

(b) the reference in Sub-section (2) thereof, to "the State Government" shall be construed as a reference to "the Central Government or the State Government, as the case may be".

(4) Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person Accused of having committed an offence punishable under this Act.

(5) Notwithstanding anything contained in the Code, no person Accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be

released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such Accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made Under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true.

(6) The restrictions on granting of bail specified in Sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in Sub-sections (5) and (6), no bail shall be granted to a person Accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing."

(17) Hon'ble Supreme Court in **Judgebir Singh and Ors. vs. National Investigation Agency**, **MANU/SC/0501/2023**, explained the law with regard to section 167 CrPc in following words:-

"A three-Judge Bench of this Court in *Uday Mohanlal Acharya v. State of Maharashtra* reported in **MANU/SC/0222/2001 : (2001) 5 SCC 453**, has noticed the object of enacting the provisions of Section 167 of the Code of Criminal Procedure. Section 57 of the Code of Criminal Procedure contains the embargo on the police officers to detain in custody, a person arrested beyond 24 hours. The object is that the Accused should be brought before a Magistrate

without delay within 24 hours, which provision is, in fact, in consonance with the constitutional mandate engrafted Under Article 22(2) of the Constitution. The provision of Section 167 is supplementary to Section 57. The power Under Section 167 is given to detain a person in custody while police goes on with the investigation. Section 167 is, therefore, a provision which authorises the Magistrate permitting the detention of the Accused in custody prescribing the maximum period. In Uday Mohanlal Acharya (*supra*) this Court while dealing with Section 167 laid down the following:

5. ...This provision of Section 167 is in fact supplementary to Section 57, in consonance with the principle that the Accused is entitled to demand that justice is not delayed. The object of requiring the Accused to be produced before a Magistrate is to enable the Magistrate to see that remand is necessary and also to enable the Accused to make a representation which he may wish to make. The power Under Section 167 is given to detain a person in custody while the police goes on with the investigation and before the Magistrate starts the enquiry. Section 167, therefore, is the provision which authorises the Magistrate permitting detention of an Accused in custody and prescribing the maximum period for which such detention could be ordered. Having prescribed the maximum period, as stated above, what would be the consequences thereafter has been indicated in the proviso to Sub-section (2) of Section 167. The proviso is unambiguous and clear and stipulates that the Accused shall be released on bail if he is prepared to and does furnish the bail which has been termed by judicial pronouncement to be "compulsive bail" and such bail would be deemed to be a bail under Chapter 33. The

right of an Accused to be released on bail after expiry of the maximum period of detention provided Under Section 167 can be denied only when an Accused does not furnish bail, as is apparent from Explanation I to the said section. The proviso to Sub-section (2) of Section 167 is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of a citizen....

29. Again, there has been a very detailed consideration of Section 167 by a three-Judge Bench of this Court in Rakesh Kumar Paul v. State of Assam, reported in MANU/SC/0993/2017 : (2017) 15 SCC 67. This Court in the above case has traced the legislative history of the provision of Section 167. This Court in the above case emphasised that the debate on Section 167 must also be looked at from the perspective of expeditious conclusion of investigation and from the angle of personal liberty. This Court also held that the right of default bail is an indefeasible right which cannot be allowed to be frustrated by the prosecution. Following was laid down in paras 37, 38 and 39:

37. This Court had occasion to review the entire case law on the subject in Union of India v. Nirala Yadav [Union of India v. Nirala Yadav, MANU/SC/0580/2014 : (2014) 9 SCC 457: (2014) 5 SCC (Cri) 212]. In that decision, reference was made to Uday Mohanlal Acharya v. State of Maharashtra [Uday Mohanlal Acharya v. State of Maharashtra, MANU/SC/0222/2001 : (2001) 5 SCC 453: 2001 SCC (Cri) 760] and the conclusions arrived at in that decision. We are concerned with Conclusion (3) which reads as follows: (Uday Mohanlal Acharya case [Uday Mohanlal Acharya v. State of Maharashtra, MANU/SC/0222/2001 :]

(2001) 5 SCC 453: 2001 SCC (Cri) 760], SCC p. 473, para 13)

13. ... (3) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the Accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the Accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

38. This Court also dealt with the decision rendered in *Sanjay Dutt* [*Sanjay Dutt v. State*, MANU/SC/0554/1994 : (1994) 5 SCC 410: 1994 SCC (Cri) 1433] and noted that the principle laid down by the Constitution Bench is to the effect that if the charge-sheet is not filed and the right for "default bail" has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The Accused can avail his liberty by filing an application stating that the statutory period for filing the charge-sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the Accused is prepared to furnish the bail bond.

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to *Mohd. Iqbal Madar Sheikh v. State of Maharashtra* [*Mohd. Iqbal Madar Sheikh v. State of Maharashtra*, MANU/SC/1045/1996 : (1996) 1 SCC 722: 1996 SCC (Cri) 202] wherein it was observed that some courts keep the application for "default bail" pending for some days so that in the meantime a charge-sheet is submitted.

While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the Accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court.

30. One more judgment of this Court on Section 167 of the Code of Criminal Procedure be noticed i.e., *Achpal alias Ramswaroop and Anr. v. State of Rajasthan*, reported in MANU/SC/1035/2018 : (2019) 14 SCC 599. After referring to several earlier judgments of this Court including the judgments of this Court in *Uday Mohanlal Acharya* (supra) and *Rakesh Kumar Paul* (supra), this Court had laid down that the provisions of the Code of Criminal Procedure do not empower anyone to extend the period within which the investigation must be completed. This Court held that no court either directly or indirectly can extend such period. Following are the observations of this Court in para 20 of *Achpal* (supra):

20. We now turn to the subsidiary issue, namely, whether the High Court could have extended the period. The provisions of the Code do not empower anyone to extend the period within which the investigation must be completed nor does it admit of any such eventuality. There are enactments such as the *Terrorist and Disruptive Activities (Prevention) Act, 1985* and the *Maharashtra Control of Organised Crime Act, 1999* which clearly contemplate extension of period and to that extent those enactments have modified the provisions of the Code including Section 167. In the absence of any such similar provision empowering the Court to extend the period,

no court could either directly or indirectly extend such period. In any event of the matter all that the High Court had recorded in its order dated 3-7-2018 [Mahaveer v. State of Rajasthan, MANU/RH/0391/2018] was the submission that the investigation would be completed within two months by a gazetted police officer. The order does not indicate that it was brought to the notice of the High Court that the period for completing the investigation was coming to an end. Mere recording of submission of the Public Prosecutor could not be taken to be an order granting extension. We thus reject the submissions in that behalf advanced by the learned Counsel for the State and the complainant.

31. The scheme of the Code of Criminal Procedure as noticed above clearly delineates that the provisions of Section 167 of the Code of Criminal Procedure give due regard to the personal liberty of a person. Without submission of chargesheet within 60 days or 90 days as may be applicable, an Accused cannot be detained by the police. The provision gives due recognition to the personal liberty. However, as explained by this Court in Dinesh Dalmia v. CBI reported in MANU/SC/7924/2007 : (2007) 8 SCC 770, such a right of default bail although a valuable right, yet the same is a conditional one, the condition precedent being pendency of the investigation. Therefore, once the investigation is complete with the filing of the police report, containing the details specified Under Section 173(2) of the Code of Criminal Procedure, the question of a claim or grant for default bail does not arise."

(18) Thus, a plain reading of the above mentioned provisions makes it clear that the benefit of default bail shall be

available to the accused for the offences alleged to have been committed under the UAPA also where the investigation has not concluded within 90 days of arrest of the accused irrespective of the punishment of the offences alleged to have been committed by him, unless the period has been extended within or upto maximum period of 180 days to complete the investigation on or before the due date following due procedure under the Statute.

(19) In ***Central Bureau of Investigation vs. Kapil Wadhawan and Ors.***, MANU/SC/0058/2024, though the Apex Court found the accused person not entitled for default bail by holding that once the charge-sheet has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to the accused after the filing of the charge-sheet, but also highlighted that the right of default bail under Section 167(2) of CrPC is not only a statutory right but is a right that flows from Article 21 of the Constitution of India. It is an indefeasible right, nonetheless it is enforceable only prior to the filing of the challan or the charge-sheet, and does not survive or remain enforceable on the challan being filed, **if already not availed of**, in following words:-

"15. There cannot be any disagreement with the well settled legal position that the right of default bail Under Section 167(2) Code of Criminal Procedure is not only a statutory right but is a right that flows from Article 21 of the Constitution of India. It is an indefeasible right, nonetheless it is enforceable only prior to the filing of the challan or the chargesheet, and does not survive or remain enforceable on the challan being

filed, **if already not availed of**. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to the Accused after the filing of the challan. The Constitution Bench in **Sanjay Dutt v. State through CBI, Bombay (II) MANU/SC/0554/1994 : (1994) 5 SCC 410**, while considering the provisions of Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 read with Section 167(2) Code of Criminal Procedure had very pertinently held that:

48. We have no doubt that the common stance before us of the nature of indefeasible right of the Accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the Accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, **if already not availed of**. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an Accused after the filing of the challan. The custody of the Accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the Accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Code of Criminal Procedure ceases to apply. The Division Bench also indicated that if there be such an application of the Accused for release on bail and also a

prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the Accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The Accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the Accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan v. State of Punjab* [MANU/SC/0073/1952 : (1952) 1 SCC 118; 1952 SCR 395; AIR 1952 SC 106; 1952 Cri LJ 656]; *Ram Narayan Singh v. State of Delhi* [MANU/SC/0035/1953 : 1953 SCR 652; AIR 1953 SC 277 : 1953 Cri LJ 1113] and *A.K. Gopalan v. Government of India* [MANU/SC/0091/1965 : (1966) 2 SCR 427; AIR 1966 SC 816; 1966 Cri LJ 602].)" **(Emphasis Given)**

(20) In **Hitendra Vishnu Thakur and others v. State of Maharashtra and others reported in (1994) 4 SCC 602**, while interpreting Section 20(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'TADA Act') read with Section 167 Cr.P.C., the Supreme Court held that once the period

for filing the charge-sheet has expired and either no extension under Clause (bb) of Section 20 (4) of TADA Act has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under Sub-Section (4) of Section 20 of TADA Act read with Section 167 of Cr.P.C. and the Designated Court shall release him on bail, if the accused seeks to be released and furnishes the requisite bail bonds but that does not mean that on expiry of the period, during which investigation is required to be completed under Section 24 of TADA Act read with Section 167 of Cr.P.C., the court must release the accused on bail on its own motion even without moving any application from the accused person on his offering to furnish bail. The accused will be required to make an application if he wishes to be released on bail on account of the 'default' of the Investigating/Prosecuting Agency, and once such an application is made, the court should issue notices to the Public Prosecutor who may either show that prosecution has obtained the order for completing the investigation from the court under Clause (bb) of Section 20 (4) of TADA Act or that the charge-sheet has been filed in the Designated Court before the expiry of prescribed period or even that the prescribed period has actually not expired and thus, resists the grant of bail on the alleged ground of 'default'. The issuance of notice would avoid the possibility of an accused obtaining an order of bail under the 'default' clause by either deliberately or inadvertently concealing certain facts and would avoid a multiplicity of proceedings. It would, therefore, serve the ends of justice, if both sides are heard on the petition for bail on account of prosecution 'default'. It has been further

held by the Supreme Court that when a report submitted by the Public Prosecutor to the Designated Court, for grant of extension for Clause (bb) of Section 20 (4) of TADA Act, its notice should be issued to the accused, before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. Even though neither Clause (b) nor Clause (bb) of Section 20 (4) of the TADA Act provides for issuance of such notice but, the issuance of such notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice, and issuance of notice to the accused or the Public Prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or Public Prosecutor in the scheme of the Act, and no prejudice whatsoever can be caused by the issuance of such a notice to any party. (para 21 of Judgment on pages 627 to 628)

(21) In **Sanjay Dutt vs. State through C.B.I., Bombay (09.09.1994 - SC) : MANU/SC/0554/1994**, while considering **Hitendra Vishnu Thakur (supra)** Apex Court opined as under:-

"52. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of

the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the CrPC. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the CrPC. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to

be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan v. The State of Punjab* MANU/ SC/ 0073/ 1952 : 1952CriLJ656 ; *Ram Narayan Singh v. The State of Delhi and Ors.* MANU/ SC/ 0035/ 1953 : 1953CriLJ113; and *A.K. Gopalan v. The Government of India* MANU/SC/0091/1965 : 1966CriLJ602 .

53. This is the nature and extent of the right of the accused to be released on bail under Section 20(4)(bb) of the TADA Act read with Section 167 Cr.P.C. in such a situation. We clarify the decision of the Division Bench in *Hitendra Vishnu Thakur*, accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribe to that view.

57.(2)(a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the CrPC and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to Clause (bb) of Sub-section (4) of Section 20 of the TADA Act has to be understood in the judgment of the Division Bench of this Court in *Hitendra Vishnu Thakur*. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

(2)(b) **The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the**

TADA Act read with Section 167(2) of the CrPC in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the CrPC. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage." **(Emphasis Supplied)**

(22) In **Uday Mohanlal Acharya vs. State of Maharashtra**, MANU/SC/0222/2001 Hon'ble Supreme Court while considering Sanjay Dutt (supra) opined as under:-

"6. There cannot be any dispute that on expiry of the period indicated in the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure the accused has to be released on bail, if he is prepared to and does furnish the bail. Even though a Magistrate does not possess any jurisdiction to refuse bail when no charge sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order

passed by the Magistrate. In other words, without an order of the Magistrate the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 cannot be given effect to and there lies the rub. The grievance of the accused is that for a variety of reasons the Magistrate or even the superior Court would refuse to pass an order releasing the accused on bail notwithstanding the pre-conditions required under the proviso are satisfied and then when the accused moves the High Court or the Supreme Court during the interregnum the police files a challan. It was also contended by Mr. Tulsi that a Public Prosecutor may take adjournment from the Court when the bail application was being moved and then would persuade the investigating agency to file a challan and then contend that the Court would not be entitled to release the accused on bail under the proviso to sub-section (2) of Section 167, and in that situation not only the positive command of the legislature is flouted but also an unauthorised period of custody is being legalised and this would be an infraction of the constitutional provision within the meaning of Article 22. In *Hitendra Vishnu Thakur vs. State of Maharashtra* MANU/SC/0526/1994 : 1995CriLJ517, two learned Judges of this Court construed the provisions of Section 167 of the Code of Criminal Procedure Code read with sub-section 4 of Section 20 TADA. After examining in detail the object behind the enactment of Section 167 of the Code of Criminal Procedure and the object of the Parliament introducing the proviso to sub-section (2) of Section 167 prescribing the outer limit within which the investigation must be completed the Court expressed that the proviso to sub-section (2) of Section 167 read with Section 20(4)(b) of TADA creates an indefeasible right in an accused person on account of

the default by the Investigating Agency in the completion of the investigation within the maximum period prescribed or extended, as the case may be, to seek an order for his release on bail and such order is generally termed as an "order on default". The Court also held that an obligation is cast upon the Court to inform the accused of his right of being released on bail and enable him to make an application in that behalf. It was also further held that the accused would be entitled to move an application for being admitted on bail and the Designated Court shall release him on bail if the accused seeks to be so released and furnishes the requisite bail. The Court declined to agree with the contention of the accused that the Magistrate must release the accused on bail on its own motion even without any application from an accused person on his offering to furnish bail."

On the aforesaid premises, we would record our conclusions as follows:-

1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.

2. Under the proviso to aforesaid sub-section (2) of Section 167, the Magistrate may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in

favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to furnish the bail, as directed by the Magistrate. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the Investigating Agency in completion of the investigation within the specified period, the Magistrate/Court must dispose it of forth with, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-section 2 of Section 167, the continued custody of the accused even beyond the specified period in paragraph (a) will not be unauthorised, and therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. **The expression 'if not already availed of' used by this Court in Sanjay Dutt's case (supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph**

(a) of proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression 'availed of' if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail.

Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with law laid down by this Court in the case of Mohd. Iqbal vs. State of Maharashtra (supra).

Having indicated the position of law, as above, and applying the same to the

facts and circumstances of the present case, it appears that the prescribed period under paragraph (a) of the proviso to sub-section (2) of Section 167 expired on 16.8.2000 and the accused filed an application for being released on bail and offered to furnish the bail on 17.8.2000. The Magistrate, however, erroneously refused the bail prayer on the ground that the proviso to sub-section (2) of Section 167 has no application to case pertaining to MPID Act. The accused then moved the High Court. While the matter was pending before the Division Bench of the High Court, the learned Public Prosecutor took an adjournment and the case was posted to 31st August, 2000 and just the day before the charge-sheet was filed on 30th August, 2000 and thus the indefeasible right of the accused stood frustrated and the High Court refused to release the accused on bail on a conclusion that the accused cannot be said to have availed of his indefeasible right, as held in Sanjay Dutt's case (supra) since, he has not yet been released on bail. But in view of our conclusion as to when an accused can be said to have availed of his right, in the case in hand, it has to be held that the accused availed of his right on 17th August, 2000 by filing an application for being released on bail and offering therein to furnish the bail in question. This being the position, the High Court was in error in refusing that right of the accused for being released on bail. We, therefore, direct that the accused should be released on bail on such terms and conditions to the satisfaction of the Learned Magistrate, and further the Magistrate would be entitled to deal with the accused in accordance with law and observations made by us in this judgment, since the charge-sheet has already been filed.

In accordance with the majority view, the appeal stands allowed."

(Emphasis given by us)

(23) Thus it is clear that if the right of default bail has been availed by an accused by moving a bail application and the period of 90 days has expired and is not extended further and even if the said bail application has not been disposed by the court and remained pending for a long time and the litigation travels to the higher forum and in between charge-sheet has been filed by the investigation agency within the statutory time, the right of the accused to be released on default bail will not be extinguished or defeated.

(24) In **RITU CHHABARIA versus UNION OF INDIA & ORS.**^{2023 LiveLaw (SC) 352}, the Apex Court opined as under:-

"21. A bare perusal of the abovementioned statement of objects strongly indicates that Section 167(2) of the Cr.PC was enacted to ensure that the investigating agency completes the investigation within the prescribed time limit, failing which no accused could be detained if they are willing to avail bail. This position was also laid emphasis on by a three-judge bench of this Court in the case of **Ravindran Vs. The Intelligence Officer, Directorate of Revenue Intelligence**,^{(2021) 2 SCC 485}, the relevant paragraphs of the same are being reproduced hereunder:

The suggestion made in Report No. 14 was reiterated by the Law Commission in Report No. 41 on The Code of Criminal Procedure, 1898 (Vol. I, 1969, pp. 76-77). The Law Commission re-emphasised the need to guard against the misuse of Section 344 of the 1898 Code by filing "preliminary reports" for remanding the accused beyond the statutory period prescribed under Section 167. It was pointed out that this could lead to serious abuse wherein "the arrested person can in

this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner". Hence the Commission recommended fixing of a maximum time-limit of 60 days for remand. It was in this backdrop that Section 167(2) was enacted within the present day CrPC, providing for time-limits on the period of remand of the accused, proportionate to the seriousness of the offence committed, failing which the accused acquires the indefeasible right to bail.

22. Further, this legal position was again reiterated in *Satendar Kumar Antil vs CBI & Anr.*,^{(2021) 10 SCC 773}, wherein it was held that Section 167(2) of the Cr.PC is a limb of Article 21 of the Constitution of India, and as such, the investigating authority is under a constitutional duty to expediate the process of investigation within the stipulated time, failing which, the accused is entitled to be released on default bail. The relevant observations made in the said judgment are as under:-

"Section 167(2) was introduced in the year 1978, giving emphasis to the maximum period of time to complete the investigation. This provision has got a laudable object behind it, which is to ensure an expeditious investigation and a fair trial, and to set down a rationalised procedure that protects the interests of the indigent sections of society. This is also another limb of Article 21. Presumption of Innocence is also inbuilt in this provision. An investigating agency has to expedite the process of investigation as a suspect is languishing under incarceration. Thus, a duty is enjoined upon the agency to complete the investigation within the time prescribed and a failure would enable the release of the accused. The right enshrined is an absolute and indefeasible one, ensuring to the benefit of suspect.

As a consequence of the right flowing from the said provision, courts will have to give due effect to it, and thus any detention beyond this period would certainly be illegal, being an affront to the liberty of the person concerned. Therefore, it is not only the duty of the investigating agency but also the courts to see to it that an accused gets the benefit of Section 167(2).

34. Even at the cost of repetition, we find it pertinent to mention that the right of default bail under Section 167(2) of the CrPC is not merely a statutory right, but a fundamental right that flows from Article 21 of the Constitution of India. The reason for such importance being given to a seemingly insignificant procedural formality is to ensure that no accused person is subject to unfettered and arbitrary power of the state. The process of remand and custody, in their practical manifestations, create a huge disparity of power between the investigating authority and the accused. While there is no doubt in our minds that arrest and remand are extremely crucial for the smooth functioning of the investigation authority for the purpose of attaining justice, however, it is also extremely important to be cognizant of a power imbalance. Therefore, it becomes essential to place certain checks and balances upon the Investigation Agency in order to prevent the harassment of accused persons at their hands.”

(Emphasis Given)

(25) In **Judgebir Singh and Ors. vs. National Investigation Agency: MANU/SC/0501/2023 (Supra)**, the Apex Court dismissed the appeal filed by the accused persons as they failed to avail the right of default bail by filing a bail

application and also noticing that the time to complete investigation, in that case, was extended on 101st day opined that the appellants would have been released on bail if they have filed any application for bail after statutory period and subsequent extension of time or filing of charge-sheet could not have extinguished their right, in following words:-

**"AN EYE-OPENER
LITIGATION FOR THE NIA/STATE
POLICE**

76. As is evident from the chronology of dates and events referred to in the earlier part of our judgment, the final report Under Section 173(2) of the Code of Criminal Procedure was filed in the Court of SDJM, Ajnala on 15.11.2019. 15.11.2019 was the 161st day from the date of arrest of two of the Appellants before us, namely, Jasbir Singh and Varinder Singh. They were the first to be arrested on 08.06.2019. The Punjab Police applied to the Court of the Additional Sessions Judge, Amritsar, for extension of time to complete the investigation invoking the proviso to Section 43D(2)(b) of the UAPA on 04.09.2019. When this application for extension of time was filed only two days were left for 90 days to expire. This is suggestive of the fact that the 91st day would have fallen on 07.09.2019. What is important to highlight is that the Additional Sessions Judge, Amritsar, looked into the extension application dated 04.09.2019 filed by the Punjab Police and ultimately, extended the time limit vide its order dated 17.09.2019 i.e., on the 101st day. By the time, the Additional Sessions Judge, Amritsar, passed an order extending the time, the period of 90 days had already expired. Indisputably, there was no chargesheet before the Court on the 91st day i.e., on 07.09.2019. The reason why we

say that this is a grey area is because what would have happened if the Appellants Jasbir Singh and Varinder Singh had preferred an application seeking statutory/default bail Under Section 167(2) of the Code of Criminal Procedure on the 91st day i.e., on 07.09.2019. The application seeking extension of time was very much pending. The Additional Sessions Judge could not have even allowed such application promptly i.e., on or before the 90th day without giving notice to the Accused persons. **The law is now well settled in view of the decision of this Court in the case of Jigar alias Jimmy Pravinchandra Aditya v. State of Gujarat reported in MANU/SC/1233/2022 that an opportunity of hearing has to be given to the Accused persons before the time is extended up to 180 days to complete the investigation. The only error or lapse on the part of the Appellants Jasbir and Varinder Singh was that they failed to prefer an appropriate application seeking statutory/default bail on the 91st day. If such application would have been filed, the court would have had no option but to release them on statutory/default bail.** The Court could not have said that since the extension application was pending, it shall pass an appropriate order only after the extension application was decided. That again would have been something contrary to the well settled position of law. This litigation is an eye opener for the NIA as well as the State investigating agency that if they want to seek extension, they must be careful that such extension is not prayed for at the last moment.

77. The right to be released on default bail continues to remain enforceable if the Accused has applied for such bail, notwithstanding pendency of the bail application or subsequent filing of the chargesheet or a report seeking extension

of time by the prosecution before the court. However, where the Accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, or a report seeking extension of time is preferred before the Magistrate or any other competent court, the right to default bail would be extinguished. The court would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the Accused may still be released on bail under other provisions of the Code of Criminal Procedure.

78. Our observations in paras 76 and 77 respectively as above are keeping in mind the decision of this Court rendered by a three-Judge Bench in the case of **Sayed Mohd. Ahmad Kazmi v. State (Government of NCT of Delhi) and Ors. reported in MANU/SC/0900/2012 : (2012) 12 SCC 1**, wherein in paras 25, 26 and 27 respectively, this Court observed as under:

25. Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General Mr. Raval. There is no denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the Additional Sessions Judge and the custody of the Appellant was held to be illegal and an application Under Section 167(2) Code of Criminal Procedure was made on behalf of the Appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of

the Appellant for a further period of 90 days with retrospective effect from 2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the Appellant on the expiry of 90 days from the date when the Appellant was taken into custody. Such right, as has been commented upon by this Court in **Sanjay Dutt [MANU/SC/0554/1994 : (1994) 5 SCC 410: 1994 SCC (Cri) 1433]** and the other cases cited by the learned Additional Solicitor General, could only be distinguished (sic extinguished) once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an Accused does not exercise his right to grant of statutory bail before the charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.

26. The circumstances in this case, however, are different in that the Appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.

27. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been endorsed by the High Court and we are of the view that the Appellant acquired the right for grant of statutory bail on 17-7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application

for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the Appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.

(Emphasis supplied)

(26) If the facts of the instant case are appreciated in the background of the aforesaid legal position it would reflect that the factual matrix of this case has not been disputed so far as the chronology of the orders passed by the Special Court whereby remand of the appellant has been granted by the Special Court, moving of bail application as well as the applications moved by the Investigating Officer forwarded by the Public Prosecutor before the Special Court for extension of period of investigation are concerned. The State in its response, especially in para no.8 onwards of the short counter affidavit dated 27/30.09.2023, has admitted that the appellant was arrested on 03.03.2023 from Melattur Police Station Malappuram, Kerala in connection with the instant case and a transit remand was granted by the local Magistrate on 04.03.2023 and it was on 06.03.2023 the appellant was again produced before the Additional District and Sessions Judge-5/Special Judge, NIA/ATS, Lucknow and the judicial custody remand was allowed for 14 days. It is also admitted in this short counter affidavit that vide order dated 20.03.2023 the remand was further allowed till 03.04.2023 and it was on 31.03.2023 an application for seeking the Police Custody Remand of the appellant was moved and it was on 01.04.2023 the police custody remand of the appellant was accepted from 02.04.2023 to 04.04.2023 and the remand

was also allowed up to 03.05.2023. Vide order dated 03.05.2023 the remand was further allowed till 17.05.2023 and vide order dated 17.05.2023 the remand was further allowed till 02.06.2023.

(27) It is also admitted to the State, as is evident from para no.17 onwards of the short counter affidavit dated 27/30.09.2023, that on 01.06.2023 the Public Prosecutor had moved an application before the Special Judge for extension of time of investigation from 90 days to 180 days, as provided under Section 43-D(2) of the UAPA and the Court vide its order dated 01.06.2023 fixed this application for 02.06.2023 and summoned the accused from the District Jail and vide order dated 02.06.2023 the Special Court also extended the remand period till 05.06.2023. It was on 05.06.2023 the Public Prosecutor again filed an application before the Special Court for extension of time for further 60 days as the period of remand was going to expire on 05.06.2023, vide order of the same date i.e. 05.06.2023 the period of investigation was extended for 50 more days and the remand of the appellant was also granted up to 03.07.2023 and subsequently on 03.07.2023 the remand was again allowed up to 20.07.2023 and ultimately the charge-sheet was also filed against the appellant on 20.07.2023. Thus, the case of the State is that the period of investigation was extended by the Special Court vide order dated 02.06.2023 to 05.06.2023 and thereafter vide order dated 05.06.2023 till 50 days and thereafter vide order dated 03.07.2023 till 20.07.2023 and it was on 20.07.2023 the charge-sheet has been filed i.e. within statutory period of 180 days and, therefore, the appellant is not entitled for default bail.

(28) The contention of learned counsel for the appellant to the contrary is

that an application to extend the time of investigation was moved on 01.06.2023, which was directed to be taken up on 02.06.2023 and the appellant was summoned from the jail. However, it is vehemently submitted that vide order dated 02.06.2023, which was the 91st day of the first remand of the appellant, no order with regard to the extension of time of investigation was passed and an indefeasible right for release on default bail had occurred in favour of appellant and in this scenario the Investigating Officer was compelled to move another application for extension of time of investigation on 05.06.2023, on which the Special Court has passed an order on 05.06.2023, whereby 50 days further time was granted for completion of investigation which was subsequently extended till 20.07.2023, on which the charge-sheet appears to have been filed.

(29) Thus, the case of the appellant is that, when the time of investigation was not extended by the Special Court on 01.06.2023 (within 90 days of the 1st remand) and was also not extended vide order dated 02.06.2023 (91st day of the 1st remand) and the same could only be extended vide order dated 05.06.2023 and as the bail application had already been filed by the appellant on 02.06.2023 (on 91st day of 1st remand), an indefeasible right to be released on bail had occurred in favour of the appellant which could not be defeated by filing the charge-sheet subsequently or by extending the time of investigation on 05.06.2023.

(30) Perusal of the record in this regard would reflect that admittedly the transit remand of the appellant was granted by a local Court at Kerala on 04.03.2023, therefore, the 90th day of the detention of

the appellant was on 01.06.2023 and an application, as is reflected from the record, for the purpose of extension of time of the investigation was moved on 01.06.2023 (on 90th day) by the prosecutor and an endorsement of date 01.06.2023 of the Presiding Officer of the Court, would reveal that on this application the accused/appellant was summoned for 02.06.2023 and vide another order of the same day the remand of the appellant was also extended till 05.06.2023. The order-sheet of date 02.06.2023, a copy of which has been placed on record as Annexure No. SCA-10 to the short counter affidavit filed by the State and perusal of this order would reveal that only remand of the appellant was accepted/extended till 05.06.2023 with a further direction to summon the accused/appellant on 05.06.2023. Admittedly in this order of date 02.06.2023, there is no mention of extension of the time of investigation. Thereafter the Public Prosecutor moved another application for extension of period of investigation for 60 days on 05.06.2023 and perusal of the order of date 05.06.2023 passed by the Special Court, a copy of which has been placed on record as Annexure No.SCA12 to the short counter affidavit filed by the State, would reveal that vide this order (05.06.2023) the period of investigation was extended for further 50 days.

A clear distinction may be inferred from the perusal of above mentioned both orders passed by the Special Court i.e. of date 02.06.2023 and of date 05.06.2023, as vide order dated 02.06.2023 only the remand of the appellant has been extended till 05.06.2023 with a further direction to summon the accused/appellant, while vide order dated 05.06.2023 the period of investigation has

been extended for further 50 days. It also appears to be an admitted situation that the appellant had moved an application for default bail alleging non-completion of the investigation within 90 days on 02.06.2023, as is evident from the order sheet of the Special Court of date 02.06.2023 and the same was directed to be listed on 05.06.2023 for hearing. It may be recalled that the 90th day of the first remand of the appellant was 01.06.2023 and the default bail application has been moved by the appellant on 02.06.2023 which is/was the 91st day of the first remand of the appellant. The confusion as to whether vide order dated 02.06.2023 the Special Court has extended time of investigation or simply remanded the accused in judicial custody till 5th June, 2023 has been cleared by the Special Judge/Special Court itself, while passing the impugned order dated 26.06.2023 whereby the default bail application moved by the appellant has been rejected and it has been specifically stated in the impugned order by the Special Court that perusal of the record would reveal that vide order dated 05.06.2023, on an application moved by the Investigating Officer, the period of extension of the period of investigation was extended till 01.09.2023 in view of Section 43-D(2) of UAPA and charge-sheet has also been filed within 180 days of the first remand of the appellant. Thus, the air has been cleared by the Special Court itself by stating in clear and loud terms that the period of investigation could only be extended vide order dated 05.06.2023 which was the 94th day of first remand. Thus the period of investigation, as may be inferred from the impugned order dated 26.06.2023 could only be extended vide order dated 05.06.2023 and by that time an indefeasible right to be released on default bail, in our considered opinion, had already occurred in

favour of the appellant and he has also availed this right by immediately moving an application for default bail before the Special Court on 02.06.2023, which has been rejected by passing impugned order of date 26.06.2023.

(31) Thus, the Special Court has committed material illegality in rejecting the prayer of default bail of the appellant and in our considered opinion the appellant is entitled for default bail.

(32) It is clarified that the subsequent extension of time of investigation after 02.06.2023, vide order dated 05.06.2023 or filing of charge-sheet on 30.07.2023 may not cure, suppress, vitiate or extinguish the right of the appellant/accused, to be released on default bail, which had already accrued in favour of the appellant in the midnight of 01/02.06.2023 when the same has also been acted upon/availed by the appellant by filing a default bail application on 02.06.2023.

(33) Accordingly, the appeal is **allowed** and the impugned order dated 26.06.2023, passed by the Additional District and Sessions Judge-5/Special Judge, NIA/ATS, Lucknow rejecting the default bail application filed by the appellant, is hereby, **quashed /set aside**.

(34) The appellant- **Kamal K.P.** is enlarged on default bail in Case Crime No. 199 of 2020 under Sections 153-A, 295-A, 124-A, 120-B I.P.C. & Section 17 and 18 of the Unlawful Activities (Prevention) Act, 1967 and Section 65 & 72 of the I.T. (Amendment) Act, 2008, Police Station Manth, District Mathura, Uttar Pradesh, on the following conditions:-

(i) The appellant shall furnish his personal bond with two sureties of the like

amount as may be determined by the Special Court;

(ii) The appellant shall surrender his passport, if the same has been issued in his favour, to the Special Court at the time of furnishing sureties;

(iii) The appellant shall not indulge in any criminal activity and shall not interfere in any manner with the further investigation, if any and shall not make any effort to influence the prosecution witnesses; and

(iv) The appellant shall mark regular attendance with the local police station within which he is residing, at such periodical intervals as may be determined by the Special Court; and

(v) The appellant shall cooperate with the Special Court for early conclusion of the trial and shall not seek any adjournment when the prosecution witnesses would be in attendance.

(35) Having given an anxious thought to the ably authored judgment by my esteemed colleague, I find it my duty to put on record some further reasons to support the view taken as under:-

(36) The legal question in the present case that has escaped the attention of the Special Court is as to whether mere pendency of an application seeking extension of time to complete the investigation would necessarily imply that the right of default bail would stand extinguished, particularly when the extension subsequently sought by the Public Prosecutor, through another application was granted by a prospective order on 05.06.2023. The next question which would simultaneously arise in the present case and was left unnoticed by the Special Court would be whether remand order was rightly passed on 02.06.2023

without passing any order on the application seeking extension of time to complete investigation and thereby the infeasible right of default bail could be denied to the appellant.

(37) Undisputed facts between the parties are that an application seeking extension of time by 90 days to complete investigation was made by the Public Prosecutor on the 90th day, i.e., 01.06.2023. The right of default bail accrued to the detainee at 12 O' clock in the midnight following the day, i.e., on 02.06.2023, by which time, the application seeking extension of time for completing the investigation had already been filed and ordered to come up next day when the remand as per the previous order dated 17.05.2023 would fall due.

(38) It is already noticed that the remand was extended upto 05.06.2023 by virtue of an order dated 02.06.2023 without extension of time for investigation on the pending application filed on 01.06.2023 and the prosecution treated the pending application filed on 01.06.2023 to have become obsolete. It is for this reason that a subsequent application seeking extension of time for completing investigation was filed on 05.06.2023. It is filing of two separate applications which has led to a vacuum insofar as the period of extension of time for completing investigation from 02.06.2023 to 05.06.2023 is concerned. The default bail application had come to be filed in the meantime on 02.06.2023. Thus the real question before the Special Court on 05.06.2023 was as to whether extension of remand on 02.06.2023 would ipso facto qualify the extension of time for the purpose of completing the investigation without any order being passed on the application filed on 01.06.2023. In other

words, whether pendency of an application seeking extension of time for completing investigation would obstruct the accrual of right to default bail particularly when the period for completing the investigation was prospectively extended on 05.06.2023 for 50 days.

(39) The Special Court in its order dated 26.06.2023 has clearly recorded that the extension of time for completing the investigation was granted on 05.06.2023. This clearly shows that there was complete non-application of mind by the Special Court insofar as the application made on 01.06.2023 is concerned. The Special Courts are under a bounden duty to consider and decide the respective applications seeking extension of time for completing investigation within the period of remand prescribed under law. The validity to the period of investigation legitimizes the grant of remand without which a judicial remand cannot be said to have obstructed or defeated the right of default bail, as is the case at hand.

(40) The Special Court ought to have applied mind on the pending application seeking extension of time for completing the investigation prior to 02.06.2023 when the period of remand was extended upto 05.06.2023 without there being a qualifying order for completion of investigation on the application seeking extension of time by 90 days. This flaw on the part of the Special Court while dealing with the earlier application on the date of its filing, i.e., 01.06.2023 or leaving it unattended on 02.06.2023 has led to the accrual of an infeasible right in favour of the detainee. The right accrued both on account of the fact that the first application itself was filed by the prosecution on 01.06.2023 leaving no scope for compliance of the Statute in

the matter of opportunity and production of the detainee, and secondly, the Special Court having failed to apply its mind on the pending application granted judicial remand on 02.06.2023 upto 05.06.2023 without validation of extension of time to complete the investigation. This is a clear position of fact in the case at hand for which the benefit which had accrued to the appellant cannot be unsettled in view of the reasoning as has been recorded by my esteemed brother exhaustively in the judgment. Be it noted that right to personal liberty can only be curtailed by following due procedure under law. The investigating agency is obliged to stand on its toes in the matter of concluding investigation and must remain vigilant to follow the prescribed procedure, deviation whereof, it is well settled would not come to their rescue simply on the ground of procedural lapse. To be more clear it can be aptly said that right to life & personal liberty can only be confined by following due procedure but it cannot be taken away.

(41) In the circumstances of the case, this Court would caution the Special Courts to remain careful in future on any such exigency. The administration of justice and any dereliction of duty in the matter of adjudication of such valuable rights cannot be taken a lenient view in ordinary course.

(42) In the result, I concur with the relief granted in favour of the applicant-appellant for the cumulative reasons recorded as above.

(2024) 9 ILRA 285
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2024

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 2616 of 1982

Shri Ram Singh ...Appellant
Versus
State ...Respondent

Counsel for the Appellant:
G.P. Dixit, R.K. Kanaujiya, Swetash Agarwal

Counsel for the Respondent:
A.G.A.

(A) Criminal Law - Appeal in Absence of Trial Court Record - Indian Penal Code, 1860 - Sections 302 and 201 - If the substantial portion of trial court record is not available before the Appellate Court - an endeavour should be made firstly for the reconstruction of the record and if only reconstruction is not possible to facilitate the High Court to hear and dispose of the appeal, then possibility should be looked into for the retrial of the case and if due to the loss of vital and basic records of the trial court retrial and fresh adjudication of the matter is not possible, then in that case the impugned judgment and order should not be permitted to operate and the matter shall stand closed. (Para -12)

Appellant was convicted in 1982 – Trial court record was destroyed /weeded out , except for the impugned judgment and order - Reconstruction of the record was not possible - Retrial was also not feasible due to the loss of vital records - appeal was pending for 42 years - question involved - If the original record of the trial court is not available before the Appellate Court, what legal consequence would ensue - High Court relied on precedents to decide the case. (Para - 1 to 7)

HELD: - Nothing remains in appeal and on account of the lack of vital and important basic records, conviction order cannot be sustained. Court has no other alternative but to allow the appeal and set-aside conviction and sentence of appellant and to acquit him. Conviction and sentence of appellant, set-aside. (Para -14,15)

Appeal allowed. (E-7)

List of Cases cited:

1. Brahmanand Shukla Vs St. of U.P. , 2010 (5) ADJ 158 (D.B.)
2. St. of U.P. Vs Subedar & ors., Govt. Appeal No.2528 of 1987
3. St. of U.P. Vs Abhai Raj Singh & anr. [2004 (2) JIC 337 (SC)]
4. Brahmanand Shukla Vs St. of U.P. [LAWS (ALL)-2010-4-14]
5. Hari Ram Vs St., Crl. Appeal No. 1239 of 1982
6. Raj Kumar Vs St. of U.P., Crl. Appeal No.29 of 1989

(Delivered by Hon'ble Nalin Kumar
Srivastava, J.)

1. This criminal appeal has been preferred by the appellant - Shri Ram Singh against the judgement and order dated 30.09.1982 passed by Session Judge, Ballia in Session Trial No.37 of 1982 (State Vs. Shri Ram Singh and another) under Section 302/201 IPC, Police Station Garwar, District Ballia convicting and sentencing the appellant for the offence under section 201 IPC to undergo 4 years rigorous imprisonment.

2. Heard Sri R.K. Kanaujiya, learned counsel for the appellant as well as learned A.G.A. for the State and perused the record.

3. A pertinent question involved in this appeal is as to if the original record of the trial court is not available before the Appellate Court, what legal consequence would ensue.

4. Learned counsel for the appellant has prayed for acquittal of the sole surviving appellant Shri Ram Singh, as the entire record (except the original judgment and order of the trial court) of this case has been weeded out as per report of District Judge, Ballia and now hearing of this Appeal is not possible for want of record. The present appeal pertains to year 1982. In view of all these facts particularly considering the fact that this appeal is pending for the last 42 years, it appears expedient in the interest of justice that this appeal may be decided finally.

5. A perusal of the record reveals that complete trial court record was summoned, but only a part of the record was sent by the District Judge, Ballia which includes only impugned judgment and order. No other document is available on record to proceed with the present appeal.

6. It further reveals from the perusal of the record that except the impugned judgment and order, rest of the record has been destroyed / weeded out. This Court vide order dated 8.8.2024 called for the report from the court concerned as to whether the reconstruction of the trial court record or retrial pertaining to the present case is possible or not. In compliance thereof, a report dated 28.8.2024 sent by the District Judge, Ballia was received wherein it was submitted that reconstruction of the trial court record of the present case is not possible and due to non-reconstruction of the trial court record, retrial of this case is also not possible.

7. In the similar circumstances, a Division Bench of this Court dealt with the matter in **Brahmanand Shukla Vs. State of U.P. reported in 2010 (5) ADJ 158**

(D.B.). In the said matter, it was observed that –

"In the present case, as we have mentioned in the earlier part of the judgment only a copy of the trial court's judgment is available and no other documents like FIR, post mortem report, copies of the documents which had been filed by the prosecution and were exhibited during trial, the statement of the witnesses recorded under Section 161 Cr.P.C. are available despite various attempts to reconstruct the record. The incident is of the year 1979 i.e. the incident took place about 30 years back. In these circumstances, no fruitful purpose would be served by ordering re-trial as the same cannot be conducted at all in absence of these documents.

In the light of the above discussions and the circumstances mentioned above, we have no other alternative but to allow the appeal, set aside the conviction and sentence of the appellant and to acquit him.

The appeal is allowed and the conviction and sentence of the appellant as recorded by the trial court is set aside and the appellant is acquitted of the charge levelled against him. His sureties and personal bonds are discharged.

Let a copy of this judgment be certified to the trial court for its intimation."

8. Subsequently the issue was again raised before the Division Bench of this Court in **Government Appeal No.2528 of 1987, State of U.P. Vs. Subedar and others**, which was an acquittal appeal and the Division Bench in the aforesaid matter found which is extracted here in below –

"The incident in the present case is of the year 1986 almost 29 years ago. The judgment of the trial court is of the year 1987. The appeal is pending for the

last 29 years. In absence of the record the direction for retrial would be of no purpose inasmuch as, the FIR, inquest report, the injury report, the postmortem report, site plan and other recovery memos are not available and as such nothing can be proved by directing retrial. Further retrial after a lapse of such a long time would also not serve the ends of justice, inasmuch as, requiring the witnesses to depose about the incident which took place 29 years ago, their memory would be falling and they would not be in a position to give an accurate account of the incident.

For the above reasons, we are not inclined to issue any direction for retrial. In such circumstances, we relying upon the judgment of the Apex Court in the case of **State of U.P. Vs. Abhai Raj Singh and another [2004 (2) JIC 337 (SC)]** and Division Bench judgment of this Court in the case of **Brahmanand Shukla Vs. State of U.P. [LAWS (ALL)-2010-4-14]**, proceed to decide the appeals accordingly.

The only option that remains with us is to dismiss the Government Appeal.

Accordingly, the Government Appeal is dismissed."

9. It is notable that the law laid down in **Brahmanand Shukla (supra)** case was also taken into account by the Division Bench in the judgment and order passed in Government Appeal No.2528 of 1987 (supra) and the law promulgated by the Hon'ble Apex Court in the matter of **State of U.P. Vs. Abhai Raj Singh and Anr. (supra)** establishing a principle on the subject where substantial portion of record was not available and it was observed like this –

"We, therefore, set aside the order of the High Court and remit the matter back for fresh consideration. It is to be noted at

this juncture that one of the respondents i.e. Om Pal has died during the pendency of the appeal before this Court. The High Court shall direct re-construction of the records within a period of six months from the date of receipt of our judgment from all available or possible sources with the assistance of the Prosecuting Agency as well as the defending parties and their respective counsel. If it is possible to have the records reconstructed to enable the High Court itself to hear and dispose of the appeals in the manner envisaged under Section 386 of the Code, rehear the appeals and dispose of the same, on its own merits and in accordance with law. If it finds that re- construction is not practicable but by order retrial interest of justice could be better served - adopt that course and direct retrial - and from that stage law shall take its normal course. If only reconstruction is not possible to facilitate High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by Sessions Court is also rendered impossible due to loss of vitally important basic records - in that case and situation only, the direction given in the impugned judgment shall operate and the matter shall stand closed. The appeals are accordingly disposed of."

10. The same principle of law echoes in a plethora of decisions of the Hon'ble Supreme Court and this Court as well, such as **Hari Ram Vs. State, Criminal Appeal No. 1239 of 1982 (date of decision 10.5.2016) and Raj Kumar Vs. State of U.P., Criminal Appeal No.29 of 1989 (delivered on 25.11.2020)**

11. The judgment of the Hon'ble Supreme Court was also considered in Government Appeal No.2528 of 1987 (supra).

12. The dictum of law, which flows from the above is that if the substantial portion of trial court record is not available before the Appellate Court, an endeavour should be made firstly for the reconstruction of the record and if only reconstruction is not possible to facilitate the High Court to hear and dispose of the appeal, then possibility should be looked into for the retrial of the case and if due to the loss of vital and basic records of the trial court retrial and fresh adjudication of the matter is not possible, then in that case the impugned judgment and order should not be permitted to operate and the matter shall stand closed.

13. In the present case, as admitted by the prosecution itself, since the reconstruction of the record is not possible and no other record except the impugned judgment and order of the trial court is available, as a natural consequence thereof, retrial of the case is also not possible.

14. Hence, in view of the legal principle enumerated in the aforesaid judgments, in my view, nothing remains in this appeal and on account of non-availability of the vital and important basic records, the conviction order cannot be sustained. This Court has no other alternative in these circumstances but to allow the appeal and set-aside the conviction and sentence of the appellant and to acquit him.

15. Resultantly, the appeal is allowed and the conviction and sentence of the appellant, as recorded by the trial court vide impugned judgement and order dated 30.09.1982, is set-aside and the sole surviving appellant Shri Ram Singh is acquitted of the charge under Section 201 IPC levelled against him. His sureties and

personal bonds are ordered to be discharged.

16. All pending applications shall also stand disposed of accordingly.

17. Let a copy of this judgment be certified to the trial court for intimation and necessary action.

(2024) 9 ILRA 289

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 25.09.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Criminal Appeal No. 3030 of 2024

Jitendra Kumar Lakhmani ...Appellant
Versus
State Of U.P & Anr. ...Respondents

Counsel for the Appellant:
In Person

Counsel for the RespondentS:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 341 (Now Section 380 of BNSS, 2023) - Family Court Act, 1984 - Section 19 - Appellant filed instant appeal against order by which application u/s 340, Cr.PC rejected - Maintainability of appeal - The order which was challenged was not an order passed on basis of consent between parties nor an order passed under Chapter IX of Code, meaning thereby that provisions of Section 19(2) of Act, 1984 would have no applicability - Thus, provisions of Section 19 (1) of Act, 1984 would be applicable. (Para 10)

Only remedy available to appellant is to challenge impugned order by filing of appeal u/s 19(1) of Act, 1984 and appeal

filed under provisions of Code or BNSS would not be maintainable keeping in view the non-obstante clause as per Section 19(1) of Act, 1984 and said Act, 1984 being a special Act. (Para 13)

Appeal dismissed. (E-13)

List of Cases cited:

1. Kiran Bala Srivastava Vs Jai Prakash Srivastava, MANU/UP/2771/2004
2. Shah Babulal Khimji Vs Jayaben - AIR 1981 SC 1786

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

1. By means of the instant appeal filed under Section 380 of Bharatiya Nagarik Suraksha Sanhita, 2023 (earlier Section 341 of the Criminal Procedure Code, 1973 in short 'Code, 1973'), the appellant seeks to challenge the order dated 24.07.2024 passed by learned Family Court whereby the application filed by the appellant under Section 340 of the Code, 1973 has been rejected.

2. A preliminary objection has been taken by Sri Piyush Kumar Singh, learned AGA appearing on behalf of respondent no.1, that considering the provisions of Section 19 of the Family Court Act, 1984 (hereinafter referred to as the 'Act, 1984'), the appellant will have to file an appeal under the provisions of the Act, 1984 itself and instant appeal would not be maintainable.

3. Learned AGA argues that Section 19 of the Act, 1984 clearly provides for filing of an appeal and as such the instant appeal filed under the provisions of the Code, 1973 would not be maintainable.

4. Heard Sri Jitendra Kumar Lakhmani, the appellant, who appeared in

person, and learned AGA for the State on the preliminary objection.

5. The appeal has been filed under Section 341 of the Code, 1973 (now Section 380 of BNSS, 2023) aggrieved against the order dated 24.07.2024 whereby the application filed under Section 340 of the Code, 1973 has been rejected by learned Family Court.

6. In order to consider the preliminary objection as raised by learned AGA the Court may have to consider the provisions of Section 19 of the Act, 1984.

7. For the sake of convenience, Section 19 of the Act, 1984 is reproduced as under:-

"19. Appeal.-

(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

*(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order **passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):***

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991 (59 of 1991).

(3) Every appeal under this section shall be preferred within a period

of thirty days from the date of the judgment or order of a Family Court.

*(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order **under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.***

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges."

8. From perusal of the provisions of Section 19 of the Act, 1984, it emerges that the Act categorically provides that except as provided in sub-section (2) of Section 19 of the Act, 1984 and **notwithstanding** anything contained in the Code of Criminal Procedure, 1973 or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

9. Sub-section (2) of Section 19 of the Act, 1984 provides that no appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code.

10. The order which is sought to be challenged in the instant appeal is not an order passed on the basis of consent between the parties nor an order passed under Chapter IX of the Code, meaning

thereby that the provisions of sub-section (2) of Section 19 of the Act, 1984 would have no applicability. Thus, it is the provisions of sub-section (1) of Section 19 of the Act, 1984 which would be applicable.

11. As already indicated above sub-section (1) of Section 19 of the Act, 1984 starts with a non-obstante clause, meaning thereby that irrespective of anything contained in the Code, 1973 it is provisions of the Act, 1984 which would be applicable.

12. Consequently, once the Act, 1984 provides for filing of an appeal from every judgment or order not being an interlocutory order of a Family Court except an order passed under Chapter IX of the Code and in the instant case it is an order by which an application filed under Section 340 of the Code has been rejected which falls under Chapter XXVI of the Code. Therefore, it is only an appeal under the Act, 1984 which would lie in case the appellant herein is aggrieved by the said order.

13. Considering the aforesaid, it is thus apparent that in case the appellant herein is aggrieved by an order by which his application under Section 340 of the Code has been rejected consequently the only remedy available to him is to challenge the said order by filing of an appeal under Section 19(1) of the Act, 1984 and the appeal filed under the provisions of the Code or BNSS would not be maintainable keeping in view the non-obstante clause as per sub-section (1) of Section 19 of the Act, 1984 and the Act, 1984 being a special Act.

14. Further, whether the order by which the application under Section 340 of the Code has been rejected would be an interlocutory order or an order is also no longer res-integra

keeping in view the Full Bench judgment in the case of **Kiran Bala Srivastava vs. Jai Prakash Srivastava** - **MANU/UP/2771/2004** wherein considering the Full Bench of this Court which has been passed after considering the judgment of Hon'ble Supreme Court in the case of **Shah Babulal Khimji vs. Jayaben** - **AIR 1981 SC 1786**, it is apparent that the order passed under Section 340 of the Code would be an 'order' as per Section 19 of the Act, 1984 and accordingly it is an appeal which would be maintainable under the provisions of the Act, 1984.

15. After the aforesaid order has been dictated the appellant states that he does not intend to press on with the instant appeal and prays that the same may be dismissed as withdrawn with liberty to him to pursue other remedy as may be available to him under law.

16. Accordingly, the instant appeal is dismissed as withdrawn with liberty as aforesaid.

17. Let certified copies of the orders as annexed be returned to the appellant as per rules.

(2024) 9 ILRA 291
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NAYAYAN
MISHRA, J.

Criminal Appeal No. 3063 of 1983

Rohtash & Ors.		...Appellants
	Versus	
State of U.P.		...Respondent

Counsel for the Appellants:

J.N. Chaturvedi, Atul Pandey, Dharmendra Kumar Mishra, M. Upadhyay, Pradeep Kumar, S.N. Chaturvedi, Shanti Dhar Dwivedi

Counsel for the Respondent:

D.G.A., R.K.Singh

Criminal Law - Indian Penal Code, 1860 - Sections 302/149 & 147 - Appeal against conviction - Life Imprisonment - P.W.2, informant, eye-witness St.d that prior to nine months of date of incident, murder of brother of co-appellants took place - Murder was committed by deceased & ors. and due to enmity, accused armed with country made pistol with other miscreants having lathies in their hands, fired two shots at deceased and died on spot - The informant witnesses incident and lodged FIR. (Para 1, 2, 21)

Held, P.W.2 and P.W.3 witnesses explained reasons for their presence - Accused persons failed to establish they are interested witnesses - No evidence that witnesses were inimical towards appellants and had direct relationship with deceased - PW-2 in cross-examination explained delay in lodging FIR - PW-1 (doctor) proved injuries of deceased in postmortem - Enmity between accused persons and deceased proved from documents - PW-2 and PW-3 has made improvement in their evidence before Court from their earlier version in FIR/St.ment where they St.d that lathi wielded by appellant was fixed with iron nail. (Para 23, 24)

Weapon assigned to surviving appellant in evidence of witnesses of fact i.e. lathi fixed with nail was not found as weapon of offence in medical evidence which might have been caused injury No.8 of deceased - Injury No.8 of deceased has not been explained in ocular testimony of witnesses - Charges not proved against surviving appellant beyond reasonable doubt and impugned order deserves to be set aside. (Para 25, 27)

Appeal partly allowed. (E-13)

List of Cases cited:

Darshan Singh Vs St. of Pun., (2024) 1 SCR 248, (Para 26)

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

1. This criminal appeal has been filed against the judgment and order of conviction dated 09.12.1983, passed by learned III Additional Sessions Judge, Muzaffarnagar, in Sessions Trial No.381 of 1982, whereby the learned III Additional Sessions Judge, Muzaffarnagar (hereinafter referred as 'trial court') has convicted the appellants namely, Rohtash, Vija alias Vijaipal, Dileep, Mughal and King Kong under Section 302/149 IPC for life imprisonment, while appellant Rohtash was further convicted under Section 148 IPC and sentenced to undergo two years imprisonment and the remaining appellants are convicted under Section 147 IPC and sentenced to undergo one year rigorous imprisonment. All the sentences were directed to run concurrently.

2. Factual matrix of the case in brief are that the informant Vishambher, son of Natthu, lodged an FIR orally at police station Purkaji, District Muzaffar Nagar stating that he is resident of village Khedaki, Police Station Purkaji, District Muzaffar Nagar. In last winter, his co-villager Bhopal, son of Mama and others had committed murder of Samay, son of Chohal. On account of the enmity of said murder case, on 6.8.1982, at 5/6:00 PM when he was coming from his agricultural field alongwith his bullock, he found that said Bhopal was fishing while sitting on slope of southwards to the river bank. Suddenly, his co-villager Rohtash armed

with a countrymade pistol, Vijayee @ Vijja and his father Mughal wielding *lathis* in their hands, Dileep and King Kong, sons of Chohal having *lathies* in their hands appeared and accused Vijayee @ Vijja, Mugal, Dalip and King Kong started assaulting Bhopal by *lathies*. Rohtash fired two shots at Bhopal in the meanwhile and due to injuries suffered in the incident, Bhopal died on the spot. The occurrence was also witnessed by Rajpal, son of Atar Sing. He left villagers near the dead body and came at the police station to lodge the report. The delay while reaching police station occurred due to non availability of conveyance and pathway becoming muddy. The report was lodged on same day i.e. 6.8.1982, at 23:30 hours, vide Crime No.128 of 1982, under Sections 147, 148, 149, 302 IPC by Head Muharrir Satyapal Sharma on the basis of oral account of Vishambhar. He also made entry of lodging of this FIR vide report No.28, time 23:30 hours dated 6.8.1982, in which it is stated that Vishambhar @ Banda, Son of Nathhu Harijan, resident of village Khedaki, Police Station Purkaji, accompanied with Rishi, resident of Gram Khedaki appeared at police station and gave oral information regarding the incident against five named accused namely, Rohtash, Vijja, Mughal, Dileep and King Kong. After lodging of FIR and registration of case vide said GD entry, S.O. Shiv Raj Singh Tyagi (PW-4) rushed to the spot where dead body was lying together with S.I. Jagdamba Prasad and two constables Surendra Singh and Dhanpal Singh alongwith necessary papers and after appointing Panch witnesses, commenced inquest on dead body of deceased Bhopal on 7.8.1982, at 6:00 AM, which concluded at 7:30 AM on same day i.e. 7.8.1982. The inquest was conducted on place of incident where the dead body was lying. It was stucked in between water and mud and was

found in supine position. In the opinion of Panch witnesses, the deceased Bhopal died due to firearm and lathi injuries received during the incident. The deceased was wearing a 'kameej' and white underwear, which were blood stained. The inquest Officer (S.O. concerned) entrusted the dead body alongwith copy of inquest report, copy of FIR, copy of GD Entry and photo lash, challan lash, report R.I., Report CMO and sample seal prepared by him to two Constables namely, Balveer Singh and Surendra Singh, who were posted at police station concerned for transporting the dead body to Headquarter at mortuary for postmortem. The Investigating Officer took into possession one cartridge shell 12 bore, one empty cartridge 12 bore without bottom and one refilled cartridge from place of incident on 7.8.1982 and prepared its inventory as Ext.Ka-9. He also collected plain earth and blood stained earth from place of occurrence and prepared its inventory as Ext.Ka-10.

3. The postmortem examination on the body of the deceased Bhopal was carried out by Dr. Satish Kumar Sharma (PW-1) on 7.8.1982, at 4:15 PM, which was sent by S.O. Purkaji (Muzaffar Nagar) through Constables Balveer Singh and Surendra Singh. Rigor mortis was present over the lower extremities and going from upper limbs. Body was covered with sand and mud. Approximate time of death was one day before the postmortem. Following antemortem injuries were found on the person of the deceased:-

(i) Lacerated wound 2 X 1/2 inch X scalp over left side head, 4 inch above left ear;

(ii) Lacerated wound 2 and 1/4 inch X 1/4 inch scalp over right side of head, 3 and half inch above right ear;

(iii) Lacerated wound 2 and half inch X 1/4 inch X scalp over right side head, 2 inch behind right ear;

(iv) Lacerated wound 2 X 1/4 Inch X scalp over right side back against head, 1-1/2 inch behind injury No.3;

(v) Gunshot wound of entry 1 inch X 1/2 inch X cavity deep over left side back chest, lateral to spine at the level of interior angle of left scapula. Tattooing and blackening present. Margins inverted and lacerated;

(vi) Gunshot wound of exit 3 inch X 2 inch over left side chest, 2 and 3/4 inch from left nipple at 7 to 8'O clock position. Margins averted, corresponding to injury No.5.

(vii) Gunshot wound of entry 1/2 inch X 1/4 inch X cavity deep over right side chest just lateral to sternum, 3 inch from right nipple at 2:00'O clock position. Tattooing and blacking were present. Margins inverted. This one entered between 3rd and 4th ribs and was directed medially and downwards. On dissecting path, which was found to cross over to left side anterior media sternum and from there to left side chest lacerating left lung;

(viii) Incised wound 3 X 1 inch X abdominal cavity deep over right side chest in anterior auxiliary line just above costal margin. Margins clean cut, angles angular.

On internal examination, it was found that right 8th, 5th and 11th ribs were cut laterally. Lower lobe of right lung was cut under injury No.8. Left lung was lacerated in both lobes. Left pleura was lacerated under injury No.5 and 8. Left 6th, 7th and 8th ribs were fractured anteriorly. Stomach was empty. Abdominal membranes were cut under injury No.8. Small intestine was half full and large intestine was half full.

8 metallic pellets and 2 wadding pieces were recovered from dead body during

postmortem and were handed over to the Constables, who had carried the dead body to mortuary. Cause of death was due to shock and haemorrhage as a result of antemortem injuries noted. In the opinion of PW-1 injury No.5-7 were possibly caused by firearm and injury No.4 might have been caused by lathi. Injury No.8 was caused by some sharp edged weapon.

4. PW-4, S.O. Shiv Raj Singh Tyagi conducted investigation of the case, recorded statements of witnesses, collected two empty and one refilled live cartridge 12 bore KF Special from place of incident and prepared its seizure memo (Ext.Ka-9). He also collected plain and blood stained earth from the place of incident and prepared its seizure memo as Ext.Ka-10. He prepared site plan of place of incident and proved the same by his evidence as Ext.Ka-11. After completing investigation, he submitted chargesheet against all the five named accused persons for charge under Sections 147, 148, 302 IPC with prayer to prosecute them in the Court.

5. Learned Chief Judicial Magistrate committed the case to Session Court for trial as offence was exclusively triable by Court of Session.

6. On commencement of trial at Court of Session, learned 3rd Additional Session Judge framed charge under Section 148 IPC against accused Rohtash, Charge under Section 147 IPC against Vijayee @ Vijja, Mughal, Dileep and King Kong. Charge under Section 302/149 IPC against Rohtash, Vijayee @ Vijja, Mughal, Dileep and King Kong. The accused persons denied the charge, pleaded not guilty to it and claimed to be tried.

7. Prosecution examined Dr. S.K. Sharma, the author of postmortem report as PW-1; Vishambher, the informant as PW-

2; Rajpal as eye-witness as PW-3, S.O. Shiv Raj Singh Tyagi, the Investigating Officer as PW-4 and Surendra Singh, Police Constable who carried the dead body to mortuary for postmortem as PW-5.

8. On closure of prosecution evidence, statement of accused persons was recorded by learned trial court under Section 313 Cr.P.C., in which they stated that the witnesses have deposed against them due to enmity. The FIR has also been lodged against them due to enmity. They have admitted enmity as deceased Bhopal had killed Samay, prior to the incident, who was brother of accused Dilip and King Kong and cousin of accused Rohtash and Vijaypal alias Vijja. However, they denied that they killed Bhopal due to enmity. They also stated that both the witnesses belonged to clan of deceased and deposed falsely against the accused persons. Accused Dileep stated that deceased Bhopal was a man of criminal antecedents and was inimical to many persons. Informant side was exerting pressure on accused Mughal to desist from deposing in the murder case of Samay.

9. The accused persons were given opportunity of adducing defence evidence but they did not tender any evidence in defence. Their defence is that of denial.

10. Learned trial court after appreciation of evidence on record and considering the submissions made at Bar from both sides, recorded verdict of guilt against accused appellants and convicted them for charge under sections 302/149, 147, 148 IPC and appellants were sentenced to life imprisonment for charge under Section 302/149 IPC. Accused Rohtash was sentenced to two years rigorous imprisonment for charge under

Section 148 IPC and other accused persons were sentenced to one year rigorous imprisonment for charge under Section 147 IPC.

11. Feeling aggrieved by the impugned judgement and order, the convicts/appellants preferred present appeal before this Court under Section 374(2) Cr.P.C.

12. Heard learned counsel for the appellants, learned AGA for the State and perused the material placed on record.

13. Prosecution examined two witnesses of fact in support of its case namely, Vishambhar (PW-2) and Rajpal (PW-3), who supported prosecution version in their testimony before the Court. PW-2 stated that accused Rohtash and Vijay @ Vijja are sons of accused Mughal. Accused Dilip and King Kong are real brothers and sons of Chohal. Deceased Bhopal belong to his village. Case of murder of Samay, son of Chohal was litigated in which deceased Bhopal and Raghuveer were accused. The incident occurred on fateful day at around 5-6 PM. He was returning to his home from his field. When he reached near the river bank, he saw Bhopal engaged in fishing. Accused Rohtash shot at Bhopal from behind. Rohtash fired two shots at him by countrymade pistol and at the same time, Dilip, King Kong, Vijja and Mughal emerged from nearby 'chari field'. The accused persons also hit Bhopal by *lathies* and he died on the spot on account of injuries suffered. He had seen the incident together with witness Rajpal, who was also present there. The witnesses namely, Vishambhar (PW-2) and Rajpal (PW-3) tried to stop the accused persons, who in turn walked away towards Pava. He straight way rushed to police station and

lodged the FIR. Rajpal also accompanied him up to police station. He dictated the written report to Head Muharrir who transcribed the same as per his dictation. He appended his thumb impression thereon after being read over by the scribe, Ext.Ka-2 was marked thereon. A long iron nail was fixed in lathi of Vijaypal. In cross-examination, the witness stated that Bhopal was sitting on the bank of river. The witness was sitting in other side of river. A distance of 30 paces was lying between two banks. The four accused persons assaulted Bhopal by the lathies. He met Station Officer of police station when he visited the police station and got the report lodged by Head Constable. He is not aware as to whether thumb impression of Rajpal was taken on FIR. He travelled the police station from the ghat (Place of occurrence) on feet. Two Sub Inspectors and three Constables left for place of occurrence after lodging of FIR. He had not conversed with police officials on way to place of occurrence. They went to place of occurrence from police station by a horse cart at around 3:00 AM (night). The Sub Inspector sealed the dead body on the next date at 8:00 AM and did writing work with regard to dead body. The dead body was taken by police constables after paper work. Co-accused Dilip and King Kong are brothers of Samay, who was killed prior to this incident. The witness denied defence suggestion that the witness and his family members were exerting pressure on accused Mughal to desist to depose in murder case of Samay. They never exerted pressure on accused Dilip and King Kong. He had dictated in written report the fact that the lathi wielded by accused Vijaypal @ Vijja was consisting of a long nail. He had also dictated this fact in written report that at the time of incident, he was standing with his bullock on second side of the river. He had also got this

fact written in his report that accused persons emerged from '*chari field*' of Fullu and also reiterated this fact to Darogaji. He cannot explain as to why this fact has not been stated in his statement recorded by Darogaji. Bhopal had hunted three fishes, which he had kept in a bag. He was fishing by fishing hook.

14. PW-2 Rajpal has also deposed that he witnessed the incident as he was present near the place of occurrence at around 5:30 PM as he was easing himself and after getting eased, he went to river to wash his hands. He saw Bhopal engaged in fishing and suddenly accused Rohtash having a countrymade pistol in his hand and accused Dilip, Vijja, Mughal and King Kong armed with *lathi* reached there from the side of hillock and they fired at Bhopal. The accused, who were wielding *lathi* also assaulted him by their *lathies*. Bhopal died on the spot having been injured. A witness Vishambhar was also present there as he was offering water to cattle for drinking. The lathi which accused Vijja was wielding consisted an iron nail fixed therein. There is a hillock near the place of incident. In cross-examination, the witness stated that the accused persons fled away towards hillock after the incident. He witnessed the incident from a distance of 50-60 paces. Bhopal was fishing by fish hook. He had hunted three fishes. The fishes and fish hook was lying on the spot after the incident. Bhopal was sitting towards Pawa. The witness denied the defence suggestion that he had not seen any occurrence and he was not present in the village at the time of incident. He stated that the accused persons were 50-60 paces away from him when fire was shot.

15. PW-1 Dr. S.K. Sharma is author of postmortem report of the deceased who proved the same by his sworn testimony before the court on which Ext.Ka-1 has been marked. He stated that he prepared the

postmortem report in his writing and signature.

16. PW-4 Shiv Raj Singh Tyagi was examined as Investigating Officer of the case who stated in his evidence that the case was registered in his presence on 6.8.1982. He was posted as Station Officer at police station concerned. The chik FIR was scribed by Head Muharrir Satyapal Sharma, who was posted at his police station. The FIR was drawn as per oral version of the informant. In chik FIR Ext.Ka-2 has been marked. He also stated that this police case was registered vide GD No.28, dated 6.8.1982, time 23:30 hours by Head Muharrir Satyapal Sharma. He is acquainted with his signature. The witness proved extracts of GD entries. The witness proved extracts of GD entries filed on record by producing the original before the court and accordingly Ext.Ka-3 has been marked on Paper No.6/1. He stated that he conducted investigation of the case on the same day on which day report was lodged. He started for place of occurrence on same day and reached there at 3:00 AM as the place of occurrence was lying in a jungle, no proceeding could be done due to onset of darkness of night. He carried out inquest of deceased Bhopal on next day in the morning at 6:00 AM on 7.8.1982 and got the inquest report prepared by dictating the same through S.I. J.P. Thapaliar. The inquest report was in the hand writing of J.P. Thapaliar, which also bears signature of the witness (PW-4), on which Ext.Ka-4 has been marked. The police papers like Letter to CMO, Letter to R.I., Challan Lash, Photo Lash were prepared by S.I. J.P. Thapaliar, which also bears signature of the witness on which Ext.Ka-5 to Ka-8 have been marked. He further stated that he dispatched dead body of Bhopal in sealed cover through Constable Balvir and

Surendra Singh alongwith necessary enclosures after finishing inquest proceeding. He collected two empty cartridge shells and one refilled live cartridge and kept the same in his possession. He sealed the same. The ammunitions were produced before him during his evidence in sealed cover which bears signature of PW-4 and witnesses which is marked as Ext.Ka-9. He also prepared panchnama of blood stained and plain earth collected from place of occurrence and got it sealed. He proved the inventory of same on which Ext.Ka-10 has been marked. The witness also stated that he conducted spot inspection and recorded statement of the witnesses. He prepared site plan of the place of occurrence in his hand writing and signature on which Ext.Ka-11 has been marked. He filed charge sheet of the case after concluding the investigation in his hand writing and signature, on which Ext.Ka-12 has been marked. He reached the place of occurrence on 3:00 AM which was in jungle and for that reason he could not do any proceeding immediately. He carried out investigation proceeding since 5:15 AM on 7.8.1982. He recorded statement of the informant at police station. The place of occurrence situates 1 furlong away from the village. He conducted inquest at 6:00 AM and got dead body sealed at 7:30 AM. The witness corrected certain clerical errors which occurred in statement of witness Vishambhar recorded by him during his cross-examination.

17. PW-5 Constable Surendra Singh testified that he carried the dead body from the place of occurrence to head quarter on 7.8.1982 alongwith Constable Balvir. The dead body of Bhopal was kept in sealed cover. The GD entry of arrival of dead body at Police Lines is report No.31, time 14:13 hours. He produced the GD of

receiving of dead body at Police Line before the Court. In cross-examination, the witness stated that they carried the dead body from place of occurrence by a Jeep, in which S.I. S.S. Tyagi, J.P. Thapalial and Constable Dharampal and Balvir were also sitting. They reached the place of occurrence at 12:30:00 hours in the night. It takes two and half hours in reaching Muzaffar Nagar from the place of occurrence. The police personnel were carrying torches in their hands at the scene of occurrence.

18. Learned counsel for the appellants submitted that the appellants have been implicated in the case due to old enmity between deceased and appellants. Deceased Bhopal was accused in murder case of Samay, son of Chohal. Appellants Dilip and King Kong were real brothers of deceased Samay. Accused appellant Mughal and his sons Rohtash and Vijaypal @ Vija belong to the clan (khandan) of Samay. All the appellants derived their origin from common ancestor Jagan. A genealogical table of the appellants has been given in paragtah No.9 of the impugned judgement as the appellants were witnesses in murder case of Samay in which deceased Bhopal was a potential accused. The informant's side was exerting pressure on the appellants to desist from deposing against Bhopal but the appellants did not oblige them, as a result of which when Bhopal was killed by some unknown person on a secluded place, the appellants have been falsely implicated in the case to settle the score by informant's side. He next submitted that no recovery of any firearm or ammunitions used in the offence has been effected from the appellant by the Investigating Officer, which creates a doubt on authenticity of prosecution version regarding complicity of appellants in the

offence. The witnesses of fact i.e. PW-2 Vishambhar and PW-3 Rajpal are chance witnesses and their presence on the spot cannot be held to be natural. The Investigating Officer had not found or collected the fishing hook allegedly used by the deceased at the time of offence or fished hunted by him. The main role has been attributed to accused appellant Rohtash, who is said to have fired a shot at the deceased which proved fatal. Other appellants are attributed the role of causing injuries to deceased by lathi blow in FIR as well as in statements of the witnesses under Section 161 Cr.P.C., however, during investigation, a case has been developed with a view to create consistency with postmortem report that the lathi wielded and used by appellant Vijaypal @ Vija was having a long nail fixed therein. In postmortem report of the appellant as many as 8 antemortem injuries are shown on the person of the deceased out of which injury No.8 is incised wound of 3 inch X 1 inch X abdominal cavity deep over right side of chest and this injury can only be caused by sharp edged weapon. Such type of injury cannot be caused by lathi or even by a lathi fixed with a nail as deposed by witnesses of fact i.e. PW-2 and PW-3. Therefore, injury No.8 of the deceased remained unexplained in prosecution evidence. This depicts that the witnesses had not seen the occurrence and they are got up witnesses. The general role has been assigned to surviving appellant Vijaypal @ Vija that he had assaulted the deceased by lathi together with other appellants namely, Mughal, Dilip and King Kong. The presence and complicity of surviving appellant Vijaypal @ Vija is highly doubtful in view of the fact that the weapon (lathi fixed with iron nail) could have hardly caused injury No.8 as shown in postmortem report of the deceased. PW-3 has falsely stated that there

was lying his agricultural field in the vicinity of place of occurrence on way. No agricultural field of Rajpal (PW-3) is shown in site plan.

19. With above submissions and contentions, learned counsel for the appellants prayed for acquittal of surviving appellant Vijaypal @ Vija in present appeal.

20. Per contra, learned AGA strongly supported the impugned judgement and order passed by learned trial court by which the appellant has been convicted and sentenced for charges under Sections 302/149, 147, 148 IPC. He submitted that the case is based on eye-witness account of witnesses i.e. PW-2 Vishambhar and PW-3 Rajpal. There was no occasion on the part of the witnesses to falsely implicate the appellants. They had no grudge or enmity with the appellants. The mode and manner of assault and the nature and number of injuries suffered by the deceased are duly proved by ocular testimony and medical evidence adduced during trial. There is consistency between medical and ocular testimony on point that deceased suffered two firearm injuries in the incident on his chest and back. The appellants nurtured strong motive against the deceased Bhopal as he was accused in murder case of Samay, who was real brother of appellants King Kong and Dilip and son of the real sister of accused Mughal and cousin of Rohtash and Vijaypal @ Vijja. The appellants committed murder of Bhopal to retaliate murder of their relative Samay. The eye-witnesses are natural witnesses of the incident as they are resident of same village where deceased and accused appellants were residing and their presence on the spot is duly explained in their testimony before the court and their

presence cannot be doubted. FIR in the present case was lodged with promptness, keeping in view the distance of police station from place of incident as shown in chik FIR (Ext.ka-2). Nothing can be elicited by defence in evidence of prosecution witnesses of fact which could suggest reasonable doubt in testimony of the witnesses. The FIR in the case was lodged by the PW-2 Vishambhar, who is unconcerned with either of the parties. He narrated the sequence of events to Head Muharrir at police station orally and on his oral information, chik FIR (Ext.Ka-2) was drawn. There is no infirmity or misappreciation of evidence on the part of the learned trial court. Appeal deserves to be dismissed.

21. We re-appreciated the evidence on record in the light of submissions and contentions made by learned counsel for the parties to determine the question as to whether there is any factual or legal error in impugned judgement and order passed by learned trial court. So far as the motive of commission of the alleged offence is concerned, the motive has been introduced in FIR itself by the informant Vishambhar, who is also an eye-witness who stated that prior to nine months of the date of incident in present case which is 6.8.1982, murder of Samay, son of Chohal and brother of co-appellants Dilip and King Kong took place. This murder was committed by his co-villagers namely, Bhopal and others and for this enmity, on 6.8.1982 at around 5:30 to 6:00 PM, when the informant was coming back to home after taking his bullocks from his agricultural field, he found deceased Bhopal sitting on the slope of hillock on southwards of river bank. Suddenly, his co-villagers namely, Rohtash, Vijaypal @ Vijja, sons of Mughal, Mughal son of Ragsi, Dilip and King Kong, sons of

Chohal emerged there. Rohtash was having a countrymade pistol and other miscreants were having lathies in their hands. Rohtash fired two shots at Bhopal and other accused persons assaulted him with lathi. Bhopal died on the spot due to injuries received in the incident. The informant witnesses the incident, left the dead body in supervision of villagers and reached police station anyhow with some delay on account of non availability of transport and the road becoming muddy. The FIR was lodged at around 23:30 hours. The FIR bears thumb impression of informant Vishambhar, which has been proved by informant in his evidence before the Court on which Ext.Ka-2 has been marked. The FIR in the case was drawn against five named accused persons on the basis of oral information given by PW-2. The witnesses of fact namely, PW-2 Vishambhar and PW-3 Rajpal have duly proved the motive introduced in FIR in their evidence during trial. PW-1 Vishambhar stated on oath as PW-2 that deceased Bhopal was his co-villager, who was an accused in murder case of Samay, the brother of accused Dilip and King Kong. Accused Mughal and his sons Rohtash and Vijaypal belong to branch of Ransi and King Kong, Dilip and deceased Samay are sons of Chohal, who was husband of Chhoti, sister of Ransi. Thus, all the accused persons belongs to same clan. PW-2 stated that he had seen accused Rohtash firing two shots at deceased Bhopal from behind. Thereafter, accused Dilip, King Kong and Mughal also came out from their place of hiding and assaulted the injured by their lathis resulting his death. This incident was also seen by witness Rajpal when the witnesses tried to intervene, the accused persons went towards Pawa. He went straight to police station for lodging the FIR and got the same lodged on the basis of his oral

information. The lathi wielded by Vijaypal @ Vijja was fixed a long nail. There was distance of 30 paces between the banks of the river.

22. In site plan the river on which on which bank the deceased was sitting and fishing by fishing hook is shown to have 8 to 10 feet water. The dead body was found at place 'A' in supine position where the deceased Bhopal was fishing. Accused ran away after committing the crime towards east. Two empty cartridge shells and one cartridge was found at place 'D' and 'E' lying near the place where the dead body was found and same was taken into possession by the Investigating Officer. The legs of deceased were turned from knees and found hanging in river water. The Investigating Officer took into possession blood stained and plain soil found on place of incident. A 'chari' field of Phool Singh, who is resident of jungle village Khedaki is shown lying north westwards of the place of incident. PW-3, Rajpal stated that at the time of incident, he had gone to river bank for easing (answering call of nature) at around 5:00 to 5:30 PM and when he was washing his hands, he saw deceased Bhopal fishing on the bank side of river and suddenly accused persons came from the side of hillock. Rohtash fired shots at Bhopal and the accused persons who were wielding lathi assaulted him by their respective lathies. Bhopal fell down after being injured. The lathi wielded by accused Vijja was fixed with an iron nail. The witness Vishambhar was also present when fire was shot. Both the witnesses have stated that Vishambhar was present on south bank of river and Rajpal was present on north bank of river. Their village lies towards hillock situated near the river. Some agricultural fields intervene between the place of incident and

the river on which incident occurred. Investigating Officer (PW-4) clarified in his evidence that due to heavy footfall at the place of incident, the fishing hook and fishes hunted by the deceased could not be found and same might have been removed by someone.

23. Learned counsel for the appellant forcefully contended that both the witnesses are chance witnesses and no reliance can be place on their statement. We are not ready to subscribe this contention as both the witnesses are co-villagers of the deceased and accused persons. The incident occurred at the outskirts of the village at the bank of local river adjacent to their village. Both the witnesses have explained the reasons for their presence. The accused persons failed to establish their contention that they are interested witnesses. A suggestion has been made to them on behalf of the defence counsel that they belong to clan of deceased Bhopal but no such evidence could be led in support of this. There is no evidence that the witnesses were inimical towards the appellants for any reason whatsoever. It could not be established in evidence during trial that the witnesses had any direct relationship with the deceased. Therefore, there was no occasion for them to falsely implicate the accused persons in the case. PW-2 Vishambhar has explained the delay of few hours in lodging of FIR in FIR itself and nothing can be illicited in his cross-examination which could suggest that the FIR was ante timed or the delay in lodging of FIR remained unexplained. As many as 8 injuries were found on the person of deceased in his postmortem, which is duly proved by its author Dr. S.K. Sharma during his evidence as PW-1 before the Court. One firearm injury over left side of back and one firearm wound of

exit on left side of chest corresponding to back injury and one gunshot wound on right side of chest just lateral to sternum are shown in postmortem examination report, which substantially corroborate the eye-witness account given by PW-2 and PW-3 that accused Rohtash fired two shots at Bhopal by his countrymade pistol. Three injuries found on the person of deceased reveal that these were caused by two firearm shots. The enmity between accused persons and deceased also finds support from documents filed on record with regard to S.T. No.30/1982, which relates murder trial of Samay, son of Chohal and in that case, deceased Bhopal, Bhansingh and Raghuveer were tried. Appellant Mughal had testified as prosecution witness in earlier murder case against deceased Bhopal and others in said criminal trial.

24. On a meticulous appreciation of evidence on record, we find no infirmity or discrepancy in approach and finding of learned trial court while recording the verdict of guilt against co-appellants namely, Rohtash, Mughal, Dilip and King Kong for charge under Section 302/34 IPC. The evidence of witnesses is found reliable so far as these appellants (since deceased) are concerned and learned trial court has rightly recorded verdict of guilt against them for alleged offence under Section 302/34 IPC. However, we cannot lost sight of a crucial fact found in post mortem report of deceased Bhopal (Ext.Ka-1) which reveals that in antemortem injury No.8 of Bhopal “incised wound 3 X 1 inch X abdominal cavity deep over right side chest in anterior auxiliary line just above costal margin. Margins clean cut, angles angular” is described whereas in FIR or even in statement of witnesses, it is nowhere stated that any of the accused persons were armed with a sharp edged

weapon, by which injury No.8 of deceased could have been caused. PW-2 and PW-3 has made an improvement in their evidence before the Court from their earlier version in the FIR/statement under Section 161 Cr.P.C. where they stated that the lathi wielded by accused Vijaypal @ Vija was fixed with an iron nail probably with a view to explain this injury No.8 of deceased Bhopal as stated above.

25. If we go through the evidence of PW-1 Dr. S.K. Sharma on this score, this is noticeable that he categorically stated in his cross-examination that injury No.8 of Bhopal as shown in postmortem examination report may not have been caused by a nail fixed in the lathi. This injury could only be caused by a sharp edged weapon. This injury could not have been caused by a pointed weapon. This injury must have been caused by a sharp edged weapon. If a small 'gadasa' had been fixed in a lathi in that case, such injury might have been caused. Such injury could also have been caused by some flat sharp edged weapon. Thus, the weapon assigned to surviving appellant Vijaypal @ Vija in evidence of witnesses of fact i.e. a lathi fixed with a nail is not found as weapon of offence in medical evidence which might have been caused injury No.8 of the deceased. Thus, injury No.8 of deceased Bhopal has not been duly explained in ocular testimony of the witnesses. Although, they had tried to explain the same by some improvement in their earlier version during investigation, as the injury attributed to appellant Vijaypal @ Vija with regard to injury No.8 of the deceased is not found to have been caused by the weapon assigned to the appellant in the light of medical evidence and there is apparent inconsistency between ocular and medical evidence in this regard and the evidence on this score cannot be

relied upon also due to the fact that in FIR, the informant Vishambhar (PW-2) has nowhere stated that an iron nail was fixed in lathi wielded by appellant Vijaypal @ Vija. From perusal of statement of Investigating Officer, it appears that in statement of witness Vishambhar under Section 161 Cr.P.C., the word 'keelwali' was added above word 'lathi' after completion of his statement. Similarly, the Investigating Officer (PW-4) admitted that the words "Vija ki lathi me keel lagi thi" was included in statement of Rajpal under Section 161 Cr.P.C. in the last line of his statement and a suggestion has been given to the PW-4 by defence during cross-examination that this sentence has been added subsequently in his statement after recording the same.

26. Hon'ble Supreme Court in a recent judgement of Darshan Singh vs. State of Punjab, (2024) 1 SCR 248, dated 4.1.2024 observed in paragraph No.26 as under:-

"26. If the PWs had failed to mention in their statements u/s 161 CrPC about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance. [See : (i) Rohtash Vs. State of Haryana, (2012) 6 SCC 589 (ii) Sunil Kumar Shambhu Dayal Gupta Vs. State of Maharashtra, 2011 (72) ACC 699 (SC). (iii) Rudrappa Ramappa Jainpur Vs. State of Karnataka, (2004) 7 SCC 422 (iv) Vimal Suresh Kamble Vs. Chaluverapinake, (2003) 3 SCC 175]."

27. In the light of foregoing discussion, we are of the considered

opinion that complicity of surviving appellant namely, Vijaypal @ Vija in the offence has not been found to be proved on re-appreciation of evidence on record in present appeal in the light of submissions made by learned counsel for the parties and the impugned judgement and order cannot be countenanced as regards surviving appellant Vijaypal @ Vija is concerned. The charges under Sections 302/149 and 147 IPC are not found to be proved against appellant Vija alias Vijaipal beyond reasonable doubt and the judgement of learned trial court deserves to be set aside qua surviving appellant Vija alias Vijaipal.

28. The appeal stands *partly allowed* qua appellant Vija alias Vijaipal and his conviction and sentence for charges under Sections 302/149 and 147 IPC in S.T. No.381 of 1982 by court below vide impugned judgement and order dated 9.12.1983 are set aside. He is acquitted of all charges. He has been enlarged on bail in present appeal by orders of this Court. He need not to surrender. His bail bonds are cancelled and sureties are discharged.

29. Let a copy of this judgement be forwarded to learned trial court for necessary compliance and further action together with record of trial court, immediately.

(2024) 9 ILRA 303

**APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2024**

BEFORE

**THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.**

Criminal Appeal No. 4739 of 2018

Smt. Jaydevi Saroj **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Hemant Kumar, Parmeshwar Kr. Chaudhary, Raj Kumar Yadav, Shamsher Singh, Shivbaboo, Vinod Kumar Yadav

Counsel for the Respondent:

G.A.

(A) Criminal Law - Appeal against conviction - Indian Penal Code, 1860 - Section 302 -Murder - Admissibility of a dying declaration and its evidentiary credibility - One of the important tests of the credibility of the dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind - A dying declaration, to be reliable, must clearly reflect the mental and physical fitness of the declarant and must not suffer from contradictions or suspicion.(Para -38,43)

Appellant was accused of setting the deceased ablaze after pouring kerosene - alleged incident occurred at the victim's matrimonial home. - deceased succumbed to burn injuries - conviction was based primarily on the victim's dying declaration. (Para – 1 to 9)

HELD: - Lack of motive attributed to the appellant. Material contradictions in the dying declaration and the FIR version which raised suspicious about its admissibility. Therefore, no reliance can be placed on the dying declaration. (Para - 43)

Appeal allowed. (E-7)

List of Cases cited:

1. Shambhubhai Kalabhai Raval Vs St. of Guj., 2023 SCC OnLine SC 1420
2. Umakant & anr. Vs St. of Chhatishgarh, (2014) 7 SCC 405
3. Kanti Lal Vs St. of Raj., (2009) 12 SCC 498

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. The present appeal has been filed challenging the judgment of conviction and order of sentence dated 01.08.2018, passed by learned Additional & Sessions Judge, Court No.2, Jaunpur in Sessions Trial No. 254 of 2013, arising out of Case Crime No. 133 of 2013, by which the appellant was held guilty of offence under Section 302 I.P.C. and awarded her life imprisonment along with a fine of Rs. 5,000/- and in default of payment of fine to further undergo one year rigorous imprisonment.

2. The Trial Court's record is received and paper books are ready.

3. Heard Ms. Mary Pucha Sheeba Jose, Advocate assisted by Sri Mohd. Kalim, learned counsel for the appellant as well as learned AGA for the State and perused the record.

4. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

5. The FIR dated 9.4.2013 was registered at the instance of informant-Akhilesh Kumar and read as under:

"न्यायालय मुख्य न्यायिक मजि० जौनपुर मु०नं० 110/2013 यह? (कागज कटा) ग्राम गोधना थाना मीरगंज जिला जौनपुर का रहने वाला है। (कागज कटा) बहन सुमन की शादी राधेश्याम पुत्र राजमणि निवासी ग्राम पाली थाना बरसठी के साथ हुयी थी।

सुमन के पति बसिलसिले रोजगार शहर मुम्बई रहते रहे। सुमन अपनी छोटी छोटी चार बेटियों के साथ ग्राम पाली में रहती थी। अभियुक्ता सजावटी देवी सुमन से पट्टीदारी की रंजिश रखती थी और हमेशा सुमन को परेशान व प्रताड़ित करती रहती थी। 2- यह कि घटना दि० 13-3-13 की सुबह लगभग चार बजे की है सुमन अपने घर के अंदर थी कि अभियुक्ता सजावटी देवी अपने पड़ोस की रहने वाली अभियुक्ता जयदेवी उर्फ अखिलेश के साथ आयी और घर में घुसकर सुमन को भद्दी -2 गालियां देने लगे। सुमन ने मना किया तो दोनों अभियुक्तगण सुमन को लात घूसे से थप्पड़ से मारने लगे। और मिट्टी का तेल छिड़ककर आग लगाकर भागने लगी सुमन ने उन्हें पकड़ने की कोशिश किया लेकिन गिर जाने के कारण पकड़ नहीं सकी। शोर पर सुमन की बड़ी बेटी खूशबू उम्र त० 10 साल व अन्य बच्चे जाग गये घटना देखे तथा चिल्लाने लगे। जिससे काफी लोग आ गये और बीच बचाव करके आग बुझाये। फोन से सूचना पाकर प्रार्थी व परिवार के अन्य लोग घर से रवाना हुये सुमन के परिवार के लोग भी सुमन को लेकर प्रार्थी के घर आ रहे थे। कि यह लोग

अगहुआ बाजार में मिल गये और सुमन को हमारे सुपुर्द कर दिया। तब प्रार्थी सुमन को लेकर सरकारी अस्पताल मछलीशहर गया तो डाक्टर ने स्थिति गम्भीर देखकर उसे इलाहाबाद ले जाने की सलाह दी सुमन को प्रार्थी लेकर इलाहाबाद जा रहा था कि उसकी हालत बिगड़ती जा रही थी। अतः रास्ते में मुंगराबादशाहपुर में प्राइवेट डाक्टर से प्रार्थना करके उसके घाव पर दवा लगवायी और फिर प्रार्थी सुमन को लेकर इलाहाबाद स्वरूपरानी अस्पताल के अमरजेन्सी वार्ड के बेड नं० 3 पर भर्ती कराया जहाँ उसकी चोटों का डाक्टरी मुआइना हुआ तथा स्थिति गम्भीर होने के कारण आईसी०यू० में भर्ती रही। यह कि प्रार्थी के भाई आशीष ने घटना की दरखास्त थाना बरसठी में एवं प्रार्थी ने पुलिस अधीक्षक जौनपुर को दिया किन्तु रपट दर्ज नहीं हुयी पुलिस वाले कहते रहे कि पहले सुमन की जान बचाओ। यह कि जलने की चोटों के कारण दिनांक 18-3-2013 की शाम करीब पांच बजे सुमन की अस्पताल में मृत्यु हो गयी और उसके शव का पोस्टमार्टम भी हुआ तथा लाश प्रार्थी की मौजूदगी में सुमन के पति राधेश्याम को सुपुर्द की गयी तथा उसका दाह संस्कार कारित

किया गया।' यह कि सुमन का पूर्व मृत्यु कारित बयान भी हुआ है तथा (कागज कटा) ने भी मोबाइल से उसके द्वारा बतायी गयी घटना को रिकार्ड (कागज कटा) जो बवजह सबूत पेश किया जायेगा। यह कि प्रार्थी ने सुमन की मृत्यु की सूचना मय घटना की दरखास्त के पुलिस अधीक्षक जौनपुर को दिया किन्तु पुलिस वाले जांच के नाम पर हीला हवाली कर रहे हैं। तथा इस अत्यन्त गम्भीर व घृणित अपराध को दर्ज नहीं करना चाहते। यह कि मामला संज्ञेय अपराध से संबंधित है प्रार्थी गरीब होने के कारण अपना मुकदमा स्वयं लड़ने में असमर्थ है साक्ष्य का संकलन पुलिस ही सम्भव है। अतः अपराध की विवेचना पुलिस द्वारा कराया जाना न्याय संगत है। अतः नम्र निवेदन है कि थानाध्यक्ष बरसठी को आदेश देवे वे प्रकरण दर्ज करके विवेचना करे ताकि न्याय हो। प्रार्थी अखिलेश कुमार वादी दिनांक 21-3-13 एस०डी० अखिलेश कुमार

नोट- नकल दरखास्त एस०पी० जौनपुर मय रजिस्ट्री रसीद एवं शव सुपुर्दगी संलग्न प्रार्थना पत्र है।

नोट- मैं का०मु० प्रमाणित करता हूँ कि प्रा० पत्र की नकल शब्द ब शब्द अक्षरशः अंकित किया गया है।

ह०अपठनीय
सी/सी
9-4-13”

6. After registration of the FIR, the police started the investigation and recorded the statement of the witnesses.

7. One Nagendra Kumar Singh, S.D.M. recorded the statement/dying declaration of the victim, Ex.Ka.4 which read as under:

“This is certify that of Suman, w/o Radhe Shyam is concious...(sic)...oriented to (sic) place person at 11.05. A.M. On 18.3.13.

ह०अप०
18-3-13

ई०एम०ओ०

एस०आर०एन० हास्पिटल

इलाहाबाद

मुत्यु पूर्व बयान

प्रारम्भ- 11.05 ए०एम०

बयान- मेरा नाम सुमन व मेरे पति का नाम राधेश्याम है। मेरी उम्र 27 वर्ष है मैं जाति की सरोज हूँ। मैं नि० निगोह, थाना वरसठी, जनपद- जौनपुर की रहने वाली हूँ। मेरी शादी 2002 में हुई थी, मेरे चार लड़कियां है। प्रेम चन्द्र की पत्नी श्रीमती अखिलेश जो मेरी देवरानी (चचेरी) है। उससे चार दिन लड़ाई-झगडा हुआ था। उसी बात

को लेकर श्रीमती अखिलेश चार बचे भोर में मेरे उपर मिट्टी का तेल डालकर जला दिया, जब मैं चिल्लाई तो मेरी जेठानी की लडकी कम्बल डालकर ढक दिया। मेरे पति बाम्बे से आ गये है। बयान सुनकर तस्दीक किया।

समाप्त- 11.15 ए०एम०

ह० अप०

नि०दाहिने पैर का अंगूठा

10-03-13

(नागेन्द्र कुमार सिंह)

ए०सी०एम०- ||

This is certify that of Suman remain concious (sic) during her statement and at 11.15. A.M. On 18.3.13.

ह०अप०

18-3-13

प्रदर्श क-4

ई०एम०ओ०

एस०आर०एन हास्पिटल

इलाहाबाद"

8. The deceased died on same day i.e. 18.3.2013 at about 5:00 PM and her post-mortem was conducted at MLN Hospital, Allahabad on 19.3.2013. The cause of death was due to septicemia as a result of ante-mortem burn injuries. The post-mortem report, Ex.Ka 3 stated that on the upper part of the body i.e. above neck, there was no injury and the deceased suffered the burn injury all over the upper chest, abdomen, left and right arms. However, no percentage of the burn injury

was assessed. The police also prepared the Panchayatnama, Ex.Ka.5 in which as per the opinion of the *Panches*, the deceased died due to burn injuries. Thereafter, the police concluded the investigation and submitted the charge-sheet only against the accused-appellant Jaydevi @ Akhilesh.

9. It is worth noticing that the incident is dated 13.3.2013 at about 4:00 AM in the matrimonial home of deceased Suman, who is sister of the informant, however, no FIR was registered instantly and as per the prosecution, a complaint was given to the Superintendent of Police, i.e. Ex.Ka.1 but no action was taken and thereafter, a complaint was given to the Ilaka Magistrate under Section 156(3) of Cr.P.C. on 21.3.2013 (which is Ex.Ka.2). This complaint was filed against two accused persons, namely, Sajawati Devi and Jaydevi @ Akhilesh. The learned Magistrate passed an order and thereafter, the chik FIR was registered on 9.4.2013.

10. The police dropped the proceedings against Sajawati Devi and submitted the charge-sheet only against the appellant. The case was committed to the court of Sessions where charges under Section 302 I.P.C. were framed against the appellant on 1.8.2014.

11. The appellant did not plead guilty and claimed trial.

12. In prosecution evidence, informant- PW-1, Akhilesh Kumar appeared and deposed as under:

"मेरी बहन सुमन (मृतका) की शादी राधेश्याम पुत्र राजमणि निवासी ग्राम पाली थाना बरसठी, जौनपुर के

साथ हुई थी। मृतका सुमन अपनी ससुराल में रह रही थी। सुमन के 4 पुत्रियां हैं। "सुमन जेठानी सजावटी है। अभियुक्ता जय देवी उर्फ अखिलेश भी पाली गाँव की रहने वाली है।"

घटना दि० 13-3-13 ई०की सुबह 4.00 बजे की है। सुमन के जलने की सूचना मिलने पर मैं उसके घर जा रहा था कि अगहुआ बाजार में सुमन जली हुई अवस्था में मिली जिसके साथ उसके परिवार के लोग व" गाँव के लोग मिले और उन्हीं लोगों में से किसी ने बताया को उसकी जेठानी तथा जय देवी उर्फ अखिलेश ने मिट्टी का तेल डालकर आग लगाकर जला दिया है।" मैं सुमन को लेकर सरकारी अस्पताल मछलीशहर गया जहां डाक्टर ने उसकी स्थिति गम्भीर देखकर इलाहाबाद ले जाने की सलाह दिया। इलाहाबाद ले जाते समय रास्ते में ही सुमन की हालत बिगडती देखकर मैंने मुंगराबादशाहपुर में प्राइवेट डाक्टर से उसके घावों पर दवा लगवाया। तत्पश्चात स्वरूपरानी अस्पताल इलाहाबाद के इमर्जेंसी वार्ड में भर्ती कराया जहाँ इलाज के दौरान जलने की चोटों के कारण दि० 18-3-13 की शाम करीब 5.00 बजे उसकी मृत्यु हो गई।

मृतक सुमन के शव का पंचायतनामा मेरे सामने हुआ था जिस पर मैंने हस्ताक्षर बनाया था। घटना की सूचना थाने पर मेरे भाई आशीष ने दिया था। कोई कार्यवाही न होने पर मैंने कप्तान साहब को रजिस्टर्ड डाक से प्रार्थना पत्र भेजा था जिसकी छाया प्रति संलग्न पत्रावली है जिस पर मेरा हस्ताक्षर है जिस पर प्रदर्शक 1 डाला गया। पुलिस द्वारा कोई कार्यवाही न होने पर मैंने न्यायालय में प्रार्थना पत्र यू/एस 156 (3) सीआरपीसी दिया था। जिस पर मैंने अपना हस्ताक्षर बनाया था। न्यायालय के आदेश मुकदमा पंजीकृत हुआ। उक्त प्रार्थना पत्र संलग्न पत्रावली है जिस पर मेरा हस्ताक्षर है जिस पर प्रदर्शक 2 डाला गया।

विवेचक ने मेरा बयान लिया था।

X X X XXX X

Cross by Defence

घटना स्थल से मेरा घर करीब 20 किमी की दूरी पर है। मेरी बहन सुमन की शादी 17-18 वर्ष की उम्र में हुई थी। शादी के 8-9 साल बाद की यह घटना है। घटना के पूर्व मेरी बहन को 4लड़कियां पैदा हुईं और सभी जीवित हैं। "कम उम्र में शादी होने और बच्चा पैदा होने की वजह से वह अक्सर

बीमार रहती थी और उसका इलाज भी चल रहा था। बीमारी के कारण सुमन शारीरिक व मानसिक रूप से काफी क्षीण हो गई थी।"

"मेरे जीजा राधेश्याम मेरी बहन सुमन के साथ परिवार से अलग रहते थे। इन दोनों का खाना-पीना व रहन-सहन भी अलग था। परिवार के मकान व खेत से मेरे जीजा व बहन का कोई वास्ता सरोकार नहीं था। घटना के पूर्व में मेरे जीजा राधेश्याम व बहन सुमन का विवाद परिवार के अन्य सदस्यों से नहीं था। परिवार के सभी लोग आपस में मिल जुलकर खुशहाल जिन्दगी व्यतीत कर रहे थे।"

टू कोर्ट

अभियुक्ता जय देवी से मेरा समझौता हो गया है। समझौता बगैर पैसे का का हुआ है बयान मैंने अपनी इच्छा से दिया है।

बाई डिफेन्स :-

घटना के समय मेरे जीजा राधेश्याम बम्बई में थे। घटना के समय घटना स्थल पर मैं मौजूद नहीं था। घटना मैंने अपनी आँखों से नहीं देखी है। जिस समय मेरी बहन सुमन के ससुराल वाले इलाज के लिए ले जा रहे थे तो रास्ते में ही मेरी मुलाकात उन

लोगों से हुई। उस समय करीब 50 लोगों की भीड़ थी। उसी भीड़ में से किसी ने सुमन के जलने वाली बात बताया था। भीड़ की बजह से मैं उस व्यक्ति जान पहचान नहीं पाया। बहन की हालत देखकर मैं काफी घबराहट में था और सुनी सुनाई बातों के आधार पर मैंने मुकदमा कर दिया। विशेष कोई जांच पड़ताल नहीं किया। इलाज के दौरान मेरी बहन गम्भीर रूप से पीड़ित थी और कुछ स्पष्ट बोल नहीं पा रही थी।"

13. In cross-examination, this witness admitted that during the treatment his sister was not in a position to speak as she was seriously injured.

14. PW-2- Khushboo, aged about 10 years, who is daughter of the victim appeared and stated that she has no knowledge as to who has caused the burn injuries to her mother. No cross-examination was offered to this witness.

15. PW-3- Rajendra Prasad, Village Pradhan appeared and deposed as under:

"घटना दि० 13-3-13 ई० की करीब 4.00 बजे सुबह की है। उस समय मैं गाँव का प्रधान था। "सुबह जब मैं सोकर उठा तो मुझे पता चला कि सुमन जल गई है तो उसके घर गया और सुमन से पूँछा कि तुम कैसे जल गई तो उसने बताया कि जलती ढिबरी

(चिमनी) मेरे उपर गिर गई जिससे मैं जल गई।" सुमन को इलाज हेतु एक चारपहिया वाहन से अस्पताल भेजा गया तो रास्ते में उसका भाई व परिवार वाले मिल गये और उसे स्वरूपरानी हास्पिटल इलाहाबाद ले गये जहाँ वह भर्ती हुई और दवा इलाज हुआ दि० 18-3-13 ई० को मैं कुछ लोगों के सुमन को देखने अस्पताल गया तो देखा कि सुमन की हालत गम्भीर थी। मैंने सुमन से बात किया तो उसके भाई व माँ सुमन से कहे कि हम लोग कहे है वैसा ही बयान देना नहीं तो हम लोग तुम्हे यहीं छोड़कर घर चले जायेंगे और तुम्हारा इलाज नहीं करायेगे। सुमन के भाई व माँ उसे सिखा पढ़ाकर उससे गलत बयान दिलवाना चाहते थे। पुलिस ने मेरा बयान लिया था।

X X X X X X X

किसी पुलिस अधिकारी ने मेरा कोई बयान नहीं लिया था।" अभियुक्ता जयदेवी ने सुमन को जलाया नहीं था। सुमन जलती हुई ढिबरी गिर आने से जली थी। जिससे उसकी मृत्यु हुई थी। घटना के दूसरे दिन सुमन को देखने मैं स्वरूपरानी हास्पिटल गया था। तो उस समय सुमन बोल नहीं पा रही थी और न ही बोलने की स्थिति में थी।"

16. PW-4- Abhiraji Devi, mother-in-law of deceased Suman, stated as under:

"दिनांक 13-3-13 ई0 को मैं अपने कमरे में सो रही थी और बगल वाले कमरे में मेरी बहू मृतक सुमन देवी अपने बच्चों के साथ सो रही थी और उसके बगल के कमरे में मेरी बड़ी बहू सजावटी देवी अपने बच्चों के साथ सो रही थी। "सुबह करीब 4.00 सुमन शौच के लिए उठी कि अचानक उसकी चारपाई के पास ऊपर रखी ढिबरी में उसका हाथ टकरा गया और जलती हुई ढिबरी उसके ऊपर गिर गई जिससे उसके कपड़ों में आग लग गई और वह जलने लगी तो उसने चिल्लाना शुरू किया। चिल्लाहट सुनकर हम लोग दरवाजा खोलना चाहे लेकिन अन्दर से दरवाजा बन्द होने की वजह से नहीं खुल सका। बल्कि तेज धक्का देने के बाद दरवाजा खुल गया तो सुमन बाहर की तरफ भागी। इसके बाद हम लोग कथरी लपेटकर उसकी आग बुझाये"। इसके बाद हम लोग गाडी की व्यवस्था करके अस्पताल ले जा रहे थे कि रास्ते में उसके मायके वाले मिल गये और सुमन को इलाज हेतु स्वरूप रानी हास्पिटल इलाहाबाद ले गये जहां दौरान इलाज 4-5 दिन बाद उसकी मृत्यु हो

गई। दरोगा जी ने मेरा बयान लिया था।

X X X X X X X X

घटना के समय मैं मृतका के कमरे से सटे हुए कमरे में मौजूद थी। घटना के वक्त मृतका सुमन का शोर सुनकर तत्काल मैं उसके कमरे के पास पहुंच गई। उस समय सुमन के कमरे का दरवाजा अन्दर से बन्द था। हम लोग बाहर से कई बार दरवाजे पर धक्का मारे तब अन्दर से जंजीर व कुण्डी छिटक गई तब दरवाजा खुल गया। हम लोगों ने अन्दर की तरफ देखा तो कमरे के अन्दर सुमन व उसके बच्चे मौजूद थे तथा सुमन जल रही थी और बच्चे चिल्ला रहे थे। दरवाजा खुलते ही सुमन व बच्चे बाहर भागे। कमरे के अन्दर काफी धुँवा मौजूद था। मैंने सुमन को कथरी से ढककर उसको बुझाने व बचाने का प्रयास किया और सुमन से पूँछा कि तुम्हे कैसे आग लग गई तो सुमन ने मुझसे व वहाँ मौजूद लोगों से कहा था कि मेरे कमरे में ढिबरी जल रही थी जो गलती से मेरे हाथ से टकरा गई और ढिबरी मेरे ऊपर गिर गई और मिट्टी का तेल भी मेरे ऊपर गिर गया जिससे मेरे कपड़ों में आग लग गई और मैं जलने लगी। "सुमन से मैंने यह भी

पूँछा कि ढिबरी तुम्हारे बच्चे या अन्य किसी ने तो नहीं गिराया है तो उसने कहा कि मेरी बच्चियों का अन्य किसी ने मेरे ऊपर ढिबरी नहीं गिरायी थी। सुमन के कमरे के अन्दर मैंने घुसकर देखा तो सुमन की चारपाई पर सुमन की ही ढिबरी गिरी पड़ी थी जिसे मैंने पहले भी सुमन के कमरे में देखा था। सुमन की लडकी भी मुझे बताई कि दादी यही ढिबरी मेरी माँ के ऊपर गिरी थी जिससे वह जली है। सुमन की लडकी ने यह भी बताया था कि धुँवा इतना ज्यादा हो गया था कि हम लोग घबरा गये और घबराहट व अँधेरा होने की वजह से दरवाजे की कुण्डी नहीं खोल सकी। सुमन जलने से गम्भीर स्थिति में थी इसलिये हम लोग तुरन्त उसे लेकर इलाज हेतु इलाहाबाद लेकर चले गये जहाँ इलाज के दौरान सुमन की स्थिति दिन प्रतिदिन खराब होती गई। जलने के 5 दिन बाद शाम 5 बजे सुमन की अस्पताल में ही मृत्यु हो गई थी। "मरने के 5-6 घण्टे पूर्व सुमन का बयान लेने तहसीलदार आये थे लेकिन उस समय सुमन बोलने की स्थिति में नहीं थी और वह बेहोश थी तथा लम्बी-2 सांसे ले रही थी।" एक बार डाक्टर ने तहसीलदार से सुमन का बयान लेने से

मना कर दिया था। डाक्टर के मना करने के बावजूद भी तहसीलदार ने सुमन के भाई के बताने के अनुसार बयान दर्ज कर लिया था। हाजिर अदालत अभियुक्ता जयदेवी उर्फ अखिलेश देवी घटना के समय सुमन के कमरे में या उसके अगर बगल मौजूद नहीं थी। घटना के समय जय देवी उर्फ अखिलेश देवी अपने घर पर मौजूद थी सुमन के कमरे से अभियुक्ता जय देवी का कमरा पश्चिम तरफ काफी दूरी पर है। सुमन के घर व अभियुक्ता के घर के बीच कई लोगों के खेत व गड़ही है। अभियुक्ता जय देवी मेरे परिवार की नहीं हैं बल्कि वह पट्टीदारी की औरत है। सुमन व जयदेवी के बीच घटना के पूर्व कोई विवाद या दुश्मनी नहीं थी और न ही उन दोनों के बीच घटना के 4-6 दिन पहले कोई झगडा ही हुआ था।"

17. PW-5- Dr. Dayanand of Motilal Nehru Regional Hospital, Allahabad, who conducted the post-mortem, deposed as under:

"दि० 19-3-13 ई० को मैं मोतीलाल नेहरू: मण्डलीय चिकित्सालय, इलाहाबाद में चेस्ट परामर्शदाता के पद पर कार्यरत था। उस दिन 03.30

पी०एम० पर मैं सुमन देवी उम्र करीब 27 वर्ष पत्नी राधेश्याम सरोज निवासी ग्राम पाली निगोह थाना बरसठी, जौनपुर के शव जो एस०एच०ओ० कोतवाली, इलाहाबाद द्वारा भेजा गया था जिसे सी०पी० / 1700 अनिल कुमार लाया था का शव विच्छेदन किया था। शय सील मुहर हालत में था और शव के साथ 10 पुलिस प्रपत्र भी थे। नमूना मुहर का मिलान किया गया और शव खोलने पर उक्त सी०पी० ने शव की शिनाख्त किया।

वाह्य परीक्षण- शव सामान्य कद काठी का था। कान नाक गुदा, मूत्रमार्ग योनि मार्ग सामान्य थे।

"मृत्यु पूर्व की चोटे:- शव के सीने का अगला व पिछला हिस्सा, पेट का अगला हिस्सा, पीठ का भाग गले का अगला व पिछला हिस्सा व दोनों हाथ की हथेलियों का अगला पिछला हिस्सा व दोनों हाथ की हथेलियों का अगला-पिछला हिस्सा गहराई तक जला हुआ था।"

आन्तरिक परीक्षण :- खोपड़ी मस्तिष्क की झिल्लियों आधार, रीढ़ का छल्ला मेरु रज्जू सामान्य थे। उरस की भित्तियां Pluera Lrynx Trackia ? सामान्य थे। दोनों फेफड़ों में मवाद

पाया गया। हृदय का बाँया चैम्बर खाली था और दाँया चैम्बर भरा हुआ था। छोटी आँत अधपची आधी खाली व आधी भरी हुई थी। बड़ी आँत भी आधी खाली व आधी भरी हुई थी। यकृत कन्जेस्टेड थी। मूत्राशय खाली था और जननांग भी खाली था।

मेरी राय में मृतका की मृत्यु की मृत्यु सेप्टीसीमिया से जलने की वजह से हुई थी।

दौरान शव विच्छेदन मेरे साथ डा० विमलेन्दु शेखर भी तैनात थे। विमलेन्दु शेखर भी मेरी राय से सहमत हैं।

उक्त शव विच्छेदन आख्या मैंने अपने लेख व हस्ताक्षर में तैयार किया था जो संलग्न पत्रावली है जिस पर प्रदर्शक 3 डाला गया।

विवेचक ने मेरा बयान लिया था।

XXXXXXXXXX

पी०एम० रिपोर्ट में मैंने यह नहीं अंकित किया है कि मृतका सुमन देवी कितने प्रश्न जली थी। मृत्यु के पूर्व मृतका की शारीरिक व मानसिक स्थिति क्या थी। मैं नहीं बता सकता। मृत्यु पूर्व मृतका के शरीर पर जलने वाली आघात की गम्भीरता की वजह से

संक्रमण (Infection) हुआ और उसी से उसकी मृत्यु हुई। मृतका की मृत्यु कब हुई यह मैं नहीं बता सकता। जब मेरे विभाग द्वारा मृतक के मृत्यु की तारीख लिखकर आती है तो मैं वहीं तारीख मृत्यु की मानकर शव विच्छेदन करता हूँ। मैंने मृतका के शव का वजन व उँचाई को पी०एम० रिपोर्ट में अंकित नहीं किया है। पी०एम० रिपोर्ट मेरे लेख व हस्ताक्षर में है। पी०एम० के समय मेरे साथ तैनात डा० विमलेन्द्र शेखर द्वारा भी मेरे द्वारा तैयार पी०एम० रिपोर्ट पर सहमति दी गई है। जिस पर उनका भी हस्ताक्षर है। पी०एम० रिपोर्ट पर डा० विमलेन्दु शेखर द्वारा अलग से कोई राय नहीं दी गई है। मैं सेवा में सन् 1999 ई० में आया हूँ। डा० ? विमलेन्दु शेखर सेवा में कब आये हैं मुझे नहीं मालूम है लेकिन वे मुझसे सीनियर थे। विमलेन्दु शेखर अभी जीवित हैं और सेवा में हैं लेकिन कहा सेवारत हैं मुझे नहीं मालूम है। पी०एम० रिपोर्ट में मैंने यह अंकित किया है कि शव में कोई अंकडन नहीं मौजूद थी। मृत्यु के 12 घण्टे बाद शव में अंकडन आनी शुरू हो जाती है। मैं यह नहीं बता सकता कि मृतका मृत्यु के कितने दिन पूर्व जली थी। मृतका के जलने से आई

चोटे स्वनिर्मित व एकसीडेन्टल भी हो सकती है। शव के साथ प्रेषित पुलिस प्रपत्र व मेरे विभाग द्वारा प्रेषित प्रपत्र पर विश्वास करके हम लोगों ने पी०एम० रिपोर्ट तैयार किया है।"

18. PW-6- Nagendra Kumar Singh who recorded the dying declaration of the victim made following deposition as under:

"दि० 18-3-13 ई० को मैं बतौर अपर नगर मजिस्ट्रेट द्वितीय इलाहाबाद में तैनात था। उस दिन मेरी ड्यूटी स्वरूपरानी हास्पिटल इलाहाबाद में लगी थी। अस्पताल में चौकी इंचार्ज द्वारा दूरभाष से मुझे अवगत कराया गया कि अस्पताल में भर्ती मजरूब सुमन देवी का मृत्यु कालिक बयान अंकित किया जाना आवश्यक है। इस सूचना पर एस०आर०एन० जाकर सुमन देवी का मृत्यु कालिक बयान मेरे द्वारा अंकित किया गया। "बयान लिये जाने के पूर्व डाक्टर द्वारा मजरूब का परीक्षण कराया गया कि वह बयान देने में सक्षम है या नहीं। डाक्टर द्वारा परीक्षण के बाद यह बताया गया कि मजरूबा बयान देने में सक्षम है। तत्पश्चात् मेरे द्वारा मजरूबा सुमन का बयान अंकित किया गया था। बयान के उपरान्त भी डाक्टर द्वारा यह प्रमाण

पत्र दिया गया कि मजरूबा सुमन देवी पूरे होशो हवास में है।" उक्त मृत्यु कालिक बयान मेरे लेख व हस्ताक्षर में है जिस पर मजरूबा सुमन देवी के दाहिने पैर के अंगूठे का निशान अंकित है जिस पर प्रदर्श क-4 डाला गया।

दि० 19-3-13 ई० को मैंने मृतका सुमन देवी के शव का पंचायतनामा स्वरूपरानी हास्पिटल में पंचान नियुक्त करने के बाद तैयार किया था। उक्त पंचायतनामा एस०आर०एन० चौकी इंचार्ज द्वारा दूरभाष पर मुझे अवगत कराने के बाद तैयार किया गया था जो मेरे निर्देशन में लिखा गया था जिस पर प्रदर्श क-5 डाला गया। दौरान पंचायतनामा, पंचायतनामा से सम्बन्धित प्रपत्र पुलिस फार्म 13 फोटो नाश नमूना मुहर, पत्रCMS. CMS डाक्टरों के पैनल हेतु एवं पत्र आर०आई० तैयार कराया गया था जो संलग्न पत्रावली है जिन पर मेरे हस्ताक्षर हैं जिन पर कमशः प्रदर्श क-6 ता० प्रदर्श क-11 डाला गया। बाद पंचायतनामा शव को एक सफेद कपड़े में लपेटकर सर्व मुहर किया गया और नमूना मुहर तैयार करके शव व उससे सम्बन्धित समस्त प्रपत्र सी०पी० अनिल कुमार सिंह को शव विच्छेदन हेतु सौंप

दिया गया। विवेचक ने मेरा बयान लिया था।

X X X X X X

जनपद इलाहाबाद में मेरी प्रथम नियुक्ति थी। मैं यह नहीं बता सकता कि इस डी०डी०के पूर्व मैंने कितनी डी०डी० तैयार किया था।

यह कहना गलत है कि प्रदर्श क 4 मेरे लेख में नहीं है। प्रदर्श क 4 से सम्बन्धित संलग्न लिफाफा 2 अदद मेरे समक्ष है लेकिन लिफाफे पर अंकित विवरण मेरे लेख व हस्ताक्षर में नहीं है लेकिन एक लिफाफे पर सील मुहर लगाते समय मेरा लघु हस्ताक्षर है लेकिन दूसरे लिफाफे पर मेरा कोई हस्ताक्षर नहीं है। उक्त लिफाफे पर बने मेरे लघु हस्ताक्षर के नीचे कोई तिथि नहीं अंकित है। प्रदर्श क 4 में मेरे द्वारा यह नही अंकित किया गया है कि डी०डी० के पूर्व मरीज के डाक्टर के द्वारा यह अनुमति नहीं ली गई थी कि वह बयान देने की स्थिति में है। "प्रदर्श क 4 में मैंने यह उल्लिखित नहीं किया है कि मैंने अपने स्वविवेक से मरीज को डी०डी० के पूर्व बयान देने की स्थिति में पाया था या नहीं। प्रदर्श क 4 पर किस डाक्टर द्वारा मरीज को बयान देने में समक्ष होने के बाबत प्रमाण पत्र दिया

गया है मुझे नहीं मालूम है। प्रदर्श क 4 से सम्बन्धित सर्व मुहर लिफाफा आज मेरे समक्ष खोला गया है। डी०डी०पर डाक्टर द्वारा दिया गये प्रमाण पत्र पर समय 11.15 ए०एम० के बाद अंकित दिनांक के बिषय में यह कहना गलत होगा कि दि० 16-3-13 अंकित है।

डी०डी० तैयार करने हेतु मुझे कोई लिखित आदेश नहीं मिला था। डी०डी० के बाबत मैंने लिखित आदेश की मांग भी नहीं किया था।" जिस मोबाईल से मुझे सूचना मिली थी उसका नम्बर मुझे नहीं मालूम है। प्रदर्श क 4 में मैंने यह उल्लिखित नहीं किया है कि किन परिस्थितियों में मरीज के पैर के अंगूठे का निशान डी०डी० पर लगवाया गया था। डी०डी० पर बने मरीज के पैर के अंगूठे के निशान को मैंने प्रमाणित नहीं किया है।"

In further cross-examination, this witness stated that Panchayatnama, Ex.Ka.5 was not prepared by him.

19. PW-7- Balendra Gautam, Inspector, I.O. stated that on 9.4.2013, the Case No. 133/13, under Section 302 I.P.C. was registered and its chik FIR, as per the order of the court was prepared and the site plan, Ex.Ka.12 was also prepared. Thereafter, he recorded the statement of the prosecution witnesses. On 10.4.2013, he recorded the statement of Nagendra Kumar Singh, Magistrate and Dr. Vimlendu and obtained the copy of the post-mortem

report. On 17.4.2013, vide G.D. No. 5, he found that Sajawati Devi is falsely implicated in the case and on 22.4.2013 accused Jaydevi was arrested and thereafter, on completion of investigation, charge-sheet was submitted which is Ex.K.13. He proved the chik FIR and G.D. as Ex.Ka.14 and Ex.Ka.15. In cross-examination, this witness stated that the incident is of 13.3.2013 whereas the FIR was registered on 9.4.2013. He further stated that when a complaint was given to the police by the brother of husband of the deceased, he recorded the statement of Radhey Shyam, husband of the deceased who has stated that his brother has got the FIR registered by faking a false incident and therefore, in his investigation, the incident of burning the victim by accused person was found to be fake incident. He further stated that the house of Jaydevi is situated at a far off place from the place of occurrence and in the site plan, he has shown one kerosene chimney (earthen lamp) which has fallen on the deceased at the time of incident.

20. He further stated that he recorded the statement of Abhiraji Devi, mother-in-law of the deceased who stated that deceased sustained burn injuries due to falling of earthen lamp and she sustained the burn injuries accidentally. She further stated that the room was locked from inside and on hearing the cries, they opened the door and doused the fire. Similar statement was made by Khushboo, daughter of the deceased. He further stated that even Radhe Shyam, husband of the deceased has given a statement during investigation that the entire incident is false and fake and his wife died due to burn injuries sustained due to falling of earthen lamp on the deceased and regarding the treatment of the victim, she stated that at the first instance on

13.3.2013 at 10:30 AM, deceased was taken to Swaroop Rani Hospital, Allahabad for her first aid and her post-mortem was conducted on 19.3.2013. As per the FIR, the victim was referred to Allahabad, however, the informant got her first aid in a private hospital and then got her admitted in Swaroop Rani Hospital where she died. This witness further stated that he had gone to record the statement of doctor of Swaroop Rani Hospital and in the statement it has not come on record whether deceased Suman was in a position to depose before her death as doctor refused to give any such statement.

21. Thereafter, the statement of the accused under Section 313 Cr.P.C. was recorded and all the incriminating evidence was put to her. The accused denied all the allegations and stated that the doctor has wrongly given an opinion being a Govt. servant. In reply to question no.15 regarding giving any clarification, she stated that she has been falsely implicated in order to extract money and she is innocent.

22. Thereafter, the trial court vide impugned judgment dated 01.08.2018 convicted the appellant under Section 302 I.P.C. and awarded her life imprisonment.

23. Learned counsel for the appellant has argued that there is material variation in the statement given to the police and the dying declaration. It is submitted that in the FIR it is nowhere mentioned that appellant-Akhilesh @ Jaydevi was related to the victim whereas, in the dying declaration she has stated accused to be her cousin sister-in-law. She further submits that in the dying declaration, the name of appellant is mentioned as Akhilesh w/o Prem Chand whereas the appellant's name is Jaydevi and

therefore, the identity of the appellant is highly doubtful in the dying declaration.

24. Learned counsel next argued that PW-6 who recorded the statement/dying declaration has admitted that he has not mentioned in the dying declaration that he has satisfied himself that the deceased was in a fit condition to record the statement or not. He has also shown ignorance about the doctor who has given the fitness certificate. It is next argued that on the dying declaration there are two endorsements of the doctor recorded at 11:05 AM and 11:15 AM. In both the endorsements, it is certified that Suman w/o Radhey Shyam is conscious and oriented during her statement. However, it is not recorded that the deceased was in a fit mental condition to record her statement. It is argued that PW-6 has neither obtained the signature of any of the attendant or family member of the deceased nor has recorded the same in the presence of the I.O. who has also not attested the same.

25. The appellant has set up a defence regarding her identity as both the name of the appellant as well as her husband name are wrongly given in the dying declaration, as PW-6 has failed to clarify this aspect.

26. Learned counsel has further submitted that nothing is stated in this dying declaration that after recording the same the I.O., he has read over the same to the victim and after understanding the same, she has put her right foot thumb impression.

27. Learned counsel further submitted that even there is no endorsement on the dying declaration that the same has been handed over to the I.O. in a sealed cover rather nothing has come on record when it

was handed over to the Investigating Officer.

proceedings against Sajawati Devi has come on record.

28. It is next argued that the doctor who treated the victim Suman from 13.3.2013 to 18.3.2013 for a period of about six days was never examined by the prosecution and even the operating notes was not produced on record and therefore, an important right to cross-examine the doctor about the nature of the injuries sustained, the mental state of the victim to make any statement and the nature of sedative medicine given to the victim is denied.

29. It is next argued that the deceased sustained burn injury on 13.3.2013 and her dying declaration was recorded on 18.3.2013 at 11:15 AM whereas the victim died on the same day at 5:30 PM i.e. in a span of about six and a half hours. It is argued that in such situation, as per the statement of PW-6 and the witnesses of fact, it is proved that the deceased was in a critical condition immediately before her death and was not in a position to speak and therefore, by not recording dying declaration for a period of six days when the victim was in hospital and recording it just few hours before her death raises a suspicion about its admissibility.

30. It is next argued that none of the witnesses of fact have supported the prosecution version and in the first complaint given to the Superintendent of Police on 16.3.2013 (Ex.K.1) i.e. after four days and no explanation of delay is given and even in complaint under Section 156(3) of Cr.P.C. two persons namely Sajawati Devi and appellant- Jaydevi @ Akhilesh are named. However, the charge-sheet was presented only against the appellant and no explanation regarding dropping the

31. Learned counsel for the appellant has next argued that all the witness of facts have consistently deposed that the deceased sustained burn injuries due to falling of a kerosene lantern and, therefore, the role of the appellant is not proved. It is also argued that there is no motive for the appellant to commit the offence as the witnesses of facts have admitted that she is not related to the family of husband of the victim and rather at the first instance, the allegations were against one Sajawati Devi who was stated to be the sister-in-law i.e. husband's brother's wife.

32. Learned counsel has next argued that the motive was attributed to Sajawati Devi as it is stated in the FIR that she used to harass and maltreat the deceased, even on previous occasions and, therefore, the prosecution has failed to prove the motive against the appellant.

33. Learned counsel has next argued that one of the eye witness, namely, Khusboo, PW-2, the daughter of the victim who as per the prosecution, was present in the room, also did not support the prosecution version.

34. Learned counsel for the appellant has further argued that the mother-in-law of the deceased also did not name the appellant as a person who has caused burn injuries and PW-7 (Balendra Gautam), the Investigating Officer has categorically stated that he has recorded the statement of Radhey Shyam, husband of the deceased, who has stated that entire incident is fake and no such offence was committed by the appellant.

35. Learned counsel for the appellant has lastly argued that the case of the prosecution is that accused named in the complaint namely, Sajawati Devi, on account of Pattidari was having a grudge with Suman and used to harass and maltreat her and even on the date of incident, she entered the house, abused Suman and gave fist blows. However, Sajawati Devi was given a clean chit by the police and no charge-sheet were presented against her and, therefore, the motive which was attributed towards Sajawati Devi, cannot be attributed to the appellant to hold her guilty of offence .

36. Counsel for the appellant has also relied upon the decision in **Shambhubhai Kalabhai Raval vs. State of Gujarat, 2023 SCC OnLine SC 1420**, wherein the Supreme Court has held as under :

“6. There are other factors on the basis which we can say that the dying declaration is not free from a serious doubt. The said reasons are as under:- (i) The dying declaration itself does not bear the endorsement of the doctor regarding the fitness of the deceased to make a statement; (ii) A panchnama (Exhibit '29') was recorded around 10:10 P.M. on 31.07.1994, which records that the deceased was barely able to tell her name and she stated that she could not speak. The alleged dying declaration was recorded between 09:45 P.M. to 10:00 P.M.; (iii) Even the police personnel, who recorded the panchnama has stated that the deceased was not in a position to speak; and (iv) PW5 - Dr. Rajendra, who examined the deceased stated in the cross-examination that when he asked the deceased about the cause of burn injuries, she disclosed that she poured kerosene on herself. But she gave no reason why she did the act.

7. These factors taken together create a serious doubt about the correctness of the dying declaration. Therefore, the dying declaration will have to be kept out of consideration. In any case, 5 the dying declaration is not of that sterling quality on which the conviction can be based in absence of any other evidence. Therefore, the prosecution has failed to prove the guilt of the appellant beyond a reasonable doubt. The appeal succeeds and the impugned orders are quashed and set aside. The appellant is acquitted.”

37. He has also relied upon the decision in **Umakant and another Vs. State of Chhatisgarh, (2014) 7 SCC 405** wherein the Supreme Court has held as under :

“22. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in Atbir v. Government of NCT of Delhi- 2010 (9) SCC 1, taking into consideration the earlier judgments of this Court in Paniben v. State of Gujarat - 1992 (2) SCC 474 and another judgment of this Court in Panneerselvam v. State of Tamilnadu - 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:

“(i). Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.

(ii). The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii). Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv). It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of

conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.

(v). Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi). A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii). Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii). Even if it is a brief statement, it is not to be discarded.”

9. When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

10. If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

23. In the light of the above legal position that governs the consideration of a dying declaration, the factual matrix has to be scrutinised. As already extracted above, in the dying declaration Ex.P-13, the deceased stated before the Magistrate that the appellants demanded dowry and that the appellants set fire to her and she asked her brother-in-law to rescue her, but he had chosen not to do so, and further on hearing her cries, the neighbours came and extinguished the fire and admitted her in the hospital. After she was admitted in the hospital, her parents came and she informed them about the incident. The deceased is said to have stated that when she was pregnant she was beaten up by the

accused and because of which the child died in the womb. At that time, she had taken treatment in Revival Hospital]. This statement is found in Ex.P-23, FIR written by K.B. Singh (P.W.23), and not in Ex.P13 dying declaration.

24. When we look at the dying declaration, it is not inspiring confidence in the mind of this Court and throws serious doubt that the same is a product of tutoring by the family members of the deceased for the reason that, the sister of the deceased who was present when the deceased was admitted in the hospital had signed in Ex.P-2 wherein it is stated that it was an accident and nobody has burnt the deceased, but later she turned around and stated that unless she signed on that, they were told that the deceased would not be treated, and the High Court has taken this fact into consideration, whereas in the dying declaration, the deceased has stated that when her parents came to the hospital on 06.08.2003, she informed to the parents for the first time and she had not mentioned that she informed her sister or anybody before that, but according to the sister of the deceased, on 02.08.2003, she was aware of this, which shows that the evidence of the witness is not reliable and clouded with doubt.

38. Counsel for the appellant has relied upon the the decision in **Kanti Lal vs. State of Rajasthan, (2009) 12 SCC 498** wherein the the Supreme Court with reference to the admissibility of the Dying Declaration has held as under :

32. It is well settled that one of the important tests of the credibility of the dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind. For placing implicit reliance on dying

declaration, the court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired, such dying declaration should be rejected, as it is highly unsafe to place reliance on it. The dying declaration should be voluntary and should not be prompted and physical as well as mental fitness of the maker is to be proved by the prosecution.

33. In the present case, as noticed above DW 2 has not taken any certificate from the doctor to prove that the deceased was in a fit state of mind to give statement nor he has recorded any endorsement to that effect on the alleged dying declaration (Ext. D-4). Another factor which impairs the credibility of the alleged dying declaration (Ext. D-4) and belies the statement of DW 2 was that, according to Dr. Vasudev, dying declaration was recorded by the reader of the Tahsildar and not by DW 2.

34. It is also proved on record that DW 2 did not ask preliminary questions from the deceased before the dying declaration allegedly made by her was recorded and this fact also created doubt about the correctness and truthfulness of the dying declaration. It is also the evidence of DW 2 that after recording the alleged statement of the deceased, he did not seal the dying declaration and the unsealed document was handed over to the Station House Officer. DW 2 has not produced on record the original copy of the "tehreer" submitted to him by a constable requesting him to visit the hospital for recording the alleged dying declaration of the deceased, and a carbon copy whereof was produced by him during his cross-examination.

35. A categorical refusal of putting her signature or thumb impression

on the alleged dying declaration (Ext. D-4) by PW 6 Bhanvri (the mother of the deceased) would further go to prove that the alleged dying declaration was not at all recorded by DW 2 in the room of the hospital where the deceased was lying before she died.

36. The abovestated facts and circumstances would prove that the alleged dying declaration, on which much reliance has been placed by the defence, cannot be said to be an admissible and reliable document. The fact that the alleged dying declaration (Ext. D-4) did not bear endorsement of DW 2 to the effect that it was read over and explained to the deceased, also created a doubt on its credibility and truthfulness.

37. The trial court as well as the High Court both have concurrently and, in our considered view, have rightly rejected the genuineness and credibility of the alleged dying declaration to prove the defence version that the deceased made the said statement to DW 2 and she died because of accidental death. We agree with the findings and reasoning of the courts below that the alleged dying declaration (Ext. D-4) suffers from a number of basic infirmities and such dying declaration cannot be found admissible and accepted as a genuine document.

38. Ms Aishwarya, learned counsel, has relied upon the judgment of this Court in *Gaffar Badshaha Pathan v. State of Maharashtra* [(2004) 10 SCC 589 : 2004 SCC (Cri) 2037] to contend that it is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. In such

case, the burden on the accused is much lighter.

39. In the present case, according to the learned counsel, A-1 and A-3 have established beyond reasonable doubt that the statement of the deceased was recorded by DW 2 with bona fide intention and without putting any pressure upon the deceased and therefore, the document has to be accepted as an admissible and reliable document to indicate that the deceased died due to accidental fire.

40. We have gone through the abovesaid judgment in Gaffar Badshaha Pathan [(2004) 10 SCC 589 : 2004 SCC (Cri) 2037] . In that case, this Court while dealing with the dying declaration produced on record held as under: (SCC p. 590f-h)

“It is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. The High Court erred in holding that the recording of the dying declaration and story stated therein apparently appears to be false and concocted. ... the fact whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted.”

41. In Ghurphekan v. State of U.P. [(1972) 3 SCC 361 : 1972 SCC (Cri) 531] this Court while dealing with the case which entirely rested on dying declaration of the deceased held as under: (SCC p. 362)

“(i) A dying declaration, recorded within a few hours after the incident, when it bore the endorsement of the doctor, that the victim was at that time in ‘proper senses’ to be able to give the statement and where the evidence of the recording Magistrate showed no flaw in taking it down, there is no reason to reject it.

(ii) Where the dying declaration had two weaknesses, namely, it did not mention the name of one of the witnesses present at the spot and it did not account for the injuries on the persons of the attacking party, it cannot be rejected on those omissions only, if otherwise it could be shown to be true in other respects, by other satisfactory evidence.

(iii) Where the circumstantial evidence negated the alternative case set up by the defence and the investigating officer's evidence about the place of incident, the medical officer's evidence in support of the prosecution about the manner of the occurrence of the incident, and the explanation of some witnesses for their presence at the spot, are consistent with the dying statement and the circumstantial evidence; the dying declaration possesses acceptability in spite of any weaknesses pointed out by the defence.”

42. In Kans Raj v. State of Punjab [(2000) 5 SCC 207 : 2000 SCC (Cri) 935] this Court held (SCC p. 218, para 11) that the statement of a person “as to any of the circumstances ... which resulted in his death” must have some close and proximate relation with the actual occurrence and proximity would depend upon the circumstances of each case for the purpose of admissibility of such statement as dying declaration under Section 32(1) of the Evidence Act, 1872.

43. In *Kamalakar Nandram Bhavsar v. State of Maharashtra* [(2004) 10 SCC 192 : (2010) 1 SCC (Cri) 495] this Court on scrutiny of the evidence on record found that the victim of dowry death/bride burning had suffered burn injuries to the extent of 94-95% could not have made dying declaration as stated by the doctor during the cross-examination that a dying declaration was made by the victim when she was in hospital. The alleged dying declaration was admitted in evidence at the behest of the defence by the trial court supportive to the defence of the accused. On the facts of the case, this Court observed that the source of production of dying declaration was neither mentioned in the trial court's judgment nor was there any evidence to prove the said document. In these circumstances, this Court held that the High Court had rightly rejected the said dying declaration.

44. In the present case, as noticed in the earlier part of the judgment A-1 and A-3 have not proved on record the source of production of the dying declaration by DW 2 who after recording the statement of the deceased was duty bound to hand over the alleged dying declaration under a sealed cover to the prosecuting agency. In this case, the origin and source of the alleged dying declaration produced by DW 2 at the time of his examination as a defence witness is highly doubtful and such document cannot be accepted as genuine and truthful document in support of the defence of A-1 and A-3.

45. In *State (Delhi Admn.) v. Laxman Kumar* [(1985) 4 SCC 476 : 1986 SCC (Cri) 2] this Court while dealing with a case of bride burning on the basis of dying declaration, held as follows: (SCC pp. 488 & 490, paras 21 & 25)

“21. ... A dying declaration enjoys almost a sacrosanct status as a

piece of evidence as it comes from [the] mouth of a person who is about to die and at that stage of life he is not likely to make a false statement. ...

25. ... Ordinarily, a document as valuable as a dying declaration is supposed to be foolproof and is to incorporate the particulars which it is supposed to contain.”

Further, it is held that: (*Laxman Kumar case* [(1985) 4 SCC 476 : 1986 SCC (Cri) 2] , SCC p. 492, para 28)

“28. ... unless the dying declaration is in question and answer form it is very difficult to know to what extent the answers have been suggested by questions put. What is necessary is that the exact statement made by the deceased should be available to the court.”

It is also said that if the doctor happened to be present at the time of recording of the dying declaration and he had heard the statement made by the deceased, he would ordinarily endorse that the statement had been made to his hearing and had been recorded in his presence. The endorsement as made is indicative of the position that a statement had been recorded and the same was being attested by the doctor.

46. In the present case, these basic principles are ignored by DW 2 at the time of recording of the alleged dying declaration of the deceased. As noticed above, the doctor has not made any endorsement on the dying declaration to state that it was recorded in his presence and attested by him. The mother of the deceased refused to put her thumb impression on the said document. Thus, the judgment cited above cannot strengthen the defence of A-1 and A-3 that the dying declaration, Ext. D-4 had been recorded by

DW 2 by observing the principles laid down in the above-said case.

47. The prosecution in support of the charge of dowry death has produced and relied upon the testimony of PW 5 Parasmal, father; PW 6 Bhanvri, mother and PW 8 Mahender Kumar, "mama" (mother's brother) of the deceased. Before we proceed to deal with and consider the evidence of the prosecution on the question of dowry death, we may consider the ratio of the law laid down in the cases relied upon before us.

48. In *Pawan Kumar v. State of Haryana* [(1998) 3 SCC 309 : 1998 SCC (Cri) 740] this Court held that: (SCC p. 314, para 6)

"6. ... The ingredients necessary for the application of Section 304-B are: (a) When the death of a woman is caused by any burns or bodily injury, or

(b) occurs otherwise than under normal circumstances,

(c) and the aforesaid two facts spring within 7 years of girl's marriage,

(d) and soon before her death, she was subjected to cruelty or harassment by her husband or his relative,

(e) this is in connection with the demand of dowry."

(emphasis in original)

49. In *Hira Lal v. State (Govt. of NCT), Delhi* [(2003) 8 SCC 80 : 2003 SCC (Cri) 2016] this Court reiterated that the essential ingredients to attract application under Section 304-B are that: (SCC p. 81b-c) "(i) the death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance, (ii) such a death should have occurred within seven years of her marriage, (iii) she must have been subjected to cruelty or harassment by her husband or any relative of her husband, (iv) such cruelty or harassment should be

for or in connection with demand of dowry, and (v) such cruelty or harassment is shown to have been meted out to the woman soon before her death."

Further it is said that the presumption under Section 113-B of the Evidence Act, 1872 is a presumption of law.

"... On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The essentials required to be proved for raising the said presumption are that (i) the question before the court must be whether the accused has committed the dowry death of the woman, (ii) the woman was subjected to cruelty or harassment by her husband or his relatives, (iii) such cruelty or harassment was for or in connection with any demand for dowry, and (iv) such cruelty or harassment was soon before her death." (*Hira Lal case* [(2003) 8 SCC 80 : 2003 SCC (Cri) 2016], SCC p. 81c-d)

50. Again, in *Kamesh Panjiyar v. State of Bihar* [(2005) 2 SCC 388 : 2005 SCC (Cri) 511], *Ram Badan Sharma v. State of Bihar* [(2006) 10 SCC 115 : (2007) 1 SCC (Cri) 166], *Trimukh Maroti Kirkan v. State of Maharashtra* [(2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80], *Kailashv. State of M.P.* [(2006) 12 SCC 667 : (2007) 2 SCC (Cri) 359] and *Appasaheb v. State of Maharashtra* [(2007) 9 SCC 721 : (2007) 3 SCC (Cri) 468] this Court reiterated and reasserted the settled principles laid down in *Hira Lal case* [(2003) 8 SCC 80 : 2003 SCC (Cri) 2016]."

39. Learned counsel for the State in reply argued that the appellant is named accused in the complaint as well as in the FIR. It is submitted that the delay in registration of FIR was due to the reasons

that at the first instance, no FIR was registered and only after direction of the Court, it was registered on 9.4.2013.

40. Learned counsel for State submits that as per the postmortem report, the deceased sustained burn injuries and in the dying declaration, the victim has named the appellant.

41. Learned counsel for State submits that even in the complaint filed before the Magistrate, the appellant is named as Jaydevi @ Akhilesh wife of Prem Chandra whereas there is no document to state that the appellant is not having any alias name.

42. After hearing the learned counsel appearing on behalf of accused- appellant as well as learned AGA for State and perusal of lower court record, paper book and re-appreciation of evidence, we find merits in this case for the following reasons :

(A) The incident is of on 13.3.2013, whereas no complaint was given to the police prior to 16.3.2013. A perusal of first complaint (Exhibit-Ka-1) given to the Superintendent of Police, the informant-Akhilesh Kumar, brother of the victim, has named two ladies i.e. Sajawati Devi wife of Ramkaran, sister-in-law with a motive that because of pattidari she was keeping a grudge and used to harass and maltreat the victim whereas the appellant who is named as second lady, who on the date of incident accompanied Sajawati Devi and after abusing her both ladies by pouring kerosene oil, lit the fire.

(B) It is admitted of the case that prosecution during investigation Sajawati Devi who is the sister-in-law (Devrani of the victim) had dropped proceedings and she was given a clean chit whereas the

appellant- Jaydevi who as per the Investigating Officer is not related to the family of the victim or her husband is nominated without any motive attributed to her. Therefore, once the police has dropped the investigation against Sajawati Devi against whom the motive was attributed, the prosecution of the appellant without there being any such motive is illegal.

(C) As per the informant, he took the victim to Government Hospital, Machhli Sahar from where she was referred to Allahabad however he got her admitted in the hospital at Mungara Badsahpur, Jaunpur who give first aid and then she was brought to Swaroop Rani Hospital, Allahabad, where she was admitted in ICU. Neither the Investigating Officer recorded the statement of any doctor of Government Hospital, Machhli Sahar, Jaunpur nor the doctor of Mungra Badshahpur, Jaunpur or the treating doctor of Swaroop Rani Hospital, Allahabad, where the deceased remains admitted for six days. Even the operative notes of the doctor regarding the treatments given to the victim, were not taken in possession by the Investigating Officer. This all raises suspicion about the version given by the informant.

(D) In the absence of any doctor being examined as witness, accused – appellant was denied a right to cross examine to put up her defence to the doctor regarding the nature of injuries sustained, or the information given at the first instance as to who has caused injuries and nature of treatment given to the victim which includes giving the sedative medicines as pain killer so as to ascertain whether the deceased was in a fit mental condition to gave the statement to PW-6.

(E) In the dying declaration, it is stated that when the accused poured kerosene oil and lit the fire, the daughter of her Jethani (husband's brother wife) came

and by putting a blanket, doused the fire, however, no such witness has come forward during the investigation to support the allegation that the niece of the husband of the deceased has doused the fire. Rather PW-3, the mother-in-law has stated that she had douse the fire after breaking the latch of the room which was locked from inside.

(F) The husband of the victim, namely, Radhey Shyam did not support the prosecution version and he has not even appeared as a witness. It has come in the statement of PW-6 that when the complaint was given to police at the first instance i.e. before registration of FIR, he had recorded the statement of Radhey Shyam who has stated the entire occurrence is a fake occurrence as the deceased suffered accidental burn injuries and, therefore, no action was taken, also proves that no complaint was registered by the husband of the victim in this regard.

(G) PW-2, daughter of the victim as well as PW-4, mother-in-law of the victim did not support the prosecution version and stated that she suffered burn injuries in an accidental fire. One independent witness, PW-3- Rajendra Prasad who is Pradhan of the village has also deposed that when he came to know that Suman has sustained burn injuries, he immediately went and enquired from her, who told that she sustained injuries due to falling of a burning lantern and thereafter he managed a vehicle to send her to the hospital.

(H) In cross examination, PW-2 stated that Suman did not tell him that accused Jaydevi has poured kerosene oil or lit the fire. This witness further stated that he has gone to the hospital to meet the victim Suman and he found that she was not in a position to speak.

43. In the light of the aforesaid prosecution evidence which is highly

discrepant and suspicious, the trial court has convicted the appellant on the basis of dying declaration, however on careful perusal of the dying declaration, we find that the same cannot be relied upon as legal evidence for the following reasons :

(a) PW-6, Narendra Kumar Singh, Sub Division Magistrate had stated that he had taken the opinion of the doctor whether the statement of the victim can be recorded and doctor had given opinion prior to recording of her statement and even subsequently.

A perusal of the dying declaration (Exhibit Ka-4) show that on the top, the doctor of Swaroop Rani Hospital, Allahabad has stated that this is to certify that "Suman wife of Radhey Shyam is conscious and oriented". This opinion was given at 11:05 a.m. and after recording the statement again, it is stated that Suman remains conscious during the statement. However, in this statement, it is nowhere recorded that the victim was in a fit mental condition to depose and give the statement.

(b) PW-6, Narendra Kumar Singh have admitted in cross examination that he himself has not recorded his satisfaction on Exhibit Ka-4 that the victim is fit to make statement as he has not asked any preliminary questions to record his own satisfaction that the victim was in a position to give statement.

(c) There is no endorsement on the dying declaration that the same was read over to the victim and after admitting the contents she has consented to give her right thumb foot impression.

(d) Since for the first time, in the dying declaration, it is stated that Jaydevi @ Akhilesh wife of Prem Chandra who is the cousin sister-in-law has committed the offence and, therefore, in order to ascertain identity of Jaydevi @ Akhilesh, no

signature of the attendant of victim as witness or any family member of the victim was recorded on the dying declaration and even the signature of the Investigating Officer regarding receiving the same, as an endorsement is not there on record.

(e) The Investigating Officer has not tried to find out who is the daughter of the sister-in-law of the victim who has doused the fire with the help of a blanket and no such persons is cited as eye witness.

(f) PW-2, daughter of the victim has not stated that Jaydevi @Akhilesh pour kerosene oil and lit fire and even did not name any other person who doused fire.

(g) The statement made by the victim Suman is in sharp contrast to the statement of the informant who is brother of the victim whereas he has named two ladies and specific motive is attributed to one Sajawati Devi wife of Ramkaran. It is the consistent stand of PW-1 that it is Sajawati Devi, sister-in-law of victim, who harassed her sister and was keeping a grudge against her.

(h) PW-1 has nowhere attributed any motive to the appellant for pouring kerosene oil on the victim.

(i) Therefore, there is material contradictions in the dying declaration and the FIR version which also raises suspicious about its admissibility. Therefore, no reliance can be placed on the dying declaration (Ex.Ka.4).

44. It is worth noticing that the appellant Jaydevi as per custody certificate dated 24th September, 2024 has undergone eight years and five months of total sentence including remission and about six years and eleven months i.e. approximately seven years of actual sentence and she has no criminal antecedents. The appellant has her own family and children and prosecution

failed to prove that she was related to victim in any manner.

45. In view of above, we find merits in the present appeal and the same is allowed.

46. Accordingly, the appellant; namely, Jaydevi @ Akhilesh is acquitted of the charges and she be released forthwith from the judicial custody, if not required in any other case.

47. Record and proceedings be sent back to the Trial Court forthwith.

(2024) 9 ILRA 326

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 12.09.2024

BEFORE

THE HON'BLE SIDDHARTH, J.

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Criminal Appeal No. 6376 of 2010
With other connected cases

Virendra Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

A.K.S. Solanki, Achyutta Nand Pandey, Bablu Singh, Dileep Kumar (Senior Adv.), Jitendra Kumar Shishodia, Rajrshi Gupta, Samit Gopal (Elevated), Sudhir Mehrotra, Vinod Singh

Counsel for the Respondent:

A.K. Singh, Aradhana Chauhan, G.P. Singh, G.S. Hajela

(A) Criminal Law - Conviction under Section 506 Part I IPC - Acquittal in Dowry Death and Associated Charges - Indian Penal Code, 1860 - Section 506(I) ,

498-A, 304-B, 201 , Dowry Prohibition Act, 1961 - Section 3/4, Indian Evidence Act, 1872 - Section 113-B, Code of Criminal Procedure, 1973 - Section 372 - Perverse conviction - Uncorroborated testimony - Presumption under Section 113-B - Regulation 97 of the Police Regulation - original copy of the FIR shall be sent by the Superintendent of Police to the Magistrate forthwith having jurisdiction - Delay in sending report to the Magistrate makes the prosecution case doubtful - To attract the provisions of section 304-B IPC, one of the main ingredients for constituting the offence which is required to be established is that the deceased was subjected to cruelty and harassment soon before her death in connection with demand of dowry. (Para - 22,23,26,29)

Appellants were convicted under Section 506(1) - P.W.-1's testimony was relied upon for conviction - P.W.-1 failed to prove allegations made in FIR and statement - Conviction was based on uncorroborated testimony of P.W.-1 - Acquitted under Sections 498-A, 304-B, 201 IPC, and Section 3/4 of the Dowry Prohibition Act by the trial court - Appellants challenged conviction in appeal.(Para – 2 to 18,41)

HELD: - Finding of trial court regarding conviction and sentence of appellants under Section 506 Part-I IPC is perverse and not based on any credible evidence. P.W.-1 failed to prove the allegations made by him in the FIR and also in his statement. conviction and sentence of appellants under Section 506(1) IPC on his uncorroborated testimony cannot be justified. Judgment and order of trial court is set aside. Appellants acquitted of all charges.(Para - 41,42)

Criminal Appeal No. 6376 of 2010 allowed.

Criminal Appeal Nos. 6365 of 2010, 6504 of 2010 U/S 372 Cr.P.C & Govt. Appeal No. 8242 of 2010 dismissed. (E-7)

List of Cases cited:

1. Ishwar Singh Vs St. of U.P., AIR 1976 SC 2423

2. Marudanal Augusti Vs St. of Kerala (1980) 4 SCC 425

3. Mohd. Muslim Vs St. of U.P. (Now Uttarakhand) [2023 (124) ACC 932]

4. Kashmir Kaur Vs St. of Punj., AIR 2013 SC 1039

5. Prema. S. Rao Vs Yadla Srinivasa Rao, AIR 2003 SC 11,

6. Mustafa Shahdal Shaikh Vs St. of Maha., AIR 2013 SC 851

7. Yashoda Vs St. of M.P., (2004) 3 SCC 98

8. Kaliyaperumal Vs St. of T.N., AIR 2003 SC 3828

(Delivered by Hon'ble Siddharth, J.)

1. Heard Shri Rajrshi Gupta, learned counsel for the appellants; Ms. Divya Ojha, learned A.G.A.-I for the State; Shri Sudhir Mehrotra, learned Special Counsel for the High Court and perused the material on record.

2. This criminal appeal against the judgment and order dated 14.09.2010 passed by learned Sessions Judge, Aligarh in S.T. No. 931 of 2006 (State vs. Virendra Singh and 4 others) connected with S.T. No. 949 of 2007 (State vs. Vishambhar) whereby the appellants were acquitted for offence under Sections- 498-A, 304-B, 201 IPC and Section 3/4 of D.P. Act. However, the appellants have been convicted for offence under Section 506(I) IPC and awarded two years rigorous imprisonment and fine of Rs. 10,000/- and in default of payment of fine to undergo two months additional simple imprisonment.

3. The prosecution case, in short, is that the informant, Panna Singh, married

his daughter, Kumari Bhumika, with the appellant no. 3, Manoj on 22.06.2024. Rs. 5 lakhs in cash and other goods were given in dowry to the accused-appellants but the accused persons used to demand one Maruti car more in dowry and used to torture his daughter. Whenever his daughter used to come to her parental home, she used to complain that the appellants are demanding a Maruti car and in case the same is not given to them she would be killed. During his posting at Rajkot from November, 2005 to February, 2006 her husband and appellant no. 3, Manoj Kumar, took her along with him and tortured her as a result of which she suffered pain in her legs but he did not get her treated. She informed her brother, Sanjay Singh, about the pain in her legs and her brother went to Rajkot to get her treated in the hospital. The informant, his son and two relatives went to Rajkot where they discovered that on account of beating, the disk of the waist of his daughter has got displaced and operation has become necessary. The appellants stated that only after their demand of car is fulfilled they will get the operation of their daughter conducted. On 21.05.2006 at about 1:30 p.m in the night her elder brother-in-law, Vishambhar Singh (*Jeth*), who was residing at Kwarsi in Aligarh, informed on phone that daughter of informant has fallen from the roof of his house and died. He is taking her dead body to village- Khempur. The informant and others went to Khempur and found that there were no signs of falling of his daughter from the roof on her body. Blue signs were found on her neck, head was fractured by causing of injuries by log or some sharp edged weapon and there were signs of injuries all over her body. When the appellants were going to cremate the dead body of his daughter, informant tried to inform the police which was

opposed by the appellants and they started throwing bricks and stones on them. They threatened them to leave their place failing which they would also be done to death. He informed the police on phone and then police reached and after taking possession of dead body of his daughter, saved the informant and his relatives.

4. Complaint in this regard was made at the police station- Gabhana, District- Aligarh on 22.05.2006 at 11:00 a.m and it was registered as First Informant Report No. 17, under Sections- 498-A, 304-B and 506 IPC and Section 3 of Dowry Prohibition Act. Thereafter on 22.06.2005 at 12:00 p.m the inquest proceedings were started which ended at 13:10 p.m. After inquest dead body of deceased was sent for post-mortem at 13:15 hours.

5. After submission of charge sheet charges were framed against the appellants under Sections- 498-A, 304-B, 201 and 506 IPC and Section 3 of D.P. Act on 14.03.2007. The appellants denied the charges and sought trial.

6. To prove the prosecution case, 8 witnesses were produced before trial court and examined. P.W.-1, Panna Singh, in his examination-in-chief, reiterated the contents of FIR. He further stated that on 31.05.2006 at about 10:30 p.m some policeman informed that his daughter has died. Thereafter, the elder brother-in-law of his daughter, Vishambhar Singh, informed him that his daughter has fallen from roof and has died and they are taking her dead body to village Khempur. When he reached Khempur along with his family members after five minutes the dead body of his daughter came in a Maruti van wherein the appellants, except Manoj and Balveer, were sitting. Manoj and Balveer followed them

on motorcycle. There were no signs of his daughter falling from roof on her body. There were blue signs on her neck. Head was fractured because of injury caused by log. On her entire body lacerated wounds and blue signs were present. Co-accused persons, were taking the dead body for cremation and when the informant tried to inform the police they started throwing bricks and stones on them and threatened them to leave otherwise they would also be killed. With great difficulty informant informed the police. Police took the dead body of his daughter in possession and saved them. Thereafter he got the report written by his son, Sanjay Singh, which was lodged at the police station. In his cross-examination, P.W.-1 admitted that in his report it is not mentioned that the appellants ever demanded any dowry from him or his other family members. In his cross examination, he stated that his son, Sanjay Singh and appellant, Manoj, both were employed in Central Industrial Security Force (C.I.S.F) at Bombay Airport, but this fact was not known to him earlier and only after marriage of his daughter was settled with Manoj, he came to know of this fact. He further admitted that he did not enquired much about the appellant, Manoj, but from his son, Sanjay Singh, before marrying his daughter with appellant, Manoj. He himself enquired about his pay-scale and his service being permanent. He never went to see Manoj at Bombay but saw him in the village only. He never informed his son, Sanjay Singh, that the appellants are demanding any amount in dowry. In answer to reply whether his elder daughter, Prabha, was willing to marry at that time, the informant informed that she was not willing to marry because she was of religious temperament and did not wanted to get involved in the relationship of marriage. She was of saintly

nature. He denied that appellant, Manoj, refused to marry his elder daughter, Prabha, and stated that he is willing to marry his younger daughter, Bhumika (deceased). He further stated that before marriage the accused persons never demanded any dowry but he spent money in marriage of his daughter on his own sweet will. They demanded Maruti car after her marriage. He admitted that he got the marriage of his daughter performed as an ideal marriage and the relatives of both sides appreciated the same. At the time of marriage his deceased-daughter, had passed intermediate examination and was studying in B.A privately. At the time of her death, she was in B.A.- IIIrd year. She had passed B.A. IInd year examination after her marriage. At the time of death her 7 papers of B.A.- III examination had concluded. After marriage, appellant, Manoj, had stated that he will not permit his daughter to study further. He never told appellant, Manoj, not to create hindrance in the study of his daughter. At the time of her death she was living in house of her elder brother-in-law, Vishambhar, at Aligarh and appearing in the examination of B.A.-IIIrd year. Her examination was concluding on 23.05.2006. In further cross-examination, P.W.-1 stated that he gave Rs. 5 lakhs in cash and other goods in dowry at the time of marriage of his daughter to the appellants but they were not satisfied and were demanding Maruti car. On account of non-fulfilment of demand of Maruti car they used to beat and torture his daughter. His daughter used to inform him of their conduct. He further stated in cross-examination that he gave the goods in marriage of his daughter willingly. He had prepared the list of goods given in dowry but had not taken signature of the appellant's side on the same. He had purchased some goods from market, some

were already given by relatives and some were in his house. He admitted that he has no receipt of any goods purchased by him for giving it to his daughter in marriage. He named the banks from which he withdrew Rs. 4.8 lakhs but did not furnished any evidence of the same. He admitted that he did not mentioned in the report that the appellants were not happy with the dowry given in marriage nor he mentioned that his daughter informed him in this regard and he informed these facts to the Investigating Officer. He also admitted that he never made any complaint against the appellants regarding their unhappiness from dowry received by them. He admitted that before marriage he enquired about the financial condition of family of appellants and after being satisfied his daughter was married with appellant, Manoj. At the time of incident his son was at his home due to some holiday but he did not remembered the day on which he had come. He admitted that he was not present at the time of incident. When his daughter was residing at Vishambhar's house and appearing in B.A.-IIIrd year examination he and his wife never visited her. His daughter, Prabha, had gone to the place of appellant, Vishambhar. He reiterated that the first information about falling of his daughter was given by appellant, Vishambhar, on phone as mentioned in the FIR. He received information at about 10:30 p.m. After the dead body of his daughter arrived at village Khempur, he did not lodged the FIR because he wanted to see his daughter properly. Four persons accompanied him to the house of appellants, namely, Tejveer Singh, Gajendra Singh, Roshan Singh and his son, Sanjay Singh. They also did not made efforts to lodge the FIR. Since all wanted to see his daughter first. The appellants did not took out the dead body of deceased from Maruti van and it was

taken out by the informant and his companions. He informed this fact to the Investigating Officer and if he did not mentioned the same in his statement he cannot say why. He admitted that when he reached village Khempur he did not had the phone. Police had not reached village Khempur at that time. It reached the village after he gave information to the police at about 09:00 a.m. He lodged the report on the next day at 11:00 a.m at P.S.- Gabhana. He further admitted in the cross-examination that neither he nor his son signed the inquest report. Dead body of the deceased was brought on *jugaad* after post-mortem at about 03:00 p.m. He further stated that clothes of deceased were not taken by Investigating Officer and given to some villager. When he contacted him investigating officer took custody of clothes of deceased and prepared memo of the same. There were blood stains found on her clothes. He further stated that on 22.05.2006 at 09:00 a.m the accused did not wanted post-mortem of dead body of his daughter. When he objected appellants threw bricks and stones on them and they suffered simple injuries thereafter police was informed and it came. When he visited the scene of incident people pointed out to the place where dead body of his daughter lying. When he went to house where incident took place he found that the roof of the house was 22 feet above the *khadanja* (uneven road). People informed that they were told by appellants, Vishambhar and Manoj, that his daughter was lying dead on this place. They also informed that they never saw the deceased falling from the roof before them. He denied that the deceased fell down from the roof while she was talking on mobile phone with her husband and there was no boundary wall on the roof. He also denied that her husband, Manoj, was at Rajkot at

the time when she was talking to him on phone. He admitted that at the time of incident appellants, Virendra Singh, Pushpa Devi and Balveer Singh, were at village Khempur. He further stated that at the time of marriage of his daughter her elder brother-in-law, Vishambhar Singh, was employed in Rapid Action Force (R.A.F). Father of Vishambhar Singh, informed that he was posted at Aligarh. Later his daughter informed her father-in-law, Virendra Singh and his wife, Babita, reside at Aligarh. His daughter used to visit them. His elder sister-in-law, Babita (*jethani*), visited his place 2-3 times. His daughter used to come with Babita to his place and also go back with her. He does not know where Babita resided at Aligarh. He had provided medicines to his daughter 3-4 times before she went with her husband to Rajkot. The pain in the legs of his daughter started 7-8 months after her marriage. These facts were not written by him in the FIR. When Manoj took his daughter he informed him about her treatment at Aligarh and Manoj informed that he will get her treated at Rajkot free of cost. Appellant, Manoj, took her to Rajkot in November, 2005 from his village. After one and a half months he came to know that Manoj was not getting her treated. This fact was informed to him by his son, Sanjay Singh. He himself did not go to Rajkot but sent his two brothers-in-law and his son. He went there only after he heard that his daughter is hospitalized. His brother-in-law, Satish Kumar Singh, informed that his daughter was suffering from slip disk which requires operation. When he asked appellant, Manoj, to admit her in hospital he stated that unless Maruti car is given by him he will not get his daughter treated and appellant, Manoj, got her discharged from hospital. After hearing about the illness of his daughter he along with his brother-in-

law, Satish Kumar Singh and other brother-in-law, Sanjay Singh and son, Sanjay Singh, went to Rajkot which he mentioned in the FIR. He admitted that he did not mention in the FIR that he sent his brother-in-law, Satish Kumar Singh, alone to Rajkot who got his daughter admitted in hospital and thereafter discharged. He further admitted in his cross-examination that his daughter came to Aligarh for appearing in B.A.-III examination in February, 2006. Her B.A.-III examination was to conclude on February, 2006. His elder daughter, Prabha, used to visit her at Aligarh at the house of appellant, Vishambhar. His daughter used to give examinations sitting on chair. She had appeared in 7 papers without any problem. The information about problem of slip disk in her spine was discovered from M.R.I report and at the time of her death she was suffering from same problem. He never went to meet his daughter while she was giving examination from the house of appellant, Babita wife of Vishambhar. After 26th December, 2006, appellant, Manoj Kumar, never got her treated for slip disc. He does not know in which hospital M.R.I of his daughter was conducted. He denied knowledge of treatment of his daughter by appellant, Manoj, at Shri G.T. Seth, Orthopaedic Hospital, Rajkot, on 23.11.2005, 30.11.2005, 07.12.2005, 15.12.2005, 22.12.2005, 11.01.2006 and 24.01.2006 continuously and making payment of cost of medicine and obtaining receipts. P.W.1 stated that he did not mention in the F.I.R that information of death of his daughter was first given by the police personnel. He only talked with appellant, Vishambhar. He stated that this fact was not mentioned by him in the F.I.R because of being mentally disturbed, but he informed the Investigating Officer in this regard. Why he did not mention this fact

in his statement he cannot say. He does not know the mobile number from which calls were made to him. He stated that he did not lodge the F.I.R on the date of incident, but on the next day because he and his family members had not seen the dead body of the deceased and when they saw the injuries on the head and body of the deceased they decided to lodge the FIR. After her marriage his daughter came to his house 12-13 times and stated that Maruti car is being demanded by the appellants and they also beat her. He admitted that he went to the matrimonial home of his daughter 5-6 times and also meet with appellant, Vishambhar, about the same time. Sister-in-law of his daughter, Geeta, also used to come to his house along with his daughter.

7. P.W.-2, Kumari Prabha, daughter of P.W.-1 repeated the contents of F.I.R in her examination-in-chief. She also reiterated the contents of the statement of P.W-1 in her statement. In her cross-examination she stated that she has two elder sisters and the deceased, Bhumika, was her younger sister. P.W.-2 refused to marry. She denied that earlier her marriage was to be solemnized with appellant, Manoj, but she refused. She clearly stated that she never wanted to marry and her decision was known to her family members. She stated that after two months of marriage of deceased, she went to her matrimonial home and she was healthy. Before going to Rajkot she had come to her parental home 10-12 times. Whenever she came to her parental house she used to make complaint about being harassed for dowry by the appellants. She stated that prior to the incident she had gone to the house of appellant, Vishambhar, in Shankar Vihar Colony 8-10 times. He used to reside on the upper floor of the house with his family where her sister, Bhumika, was

staying for appearing in B.A.-III examination. Whenever she went there no one misbehaved with her. She went to the house of appellant, Vishambhar, after the death of her sister where someone informed that her sister has been done to death. No one told her earlier that Bhumika has died. She was never informed that Bhumika was admitted in hospital. She herself was appearing in examination. She found dried blood on the body of deceased in the police station. She reached the police station after F.I.R was lodged. She stated in her cross-examination that she is giving statement on the basis of her statement noted on paper because she has habit of reading after writing on paper only. The deceased suffered pain in the legs because of beating by the family members of her matrimonial home. She also stated that the accused persons refused to get the deceased treated till their demand of Maruti Car is fulfilled. She stated that she had informed the Investigating Officer that her father and brother had gone to Rajkot in last week of December, 2005 but why this fact was not mentioned in her statement recorded by the Investigating Officer she cannot say. She stated that she had informed the Investigating Officer that her sister had suffered slip disk due to torture by the appellants and was unable to climb the stairs. She requested the appellants to permit Bhumika to live with her and appear in B.A.-III year examination but they refused stating that appellant, Vishambhar and Babita, have their own house in Aligarh and Bhumika will stay with them and appear in examination. She had informed the Circle Officer that on 21.05.2006, appellant, Manoj, came from Rajkot to Aligarh and other appellants had also reached Aligarh. On 21.06.2006 at about 06:00 p.m phone call came calling all the persons to the house of Vishambhar.

She had informed the Circle Officer that she sensed that intention of appellants are not good. She had informed Investigating Officer that all the appellants in execution of conspiracy caused murder of her sister on 21.05.2006 by causing her injuries and if this is not mentioned in her statement recorded under Section 161 Cr.P.C., she cannot say why. When the appellants were taking the dead body of her sister in Maruti van at 10:30 p.m in the night to village - Khempur for cremation, the police personnel informed her father. This fact was also informed by her to the Investigating Officer but he did not mention it in her statement. She clearly stated that the family members of matrimonial home of her sister did not indulge in any dispute regarding performance of her last rites. She had informed this fact to the Investigating Officer. She stated that when the dispute between the parties took place, she informed Investigating Officer that after dispute between the parties police was informed. She was not able to inform any phone number of her father nor her own mobile number to the police personnel informing about the death of her sister to the Investigating Officer. She could not state the phone number on which the deceased used to talk to her husband at Rajkot. In her cross-examination, she admitted that the Government Advocate got her statement prepared in writing but she did not read the statement of her father recorded earlier before the court. She did not ask her father what questions were put to him in a cross-examination. She admitted that she has written her statement because of habit and it has been prepared as the incident took place. She admitted that she had given her written statement to a Government Advocate and he may have left out something from her statement. She

admitted that whenever Manoj used to come to village- Khempur, she used to go to meet him and her sister, Bhumika. She used to talk to appellant, Manoj. She used to talk to all the family members of matrimonial home of her sister. Prior to the death of her sister, she had gone to house of Babita and Vishambhar 8-10 times. It was situated on upper floor and consisted of one room only taken on rent. When Bhumika went to Rajkot, she had informed her that appellant, Manoj, was taking her for treatment. Manoj had come to Aligarh on the date of incident but she was not present in Aligarh. This was informed by Bhumika to her on telephone. When she went to house of Babita and Vishambhar, Manoj was not present. She stated that she had requested the appellants, including Manoj, to permit Bhumika to stay with her *mama*, Satish Kumar Singh, for giving examination but they refused. In the cross-examination, she was questioned as to how she named, Manoj, in her examination-in-chief when he was not present at Aligarh and then she replied that Manoj informed him on phone that Bhumika will appear in examination from his brother's place. She stated that she saw the place of incident where no blood was found. It was wiped out. People informed that her sister was done to death. She had informed everything to her father. No one informed her that they saw Bhumika falling from upper floor of the house.

8. P.W.-3, Dr. K.P. Singh, testified before the court that blood was oozing from nose and ears of the deceased. He found the following injuries on the dead body of the deceased :-

(1) lacerated wound 5cm x 0.5 cm x bone deep on the central vault of skull, 6 cm above from glabella.

(2) *Abraded contusion on top of left shoulder 3cm x 3cm.*

(3) *Multiple abrasions 58cm x 8cm on outer side on left thigh and knee.*

(4) *Multiple abrasions 3cm x 3cm on medial aspect of right knee.*

(5) *Abrasion 2cm x 2cm in front of right wrist.*

(6) *Abrasion 1cm x 0.1cm between thumb and index finger.*

9. No injury was found on the face and back. In internal examination both the bones of parietal side of the skull was found to be broken. Membrane of brain was congested and redness was present. Cause of death was certified to be coma as a result of head injury. During cross-examination, P.W.-3, stated that injury no. 1 was situated 6cm above glabella. Glabella is situated between both the eyebrows. He stated that injury no. 1 started from glabella on frontal bone. Injury nos. 2 to 6 were found on non-vital parts of the deceased and the doctor stated that they can be caused by falling on rough surface like *damar* road (metalled road) and *khadanja* (uneven road). Doctor further admitted that if a person falls from a height of 22 feet he cannot have any control over his body and the injury shall be caused on the part which will hit the land surface. He accepted that if the deceased fell from the height of 22 feet on the road, the injury suffered by her could have been caused. Her clothes would also be torned. He stated that in the inquest report, he found that *mehroon* colour *salvaar* of the deceased was torned because of skidding on the rough surface. No visible injuries were found on the face, neck and back of the deceased. The deceased died due to coma.

10. P.W.-4, proved that he registered the case at the police station chik report

whereof is present on the record. He also proved the G.D. entry in this regard recorded by him. He also proved that the application for lodging the FIR was written by the son of informant, Sanjay Singh.

11. P.W.-5, Nayab Tehsildar, Devraj Singh, proved that he got the inquest proceedings conducted. He proved that he himself wrote in the inquest report that *salvaar* of deceased was torned due to skid injury. He further prove that the clothes of the deceased were not taken by the police in custody before him.

12. P.W.-6, Circle Officer, Rajesh Kumar Singh, proved that case in dispute were registered at P.S.- Gabhana in his absence and its investigation was entrusted to him. In his cross-examination, P.W.-6 admitted number of procedural lacks committed by him during investigation, like not recording the time when he left for investigation in General Diary nor the time of reporting back to the police station. He admitted that he did not recorded the statement of Head Constable of police station. He did not stated even the date when he recorded the statement of informant nor he could tell the reason why the signatures of P.W.-1 were not taken on the FIR. He also did not tried to know when the chik FIR was sent to the court concerned. He admitted that who brought to the dead body of the deceased to the police station is also not mentioned by him in a case diary. He stated that P.W.-1 did not provided him any receipt of purchasing the goods given in dowry in the marriage of deceased. He also admitted that P.W.-1 did not provided him details of the bank accounts from which he withdrew the amounts for making payment of dowry in cash to the appellants. He admitted that P.W.-1 never informed him that his

deceased daughter used to inform him that the appellants were not satisfied with the dowry. He only informed that the appellants used to beat his daughter because of non-fulfilment of demand of Maruti car. He further admitted that when he took the copy of post-mortem report, he never informed him that the appellants did not cooperated with him after death of deceased nor he informed him that they started throwing bricks and stones. He stated that P.W.-1 only informed that the appellants started quarrelling on the issue of getting post-mortem of the dead body of deceased. He admitted that P.W.-1 never showed him the place of incident. He did not recorded the statement of any person of village Khempur, where the appellants resided. He did not went to the house where the deceased was residing nor he enquired from anyone in that locality. P.W.-1 informed him that appellant- Vishambhar Singh, informed him about the death of his daughter on account of falling from the roof and died on the spot. He also informed P.W.-1 that they are taking the dead body of deceased to village- Khempur. He admitted that Parcha No. 1 of the case diary was not in his hand writing.

13. P.W.-7, Circle Officer, Sunil Kumar Singh, proved that he got the investigation from earlier Investigating Officer, P.W.-6. Rajesh Kumar Singh. He proved that he recorded the statement of P.W.-1 and on his pointing out inspected the scene of occurrence and prepared site plan. At the time of inspection of place of incident, he recorded the statement of Mulayam Singh and Saurabh and further implicated the accused under Section 201 IPC. He proved that he recorded the statements of the prosecution witnesses, thereafter he conducted the other tasks like arrest of the accused persons, incorporating

details of inquest report, post-mortem, etc., in the case diary. He is not aware when chik FIR was sent to the court since no such entry was found on the F.I.R and no signature of C.J.M is present on the F.I.R. It is not mentioned in the application of P.W.-1 that family members of matrimonial home of the deceased ever demanded dowry nor any such allegation was made in the statement of P.W.-1 recorded by him. P.W.-1 also never stated before him that appellants ever demanded dowry. He admitted that in the entire investigation none of the witnesses informed him that any of the appellants demanded dowry in front of them. No one informed him that prior to the death of deceased any application was given to any authority regarding the demand of dowry by anyone. He did not enquired from which bank account Rs. 5 lakhs was withdrawn by P.W.-1 nor he provided any list of the goods purchased by him and given as dowry in marriage of the deceased. P.W.-1 also did not provided any documents regarding treatment of the deceased prior to her death but he was informed that appellants stated that unless their demand of dowry is met, they will not get the deceased treated. He admitted that he also did not enquired from the appellant, Manoj, whether he got deceased treated and, if yes, then where. He did not collected any call details to verify whether deceased ever informed anyone about her torture for demand of dowry. Mama of deceased, brother of deceased and P.W.-1 never informed him about any ticket or reservation details about their going to Rajkot to prove whether they went to Rajkot for getting the deceased treated in the hospital. He admitted that in the FIR P.W.-1 stated that demand of Maruti car was being made. He was not shown any evidence of throwing bricks and stones by

the accused persons on the prosecution side nor they were shown to the earlier Investigating Officer. During the investigation, it had come to his knowledge that information of death of Bhumika was given by family members of her matrimonial home to her father, P.W.-1, stating that she was strolling on roof of first floor and talking to her husband, Manoj, on phone when she fell down and died on account of injuries suffered by her and they are reaching village- Khempur with her dead body. During investigation he was never informed that any altercation took place between both the sides in the night of incident at village Khempur. He also stated that he was never informed by P.W.-1 that his one daughter is unmarried and involved in religious pursuits. He did not enquired why if the deceased was being tortured for dowry she was still living with the appellants, Vishambhar and Babita, and appearing for B.A.III examination from their house. At the place of incident at Shankar Vihar Colony, no one had informed him about beating and causing injuries to the deceased by anyone. No one told him that the deceased after suffering injuries was not in a position to walk and was made to walk by giving support. He did not found any sign of blood on the place of incident but admitted that the height of roof was 20-22 feet.

14. P.W.-7 further testified that P.W.-2 did not provided him any document regarding treatment of deceased nor he asked from P.W.-2, Kumari Prabha, why she has not married. He also stated that P.W.-2, never informed him that she went to Shankar Vihar Colony where deceased was residing and died at 10:30 p.m on the night of incident. He further stated that P.W.-2 never informed him that on the night of incident, husband of deceased, Manoj, had came back from Rajkot

to Aligarh nor she informed him that on the night of incident husband of deceased and other family members of her matrimonial home had come to the place where deceased was residing. She also did not informed him that because of non-fulfilment of demand of a Maruti Car deceased was subjected to grievous injuries and she died of the same. She did not informed that deceased informed her about this on telephone nor she informed him about any telephone number.

15. P.W.-8, the third Investigating Officer, stated that he again recorded the statement of P.W.-1 and inspected the place of incident in the presence of witnesses, Asha Devi, Anokhe Lal, etc., on 18.09.2006 and submitted charge sheet against appellants in court against all of them except, Vishambhar Singh. Charge sheet was submitted against Vishambhar Singh later on 09.01.2007. He stated that witness, Asha Devi, informed him that Bhumika was strolling on roof talking on mobile phone on the upper floor of the house and she saw her there. After 15 minutes she heard the sound of her falling. She came out and saw the deceased lying on the road and raising cries. Anokhe Lal, informed P.W.-8, that he saw the deceased falling from roof. He enquired about deceased from Satendra who informed that he had come to know the deceased was wife of younger brother of Vishambhar, who is tenant on the first floor. The deceased was lying in the pool of blood and died soon. The other persons present on the spot approved the statements of Asha Devi, Anokhe Lal and also one Satendra. The appellants also informed him about the manner of incident as informed by the aforesaid witnesses.

16. The statement of the appellant, Babita, was recorded under Section 313 Cr.P.C., who clearly stated that deceased was living with her at the time of incident

and was appearing in B.A.-III examination. She was talking on phone with her husband on the roof of upper floor of her house and accidentally fell down. Appellant, Pushpa, stated that she was in the village- Khempur at the time of incident. Appellant, Vishambhar Singh, stated that at the time of incident he was at Delhi and his family was residing in rented house at Aligarh where the deceased was also living for the purpose of appearing in B.A.-III examination. She fell accidentally from the roof top and died. Later he received information of this accident. Appellant, Manoj, husband of deceased, stated that on the date of incident he had taken leave and was coming to take back his wife, the deceased, whose examination was about to be concluded. He was coming from Rajkot, Gujarat and was on the way when the incident took place. Appellant, Balbeer, stated that the deceased died on account of falling from roof and at that time he was in his village- Khempur. Appellant, Virendra, stated that his daughter-in-law died because of suffering injuries from falling from the roof. Information of incident was given to the family members of the deceased and they were informed that her dead body is being taken to village- Khempur for last rites. He also stated that deceased was living with his another daughter-in-law, Babita, at Aligarh and appearing for examination.

17. The trial court after considering the rival submissions and going through the evidence on record acquitted the appellants of charges under Sections- 498-A, 304-B, 201 IPC and Section 34 of D.P. Act but convicted and sentenced the appellants under Section 506 Part-I IPC to two years rigorous imprisonment.

18. Against the judgment and order of trial court above noted four criminal

appeals have been preferred. Criminal Appeal No. 6376 of 2010 has been preferred by the appellants against the order of conviction and sentence under Section 506 Part-I IPC. Second Criminal Appeal No. 6365 of 2010 and third Criminal Appeal No. 6504 of 2010 have been preferred by the informant, P.W.-1, challenging acquittal of the appellants for committing the offences under Section 498-A, 304-B, 201 IPC and Section 34 of D.P. Act. Last Government Appeal No. 8242 of 2010 has been also preferred by the State Government against the acquittal of the accused by trial court regarding the sections aforesaid.

19. Learned counsel for the appellants has submitted that it is a case of false implication of the appellants as clear from the evidence on record. The prosecution has tried to implicate the appellants falsely in the case of dowry death when it is a simple case of accident. He has made number of other submissions which shall be considered hereinafter.

20. Learned A.G.A has vehemently opposed the submissions made by learned counsel for the appellants and has submitted that the trial court has committed patent legal error in acquitting the appellants for committing the offences under Sections- 498-A, 304-B, 201 IPC and Section 34 of D.P. Act and only convicting them for committing minor offence punishable under Section 506 Part-I IPC. He has pointed out that at the time of consideration of bail application of the appellants a learned Single Judge of this court issued notices to the Presiding Officer of the trial court seeking his explanation as to why he has acquitted the appellants regarding the charges under Sections- 498-A, 304-B, 201 IPC and Section 34 of D.P.

Act. There was presumption against the accused under Section 113-B of Evidence Act since the deceased died within 7 years of her marriage with appellant, Manoj. He has further submitted that the Presiding Officer of the trial court has submitted his reply which is on record, but it is not satisfactory.

21. After hearing the rival submissions, we find that first lacuna in the prosecution is that the F.I.R was lodged on 21.05.2006 and the same was produced before C.J.M on 27.05.2006. Further, the Investigating Officers, P.W.-6 and P.W.-7, have not been able to state the date when F.I.R was sent to the C.J.M., Aligarh from the police station- Gabhana, District-Aligarh as per Section 157 Cr.P.C.

22. Regulation 97 of the Police Regulations also mandates that the original copy of the FIR shall be sent by the Superintendent of Police to the Magistrate forthwith having jurisdiction. For ready reference regulation 97 of Police Regulations is quoted hereinbelow:-

“97. Process for information relating to the commission of a cognizable offence.- Whenever information relating to the commission of a cognizable offence is given to an officer-in-charge of a police station the report will immediately be taken down in triplicate in the check receipt book for reports of cognizable offences (Police Form No. 341). The step will on no account be delayed to allow time for the true facts to be ascertained by a preliminary investigation. Even if it appears untrue, the report must be recorded at once. If the report is made orally, the exact words of the person who makes it, including his answers to any questions put to him should be taken down and read over to him; he must sign

each of the three parts, or if he cannot write, he must make his mark or thumb-impression. If a written report is received an exact copy must be made, but the signature or mark of the messenger need not be taken. In all cases the officer-in-charge of the station must sign each of the three parts and have the seal of the station stamped on each. The triplicate copy will remain in the book; the duplicate copy will be given to the person who makes the oral or brings the written report; the original will be sent forthwith through the Superintendent of Police to the Magistrate having jurisdiction with the original written report (if any) attached.

The practice of delaying first information reports until they can be sent to head quarters attached to special or general diaries is contrary to the provisions of Criminal Procedure Code and is prohibited.

If there is an Assistant or Deputy Superintendent incharge of the subdivision, and stationed at a place other than the headquarters of the district, the original should be sent through him to the Magistrate.”

23. The Apex Court in the case of **Ishwar Singh (the appellant) Vs. State of U.P. (The respondent) AIR 1976 SC 2423** has held that delay in sending report to the Magistrate makes the prosecution case doubtful. Only two days' delay in sending of the FIR to the Magistrate was considered fatal for the prosecution case. The Apex Court found that the delay in sending of the FIR gives time for introducing improvements setting up distorted version of the occurrence in the FIR. It would be useful to refer to paragraph 5 of the judgment of the Apex Court which is as follows:-

“ 5. Mr. Frank Anthony appearing for appellant Ishwar Singh

submitted that in affirming the Judgment of the trial Court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed out that the F.I.R. which is stated to have been lodged at 9.05 A. M. on February 14, 1973 was sent out from the police station the next day, February 15; the time when it was despatched is not stated, but it appears from the record that the Magistrate received it on the morning of February 16. The Court of the Magistrate was nearby, which makes it difficult to understand why the report was sent to him about two days after its stated hour of receipt at the police station. Section 157 of the CrPC, 1898 as well as of 1973 both require the first information report to be sent "forthwith" to the Magistrate competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to the Magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr. Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when one finds that the case made in Court differs at least in two very important particulars from that narrated in the F.I.R. Mahabir Singh, who lodged the first information report, stated in-Court that he had invited some people to his house to effect a settlement between him and Ishwar Singh, and that he had also sent Ghanshyam to call Ishwar Singh there. The F.I.R. does not mention anything like this. From the F.I.R. it appears as if the accused persons came uninvited to his house,

demanded why he had demolished the drain, and started assaulting him and the other persons who were present there. It is also difficult to understand why Mahabir should invite anyone to his house for a settlement, if really Ishwar Singh had permitted him to demolish the drain as he claimed. Further, the F.I.R. does not mention that Mahabir and Satyapal wielded lathis in their defence when attacked and that this resulted in some of the accused getting injured; but that is what both Mahabir (P.W. 1) and Satyapai (P.W. 2) stated in their evidence in Court. These variations relate to vital parts of the prosecution case, and cannot be dismissed as minor discrepancies. In such a case, the evidence of the eye-witnesses "cannot be accepted at its face value", as observed by this Court in *Mitter Sain v. State of U.P.*"

24. The Apex Court in the case of **Marudanal Augusti Vs. State of Kerala (1980) 4 SCC 425** has held that once FIR is found to be fabricated brought into existence long after the occurrence, entire prosecution case will collapse. In this case there was only 29 hours delay in receipt of FIR by Sub-Magistrate which the Apex Court held fatal for the prosecution case and affirmed the order of the acquittal passed by the trial court and set aside the judgment of the High Court.

25. In the recent judgment of the Apex Court in the case of **Mohd. Muslim Vs. State of U.P. (Now Uttarakhand) [2023 (124) ACC 932]** Apex Court has held that four days delay in sending of FIR to the court in a case of murder casts doubt on its authenticity in paragraph 13 which is quoted as follows:-

"13. The chick FIR report was sent to the Court on 08.08.1995 with the

delay of about 4 days. It is worth mentioning that FIR in a criminal case and particularly in a murder case is a vital and a valuable piece of evidence especially for the purpose of appreciating the evidence adduced at the trial. It is for this reason that the infirmities, if any, in the FIR casts a doubt on its authenticity. The FIR in such cases may also lose its evidentiary value. In Meharaj Singh and Ors. Vs. State of U.P. and Ors.1, it has been opined that on account of the infirmities such an ante-timing of the FIR loses its evidentiary value. Thus, this entitles the accused to be given the benefit of doubt.”

26. Secondly, we find that there is no evidence at all on record which may prove that the deceased was subjected to cruelty soon before her death regarding non-fulfilment of demand dowry attracting section 304-B IPC along with Section 113-B of Evidence Act. For attracting the provisions of Section 304-B IPC prosecution is required to prove its one of the vital ingredients of Section 304-B IPC beyond reasonable doubt that deceased was subjected to cruelty by accused in connection with demand of dowry soon before her death. Legal presumption under Section 113-B of Evidence Act does not appear to be attracted in this case. The presence of all the appellants in their village home except appellants, Smt. Babita, Vishambhar, and Manoj, was proved in their village at the time of incident. City Aligarh where deceased died in the house of appellants, Babita and Vishambhar, was 21 kms away from the village- Khempur where remaining appellants resided. The prosecution under Section 304-B IPC cannot escape from the burden of proof that harassment / cruelty of deceased woman was related to demand of dowry and it was done “soon before her

death”. The court cannot simply pass order of conviction and sentence if the death of deceased woman takes place within 7 years of her marriage in abnormal circumstances. To attract the provisions of section 304-B IPC, one of the main ingredients for constituting the offence which is required to be established is that the deceased was subjected to cruelty and harassment soon before her death in connection with demand of dowry.

27. In the present case, P.W.-1 stated that at the time of marriage of the deceased with appellant, Manoj, no demand of dowry was made and he willingly gave Rs. 5 lakhs in cash and other goods in dowry in their marriage which took place on 22.06.2004. It was an ideal marriage and all the relatives appreciated the same. He then stated that appellants were not happy with the dowry and they started demanding Maruti car in dowry after marriage and subjected his daughter to beating and harassment daily by different modes. There is nothing on record to prove this allegation except oral statement of P.W.-1. The marriage of deceased took place on 22.06.2004 and she died on 21.05.2006. During this period, no complaint was made against the appellants before the police or any other forum or authority alleging that appellants are demanding Maruti car from the deceased.

28. P.W.-2, who is real sister of deceased, also failed to prove any such allegation before the trial court. She gave her statement by reading a written document and admitted that she writes everything prior to stating it before the court. She also stated that government advocate may have failed to state some facts in her written note. The last Investigating Officer, P.W.-8, went to the

place of incident and he recorded the statements of three witnesses, namely, Asha Devi, Anokhe Lal and Satendra Singh, where from it is clear that the deceased was talking on mobile phone and strolling on the upper floor of the house and accidentally fell down. It has come in the evidence that there was no boundary wall on the upper floor of the house whereon the deceased was strolling and talking on mobile phone from her husband. The above witnesses have clearly stated that the deceased fell down accidentally from the upper floor on the road and died soon. P.W.-1 and P.W.-2 have tried their best to make out a case of dowry death against the appellants but they have miserably failed in their efforts.

29. The essential ingredients to attract to provisions of Section 304-B IPC have been enumerated by the Apex Court in the case of **Kashmir Kaur vs. State of Punjab**, AIR 2013 SC 1039 as follows :-

“To attract the provisions of Section 304-B of the IPC the main ingredients of the offence to be established is (a) that soon before the death the deceased she was subjected to cruelty and harassment in connection with the demand of dowry, (b) the death of the deceased woman was caused by any burn or bodily injury or some other circumstance which was not normal, (c) such death occurs within seven years from the date of her marriage, (d) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband, (e) such cruelty or harassment should be for or in connection with demand of dowry, and (f) it should be established that such cruelty and harassment was made soon before her death.”

30. The Apex Court in the case of **Prema. S. Rao vs. Yadla Srinivasa Rao**,

AIR 2003 SC 11, has held that to attract the provisions of Section 304-B IPC one of the main ingredients of offence which is required to be established is that “soon before her death” deceased was subjected to cruelty and harassment “in connection with demand of dowry”. In the case of **Mustafa Shahdal Shaikh vs. State of Maharashtra**, AIR 2013 SC 851, the Apex Court defined the meaning of “soon before her death” as interval between cruelty and death should not be much. There must be existences of approximate and live link between the effect of cruelty based on demand of dowry in the concerned death. If the alleged incident of cruelty is remote in time and has become state enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. In the cases of **Yashoda vs. State of Madhya Pradesh**, (2004) 3 SCC 98 and **Kaliyaperumal vs. State of Tamil Nadu**, AIR 2003 SC 3828 similar proposition of law has been considered.

31. In the present case, P.W.-1, stated that after the marriage of his daughter the appellants started demanding maruti car and she was subjected to torture daily. This assertion does not sounds credible in view of the fact that soon before her death, deceased had come from Rajkot, where her husband was employed. She was living at her sister-in-law's place at Aligarh and peacefully appeared in 7 papers of B.A.-III examination from there. There is no allegation that she was hindered from appearing in examination by any of the appellants. P.W.-1 has admitted that all the appellants, except appellant, Virendra and his wife visited his place with his daughter, number of times. He has not alleged that while they came to his house with his daughter they ever demanded maruti car or

taunted him on this account. P.W.-2 has also not made any such allegation in her statement. She has admitted going to the matrimonial home of her sister, Bhumika and meeting the members of her matrimonial home and talking to appellant, Manoj, whenever he came to his house on leave. Thus, there is no evidence of the deceased being subjected to torture in connection with demand of dowry soon before her death.

32. In the present case, we find that the deceased was living at the house of her sister-in-law, Smt. Babita, in the city of Aligarh and was appearing for B.A. IIIrd year examination soon before her death. It is admitted fact that she had passed her examination of B.A. Part-1 and B.A. Part-II after her marriage. She has appeared in 7 papers in B.A final examination which was about to be completed in two days i.e., on 23.05.2006 and appellant, Manoj, who was posted at Rajkot in Gujarat was coming to take her back to Rajkot after her examinations were over. Before the trial court, documentary evidence were placed to prove that the appellant, Manoj, was coming back from Rajkot. He filed the copy of railway reservation ticket dated 20.05.2006 from Rajkot to Aligarh and also the warrant for travel issued by his employer, Central Industrial Security Force (C.I.S.F.) and his leave certificate from 22.05.2006 to 26.05.2006. he also produced the railway reservation ticket of return journey dated 29.05.2006 and 30.05.2006. Therefore, it is clear that the deceased was peacefully appearing in B.A. Part-III examination staying in the house of her sister-in-law, Smt. Babita. Prior to that she was living at Rajkot, where her husband was employed and she suffered problem of slip disk in her spine for which the appellant, Manoj, got her treated from

22.05.2005 to 26.11.2005. He filed the documents of Orthopaedic Hospital and the receipts of purchasing medicines, M.R.I report, prescription of her treatment, receipts of physiotherapy and the registration slip in the Rajkot Hospital regarding treatment of deceased. This proves that the deceased was living with her husband prior to her death at Rajkot and from Rajkot she came to Aligarh to appear in B.A.-III examination. There is no allegation that she was subjected to any torture connected with demand of dowry during this period except the statement of P.W.-1 that the appellant, Manoj, and husband of deceased, stopped her treatment for slip disk at Rajkot and threatened that unless the demand of Maruti car is fulfilled, he will not get the daughter of P.W.-1 treated further.

33. Even if the entire evidence lead before trial court by appellants regarding treatment of deceased, travel from Rajkot to Aligarh ignored even then the mere threat extended by appellant, Manoj, that he will not get daughter of P.W.-1 treated for her ailment of slip disk unless maruti car is given in dowry will not amount to subjecting the deceased to cruelty soon before her death. There is no evidence that deceased was suffering from ailment of slip disk to such an extent that her movement was difficult. She appeared in 7 papers of B.A.-III examination after sitting on chair without trouble which shows her ailment of slip disk was not critical. P.W.-1 claimed that his son and two brothers-in-law went to Rajkot and appellant, Manoj, gave threat to them that he will not get their daughter treated unless demand of maruti car is made. However, before the trial court P.W.-1 failed to file any documentary evidence to prove that he, his son and two brothers-in-law, ever went to Rajkot to

meet the deceased where the threat was extended to P.W.-1. There is no allegation that the deceased was being subjected to any torture at Rajkot where she resided before coming to Aligarh to appear in B.A.-III examination before her death, nor P.W.-1 or P.W.-2 made any such allegation. Therefore, it is clear that soon before her death the deceased was not subjected to any harassment in connection with demand of any dowry by the appellants. The claim of P.W.-1 in his statement that he went to Rajkot along with his son and his two brothers-in-law also went there does not stand proved before trial court. Therefore, the finding of trial court that there was no evidence of the deceased being subjected to any cruelty in connection with demand of dowry soon before her death is in accordance with law and cannot be said to be perverse and is hereby affirmed.

34. The nature of injuries suffered by the deceased are six in numbers. Except the injury no. 1 which was a lacerated wound on the central vault of the skull, 6 cm above from glabella, all the other injuries were simple and on non-vital parts of body the deceased.

35. The Doctor, P.W.-3, was cross-examined on the nature of injuries by the prosecution and he proved that the injury no. 1 may have been caused by falling from the height of 22 feet on rough surface. After falling from above height, the injured may skid and it can result in tearing of clothes in the process. The doctor found the “salvaar” of the deceased torn on account of skidding after falling from the height. In the cross-examination, the prosecution did not cross-examine him as to whether such an injury can be caused by hitting the deceased on head by some hard object and he salvaar can get torn in the process.

Therefore, the medical evidence clearly proves that the deceased suffered vital head injury no. 1 because of accidentally falling from the height of about 22 feet while she was talking on phone.

36. P.W.-1 and P.W.-2 have tried to make improvements in their statements before the court with regard to the facts which they did not state in their statements before the Investigating Officer. It was alleged in the F.I.R. that there were blue marks found on the neck of the deceased and her head was broken by *danda* or some incised weapon but the doctor did not find sign of any such injury nor the prosecution cross-examined him in this regard. Therefore, the manner of incident and the injuries allegedly suffered by the deceased as alleged by the prosecution were not found to be proved before the trial court.

37. The statement of P.W.-2, daughter of P.W.-1 and sister of deceased, is most unreliable. She has given her statement on the basis of written note and has admitted that it was prepared in consultation with the government advocate. She has implicated appellants, Manoj and Vishambhar, and the other appellants and stated that they had gathered at Aligarh, where the deceased was temporarily residing and appearing for B.A. final examination, and all of them conspired and killed the deceased. This was never stated by the P.W.-1 in his statement. Clearly there is vital contradiction in the statements of P.W.-1 and P.W.-2. The appellants, Manoj and Vishambhar, both filed their railway tickets of travel before the trial court in evidence and proved that while the appellant, Manoj, was coming from Rajkot to Aligarh and was on the way on the night of incident, the appellant, Vishambhar, was employed and posted at

Delhi and he had applied for leave on 21st and 22nd May, 2005. He also filed the documentary evidence issued by C.I.S.F Delhi before the trial court. The ration card of the appellant, Manoj and deceased, Bhumika and appellants, Virendra Singh and Pushpa Devi, were filed in evidence which proved that deceased was not member of family of her father-in-law and mother-in-law and was not residing with them in village- Khempur. She was residing with her husband, Manoj at Rajkot, Gujarat.

38. Regarding the incident of throwing bricks by the appellants on the prosecution side, this court finds that except the allegation made in statement of P.W.-1 and the F.I.R., there was no evidence at all to prove this allegation. The Investigating Officers did not found any evidence in this regard. There was no evidence found by the three Investigating Officers, P.W.-6, P.W.-7 and P.W.-8, nor any injury was suffered by prosecution side at all. The trial court convicted the appellants under Section 506 Part-I IPC only on the basis of the allegations made by P.W.-1. He stated that the alleged incident took place when the appellants were going to cremate the body of his daughter without post-mortem and they resisted and threatened P.W.-1 and his relatives of life. P.W.-2 was clearly not present in the village Khempur of appellants at that time as per her own admission. Therefore, the solitary witness, P.W.-1 supported the allegations of throwing bricks and stones on his side by the appellants. This court has found that the statement of P.W.-1 is not reliable since he failed to prove the allegations of commission of main offences under Sections 498-A, 304-B, 201 IPC and Section 34 of Dowry Prohibition Act, as alleged by him in the FIR and also in his

statement, against the appellants. His allegation of visiting his daughter at Rajkot and sending his son and two brothers-in-law is also not found to be proved. Therefore, without any corroboration of his evidence regarding allegations of commission offence under Section 506, Part 1 IPC, conviction of appellants under Section 506 Part-I IPC by the trial court cannot be upheld. The allegations do not sound credible since this incident is alleged to have taken place on the night of 21.06.2006. Thereafter, the dead body of deceased was retained and inquest proceedings were conducted on 22.05.2006 from 11:00 a.m to 12:00 a.m.; post-mortem was conducted on 22.05.2006 at 04:00 p.m and thereafter the body of deceased was cremated. The cremation of the deceased was joined by the P.W.-1 and his relatives and no dispute took place between them. During inquest proceedings the *mama* of deceased, Satish Kumar Singh, was present as witness of inquest. Neither P.W.-1 nor his son are witnesses of inquest proceedings. It appears that dead body of the deceased was sought to be cremated by the appellants after being taken to the village but it was opposed by the prosecution side and therefore the police took the dead body of the deceased in its custody. There is no allegation that after the dead body of the deceased was taken by the police in its possession, P.W.-1 was threatened or subjected to any insult by the appellants, who did not wanted post-mortem of the dead body of the deceased. P.W.-1 stated that when the dispute took place between the parties he made phone call to the police but he has admitted in his cross-examination before the trial court that he did not had any phone at that time.

39. Reading of definition of “criminal intimidation” would indicate that there

must be an act of threatening to another person, of causing an injury to the person, reputation or property of person threatened, or to the person in whom the threatened person has interest and the threat must be with the intent to cause alarm to the person threatened or it must be to do any act which he is not legally bound to do or forbid to do an act which he is legally entitled to do.

(i) For proving the offence under Section 506 IPC prosecution is required to prove that the accused threatened some person.

(ii) That such threatening consisted of some injury to his person, reputation of property.

(iii) That he did so with intent to compel either that person to do or not to do an act to which he was legally entitled.

40. In this case, no injury was caused to any person. There is no evidence that the appellants threatened the prosecution side from not insisting upon the post-mortem of the dead body of the deceased which was a legal necessity. There is clear allegation that bricks and stones were thrown on P.W.-1 and his relatives by the appellant's side. None of them suffered any injury nor the Investigating Officer, during investigation, found any such evidence. The Investigating Officers, P.W.-6, P.W.-7 and P.W.-8, have not found the alleged incident proved.

41. In view of the above consideration, this court finds that the finding of the trial court regarding conviction and sentence of appellants under Section 506 Part-I IPC is perverse and not based on any credible evidence. P.W.-1 does not appear to be a reliable witness since he failed to prove the allegations made by him in the FIR and also in his statement and conviction and sentence

of appellants under Section 506, Part-1 IPC on his uncorroborated testimony cannot be justified.

42. The judgment and order of trial court regarding conviction and sentence of appellants under Section 506 Part 1 IPC is set aside. The judgment and order of trial court is set aside. The appellants are acquitted of all charges.

43. Criminal Appeal No. 6376 of 2010 is allowed.

44. The appellants are on bail. Their bail bonds are cancelled and sureties are discharged.

45. Before parting we must do justice also to the Presiding Officer who passed the judgment and order under appeal and was issued show cause notice by a learned Single Judge as to why he has acquitted the appellants u/S 498-A, 304-B, 201 IPC and Section 34 of D.P. Act despite presumption against them u/S 113-B of Evidence Act.

46. The notice issued by a learned Single Judge of this court on 23.09.2010 to the District and Sessions Judge, Aligarh, who passed the judgment and order under challenge, was replied by him stating that the offences alleged U/S 498-A, 304-B, 201 IPC and Section 34 of D.P. Act are not proved against the appellants because they failed to prove that soon before her death deceased was subjected to any cruelty or harassment in connection with any demand of dowry, which is one of the vital ingredients for proving the offence of dowry death.

47. We are in full agreement with the reply submitted by the District and Sessions Judge, Aligarh to the notice issued

by the learned Single Judge of this court. He has not committed any mistake in deciding the case and acquitting the appellants of charges under Sections- 498-A, 304-B, 201 IPC and Section 34 of D.P. Act. We have also reached the same conclusion. Further, we have found that conviction and sentence of appellants U/S 506 Part 1 IPC was also unwarranted and may have been ordered only for protection of trial court from unwanted notice like the one which was issued by learned Single Judge to the District and Sessions Judge.

48. The reply submitted by the District and Sessions Judge, Aligarh is accepted with regret that learned Single Judge should not have issued notice to the Presiding Officer of trial court merely on the basis of submission of counsel for informant without considering the full facts and the law involved in the case. Learned Single Judge of this court acted in haste when he issued notice to the District and Sessions Judge, Aligarh. The District and Sessions Judge has stated in his reply that the notice has been issued to him only to harm his reputation and service career.

49. Learned Single Judge of this High Court not only issued notice to the Sessions Judge but directed the matter to be placed before Hon'ble The Chief Justice for kind perusal without waiting for reply of District and Sessions Judge and deciding whether reply of the District and Sessions Judge was satisfactory or not. Such conduct of the High Court is responsible for the fear on the part of the Judicial Officers in the trial court and in many cases where the accused deserves clear acquittal, judgment of conviction and order of sentence is passed only because Presiding Officers want to avoid issuance of notice and action by High

Court ordered without properly considering their judgments and orders.

50. The office shall make endeavour to search the then District and Sessions Judge, Aligarh who has certainly retired by now and send a copy of this judgment to him so that he may know that he did not committed any error in deciding the case, except the minor error of conviction of appellants u/S 506, Part 1 IPC, which we have rectified.

51. For the detailed reasons given in the judgment of Criminal Appeal No. 6376 of 2010, the Criminal Appeal Nos. 6365 of 2010, 6504 of 2010 U/S 372 Cr.P.C and Government Appeal No. 8242 of 2010 are clearly without force and are hereby dismissed.

52. Office is directed to return the record of the trial court within period of two weeks and notify this judgment to the trial court too.

(2024) 9 ILRA 346
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2024
BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 6710 of 2011
 With
 Criminal Appeal No. 5490 of 2011

Ram Ji & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
 V.P. Srivastava, Sr. Advocate

Counsel for the Respondent:
 G.A.

(A) Criminal Law - Dowry Death and Cruelty - Indian Penal Code, 1860 - Section 304-B/34, 498-A/34, The Dowry prohibition Act, 1961- Section 4 - Essential ingredients of Section 304-B IPC, including "soon before her death" and "in connection with demand of dowry - Presumption under Section 113-B of the Evidence Act, 1872 - There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned - General and Omnibus allegations cannot be manifest in a situation where the relatives of the husband are forced to undergo trial - Allowing prosecution in the absence of clear allegations against relatives of the husband would simply result in an abuse of the process of law - Burden on the accused is not as onerous as that which lies on the prosecution - In a criminal trial the defence evidence stands on the same footing as that of the prosecution.(Para - 72,76,93,101,104)

Deceased, married to the appellant - was allegedly harassed for dowry (Rs. 50,000 and a scooter) - She was brought to her parental house in an injured state - was tortured and burnt by pouring hot mustered oil, which resulted into the burning of her right hand and leg - died the following day - death of deceased occurred while she was staying with her own family members. **(Para - 4 to 6 ,104)**

HELD: - Accused husband (Ram Ji) and mother-in-law (Sumari Devi) only may be held liable for the offence under Section 498-A and Section 4 D.P. Act for causing cruelty to the deceased and also for making an indirect demand of dowry from the family members of the deceased through her but the evidence on record is not sufficient to record the conviction of the appellants under Section 304-B/34 I.P.C. as the essential ingredient of 'soon before' is not satisfied. Prosecution failed to show that 'soon before' her death the deceased was subjected to cruelty and harassment by her in-laws for or in connection with demand of dowry. Prosecution also failed to show that all the relatives of the husband were residing jointly with the appellant (Ram Ji) and her mother (Sumari Devi) and hence, they are entitled for benefit of

doubt. Other relatives of the husband were acquitted. (Para -104,105,106)

Criminal Appeal 6710 of 2011, party allowed.

Criminal Appeal 5490 of 2011, allowed. (E-7)

List of Cases cited:

1. Satveer Singh Vs St.of Punj. (2001) 8 SCC 633
2. Shanti Vs St.of Har. (1991) 5 SCC 371
3. Kansraj Vs St.of Punj. (2000) 5 SCC 207
4. Sadhu Saran Singh Vs St.of U.P. & anr. (2016) 4 SCC 357 and
5. St. of Haryana Vs Bhagirath & ors. (1999) 5 SCC 96
6. Sahebrao Mohan Berad Vs St.of Maha., 2011 Cr.LJ. 2157 (SC)
7. Satveer Singh Vs St.of Punj. (2001) 8 SCC 633
8. Satbir Singh Vs St.of Ha. (2021) 6 SCC 1
9. Kunhiabdulla & anr. Vs St.of Kerala (2004) 4 SCC 13
10. K. Subba Rao & ors. Vs St.of Telangana (2018) 14 SCC 452
11. Kahkashan Kausar @ Sonam & ors. Vs St.of Bihar & ors. (2022) 6 SCC 599
12. Asokan Vs St.with M. Balasubramaniam Vs St.of Tamil Nadu and Rajammal & anr. Vs St., (2000) 4 SCC 68
13. Sher Singh Vs St.of Har. (2015) 3 SCC 724
14. Primila Vs St.of U.P. (2023) 2 SCC (Cri) 223
15. Anand Ramchandra Chougule Vs Sidarai Laxaman Chougala & ors. (2019) 8 SCC 50

16. Pratap Vs St.of U.P. (1976) 2 SCC 798

17. Munshi Prasad Vs St.of Bihar, (2002) 1 SCC 351

(Delivered by Hon'ble Nalin Kumar
Srivastava, J.)

1. Since these appeals have been filed by the accused appellants against the same judgement and order, they have been heard together and are being disposed of by a common order.

2. Feeling aggrieved with the judgment and order dated 9.9.2011 passed by Additional Sessions Judge, Court No.13, Allahabad in S.T. No. 618 of 2006 arising out of Crime No. 193 of 2003 under Section 304-B/34, 498-A/34 I.P.C. and 4 D.P. Act, P.S.-Kydganj, Allahabad, whereby the appellants have been convicted and sentenced under Section 304-B/34 I.P.C. for 10 years rigorous imprisonment, under Section 498-A/34 I.P.C. for 2 years rigorous imprisonment with a fine of Rs.2,000/- each with default clause and under Section 4 D.P. Act for 1 year simple imprisonment with a fine of Rs.1,000/- each with default clause and all the sentences were to run concurrently, the present criminal appeals have been preferred by convict-appellants 1. Ram Ji, 2. Smt. Sumari Devi, 3. Mahendra Kumar, 4. Dwarika Prasad, 5. Ram Prasad, 6. Smt. Manju, 7. Smt. Manisha, 8. Smt. Urmila and 9. Smt. Kusum.

3. Out of nine convict appellants, convict Ram Ji and Dwarika Prasad have died and reports regarding their death are available on record. Hence, the appeals qua convict appellants Ram Ji and Dwarika Prasad stand abated.

4. The prosecution story as unfolded in the FIR is that Urmila, the daughter of

the informant Chote Lal was married with Ram Ji s/o Shyam Sundar on 11.11.2003 and when she came to her matrimonial house after marriage a demand for one scooter and Rs.50,000/- cash was made by her in-laws as an additional dowry and she was also threatened for dire consequences in case the demand made by the in-laws was not satisfied. She came back to her parental house and when on 27.11.2003 she again went to her matrimonial house she was tortured and burnt by pouring hot mustered oil, which resulted into the burning of her right hand and leg; On her telephone call, Ghanshyam, the son of the informant and his son-in-law Chaman Kumar went to the house of her in-laws on 3.12.2003 and the deceased was taken to her parental house and when they were taking her to the hospital on 4.12.2003, she died on way at 7 am.

5. On the written report of informant FIR was lodged on 4.12.2003 at 10.00 am against 9 named accused persons and investigation started.

6. Inquest proceedings were performed by Tehsildar Bara, Brajendra Singh on 4.12.2003 and subsequently her dead body was examined by Dr. A.K. Mehrotra on 6.12.2003, who prepared the autopsy report and found several ante-mortem injuries over the body of the deceased and the cause of death was found coma as a result of ante-mortem head injury.

7. The matter was investigated initially by Shri Prakash Swaroop Pandey, Dy. S.P. EOW, who during course of investigation inspected the place of occurrence and prepared site plan, made arrest of accused persons and also proceeded to interrogate the witnesses of

this case and subsequently the investigation was transferred to Shri Rajesh Kumar, C.O. City, Firozabad, who completed the rest formalities of the investigation and after collecting sufficient evidence submitted charge sheet to the Court.

8. The offence being exclusively triable by the Sessions Court was committed to the Court of Sessions by the Magistrate where charges under Section 498-A/34, 304-B/34 I.P.C. and Section 3/4 D.P. Act were framed against all the charge sheeted nine accused persons. They denied all the charges and claimed for trial.

9. To bring home the charges against the accused-appellants the prosecution relied upon the oral evidence and in all as many as 10 prosecution witnesses were examined. P.W.1 Chote Lal, informant/father of the deceased, P.W.2 Ghanshyam Kumar, brother of the deceased, P.W.3 Km. Shabnam, sister of the deceased and formal witnesses P.W.4 Dr. Veerendra Singh, medical officer, P.W.5 Crt. Mhr. Rampati Singh, P.W.6 Dr. R.D. Ram, P.W.7 Rajesh Kumar, C.O. City, second I.O., P.W.8 Dy. S.P. Prakash Swaroop Pandey, first I.O., P.W.9 Brijendra Dwivedi, Tehsildar and P.W.10 S.I. Surendra Nath Dubey, the scribe, have been produced by the prosecution.

10. In support of the oral evidence the prosecution has relied upon the documentary evidence as well. Written report Ex.Ka-1, Inquest report Ex.Ka-2, marriage invitation cards Ex.Ka-3 and Ex.Ka-4, photographs Ex.Ka-5 to Ex.Ka-9, first post mortem report Ex.Ka-9/1, GD. Ex.Ka-10, second post mortem report Ex.Ka-11, charge sheet- Ex.Ka-12, site plan Ex.Ka-13, memo of taking photo and video of marriage ceremony Ex.Ka-14,

report to CMO Ex.Ka-15, Report of Tehsildar Ex.Ka-16, report to R.I. Ex.Ka-17, letter by Tehsildar to C.M.O. Ex.Ka-18, challan lash Ex.Ka-19, photo nash Ex.Ka-20, chick FIR Ex.Ka-21, copy of nakal rapat regarding registration of case Ex.Ka-22 are produced as documentary evidence. Shri Rajesh Kumar Yadav, C.O. Sirathu, District Kaushambi was produced as C.W.1, who has proved the fact, the investigation in this case was performed by C.O. City-III, Shri Rajesh Kumar, who as per his information is posted at Firozabad at present.

11. The incriminating circumstances appearing in evidence were put to the accused persons after closure of the prosecution evidence in their statement under Section 313 Cr.P.C. wherein they made a specific denial of the prosecution case, claimed the prosecution evidence as false and fabricated and pleaded for defence evidence. A specific defence was taken by the accused Ramji, the husband, who stated in his statement under Section 313 Cr.P.C. that no conjugal relation was made between the couple and the deceased stayed at his home for about 2 days only and then her family members took her with them. The bidaai of his wife had to take place on 7.12.2003 but they got information of her death prior to that. Subsequently he came to know that his wife was entangled with some other person and was making preparation to go with him but when the matter was disclosed to her family members she was bitterly assaulted by them which resulted into her death. The accused persons were falsely implicated in this matter as the family members of the deceased are active in politics and they have a lot of influence upon the police and local leaders. Besides it a plea for separate living was taken by the co-accused persons.

12. To strengthen the defence version D.W.1 Vinod Kumar, D.W.2 Smt. Usha Devi and D.W.3 Jagdish Prasad have been examined as defence witnesses by the accused persons.

13. The trial Court after hearing at length both the sides and after scrutinizing and analyzing the evidence on record passed an order of conviction against all the 9 accused persons and they all were convicted under Sections 304-B/34, 498-A/34 I.P.C. and Sec. 4 D.P. Act and were sentenced as mentioned herein above.

14. Heard Sri V.P. Srivastava, learned Senior Advocate assisted by Ms. Neeja Srivastava, learned counsel for the appellants and Sri Kamal Dev Rai and Sri A.K. Mishra, learned A.G.A. for the State.

15. Criminal Appeal No. 6710 of 2011 was filed by appellant Ram Ji, the husband and Smt. Sumari Devi, the mother-in-law and Criminal Appeal No. 5490 of 2011 was preferred by Mahendra Kumar, brother-in-law (Jeth), Dwarika Prasad, uncle of husband, Ram Prasad, uncle of the husband, Smt. Manju, aunt of accused Ram Ji, Smt. Manisha and Smt. Urmila sister-in-law (Jethani) and Smt. Kusum, sister-in-law (Nand) of the deceased.

Prosecution Evidence-

16. To start with the appreciation of evidence on record the examination of P.W.1 Chote Lal, the informant/ father of the deceased is to be scrutinized. P.W. 1 in his testimony has corroborated the prosecution case as disclosed in the FIR. He has narrated that several articles were given along with cash rupees in the marriage of his daughter with Ram Ji on

11.11.2003 but her in-laws were not happy with the dowry given in the marriage and on her stay to her matrimonial house for 5-6 days only the deceased was subjected to cruelty and harassment for demand of additional dowry and the said story was disclosed by her to her mother blaming all the accused persons/ in-laws for the said harassment and demand. The deceased was sent again to her in-laws' house on 27.11.2003 but this time she was bitterly assaulted by her in-laws and hot mustard oil was poured upon her causing burn injuries to her legs and hands. On a telephone call made by the deceased he sent his son-in-law and son to her matrimonial house on 3.12.2003 to take her back and when she came back she was unable to speak even and reported her family members about the serious assault made upon her by her in-laws. They also found her face swollen, having blackening in the back of chest and marks of injuries over her whole body. When she was being taken by an auto for treatment next day on 4.12.2003 she collapsed near the Glass factory. P.W.1 has also proved written report Ex.Ka-1, which he dictated to Shiv Shankar Gupta and on the basis of which FIR was lodged. He has also proved inquest report Ex.Ka-2 and has affirmed his presence at the time of inquest proceeding.

17. P.W. 2 Ghanshyam Kumar is the brother of the deceased. Corroborating the testimony of P.W.1. he has also given his statement in the same fashion and has proved this fact that his sister had been under continuous torture made by her in-laws for demand of dowry and when on her telephone call he along with his brother-in-law went to her matrimonial house on 3.12.2003 she again disclosed the factum of assault made by her in-laws and she was not in a fit state of health. She was brought

to her parental house and the next morning she became serious. They took her for treatment by a tempo but his sister who was having several injuries over her body died near a glass factory. P.W.2 has proved the marriage invitation cards as Ex.Ka-3 and Ex.Ka-4 and photographs at the time of jaimal as Ex.Ka-5 to Ex.Ka-7 and photographs taken after her death as Ex.Ka-8, Ka-9.

18. P.W.3 Km. Shabnam is the sister of the deceased, who has corroborated the statements made by P.W.1 and P.W.2 and has repeated the story of demand of dowry and causing cruelty and harassment to her sister followed by serious assault by her in-laws for demand of one scooter and Rs.50000 cash as additional dowry.

19. Apart from the aforesaid witnesses of fact the prosecution has also relied upon the testimony of formal witnesses.

20. P.W. 4 Dr. Veerendra Singh, medical officer, who has conducted the autopsy of the body of the deceased on 05.12.2003 at 3:15 p.m. has proved the first post mortem report as Ex.Ka-9 and has also identified the signature of Dr. Pradip Tondon, who accompanied him in the proceedings of post mortem of the deceased. P.W.4 at the time of post mortem found following injuries over the body of the deceased:

(i) *Abrasion 1 cm x 1 cm on left forearm post aspect 2.5 cm below elbow.*

(ii) *Abrasion 1 cm x 1 cm on medial aspect of left elbow.*

(iii) *Abrasion 1 cm x ½ cm on dorsal aspect of left hand near base of middle finger.*

(iv) *Abrasion 1 cm x 1 cm on outer part of left forearm 1 cm above wrist joint.*

(v) *Abrasion 1 cm x 1 cm on anterior aspect of right leg 4 cm below knee joint.*

(vi) *Abrasion 1 cm x ½ cm on outer part of right ankle joint.*

(vii) *Abrasion 2-1/2 cm x ½ cm on back of chest left side just medial to shoulder blade.*

(viii) *Contusion 8 cm x 4 cm on the scalp left side 10 cm above left eyebrow and 2 cm behind to midline.*

21. P.W.4 has stated that the death of the deceased was caused due to ante mortem head injury followed by coma.

22. P.W.5 Cons. Rampati Singh is the scribe of G.D. He has narrated in his testimony that earlier the case was registered as case crime no. 'Nil' of 2003 but since the place of occurrence was falling in the area of P.S. Kydganj he marked a crime number to it and prepared G.D. by his signature. He has proved the copy of G.D. as Ex.Ka-10.

23. P.W.6 Dr. R.D. Ram has proved the factum of second post mortem and he has explained that earlier the post mortem of the deceased was conducted on 5.12.2003 by Dr. Veerendra Singh and Dr. P. Tondon and subsequent post mortem was performed by him by order of C.M.O. on 6.12.2003 at 4:45 p.m. and in the panel he was authorized along with Dr. A.K. Mehrotra and Dr. D.K. Srivastava to perform the post mortem. P.W.6 who proves the second autopsy report as Ext. Ka-11 found following injuries over the body of the deceased:

(i) *Abraded wound 1 cm x 1 cm on the dorsum of left forearm 2.5 cm below the elbow.*

(ii) *Abraded wound 1 cm x 1 cm on the medial epicondyle of left elbow.*

(iii) *Abraded wound 1 cm x 1/2 cm on the dorsum of left hand 4 cm proximal to the base of middle finger 3 cm from the medial border of the hand.*

(iv) *Abraded wound 1 cm x 1/2 cm on the lateral aspect of left forearm 1 cm proximal to wrist joint.*

(v) *Abraded wound 1 cm x 1 cm on the front of the right leg 2 cm below tibial tuberosity.*

(vi) *Abraded wound 1 cm x 1/2 cm on the lateral aspect of right ankle joint.*

(vii) *Abraded wound 2.5 cm x 1 cm on the outer back of chest on left side. Just medial to the medial end of the spine of scapula.*

(viii) *Contusion 8 cm x 4 cm on the scalp on left side 2 cm from midline 10 cm above the left eyebrow.*

He has opined that the death should have been caused 2 and ½ day before the post mortem and opined that due to ante mortem head injuries which resulted into coma, the death of the deceased occurred. He has also clarified that no difference was found between the first and the subsequent post mortem of the deceased.

24. P.W.7 Rajesh Kumar, C.O. city, Firozabad is the second I.O. of the case, who took over the investigation on 09.01.2004 and performed the remaining investigation of the case and on the basis of sufficient evidence submitted the charge sheet Ex.Ka-12 against all the 9 named accused persons of the case.

25. P.W.8 Prakash Swaroop Pandey is the first I.O of the case who has proved the

proceedings of the investigation. He has also proved the site plan as Ex.Ka-13 and memo of taking photographs into possession as Ex.Ka-14. He has further proved the factum of recording of the statement of the witnesses of fact and other relevant formal witnesses.

Rival contentions-

26. The impugned judgement and order passed by the learned Sessions Court has been assailed by the learned counsel for the appellants on various grounds. It has been vehemently submitted that the essential ingredients to constitute an offence under Section 304-B I.P.C. are completely missing in this case and the prosecution has miserably failed to establish the essential components to bring the matter within the purview of dowry death.

27. It is further urged that significantly in this case the death of the deceased lady has been occurred while she was present in her parental house amongst her own family members. It is further submitted that the evidence available on record explicitly shows that when the deceased was taken by her own family members from her matrimonial house she was in a fit and healthy condition but the family members of the deceased herself ill-treated and assaulted her causing grievous injuries which were proved fatal to her. It is further submitted that the prosecution has failed to show on the basis of the evidence of fact and medical evidence as well that the deceased came to her parental house in injured condition and the injuries whatsoever, found upon her body were the result of beating her violently by her own family members and the present appellants had nothing to do with that.

28. The impugned judgement has been assailed on another ground that the prosecution has come forward with an unnatural story that a demand of Rs.50,000/- and one scooter was made to the deceased by all the appellants, including all the family members of her husband viz. brother-in-law, Mahendra Kumar (Jeth), Sisters-in-law, Smt. Urmila and Smt. Manisha, uncle and aunt of husband, Ram Prasad and Smt. Manju, sister-in-law Smt. Kusum (married nand), mother-in-law Sumari Devi, and Dwarika Prasad (uncle) and Ram ji the husband as well. It is vehemently submitted that in this way all the family members of the husband of the deceased including his married sister, uncle and aunt have been falsely roped into the present case on the basis of omnibus allegations without any specific instance of their involvement in the alleged offence.

29. It is further submitted that the medical evidence does not corroborate the prosecution version in material terms and there are relevant contradictions between the evidence of fact and the medical evidence on record. On such grounds a prayer has been made for the acquittal of all the appellants by allowing the present criminal appeal.

30. Per contra, learned A.G.A vehemently opposed the contentions raised by the learned counsel for the appellants. It has been submitted that there is ample evidence on record to prove that the demand for additional dowry in the form of one scooter and Rs.50,000/- cash was continuously being made by all the appellants. It is further submitted that the essential element of 'soon before' to bring an offence under the cover of 'dowry death' has very well been proved by the witnesses of fact. The deceased was taken

to her parental house same day when she was tortured by the appellants for the sake of additional dowry. It is also submitted that she was taken to her parental house in injured condition and the injuries were very severe and grievous in nature which ultimately proved fatal to her and the poor lady died just on the next day when she was being taken to the doctor by her family members.

31. It is also submitted that the conduct of the appellants from the very inception of the occurrence is also relevant to be taken into consideration.

32. The medical evidence on record stands in complete conformity with the deposition of the witnesses who are the family members of the deceased. It is also submitted that there is no perversity in the impugned judgement which is well reasoned and sentencing is also proper and the present criminal appeal is liable to be dismissed.

Ingredients of Section 304-B I.P.C.-

33. At the very outset before analysing the evidence on record the essential ingredients to constitute an offence under Section 304-B are required to be taken into consideration. Section 304-B I.P.C. provides as hereunder:

“304-B. Dowry death. -- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be

called "dowry death", and such husband or relative shall be deemed to have caused her death".

34. Further, the conditions for applying Section 498-A I.P.C. and Section 4 D.P. Act are also to be kept in mind which follow like this-

"Section 498-A. Husband or relative of husband of a woman subjecting her to cruelty.

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine".

"Section 4 Dowry Prohibition Act, 1961

If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months".

35. The definition of 'dowry death' envisaged under Section 304-B I.P.C. is exhaustive and the essential components to constitute an offence thereunder deserve to be observed which have been elucidated in umpteen of cases.

Essentials of Section 304-B I.P.C.-

36. In **Satveer Singh Vs. State of Punjab (2001) 8 SCC 633** relying upon the decision in **Shanti Vs. State of Haryana (1991) 5 SCC 371** and **Kansraj Vs. State of Punjab (2000) 5 SCC 207** the Hon'ble Apex Court defined the essential components of Section 304-B I.P.C. which are as follows-

(i) *death of woman occurring otherwise than under normal circumstances,*

(ii) *such death should be occurred within 7 years of her marriage and*

(iii) *soon before her death she should have been subjected to cruelty and harassment and*

(iv) *such cruelty and harassment should be in connection with any demand of dowry.*

When the above pre-requisitions are established the husband or his relatives who caused the deceased such cruelty and harassment shall be presumed to be guilty of offence under Section 304-B I.P.C.

Conclusion-

Death within 7 years of marriage-

37. Death of the deceased within seven years of her marriage with Ram Ji (now dead) being an admitted fact needs no analysis of evidence over this issue.

Death caused otherwise than under normal circumstances-

38. The second ingredient necessary to establish an offence under Section 304-B I.P.C is that the prosecution has to show

that the death of the lady occurred otherwise than under normal circumstances. The phrase “otherwise than under normal circumstances” may be taken to mean as to the death of the deceased was not a result of any usual course of life but the circumstances under which the death of the woman was caused should be apparently under suspicious circumstances. It should never be a result of natural death but the circumstances surrounding her death must be otherwise than normal circumstances.\

39. The learned trial Judge in order to find out the truthfulness of the aforesaid fact relied upon the testimony of the witnesses of fact and formal witnesses and medical evidence as well available on record.

40. The most crucial point in the matter in hand is as to whether the deceased was brought to her parental house in an injured condition from her matrimonial house and injuries inflicted upon her body were the root cause of her death occurring just on the next day of the injuries caused or she was brought to her parental house in a healthy state of body and only after coming to her parental house she was belaboured by her own family members which was proved fatal to her. The Court has to find out whether she sustained injuries in her own parental house or she was already seriously injured when she was brought to her parental house.

41. The evidence on record on the said relevant issue is to be examined minutely to find out the guilt of the accused persons in connection with dowry death of the deceased. The FIR of this case consists of the allegation that when after Bidaai the deceased went to her matrimonial house on 27.11.2003 she

was bitterly assaulted by all the named accused persons and was burnt over her right hand and legs by hot mustard oil which was poured upon her by her mother-in-law and elder sister-in-law (jethani) and when the incident was informed by the deceased on phone to her family members Ghanshyam, brother of the deceased and his brother-in-law (behnoi) went to her matrimonial house and took the deceased to her parental house on 3.12.2003 in the evening.

42. P.W.1 the informant/ father of the deceased in his statement recorded before the Court has deposed that on 27.11.2003 when his daughter went again to her matrimonial house she was beaten bitterly by her in-laws and her legs and hands were also burnt by pouring hot mustard oil upon her. P.W.2 Ghanshyam Kumar, the brother of the deceased is the person who had gone with his brother-in-law to the matrimonial house of the deceased and he states in his evidence that on receiving the phone call by her sister on 3.12.2003 informing of the injuries she sustained by her in-laws, he along with his brother-in-law went there and took her to her parental house. She was having serious injuries.

43. P.W.3 the sister of the deceased also affirms that when on 3.12.2003 the deceased was brought to her parental house she had seen several injuries upon her body.

44. P.W.4 Dr. Virendra Singh, who performed the first post mortem of the deceased has categorically stated that the death of the deceased was caused due to ante mortem head injury. He also found several injuries over the body of the deceased.

45. In the same fashion P.W.6 who performed the second autopsy of the dead

body of the deceased also finds several injuries, eight in number over the body of the deceased and in his opinion the death of the deceased was caused due to coma as a result of ante mortem head injury.

46. The aforesaid set of evidence is capable of disclosing the number and nature of the injuries of the deceased but the most crucial point to be taken into account is whether the deceased was brought to her parental house already in a fit state of health and body and subsequently for some reasons she sustained injuries by her own family members or she was already injured when brought to her parental home. This issue arises on account of the defence case which was suggested by the defence during the course of cross-examination of the witnesses of fact. The defence has come forward with a definite case that the deceased was entangled with some one else and she never wanted to go to her matrimonial house but P.W.1, P.W.2 and P.W.3 the family members of the deceased denied of such suggestions.

47. P.W.3 in her deposition further states that when after first bidai her sister came to her parental house she herself found some signs of injuries over her body which she disclosed before the I.O. as well. Further, she states that subsequently on 3.12.2003 when the deceased came to her house she herself found some injuries over her head, leg, back and her private parts as well but however, no sign of burning or blister was discovered by her.

48. P.W.2 in this connection has stated that her sister herself told her that she was beaten violently by her in-laws and sustained a number of injuries when he went for her bidai on 3.12.2003. He further states that due to that assault serious injuries were present over her body and he had seen the signs of injuries over her chest, head, back etc. and further he affirms

that due to injuries his sister was unable to move even.

49. P.W.1 in the same fashion states that when her daughter was brought to her parental house she had a swollen face, black signs over her back and several signs of injuries were present over different parts of her body including several burn signs and blisters over different parts of her body as well. However, this court takes notice of this fact that the evidence of P.W.1, the informant/father of the deceased is self contradictory as in his cross-examination he categorically states that his daughter did not make any telephone call on 03.12.2003 and further did not inform about any assault made to her by her in-laws. Remarkably, if it was so, what brought two family members of P.W.1 and why they went to the matrimonial house of the deceased becomes a highly suspicious circumstance. The prosecution was certainly under obligation to explain the same but it failed and resultantly P.W.1 at this place himself disowns the contents of the FIR which was lodged by him leaving an ugly scar upon the story of prosecution.

50. The attention of this Court has been drawn to a very relevant situation which unfolds the truth of the prosecution case and the defence version as well. As per oral evidence on record when the deceased was brought to her parental house in the evening of 3.12.2003 she was found in injured condition by her family members and was medically examined by some Dr. Maurya in the very evening of 3.12.2003.

51. The prosecution evidence requires to be examined from the angle of the treatment of deceased in the evening of 3.12.2003 as well.

52. P.W.1 in his examination-in-chief states that when her daughter came to his house she told that she had been subjected to assault by her in-laws and she was even unable to speak properly but however he makes no statement for her treatment by some doctor of the locality, however, in his cross-examination he states that when his daughter came to his house she was conscious and was speaking as well. There were several signs of burn injuries over her body and blisters were also visible on different parts of her body. Significantly in his entire testimony he makes no statement for the treatment of the deceased in the evening of 3.12.2003.

53. P.W.2 Ghanshyam in his examination-in-chief has stated that the deceased had undergone treatment by a local doctor in the evening of 3.12.2003 who was named as Dr. Maurya Prasad kushwaha by him later on and further he explains that since doctors were not available in the government hospital she had undertaken treatment of Dr. Maurya at 7.30 pm where she was carried by his father and not by him.

54. P.W.3 Shabnam states that since the deceased had several bodily injuries, Dr. Maurya was called for her treatment. However this fact does not appear in her statement under section 161 Cr.P.C. and she is unable to explain the reason thereof. While controverted in her cross-examination she states that on being interrogated by the I.O. she had disclosed the factum of treatment of the injured by Dr. Maurya and she herself had seen injuries over the several parts of her body but however there was no sign of burning and no blisters were seen by her. She further states that Dr. Maurya visited her place at 7.30 in the evening but how long

he remained at her house she is unable to tell. She further states that only one or two bangles were found in her wrist and rest of the bangles were broken while she was being beaten by her in-laws.

55. On analysis of the evidence of the witnesses of fact on record some twisted story in respect of the treatment of the deceased by Dr. Maurya is found. At one place P.W.3 the sister of the deceased states that in the evening at 7.30 PM Dr. Maurya had visited her own house to see her sister but at the same time P.W.2 the brother of the deceased states that his father himself took his sister to Dr. Maurya in the evening at 7.30. This is a material contradiction in the deposition of P.W.2 and P.W.3 as to whether Dr. Maurya himself visited the place of the informant or the deceased was taken to the clinic of Dr. Maurya. The said contradiction undoubtedly is very significant and relevant in the facts and circumstances of the present case because the most crucial issue in this case is as to at which place the deceased sustained injuries. There are material contradictions in the statement of P.W.1, P.W.2 and P.W.3 as to whether there were blisters/burn injuries over the body of the deceased or not. No clear picture regarding the health and condition of the deceased when she was brought to her parental house is found on the basis of evidence of P.W.1, P.W.2 and P.W.3 who make inconsistent and contradictory statements in this regard. It is also relevant to see that if the deceased was taken by the informant P.W.1 to Dr. Maurya for treatment why this fact does not appear in the entire testimony of P.W.1 himself. Moreover, P.W.8 the first I.O. categorically states that P.W.3 Shabnam never told him that the deceased remained under treatment of some Dr. Maurya in the evening of 03.12.2003, hence the entire

story of treatment of the deceased by some Dr. Maurya is an after thought script of the prosecution which cannot be relied upon.

56. P.W.4 the doctor who performed the first autopsy of the deceased no where states that any blister was found over any of the injuries sustained by the deceased.

57. P.W.6 in the post mortem report Ex.Ka-11 makes no statement in respect of any burn injury or blister found over the body of the deceased and this is a material contradiction between the prosecution version and the medical evidence adduced in this regard which leaves this question unanswered as to if the deceased was burnt by some of the accused persons by pouring hot mustered oil upon her which resulted into generating some burn injuries and blisters over her body parts why no blister or burn sign was found by the doctors who performed her autopsy and at this juncture the prosecution story becomes highly suspicious which proceeds with a specific case that the deceased had informed her family members on phone that she was burnt by her mother-in-law and elder sister-in-law (jethani) by pouring hot mustard oil upon her and this situation indicates that certainly there was some concealment of facts on the part of the prosecution which adversely affects the very inception of the case.

58. It is relevant to note that Dr. Maurya who is said to perform the medical examination of the deceased on the very evening when she was brought to her parental house has not been produced by the prosecution as a witness. Interestingly the I.O. has not arrayed him in the list of witnesses which further shows that no statement under Section 161 Cr.P.C. of the

said Dr. Maurya has been recorded by the I.O.

59. It is true that every omission and negligence on the part of the I.O. is not fatal for the prosecution unless its goes to the very root of the prosecution case but in the case in hand notably Dr. Maurya would be the only and the best witness who could affirm the factum of the injuries, if any, inflicted upon the body of the deceased in the very morning of the incident of assault and burning by the in-laws of the deceased and no doubt this omission of I.O hits the prosecution case adversely.

60. A very significant statement has been made by P.W.4, the doctor who in his testimony emphasises injury no.8 sustained by the deceased which was a contusion over the scalp of the deceased as cause of death of the deceased. In his cross-examination P.W.4 says:

"चोट नंबर 8 के लगने के तुरंत बाद अथवा 15-20 मिनट बाद मृतका बेहोश हो गई होगी और इसी चोट के कारण कोमा में चली गई होगी"

61. P.W.6 also finds a contusion over the scalp of the deceased and has also averred that the death of the deceased was caused by coma as a result of ante-mortem head injury.

62. Learned counsel for the appellants has raised a prominent question particularly with reference to the medical evidence. Referring the statement of P.W.4 it has been argued that if the deceased became unconscious immediately after sustaining injury no.8 (head injury) and went in coma

how it can be said that the said head injury was received by the deceased in her matrimonial house on 3.12.2003 as she survived and died on the next day at about 7.30 am. It has been vehemently argued that the aforesaid situation is indicative to the fact that the deceased was probably beaten by her own family members some time before her death and in that case no injury could be inflicted upon her body in her matrimonial house from where she had already been taken to her parental house in the evening of 3.12.2003. Had she sustained the injuries, particularly the head injury in her matrimonial house she could not survive beyond the evening of 3.12.2003 as opined by the doctor P.W.4 and if she remained alive for the next day it denotes that no injury, particularly the fatal injury no.8 as shown in the post mortem reports Ext. A9 and Ext. A11 respectively, was inflicted upon her in her matrimonial house. The defence has come forward with a definite case by putting suggestions to the P.Ws, who were the family members of the deceased that the deceased was beaten by her own family members at any point of time in the evening of 03.12.2003 or in the morning of 4.12.2003 as she was insisting upon not to go to her matrimonial house because she was not willing to marry and live with Ram ji and the injuries so caused by her own family members were proved fatal to her .

63. In the facts and circumstances of this case and also in the light of the evidence adduced by the prosecution it is found that the prosecution has miserably failed to prove that the injuries were inflicted by the accused persons to the deceased when she was with them in her matrimonial house for the reason that the oral evidence of P.W.1, P.W.2 and P.W.3 over this issue

is full of contradictory and inconsistent statements.

64. Learned A.G.A. vehemently argued that the medical evidence as per settled legal principle cannot override upon the ocular evidence and if there is some conflict between medical and ocular evidence this is the evidence of eyewitness which overpowers the opinion given by the doctor whose deposition being an expert is only of advisory character.

65. The attention of the Court is drawn to the rule that in case the Court finds a possibility that the medical evidence may not supersede the ocular evidence, the Courts of law should lean in favour of the prosecution but in the present case the opinion given by the doctor is nowhere contrary to the material evidence on record due to the reason that there is no ocular evidence in respect of the story of assault made upon the deceased on record and the prosecution case at this juncture runs under the circumstantial evidence; no witness has seen the accused persons making assault upon the deceased and the crucial issue involved in this matter as to whether the deceased sustained injuries in her matrimonial house or parental house has not been clarified by the prosecution by any cogent and consistent evidence and the prosecution no doubt failed to prove this crucial issue in its favour.

66. The legal presumption as to the medical evidence has always been to the effect that it is only an opinion given by a medical expert but it need not be the last word on the subject. From the conjoint reading of the decisions **Sadhu Saran Singh Vs. State of U.P. and Anr. (2016) 4**

SCC 357 and State of Haryana Vs. Bhagirath and Ors. (1999) 5 SCC 96 over this issue the conclusion which is arrived at is that the evidence of a doctor is only of an advisory character which should be tested by the Court and if the opinion is bereft of logic or objectivity or not consistent with the probabilities of the case, the Court is not obliged to go by that opinion. The Court has no liability to go by that opinion merely because it is said by a medical expert although due weight must be given to opinion given by persons who are expert in the particular subject.

67. Sahebrao Mohan Berad Vs. State of Maharashtra 2011 Cr.LJ. 2157 (SC) is another authority wherein it has been pronounced that if the cause of death as opined by the doctor is inherently defective it can be rejected in that case only otherwise doctor is the only competent person to opine about the cause of death.

In the instant case, the doctor P.W.4 has given a clear opinion that death of the deceased might have been the result of injury no.8 and the impact of the said injury might be that in all probabilities 15-20 minutes after sustaining the aforesaid injury the deceased was likely to be unconscious and further to go into coma and this opinion has not been controverted by P.W.6, who performed the second autopsy of the deceased.

68. No doubt the concept of dowry death takes within its purview death of any type, whether accidental, homicidal or suicidal. It also does not make any bifurcation with regard to the place of occurrence as to at which place death was occurred. In the case in hand injuries found over the body of the deceased out of which

one was proved fatal to her were capable to indicate that the death was not normal but to take benefit of this column the prosecution bears the burden of at least to show that when the deceased was brought to her parental house, she had already sustained injuries and unfortunately the present case lacks an unblemished evidence on record and this failure comes out with an inference adverse to the prosecution. Despite testimony of P.W.1, P.W.2 and P.W.3 although contradictory, who state of having seen the injuries upon the body of the deceased, the main question remains unanswered as to why she was not undertaken any medical assistance in the evening if she was badly injured. P.W.1, P.W.2 and P.W.3 are having material contradictions as to the general condition of the deceased and the story of her treatment under Dr. Maurya is highly suspicious and cannot be believed. If the deceased, as the facts and circumstances indicate, received injuries which resulted into her unfortunate death while residing with her own family members, I doubt the prosecution is enabled to get the benefit of the ingredient “death occurred otherwise than under normal circumstances”.

“Soon before”-

69. The other relevant component to establish an offence under Section 304-B is the element of ‘soon before’ and when this Court goes through the evidence rendered by the prosecution over this issue it is found that only within a period of about 24 days from the marriage to death all the incidents happened. The learned state counsel urged that since the occurrence happened in a very short span of about 24 days of married life of the deceased, the element of ‘soon before’ naturally existed there. The FIR speaks that the marriage

between the two solemnized on 11.11.2003 and when the deceased came back from her matrimonial house after about 5-6 days as P.W.1 states she told her family members that she was subjected to cruelty and harassment for demand of dowry by her in-laws but on 27.11.2003 she was again sent to her matrimonial house by her parents and again she was assaulted and harassed by her in-laws and on 3.12.2003 when she made a telephone call to her family members after being beaten and burnt by hot mustered oil in her matrimonial house, she was brought back to her parental house on the same day by her brother Ghanshyam and brother-in-law and thereafter on 4.12.2003 she died.

70. Sharpening his argument the learned AGA further argued that on the aforesaid issue, the testimony of P.W.1, P.W.2 and P.W.3 is almost the same and they corroborate the prosecution version over the aspect of short span of married life of the deceased. Now since 11.11.2003 the deceased was harassed and tortured by her in-laws for the demand of dowry and when she was lastly brought back to her parental house in the evening of 3.12.2003 after she complained of the cruelty, harassment and torture made by her in-laws in the morning and died just next day of her injuries, the element of 'soon before' is very well proved. The meaning and sense of the word 'soon before her death' has been explained in a catena of decisions by the Hon'ble Apex Court and this Court as well.

71. Explaining the manner and scope of the term 'soon before' her death the Hon'ble Apex Court in **Satveer Singh Vs. State of Punjab (2001) 8 SCC 633** clarified that this expression indicates that there must be a perceptible nexus between the infliction of dowry related harassment

and cruelty on the woman and her death. Further, in **Satbir Singh Vs. State of Haryana (2021) 6 SCC 1** the Hon'ble Apex Court reiterated the principle of 'soon before' like this:

"Being a criminal statute, generally it is to be interpreted strictly. However, where strict interpretation leads to absurdity 10 or goes against the spirit of legislation, the courts may in appropriate cases place reliance upon the genuine import of the words, taken in their usual sense to resolve such ambiguities. Therefore, courts should use their discretion to determine if the period between the cruelty or harassment and the death of the victim would come within the term "soon before". Thus, held, phrase "soon before" cannot be construed to mean "immediately before". Prosecution must establish existence of "proximate and live link" between the dowry death and cruelty or harassment for dowry demand by the husband or his relatives"

72. In fact the expression 'soon before' never means immediately before and no definite period has been indicated in the provision itself and it is left open for the Courts to define the said expression dependent upon facts and circumstances of each case. It is reiterated in **Kunhiabdulla and Anr. Vs. State of Kerala (2004) 4 SCC 13** that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

73. However, in the facts and circumstances of the presentie it is to be noted that it is an admitted case that the death of the deceased was caused when she was staying in the company of her own family members and the evidence on record falls short of the proof that the injuries sustained by her were the result of any assault or excruciating conduct of her in-laws and also it is not shown on the basis of any cogent and consistent evidence of the witnesses that soon before her death she was subjected to cruelty and harassment by her husband or any relative of the husband for, or in connection with, any demand of dowry. The prosecution failed to produce any cogent, reliable and unblemished evidence that after her bidai on 27.11.2003 to her matrimonial house, the deceased ever complained of any ill-treatment or cruelty in connection with demand of dowry by the accused persons and also that when on 03.12.2003, she was brought to her parental house she was bitterly injured. The evidence of P.W.1 himself shatters the whole prosecution story in this regard.

74. Hence, the vital element of 'soon before' is also found not proved and the inherent inconsistency and improbability in the evidence on record denies the prosecution of any benefit of the principle enumerated in the decisions noted above.

False implication of the relatives of the husband in the case pertaining to dowry death

75. The learned state counsel submits that prosecution in the instant case has proved by cogent evidence of P.W.1, P.W.2 and P.W.3 that the deceased was subjected to cruelty and harassment for the demand of dowry since after her marriage by her in-laws. At this juncture it is also desirable to

find out as to whether all the accused persons who were summoned to face trial under Section 304-B/34, 498-A/34 I.P.C. and 4 D.P. Act are liable to be punished for the said offences and this search takes the Court to find out the relation of the accused persons with the deceased Ram Ji, the husband. Accused Mahendra Kumar is brother in law (Jeth), Dwarika Prasad, Ram Prasad are uncles-in-law of the deceased, Smt. Manju is aunt-in-law, Smt. Manisha and Smt. Urmila are sisters in law (Jethani) and Smt. Kusum is sister in law (Nand) of the deceased. It is pertinent to mention here that as per prosecution case demand of dowry which was made by the accused persons from the deceased was for one scooter and Rs.50,000/- cash and that too by all the accused persons nine in number.

76. The Court genuinely feels that the implication of all the in-laws of the deceased for a demand of Rs.50,000/- and one scooter as dowry does not seem to be plausible and natural. The old aged uncles of deceased Ram Ji along with their wives and Jeth-Jethani, who have taken specific plea of separate living appear to be falsely implicated in this case and no specific or overt act has been assigned to them. Although a specific role on the part of the mother-in-law and Jethani of the deceased has been alleged by the prosecution witnesses to pour down hot mustered oil upon the body of the deceased but this allegation has not been proved by any cogent evidence. The Hon'ble Apex Court has focused on the issue of false implication of all the in-laws in the cases related to demand of dowry, cruelty and dowry death and in a catena of decisions this pattern has been deprecated by the Hon'ble Apex Court and it has been alarmed in case of **K. Subba Rao and Ors. Vs. State of Telangana (2018) 14 SCC**

452 that the Courts should be extremely careful and vigilant in proceeding against distant relatives of the husband in the crimes pertaining to the dispute even in dowry deaths. All the relatives of the husband should not be roped in on the basis of omnibus allegation unless specific instances of their involvement in the crime as alleged and surfaced during investigation. The increasing number of the cases relating to dowry death drew the concern of Hon'ble Apex Court and again it was observed in **Kahkashan Kausar @ Sonam and Ors. Vs. State of Bihar and Ors (2022) 6 SCC 599** that implicating relatives of husband in matrimonial disputes, without analysing the long-term ramification of a trial on the complainant as well as the accused is improper. It was further held that general and omnibus allegations cannot be manifest in a situation where the relatives of the husband are forced to undergo trial. It was also emphasised by the Hon'ble Apex Court that allowing prosecution in the absence of clear allegations against relatives of the husband would simply result in an abuse of the process of law.

77. The case in hand is very well covered as to what was emphasised by the Hon'ble Apex Court in the above mentioned decisions.

78. The Court takes notice of the fact at the cost of repetition, that no other relatives of Ram Ji, who are roped as co-accused in this case have been assigned any specific role in the case in hand except a specific role of burning the deceased by use of hot mustered oil which is assigned to Smt. Sumri Devi, the mother-in-law and Smt. Manju, the sister-in-law (jethani) but as discussed earlier in the body of this judgement the evidence rendered by the prosecution on the aforesaid particular

issue is completely unreliable and misleading and there is no cogent proof of the same on record.

79. P.W.1 the father of the deceased no where states in his examination- in-chief that he had seen any sign of burning or blister over the parts of the body of her daughter. In his cross-examination P.W.1 states that when her daughter came back to her parental house he had seen several burn injuries and blisters upon her body but his examination-in-chief consists of no such statement. In the same fashion P.W.2 in the examination-in-chief makes no statement in respect of burn injuries and blisters seen over the body of the deceased. P.W.3 in her cross-examination makes a significant statement when she says that there appeared no sign of burn injuries over the body of her sister and she further states that there was no blister on any of the injuries of her sister and significantly she was watching her sister in the same evening when she allegedly sustained burn injuries in the morning. Hence, P.W.1, P.W.2 and P.W.3 are having material contradictions in their depositions recorded before the Court on the aforesaid issue. P.W.4 the doctor found several injuries over the body of the deceased but no where he states that he found any burn injury or blister over her body. In the same fashion P.W.6 the doctor who performed the subsequent autopsy of the deceased no where states to find out any burn injury or blister over the body of the deceased. Hence, the prosecution case so far as the injuries allegedly caused to the deceased on 3.12.2003 are concerned miserably fails to prove any specific role of assault or overt act to any of the accused persons.

80. In continuation it is also to be pointed out that the prosecution evidence is not sound on the point that all the accused persons were residing in the same house.

The accused persons relatives of Ram Ji have taken a defence of separate living as well and their addresses as may be found in their statement under Section 313 Cr.P.C. are different from that of Ram Ji, the husband. It might be a normal situation that Ram Ji, the husband of the deceased, who himself is no more at present would be residing with her mother Smt. Sumri Devi in the same house but it is never plausible that her married sister Smt. Kusum also used to reside with the deceased in the same house. The prosecution has not produced any cogent and reliable evidence to this effect that all the accused persons were living jointly in the same house. In the site plan Ex.Ka-13, the place of occurrence is shown in the house of Shyam Sundar, who is the late father of Ram Ji, which is indicative of the fact of separate living of other relatives of Ram Ji. Hence, if except the husband and mother-in-law of the deceased all the other relatives of the husband/ co-accused persons were residing separately, it was not plausible that they, who were in a large number, used to visit the matrimonial house of the deceased only for the sake of causing cruelty and harassment to her and to make a demand of one scooter and Rs.50,000/- only as dowry.

81. This Court is of considered view that in absence of any cogent evidence for any specific role played by any of the relatives of the husband of the deceased, in accomplishment of the demand made and the harassment and cruelty, if any, for or in connection with any demand for dowry caused to the deceased, the relatives of the husband cannot be held liable for the charges levelled against them but the same treatment cannot be applied in the case of husband Ram Ji, now dead and mother-in-law Smt. Sumri Devi and up to this extent

their evidence, after the death of the deceased does not fall in the category of 'hearsay evidence' and remains an admissible piece of evidence so far as the offences under Section 498-A and Section 4 Dowry Prohibition Act are concerned.

82. In the case of **Asokan Vs. State with M. Balasubramaniam Vs. State of Tamil Nadu and Rajammal and Anr. Vs. State (2000) 4 SCC 68** the death of a house wife was caused by strangulation in her matrimonial house. The High Court on the given facts and evidence on record held that charge of murder was not established against the accused but the conviction of the husband of the deceased was found justified under Section 498-A I.P.C. and the Hon'ble Apex Court considered the statement of P.W.7, who had deposed that the deceased had told her for demand of a scooter and cot made by the accused husband and also had shown her injuries which were inflicted upon her on her failure to bring the scooter and other witness P.W.2 who also stated that the deceased had told him for her torture by her husband and mother-in-law for not getting the scooter and the Hon'ble Apex Court did not discard the evidence of P.W.2 & 7 and their deposition was not placed in the category of hearsay evidence. On the same analogy in the case in hand since the deceased used to tell her family members regarding the demand of one scooter and Rs.50,000/- cash as additional dowry and her tormentation for the same which was deposed by P.W.1, P.W.2 and P.W.3 before the trial Court, in my view, the deposition of all the aforesaid three witnesses does not fall within the category of hearsay evidence and is capable of proving the charge under Section 498-A I.P.C. and Section 4 D.P. Act.

Application of Section 113 B Evidence Act

83. Learned A.G.A. appearing for the prosecution has vehemently argued that a presumption under Section 113-B of the Evidence Act arises against the accused persons of this case, which means that burden of proof is now shifted to the defence side. Pleading their innocence, the said plea was heavily opposed by the learned counsel for the appellants.

84. Learned senior advocate appearing on behalf of the appellants has drawn the attention of the Court in respect of the concept of the burden of proof particularly in a case relating to dowry death. It has been submitted that the case relating to dowry death rests upon circumstantial evidence and there can be no ocular evidence in a dowry death case but the surrounding circumstances which play a vital role in establishing the offence of dowry death should also be taken into account while dealing with such a matter.

85. The Evidence Act, 1872 consists of a peculiar provision under Section 113-B which provides like this:

“113-B. Presumption as to dowry death- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death”.

86. It is vehemently submitted that a presumption as to dowry death arises only in case the essential components to establish an offence of dowry death are

found established on the basis of the evidence on record and in that case the theory of burden of proof is to be looked into with a different angle and in case the prosecution succeeds to establish the essential ingredients in respect of an offence of dowry death, particularly the element of ‘soon before’, the corresponding burden of proof shifts upon the accused and a legal presumption arises against him to show that the dowry death was not caused by him and the Court presumes that the accused had caused a dowry death.

87. In **Sher Singh Vs. State of Haryana (2015) 3 SCC 724** the Hon’ble Apex Court in a wide perspective made an interpretation of the word ‘shown’ and ‘deemed’ in connection with Section 113-B of Evidence Act and it has been held that

“Shown” should be read as “proved” and “deemed” should be read as “presumed”. Initial burden is on prosecution to prove by preponderance of probabilities the ingredients of Section 304-B. Requiring prosecution to prove these ingredients beyond reasonable doubt would defeat purpose of Section 304-B. Once such initial burden is discharged by prosecution, initial presumption of innocence of accused would get replaced by deemed presumption of guilt of accused. Burden would then be shifted on accused to rebut that deemed presumption of guilt by proving beyond reasonable doubt his innocence. Right to life and liberty of accused cannot be jeopardised without providing accused opportunity to prove his innocence”

88. So far as the case in hand is concerned it has been discussed in the earlier part of this judgement that the prosecution has miserably failed to show

that when the deceased came to her parental house from her matrimonial house she was injured and in the same evening she was also medically examined by some local doctor. The prosecution was under initial obligation to show that soon before her death the deceased was subjected to cruelty and harassment by the accused persons in connection with demand of dowry but it failed.

89. For failure of prosecution to establish the aforesaid ingredient of 'soon before' no presumption under Section 113-B of The Evidence Act arises against the accused persons or in favour of the prosecution and consequently the burden of proof does not shift in this matter and it remains intact upon the shoulders of the prosecution.

90. Vetting the submissions made by both the sides on the aforesaid crucial issue of presumption as to dowry death, the Court takes notice of the legal formula as to what is the extent of burden of proof which lies upon an accused in a criminal trial. It is a trite law and this Court is never hesitant to promulgate that it is always the prosecution which owes a burden of proof beyond reasonable doubt in a criminal trial but in certain enactments and in a case like this one as well by virtue of Section 113-B of Evidence Act the prosecution enjoys a privilege of shifting of burden of proof by way of a legal presumption whereby showing certain contingencies and it is able to be drawn a presumption in its favour but at the same time it must be borne in mind that the concept of burden of proof in a criminal trial is little lighter when it is the duty of the accused to prove certain facts and it is not beyond reasonable doubt in comparison with the prosecution. In the case in hand, it is found on the basis of evidence on record that the prosecution, in

view of the concept laid down in *Sher Singh* (supra) has failed to prove by preponderance of probabilities the ingredients of the offence under Section 304-B I.P.C. and since this initial burden is not discharged by the prosecution, no deemed presumption of guilt arises against the defence side.

91. In a recent pronouncement **Primila Vs. State of U.P. (2023) 2 SCC (Cri) 223**, the Hon'ble Apex Court over the subject held as below:

7. It has repeatedly been held that the procedure under Section 313 CrPC is but a facet of the principles of natural justice giving an opportunity to an accused to present the defence. The burden of proof on an accused in support of the defence taken under Section 313 CrPC is not beyond all reasonable doubt as it lies on the prosecution to prove the charge. The accused has merely to create a doubt. It will be for the prosecution then to establish beyond reasonable doubt that no benefit can flow from the same to the accused.

92. Similarly in **Anand Ramchandra Chougule Vs. Sidarai Laxaman Chougala and Ors. (2019) 8 SCC 50** the same principle was reiterated by the Hon'ble Apex Court in following paragraphs which are extracted as herein under:

"10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely,

there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt.

11. The fact that a defence may not have been taken by an accused under Section 313 CrPC again cannot absolve the prosecution from proving its case beyond all reasonable doubt. If there are materials which the prosecution is unable to answer, the weakness in the defence taken cannot become the strength of the prosecution to claim that in the circumstances it was not required to prove anything. In Sunil Kundu v. State of Jharkhand, this Court observed: (SCC pp. 433-34, para 28)

"28.... When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt."

93. In the said law the Hon'ble Apex Court referring the notion of law promulgated in **Pratap Vs. State of U.P. (1976) 2 SCC 798** clarified that it is well settled that the burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability.

94. In fact the legal philosophy which makes the onus of proof easier for an accused is that from the materials placed on record a reasonable doubt is created in the mind of the Court that with regard to some

relevant probabilities the accused shall be entitled to the benefit of doubt.

95. In the preceding paragraphs of this judgement this Court has dealt with the circumstances as to what was incumbent upon the prosecution to prove on the basis of the cogent, factual and medical evidence which the prosecution failed to prove in the present case and that resulted into non-application of Section 113-B of Evidence Act in this matter.

Defence Evidence-

96. To buttress his arguments on the basis of the evidence and case laws the learned counsel for the appellants relied upon the defence evidence adduced by the accused persons during trial.

97. D.W.1 Vinod Kumar, who is the resident of same village where Ram Ji, the deceased's husband was residing, states that after marriage deceased came to her matrimonial house but stayed only for a short period of 2-3 days and then went to her parental house where she expired after 14-15 days.

98. In the same fashion D.W.2, who is the neighbourer of Ram Ji states before the Court that after her Bidai when the deceased after 2-3 days of her marriage went to her parental house, she never came back to her matrimonial house.

99. D.W.3 is the witness of separate living of accused Mahendra (Jeth) and he further states that after marriage the deceased stayed at her matrimonial house only for a period of 2-3 days and then went back to her parental house where she expired after 14-15 days.

100. All the three defence witnesses have been cross-examined by the government counsel but remained intact and strengthened the defence case. It is to be added here that some defence papers showing the factum of separate living of some of the accused persons attached along with list 42 Kha are found on record but however, no witness came forward to prove the same.

101. The Court also takes notice to the fact that CW-1 Rajesh Kumar Yadav, C.O. Sirathu was also examined under the impression that he was the I.O. of the case but in his deposition he clarifies that he has not been working in this case as I.O.

102. It is trite law that in a criminal trial the defence evidence stands on the same footing as that of the prosecution and the law is settled in a catena of decisions of the Hon'ble Apex Court. In **Munshi Prasad vs. State of Bihar, (2002) 1 SCC 351**, it has been held that :

"3... Before drawing the curtain on this score, however, we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution....."

103. It is notable that the present matter was investigated by two Investigating officers and both have been examined as P.W.7 and P.W.8 by the prosecution.

Conclusion-

104. To sum up the matter, it is to be concluded that the charge relating to dowry death of the deceased is not proved in this case particularly for want of proof of the essential ingredient of 'soon before' on the part of prosecution. The aforesaid discussion leads this Court to a logical conclusion that the prosecution miserably failed to show that 'soon before' her death the deceased was subjected to cruelty and harassment by her in-laws for or in connection with demand of dowry. The evidence of P.W.1, P.W.2 and P.W.3 is sufficient to prove the factum of her being victim of cruelty and harassment by the husband and her mother but the relatives of husband Ram Ji have been falsely roped in this case. Hence, in the facts and circumstances of this case the accused husband Ram Ji and mother-in-law Sumari Devi only may be held liable for the offence under Section 498-A and Section 4 D.P. Act for causing cruelty to the deceased and also for making an indirect demand of dowry from the family members of the deceased through her but the evidence on record is not sufficient to record the conviction of the appellants under Section 304-B/34 I.P.C. as the essential ingredient of 'soon before' is not satisfied. The death of the deceased occurred while she was staying with her own family members. The evidence adduced by the prosecution falls short of proving the essential ingredients to constitute an offence under Section 304-B I.P.C. as discussed earlier. It is also found in the facts and circumstances of this case that the prosecution further failed to show that all the relatives of the husband were residing jointly with the appellant Ram Ji and her mother Sumari Devi and hence, they are entitled for benefit of doubt and as

such the appeal deserves to be party allowed.

105. Hence, the Criminal Appeal No. 6710 of 2011 is **party allowed**. The conviction and sentence of the sole surviving convict-appellant Smt. Sumari Devi for the offence under Section 304-B/34 I.P.C. is set aside whereas the conviction and sentence imposed upon her for the offences under Section 498-A/34 I.P.C. for 2 years rigorous imprisonment with a fine of Rs.2,000/- with default stipulation and for the offence under Section 4 D.P. Act for 1 year simple imprisonment with a fine of Rs.1,000/- with default clause is hereby confirmed. Appellant Smt. Sumari Devi is on bail, her bail bonds are cancelled and sureties are discharged. The concerned Court is directed to take the appellant Smt. Sumari Devi into custody forthwith and send her to jail to serve-out the remaining sentence. It is also clarified that both the sentences shall run concurrently and the period of sentence shall be adjusted into the period already undergone by her in this matter.

106. The Criminal Appeal No. 5490 of 2011 is **allowed**. The conviction and sentence under Sections 304-B/34, 498-A/34 I.P.C. and under Section 4 D.P. Act awarded by the learned trial Court vide impugned judgement and order dated 9.9.2021 to the convicts-appellants Mahendra Kumar, Ram Prasad, Smt. Manju, Smt. Manisha, Smt. Urmila and Smt. Kusum is set aside and they are acquitted of the charges levelled against them. They are on bail. They need not surrender. Their bail bonds are cancelled and sureties are discharged.

107. The amount of fine, if any, deposited earlier by the aforesaid appellants

shall be taken into account by the learned trial Court while making a compliance of impugned judgement and order of this appeal.

108. Registry is directed to transmit the trial court record to the Court concerned along with copy of this judgement and order for necessary compliance.

109. This Court is thankful to Sri V.P. Srivastava, learned Senior Advocate assisted by Ms. Neeja Srivastava, learned counsel for the appellants, Sri Kamal Dev Rai and Sri A.K. Mishra, learned A.G.A. for the State and Mr. Akash Verma, Research Associate of this Court for ably assisting the Court.

(2024) 9 ILRA 369

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 18.09.2024

BEFORE

**THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.**

Criminal Appeal No. 10948 of 2023

Dinesh Kumar Agarwal	...Appellant
Versus	
State of U.P. & Anr.	...Respondents

Counsel for the Appellant:

Syed Imran Ibrahim, Vinay Kumar Rai

Counsel for the Respondent:

G.A.

(A) Criminal Law - Appeal against rejection of discharge application- The Schedule Castes and The Schedule Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)IX ,14A(2) - Appeal , Indian Penal Code, 1860 - Sections 420, 467, 468, 471 - The Code of criminal procedure,

1973 - Section 156(3), 160 , 227 - Strong suspicion, in order to be sufficient to frame a charge should be based on the material brought on record by the prosecution and should not be based on supposition, suspicions and conjectures - At the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Sections 482 Cr.P.C., the Court is not required to conduct the mini trial - At the time of framing charge or taking cognizance the accused has no right to produce any material. (Para -15,17,35,38)

(B) Criminal Law - The Code of criminal procedure, 1973 - Section 227 - Discharge - At the stage of discharge and/or while exercising the powers under Section 482 Cr.P.C. - Court has a very limited jurisdiction and is required to consider "whether any sufficient materials is available to proceed further against the accused for which the accused is required to be tried or not - If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused irrespective of result of the trial - At the time of framing of charge the Court is required to evaluate the material and documents on record to decide whether there is a ground for presuming that the accused had committed the offence - No need to evaluate the sufficiency of evidence to convict the accused.(Para - 18,19,30,37)

Appellant allegedly submitted forged documents for declaring land as Abadi - private forensic expert's report indicated forged signatures - leading to charges under IPC and SC/ST Act - FIR lodged against appellant - alleging forgery and conspiracy - allegations relate to a property dispute - appellant's alleged attempt to purchase the property at a lower value - appellant filed a discharge application under Section 227 of CrPC - rejected by trial court - appellant challenged the rejection order.(Para - 3 to 9)

HELD: - Perusal of F.I.R. and material collected by Investigating Officer based on which charge sheet has been submitted makes out a prima facie case against the accused at this stage. Quashing or setting aside impugned order refused. No illegality, impropriety and incorrectness in the impugned order or the proceedings under challenge. No abuse of process of the Court. (Para - 40,41)

Appeal rejected. (E-7)

List of Cases cited:

1. Vinay Tyagi Vs Irshad Ali @ Deepak & ors., (2013) 5 SCC 762
2. St. of Orissa Vs Debendra Nath Padhi, 2005 (1) SCC 568
3. BK Sharma Vs St.of UP, 1987 SCC Online ALD 314
4. P. Vijayan Vs St.of Kerala & Anr.
5. Sheoraj Singh Ahlawat Vs St.of U.P., 2013 (11) SCC 476
6. St. of Bihar Vs Ramesh Singh 1977 (4) SCC 39
7. Superintendent & Remembrancer of Legal Affairs, W.B. Vs A.K. , Bhunja AIR 1980 (SC) 52
8. Palwinder Singh Vs Balvinder Singh , AIR 2009 SC 887
9. Sanghi Brothers (Indore) Pvt. Ltd. Vs Sanjay Choudhary, AIR (2009) SC 9
10. CBI Vs Aryan Singh etc., 2023 SCC Online SC 379
11. R.P. Kapur Vs St. of Punj. AIR 1960 SC 866
12. St. of Har. Vs Bhajan Lal 1992 SCC(Cr.) 426

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Syed Imran Ibrahim, learned counsel for the appellant and Mr. Amit Singh Chauhan, learned AGA for the State-respondent.

2. The present criminal appeal under Section 14A(2) of SC/ST Act, 1989, has been filed challenging the order dated 07.10.2023 passed by learned Special Judge, SC/ST Act, Mathura, in S.S.T. No.1999 of 2016 (State vs. Dinesh Kumar Agrawal), arising out of Case Crime No.374 of 2014, under Sections 420, 467, 468, 471 IPC and Sections 3(1)IX SC/ST Act, Police Station-Highway, District-Mathura.

3. Brief facts of the case; that an FIR has been lodged through an application u/s 156(3) Cr.P.C. by Dwarika Prasad S/o Bhoop Singh against the appellant with the allegations that Bhoop Singh was owner of Khasra No.97, Gata No.67, situated at Village-Nawada, District- Mathura along with Kishan Singh and Dwarika Prasad. The eyes of the appellant was on this property and he wanted to purchase the same in less value, for which he pressurized Bhoop Singh father of the informant. He also used caste indicative words in order to take the property in question. When Bhoop Singh was alive, partition of the property was done and as per the mutual consent between the family members of the Bhoop Singh, the property was divided amongst Dwarika Prasad his brother and mother and application in this regard was given, on which, order dated 14.07.2008 was passed by SDM making partition of the property in accordance with the settlement between the parties. An application was given by Bhoop Singh for declaring the land as Abadi, on which order dated 02.05.2001 was passed by the SDM. In the records of the aforesaid case, an

application as well as affidavit having signatures of Bhoop Singh were found. The signatures in the aforesaid application were sent for being verified with the signatures as made by Bhoop Singh in the proceedings for cancellation of Mukhtarnama, which were found in the records in the office of the registry, Mathura.

4. The signatures of Bhoop Singh as accepted to be made in the proceedings for cancellation of power of attorney, did not tally with that of the application as well as affidavit moved for declaration of Abadi. Thus, alleging that the appellant has conspired to forged signatures of Bhoop Singh in the application and affidavit. Thus, the allegations in the FIR in short was that the application and affidavit alleged to be given by Bhoop Singh wherein order dated 02.05.2001 was passed by SDM, was not at all moved by him and the application and affidavit so placed before the S.D.M. were having forged signatures of Bhoop Singh.

5. Learned counsel for the appellant submits that present criminal proceedings initiated against the appellant are an after thought, as such the same is not only malicious but also amount to abuse of process of Court. He further submits that the concerned Court below has rejected the discharge application of the applicant without assigning any reason, therefore, the impugned order dated 07.10.2023 passed by the concerned Court below is

6. Learned counsel for the appellant has placed the brief facts of the case which are as follows:-

(i) The First Information Report has been lodged on 27.04.2014 at 12:10 PM by Dwarika Prasad s/o Late Bhoop Singh against the appellant Dinesh Kumar

Agarwal with the allegations that father of the first informant, namely, Bhoop Singh was in possession of land of Khasra No.97, Khata No.67 situated in village Nawada District-Mathura along with his co-sharer, namely, Kishan Singh and Dwarika Prasad. When Bhoop Singh expired on

30.12.2010, the first informant became the owner of the property by law of succession along with his brother Mahesh Chandra, Vijendra Singh and mother Ram Kumari.

(ii) It has further alleged that on 14.07.2008 when father of the first informant was alive, a partition suit u/s 176 of U.P.Z.A. & L.R. Act was decreed in favour of Bhoop Singh, as a consequence of which partition of the property was allowed. A restoration application was filed by the appellant against the order dated 14.07.2008, on 29.08.2013, in which he has stated that he had filed an application u/s 143 of U.P.Z.A. & L.R. Act (in short 'of the Act') and has got the property declared as Abadi as such the jurisdiction of the Court under U.P.Z.A. & L.R. Act does not lie. It has been categorically alleged by the first informant in the first information report that the application u/s 143 of the Act which was the basis of the restoration application is a forged document as his father had never submitted any application to get the land declared as Abadi. As such the appellant has filed a forged and fabricated application, on the basis of which the order dated 14.07.2008 was being sought to be restored. On the said forged application, the order dated 02.05.2001 was passed by S.D.M. The signatures of Bhoop Singh were sent for examination by Private Forensic Science Laboratory expert, namely, Ms. Shruti Agarwal to be examined comparing the same with the signatures of the appellant made in an application for cancellation of power of attorney as available in the Registry

office. It has been alleged that the report as placed by Ms. Shruti Agarwal proved that the signatures were not of Bhoop Singh, thus, the present FIR was lodged.

(iii) The investigation was conducted in different police stations of different districts and finally charge sheet was submitted by Investigating Officer of Police Station- Highway, District- Mathura.

(iv) While conducting the investigation, the Investigating Officer tried to get copy of original document for getting the signatures of Bhoop Singh examined by Government Forensic Science Laboratory and went to the extent for sending notices under Section 160 Cr.P.C. requesting the appellant to provide original documents at the earliest. Thus, without getting the original documents, the Investigating Officer solely relying upon the alleged Forensic Report of Ms. Shruti Agarwal (Private Forensic Expert) as supplied by the first informant himself, has submitted the charge sheet against the appellant on 09.07.2015 on which the Court below took cognizance on 08.10.2015 and summon the appellant to face the trial.

7. On an application moved by the appellant before the Investigating Officer requesting to conduct further investigation after getting the signatures of Bhoop Singh verified by Government Forensic Laboratory and the SSP, Mathura, directed for further investigation by order dated 09.04.2016. The aforesaid fact is evident from Parcha No.7 placed at Page-98 of the affidavit.

8. The discharge application was filed by the appellant on 24.08.2023 on the following grounds:-

(i) That the original document containing the handwriting of Bhoop Singh was never examined and solely relying

upon the report of Private Forensic Expert, the charge sheet has been submitted.

(ii) That the supplementary charge sheet was submitted after order of further investigation by the SSP, Mathura, which has not been taken into consideration while taking cognizance.

(iii) The FIR is a counterblast to the case filed by the company of the appellant.

(iv) Despite the pendency of matters before Civil Court, the FIR has been lodged to give a criminal color to the civil proceedings, which has been ignored by the concerned Court while taking cognizance.

(v) The forensic handwriting report from private person cannot be taken as an authentic document relying upon which charge sheet has been submitted.

(vi) The report of handwriting expert is based on photo-copy of the documents, hence, the same is not valid.

9. The discharge application was rejected by order dated 07.10.2023 in an illegal manner, without application of judicial mind, ignoring two aspects, (i) that the charge sheet has been submitted on the basis of defective investigation as the report of Private Forensic Expert based on photo-copy of the documents has been taken into consideration, (ii) there being two reports on record, and supplementary report has not been taken into consideration, hence, the same is liable to be quashed.

10. Learned counsel for the appellant relying upon the judgements of High Courts passed in cases of **Bheri Nageswara Rao vs. Mavuri Veerbhadra Rao & Ors., 2006 SCC Online AP 330** and **Abhay Jain and Others vs. State of Madhya Pradesh and Another, 2018**

SCC Online MP 1839, submits that law is clear that the opinion of handwriting expert is relevant but not conclusive. It is a fragile type of evidence and it is only corroborative evidence. It's probative value is that only on the basis of expert opinion no conclusion can be drawn if there is no other supportive evidence. It is to be accepted with good amount of circumspection. Thus, without analyzing that the expert report was not based on verification from original documents, the charge sheet has been submitted and Court concerned has ignored the aforesaid fact.

11. After further investigation, supplementary report was not taken into consideration, hence, the impugned order rejecting the discharge application without considering the aforesaid is bad in the eyes of law. It is settled position that when there are two reports, both have to be read conjointly and it is cumulative efforts of the reports and documents annexed thereto which the Court is expected to apply its mind to determine whether there exist ground to presume that the appellant has committed offence or not. Hence, after considering both the reports, the Court shall decide the discharge application of the alleged accused in compliance of the provision of Section 227 of Cr.P.C. In support of his submission he has relied upon the judgement of Apex Court passed in case of **Vinay Tyagi vs. Irshad Ali Alias Deepak And Others, (2013) 5 SCC 762**.

12. Per contra learned AGA has opposed the contention raised by learned counsel for the appellant by submitting that in the impugned order itself it has been mentioned that documents placed with the discharge application are to be seen at the time of evidence. From perusal of the

records, prima facie it cannot be said that at this stage no offence has been committed by the appellant.

13. Before appreciating the contentions as raised by learned counsel for the parties, it will be appropriate to refer the position of law with respect to the scope of exercise of power under Section 227 of Cr.P.C.:-

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

14. From bare reading of Section 227 of Cr.P.C., the meaning of the expression “the record of the case and documents submitted therewith” is clear and there cannot be any doubt with respect to the position that at the stage of consideration of such an application for discharge, defence case or material, if produced at all by the accused, cannot be looked at all. Once “the record of the case and the documents submitted therewith” are before the Court they alone can be looked into for considering the application for discharge and thereafter if it considers that there is no sufficient ground for proceeding against the accused concerned then he shall be discharged after recording reasons therefor. The aforesaid has been held in the case of **State of Orissa vs. Debendra Nath Padhi, 2005 (1) SCC 568.**

15. The words “not sufficient ground for proceeding against the accused”

appearing in Section 227, Cr.PC, postulate exercise of judicial mind on the part of the Judge to the facts of the case revealed from the materials brought on record by the prosecution in order to determine whether a case for trial has been made out. Thus, at the stage of consideration of an application for discharge, the Court has to proceed with an assumption that the materials brought on record by the prosecution are true, and evaluate the materials to find out whether the facts taken at their face value disclose the existence of the ingredients constituting the offence. At this stage, only the probative value of the materials has to be gone into and the court is not expected to go deep into the matter to hold a mini-trial.

16. The Apex Court in the case of **BK Sharma v. State of UP, 1987 SCC Online ALD 314**, has held that the standard of test and judgement which is finally applied before recording a finding of conviction against an accused is not to be applied at the stage of framing the charge. It is just a very strong suspicion, based on the material on record, and would be sufficient to frame a charge.

17. Thus, in the opinion of this Court, strong suspicion, in order to be sufficient to frame a charge should be based on the material brought on record by the prosecution and should not be based on supposition, suspicions and conjectures.

18. In **P. Vijayan v. State of Kerala and Anr.**, after extracting Section 227, Cr.PC, the Court in paragraph No.10 and 11 held thus: -

“10. If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge

the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words “not sufficient ground for proceeding against the accused” clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

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

19. In paragraph 13 in **P. Vijayan’s** case (supra), this Court took note of the principles enunciated earlier by this Court in **Union of India v. Prafulla Kumar Samal** which reads thus: -

“10....

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

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

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

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

20. From the aforesaid decisions, it is, thus, obvious that it will be within the jurisdiction of the Court concerned to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused concerned has been made out.

21. Be that as it may, though it is permissible to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case is made

out against the accused, on appreciation of the admissibility and the evidentiary value such materials brought on record by the prosecution is impermissible as it would amount to denial of opportunity to the prosecution to prove them appropriately at the appropriate stage besides amounting to exercise of the power coupled with obligation under Section 232, Cr.PC, available only after taking the evidence for the prosecution and examining the accused.

22. It can be said in that view of the matter that the intention embedded is to ensure that an accused will be made to stand the ordeal of trial only if 'the record of the case and the documents submitted therewith' discloses ground for proceeding against him. When that be so, in a case where an application is filed for discharge under Section 227, Cr.PC, it is an irrecusable duty and obligation of the Court to apply its mind and answer to it regarding the existence or otherwise, of ground for proceeding against the accused, by confining such consideration based only on the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in that behalf. To wit, such conclusion on existence or otherwise of ground to proceed against the accused concerned should not be and could not be based on mere suppositions or suspicions or conjectures, especially not founded upon material available before the Court.

23. In case of **Ram Prakash Chadha (supra)**, the Apex Court has held that while considering the discharge application, it is just a very strong suspicion, based on the material on record and it is sufficient to frame a charge.

24. As regards the submission of learned counsel for the applicant regarding

non consideration of supplementary report dated 25.05.2016, Parcha No.7, annexed as Annexure-13, while passing the order impugned, this Court finds that nothing has been placed on record to show that the aforesaid supplementary charge sheet dated 25.05.2016 was placed before the concerned Court nor any such specific ground has been taken in the discharge application.

25. Perusal of the discharge application goes to show that all the grounds as taken by learned counsel for the applicant have been dealt with by the concerned Court while rejecting the same, thus, there is no illegality in the order impugned.

26. Be that as it may, all the grounds as taken in the discharge application can be examined at any/appropriate stage of trial and this Court while exercising inherent powers cannot go to conduct mini trial.

27. The second supplementary report dated 25.05.2016 is of no relevance and this Court is of the opinion that, even if it is presumed that supplementary report dated 25.05.2016 has not been considered by the concerned Court while rejecting the discharge application, there can be no illegality in the order as the second supplementary report has been submitted by the Investigating Officer on the basis of signature being verified by photocopy of the documents, which has been the position in the first report as placed before the Court. In other words, the second report is of no value when the same has been prepared after verification from photocopy of the documents as is the case wherein first signature verification report has been placed on the basis of photocopy of the documents.

28. Even otherwise, learned counsel for the applicant has not been able to make out the case as to what was the illegality in the first report except the fact that it is by a Private Forensic Laboratory (which as per record is recognized by the Government), when the same has been placed by verifying from photocopy of the documents as is the position of the second report. Thus, in such circumstances which report has to be relied upon and how the same is going to effect the applicant is subject matter to be considered and examined at appropriate stage.

29. To sum up, reliability is to be placed on first report, which has been first forensic verification report as the second one has not been placed before the concerned Court and is also based on verification from photocopy of the documents and has not been verified by the original signatures or documents.

30. The Court in the case of **Sheoraj Singh Ahlawat vs. State of U.P., 2013 (11) SCC 476**, has held that if two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused irrespective of result of the trial. It has been further held that at the time of framing of charge the Court is required to evaluate the material and documents on record to decide whether there is a ground for presuming that the accused had committed the offence. There is no need to evaluate the sufficiency of evidence to convict the accused. Materials brought on record by the prosecution can be believed to be true, but their probative value cannot be decided at that stage. The accused is entitled to urge his contentions while entertaining the discharge application only on the material

submitted by the prosecution, but he is not entitled to produce any material at that stage and the court is not required to consider any such material.

31. In the present case, both the signature verification reports are based on photocopy of the documents, thus, there is no chance of any suspicion and as to which report has to be considered, is to be seen at the time of trial at the appropriate stage when the aforesaid report is placed before the trial Court.

32. In the present facts of the case, the Court has applied its mind and on the basis of necessary material collected during the course of investigation and as placed before the Court concerned, has proceeded to pass the order impugned, hence, there is no illegality in the aforesaid.

33. Before proceeding to adjudge the validity of the impugned order, in opinion of this Court, it would be useful to cast a fleeting glance to some of the representative cases decided by the Hon'ble Supreme Court which have expatiated upon the legal approach to be adopted at the time of framing of the charge or at the time of deciding whether the accused ought to be discharged. It shall be advantageous to refer to the observations made by the Hon'ble Apex Court in the case of **State of Bihar vs. Ramesh Singh 1977 (4) SCC 39** which are as follows :-

"4. Under S. 226 of the Code while opening the case for the prosecution the prosecutor has got to describe the charge against the accused and State by what evidence he proposes to prove the guilt of the accused. Thereafter, comes at the initial stage, the duty of the Court to consider the record of the case and the

documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either u/s. 227 or u/s. 228 of the Code. If "the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", so enjoined by s. 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which ?.....

(b) in exclusively triable by the court, he shall frame in writing a charge against the accused," as provided in S. 228.

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

presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence, if any, cannot show that the accused committed the offence, there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under S. 227 or S. 228, then in such a situation ordinarily and generally the order which will have to be made will be one under S. 228 and not under S. 227."

34. Aforesaid case was again referred to in another Apex Court's decision **Superintendent and Remembrancer of Legal Affairs, West Bengal Versus Anil Kumar Bhunja AIR 1980 (SC) 52** and the Apex Court proceeded to observe as follows:-

"18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not

yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in *State of Bihar v. Ramesh Singh*, AIR 1977 SC 2018, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence."

35. In yet another case of **Palwinder Singh Vs. Balvinder Singh reported in AIR 2009 SC 887**, the Apex Court had the occasion to reflect upon the scope of adjudication and its ambit at the time of framing of the charge and also about the scope to consider the material produced by the accused at that stage. Following extract may be profitably quoted to clarify the situation:-

"12. Having heard learned counsel for the parties, we are of the opinion that the High Court committed a serious error in passing the impugned judgment insofar as it entered into the realm of appreciation of evidence at the stage of the framing of the charges itself. The jurisdiction of the learned Sessions Judge while exercising power under Section 227 of the Code of Criminal

Procedure is limited. Charges can be framed also on the basis of strong suspicion. Marshalling and appreciation of evidence is not in the domain of the Court at that point of time. This aspect of the matter has been considered by this Court in *State of Orissa v. Debendra Nath Padhi*, (2005) 1 SCC 568 wherein it was held as under :

"23. As a result of the aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. *Satish Mehra's Case* holding that the trial Court has powers to consider even materials which the accused may produce at the stage of Section 227 of the Code has not been correctly decided."

36. The following observations made by the Hon'ble Supreme Court in the case of **Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary reported in AIR (2009) SC 9** also reiterated the same position of law :-

"10. After analyzing the terminology used in the three pairs of sections it was held that despite the differences there is no scope for doubt that at the stage at which the Court is required to consider the question of framing of charge, the test of a prima facie case to be applied.

11. The present case is not one where the High Court ought to have interfered with the order of framing the charge. As rightly submitted by learned counsel for the appellant, even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the Court to frame a charge. At that stage, there is no necessity of formulating the opinion about the prospect of conviction. That being so,

the impugned order of the High Court cannot be sustained and is set aside. The appeal is allowed."

37. Lastly, at the stage of discharge and/or while exercising the powers under Section 482 Cr.P.C., the Court has a very limited jurisdiction and is required to consider "whether any sufficient materials is available to proceed further against the accused for which the accused is required to be tried or not".

38. In any case, at this stage, what is required to be considered is a prima facie case and the material collected during the course of the investigation, which warranted the accused to be tried. The same has been held in the case of **CBI v. Aryan Singh etc., 2023 SCC Online SC 379**. It has also been held in the aforesaid case that as per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Sections 482 Cr.P.C., the Court is not required to conduct the mini trial.

39. In fact, while exercising the inherent jurisdiction under Section 482 Cr.P.C. or while wielding the powers under Article 226 of the Constitution of India the quashing of the complaint or charge sheet can be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis. The Apex Court decisions in **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** and **State of Haryana Vs. Bhajan Lal 1992 SCC(Cr.) 426** make the position of law in this regard clear recognizing certain categories by way of illustration which may justify the quashing of a complaint or charge sheet.

40. The submissions made by the learned counsel for the applicants counsel

call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and this Court does not find any justifiable ground to set aside the impugned order refusing the discharge of the accused. This court has not been able to persuade itself to hold that no case against the accused has been made out or to hold that the charge is groundless.

41. The prayer for quashing or setting aside the impugned order dated 07.10.2023 is refused as I do not see any illegality, impropriety and incorrectness in the impugned order or the proceedings under challenge. There is absolutely no abuse of process of the Court perceptible in the same. The present matter also does not fall in any of the categories recognized by the Supreme Court which might justify interference of this Court in order to upset or quash them.

42. With the above observations, this application is **rejected**.

(2024) 9 ILRA 381
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.09.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Writ Petition No. 6409 of 2024

Shyamji Tripathi ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Suresh Kumar Upadhyay, Ashutosh Pandey

Counsel for the Respondents:
G.A.

Limitation Act, 1963- Section 5-Impugned order-police protection granted to the opposite party who is allegedly criminal-iM.P.ugned order challenged after 13 years-without any iota of explanation -no justification to grant relief on the ground of delay and latches.

Petition dismissed. (E-9)

List of Cases cited:

1. Collector, Land Acquisition Vs Katiji, 1987(2) SCC 107
2. P.K. Ramachandran Vs St. of Kerala, AIR 1998 SC 2276
3. Shakuntala Devi Jain Vs Kuntal Kumari, AIR 1969 SC 575
4. Brij Indar Singh Vs Kanshi Ram ILR (1918) 45 Cal 94
5. St. of Nagaland Vs Lipok AO & ors., AIR 2005 SC 2191
6. Vedabai @ Vijayanatabai Baburao Vs Shantaram Baburao Patil & ors., JT 2001(5) SC 608

7. Pundlik Jalam Patil (dead) by LRS. Vs
Executive Engineer, Jalgaon Medium Project &
anr.(2008) 17 SCC 448

8. Maniben Devraj Shah Vs Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Ashutosh Pandey, learned counsel for the petitioner and Sri Rajeev Verma, learned A.G.A.-1 for the State.

2. This writ petition has been filed with the following prayer:

"i) A writ, order or direction in the nature of Certiorari thereby quashing the impugned order of the learned Session Judge, District and Session Judge, Ambedkar Nagar dated 08.09.2011 passed in Case No. 174/2011, whereby the learned Session Judge granted police protection to opposite party No.2, as contained in Annexure No.1 to this writ petition.

ii) A writ, order or direction in the nature of Mandamus directing and commanding the opposite parties not to harass the petitioner;

iii) A writ, order or direction in the nature of Mandamus directing and commanding the opposite parties not to lodge frivolous cases against the petitioner"

3. Learned counsel for the petitioner submits that vide impugned order dated 08.09.2011 passed in Case No. 174/2011: State Vs Shyam Ji Tiwari, learned Session Judge granted police protection to opposite party No.2 while he is in District Ambedkar Nagar and the said police protection continues even today. Learned counsel for the petitioner further submits

that the impugned order is passed without application of mind, as the opposite

4. Sri Rajeev Verma, learned A.G.A.-1 submits that there are five criminal cases against the petitioner, reference of which has been given on page 21 of the writ petition i.e. Case Crime No.220/10 under Sections 147, 447, 504, 506 I.P.C., Case Crime No. 174/11, under Section 419/420/467/468/471 I.P.C., Case Crime No. 273/13, under Sections 341/306 I.P.C., Case Crime No. 24/14, under Section 323/504/452 I.P.C. and Case Crime No. 56/82 under Section 147, 148, 149, 302 I.P.C..

5. Learned A.G.A.-1 further submits that the impugned order dated 08.09.2011 has been challenged after 13 years and regarding delay no explanation/sufficient cause has been given in any paragraph of the writ petition. He further submits that the petitioner has not filed complete order sheet and the current status to the case in which the impugned order has been passed. The writ petition is totally frivolous and is liable to be dismissed. However, on the ground of delay itself the present writ petition is liable to be dismissed, even though the petitioner has not filed any document or order to show before the court that the impugned protection given to the opposite party No.2 vide order dated 08.09.2011 is still continuing.

6. After considering the argument, as advanced by learned counsel for the parties and after perusal of the entire averment made in the writ petition, this court is of the view that the petitioner has approached this Court at a highly belated stage after about 13 years without any explanation/sufficient cause and prayed for quashing of the impugned order dated 08.09.2011. A

petition must be filed within a reasonable time and it should not be vitiated by inordinate delay and laches on the part of the petitioner. As per the record there are five criminal cases against the petitioner and even though the ground and averment made in the writ petition is neither acceptable and trustworthy.

7. The expression “sufficient cause” in Section 5 of Limitation Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and generally a delay in preferring the case may be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. In **Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107**, the Court said, that, when substantial justice and technical considerations are taken against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. The Court further said that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

8. In **P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276** the Court said:

“Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds.”

9. The Rules of limitation are not meant to destroy rights of parties. They

virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come up, necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The statute providing limitation is founded on public policy. It is enshrined in the maxim *Interpublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). It is for this reason that when an action becomes barred by time, the Court should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the suiter from putting forth his cause but simultaneously the party on the other hand is also entitled to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

10. There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it

should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

11. I need not to burden this judgment with a catena of decisions explaining and laying down as to what should be the approach of Court on construing "sufficient cause" under Section 5 of Act, 1963 and it would be suffice to refer a very few of them besides those already referred.

12. In **Shakuntala Devi Jain Vs. Kuntal Kumari**, AIR 1969 SC 575 a three Judge Bench of the Court said, that, unless want of bona fide of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

13. The Privy Council in **Brij Indar Singh Vs. Kanshi Ram** ILR (1918) 45 Cal 94 observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in **State of Nagaland Vs. Lipok AO and others**, AIR 2005 SC 2191.

14. In **Vedabai @ Vaijyanatabai Baburao Vs. Shantaram Baburao Patil and others**, JT 2001(5) SC 608 the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

15. In **Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr.** (2008) 17 SCC 448, in para 17 of the judgment, the Court said :

“...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights.”

16. In **Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai**, 2012 (5) SCC 157, in para 18 of the judgment, the Court said as under:

“What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain

rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest.”

17. Within what time the petitioner should approach the Court depends upon the facts and circumstances of the case. Reasonable time generally means any time which is not manifestly unreasonable and which is fairly necessary for approaching the Court. Reasonable time would mean a time required by a prudent litigant to approach the Court in the given facts and circumstances of the case.

18. Analyzing the facts of the instant case in the backdrop of aforesaid legal position, it is absolutely clear that the

petitioner has approached this Court at a highly belated stage after about 13 years. The petitioner after waking up from deep slumber, approached this Court, without any iota of explanation for the delay as per his choice, caprice and whim. Thus, it can by no stretch of imagination be stated that the petitioner has approached this Court within a reasonable time and even though nothing has been stated in the writ petition, why the petitioner is coming after 13 years of passing the impugned order dated 08.09.2011, thus this Court does not find any justification to grant relief as sought by the petitioner on the ground of delay and laches. The petition is totally misconceived and is liable to be dismissed.

19. According, **dismissed.**

20. No order as to cost.

(2024) 9 ILRA 385
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.

Government Appeal No. 443 of 2024

State of U.P. ...Appellant
Versus
Balwan Singh & Ors. ...Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Subhash Chandra Tiwari

**Criminal Law - Indian Penal Code, 1860 -
Sections 366 & 376 - Appeal against
acquittal - Code of Criminal Procedure,**

1973 - Section 313 - Benefit of doubt - Consenting party - Incident happened on 07.04.2009 - FIR was lodged after 15 days of incident - No plausible explanation regarding delay was found in FIR or in evidence of witnesses - PW-1 (Informant/father of victim) was not an eye witness and only informant in case - Main witness, minor son of informant and brother of victim in whose presence she was allegedly kidnapped by accused persons, was not examined during trial - Victim remained in company of accused as per her testimony for 25- 26 days, she never raised any alarm to seek assistance of passersby while on journey or made complaint to wife of family members or other accused in whose house she was allegedly confined - Her medico legal examination report does not corroborate allegations that she was subjected to sexual assault, as no mark of external or internal injury were found on her person - She was found to be aged around more than 18 years in her medical age determination report - No evidence to prove that she was below 18 years of age at time of incident. (Para 12, 13)

Appeal dismissed. (E-13)

List of Cases cited:

1. Kumabuddin Vs St. of U.P. 2013 (3) JIC 61
2. M.S. Narayana Menon @ Mani Vs St. of Kerala & anr, (2006) 6 S.C.C. 39, (Para 54)
3. Chandrappa Vs St. of Karn., reported in (2007) 4 S.C.C. 415, (Para 42)
4. Shivasharanappa & ors. Vs St. of Karn., JT 2013 (7) SC 66
5. Jayaswamy Vs St. of Karn., (2018) 7 SCC 219
6. Shailendra Rajdev Pasvan Vs St. of Guj., (2020) 14 SC 750
7. Samsul Haque Vs St. of Assam, (2019) 18 SCC 161

(Delivered by Hon'ble Rajiv Gupta, J.

&

Hon'ble Ram Manohar Narayan Mishra, J.

1. Heard Sri Jitendra Kumar Jaiswal, learned A.G.A. for the State/appellant and Sri Subhash Chandra Tiwari, learned counsel for respondent No.1 to 4. We have perused the record and also the impugned judgment under challenge in this appeal.

2. The trial court has acquitted the accused-respondents for charge under Sections 366 and 376 IPC, vide judgment and order dated 08.04.2015 passed by learned Additional District and Session Judge/FTC, Kanpur Dehat in S.T. No.233 of 2010 (State Vs. Balwan Singh and others). This appeal under 378(3) of the Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.) has been preferred at the instance of the State as Government Appeal against the impugned judgment and order.

3. The brief facts of the case as appeared from FIR and other material on record are that the defacto complainant Munna Lal had given a written report on 22.04.2009 at Police Station concerned, on the basis of which Chick FIR (Ext. Ka-2) was drawn by Head Constable Sudhakar Singh on 22.4.2009 at 11:00 hours under Section 363 and 366 IPC at Police Station Rura, District Kanpur Dehat. The informant stated in his written report that on 07.04.2009 his minor daughter whose date of birth was 15.09.1993 had gone with her younger brother Rohit to the market to take medicines, at around 10:00 am accused Balwan Singh and Akhilesh who were coming by a tractor met them and got his daughter and son sit on the tractor. On some pretext they send his son Rohit to take guthka for them on way and when he returned back to the place where he was

dropped by accused persons, he found neither the accused nor tractor nor his sister (victim), thus Rohit came back to home and narrated the incident to the informant. The informant embarked on search of his missing daughter, and in that sequence Akhilesh met him in the evening on the bank of a canal in Ballia and on making a pointed query he told that his brother Siya Ram and his brother-in-law (Bahnoi) who belonged to Panki took away his daughter from Madhauri by making her sit on a Marshal Jeep. The informant raised an apprehension in FIR, if his daughter be not recovered immediately she might be killed by the accused persons.

4. The police carried out investigation in the case and victim was recovered on 03.05.2009 by police. On secret information on 03.05.2009 at 17:15 hours she was recovered alongwith main accused Balwan Singh. Both the accused and victim were apprehended by police near staircase of over-bridge situated towards North of Railway Station Rura. The accused Balwan Singh was taken into custody by police and recovery cum arrest memo was prepared, which is placed on record as Ext. Ka-6. The investigating officer recorded the statement of the victim and other witnesses prepared site plan of place of occurrence, which is marked as Ext. Ka-7. In medico legal examination of victim which was carried out by C.M.O. District Women Hospital, Kanpur Dehat, no mark of injury was seen on private part, hymen was torn and healed, vagina admitted two fingers easily. Referred to Radiologist for Xray, for ossification test for age examination. In the opinion of lady doctor she was found to be used to sexual intercourse and no definite opinion about rape could be given. In age determination report Ext. Ka-5, her age was found to be more than 18 years, on the

basis of her radiological examination. The Investigating Officer submitted chargesheet against named accused persons Balwan Singh, Akhilesh, Siya Ram and Vimal Chandra Tiwari for committing and facilitating the offence of kidnapping and rape. The tractor in which the victim was allegedly kidnapped was taken into custody by police, which is marked as Ext. Ka-9.

5. Learned Additional Chief Judicial Magistrate, Kanpur Dehat committed the case for trial to the court of session, as offence was triable by court of session. Learned Additional Session Judge Court No.3, Ramabai Nagar framed charge under Sections 366 and 376 IPC, against chargesheeted accused Balwan Singh, Akhilesh, Siya Ram and Vimal Chandra Tiwari, charges were read-over and explained to the accused persons who denied the charge and claimed to be tried.

6. The prosecution examined witnesses PW-1 Munna Lal the informant, PW-2 victim, PW-3 SI Sudhakar Singh (then Head Constable) placed before, the author of FIR and GD Entries of registration of this case. PW-4 Pushpa Gurnani who conducted medico legal examination of the victim, PW-5 SID Data Ram the investigating officer. After conclusion of prosecution evidence, the accused were examined under Section 313 Cr.P.C. with a view to seek their explanation regarding evidence and circumstances appearing against them during trial. The accused persons stated in their statement under Section 313 Cr.P.C. that they were falsely implicated in the case, they have committed no offence, the witnesses had deposed against them falsely.

7. Learned trial judge after hearing the submissions of both the sides and

appreciating their evidence on record observed that on the basis of evidence on record it is proved that the victim had left her home alongwith accused on her own volition and will. She had attained age of majority as per medical age determination report. She never tried to seek help of any person enroute to her journey. The tractor passed through Madhauri village at 10:00 am, but she had not ask for help from any person as admitted by her. Thereafter she was taken by Marshal Jeep, even then she did not make any effort to seek help. She resided at the residence of Vimal Tiwari (accused) in Panki, but even there she did made any complaint to wife of Vimal Tiwari or person in vicinity she even did not tried to raise alarm by shouting. All these facts and circumstances which proved that she went alongwith the accused on her own volition.

8. Learned trial judge placed reliance on a judgment of this Court reported as **Kumabuddin Vs. State of U.P. 2013 (3) JIC 61**. Learned trial court gave a finding that victim was more than 18 years on the date of incident and she left her home on her own volition. Therefore, it is discerned that she was neither taken by the accused against her will, nor was subjected to sexual intercourse against her will. Therefore charge under Section 366 and 376 IPC has not been proved beyond reasonable doubt. Consequently accused persons are acquitted of charges under Sections 363 and 366 IPC.

9. Learned A.G.A. for the State-appellant submitted that the order of acquittal recorded by learned trial court is not justified in the eyes of law, as prosecution established the case against the accused persons. He further submitted that learned additional session judge has

misread the evidence adduced during trial. Both the witnesses of facts PW1 informant the father of the victim and PW2 victim have fully proved the guilt of the accused respondents, but the learned trial court has taken erroneous approach while disbelieving the sworn testimony of the complainant as well as victim before the court. The victim has categorically stated in her evidence that the applicant had committed bad work, which implies that she was subjected to rape by her. She has even explained the said bad work in her testimony, but learned trial court has misappreciated the evidence and passed impugned judgment of acquittal, which is liable to be set-aside.

10. Per-contra, learned counsel for the respondent No.2 to 4 submitted that there are number of discrepancies in prosecution evidence. The FIR is highly belated which finds no explanation. The victim and the accused were caught together by police near over-bridge situated in the vicinity of railway station. She never raised alarm to seek assistance of passersby while she was allegedly taken by the accused. She never made complaint to wife or family members of co-accused Vimal Tiwari in whose house she was allegedly confined by main accused Balwan during the period of her kidnapping. She was found major in medico legal examination and her date of birth recorded in school record was not proved by prosecution. Therefore, no reliance can be placed on date of birth relied by prosecution on the basis of her academic records. The star witnesses of the case Rohit who happened to be minor brother of the victim and son of the informant in whose presence she was allegedly kidnapped by accused Balwan and Akhilesh was not produced in any evidence, whose testimony would have

thrown some light on actual sequence of events. There is clear contradiction in stand of the informant and victim on one hand and that of investigating officer on the other hand with regard to place of arrest and recovery of the accused and victim.

11. PW-1 and PW-2 have stated in their statement that victim was recovered by police from the house of accused Vimal Tiwari at Panki, whereas the investigating officer has stated that she was recovered on 03.05.1999 near Rura Railway Station. Therefore one thing is certain that either the victim or the investigating officer had taken false stand before the court with regard to recovery of the victim and arrest of the accused Balwan. The learned trial court has rightly extended benefit of doubt in favour of the accused persons and recorded verdict of acquittal, as evidence adduced by prosecution does not inspire confidence.

12. In the present case, if we briefly examine the facts of the case and evidence adduced during trial we find that incident occurred on 07.04.2009. Whereas FIR was lodged after 15 days of the incident, this inordinate delay does not find any plausible explanation either in FIR or in evidence of the witnesses. PW-1 Munna Lal is not an eye witness and only the informant in the case is the father of the victim. The main witness Rohit who is minor son of the informant and brother of the victim was not examined during trial for reasons best known to prosecution. The victim remained in the company of accused Balwan as per her testimony for 25-26 days, but she never raised any alarm to seek assistance of passersby while on journey or made complaint to the wife of family members of accused Vimal Tiwari in whose house she was allegedly confined. Her medico legal examination report does not corroborate the

allegations that she was subjected to sexual assault, as no mark of external or internal injury were found on her person. She was found to be aged around more than 18 years in her medical age determination report. No evidence was led to prove the prosecution version that she was below 18 years of age at the time of incident.

13. Learned trial court has rightly observed that she appears to be a consenting party. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of **"M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39**, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two views are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."

14. Further, in the case of **"CHANDRAPPA Vs. STATE OF KARNATAKA", reported in (2007) 4 S.C.C. 415**, the Apex Court laid down the following principles;

"42. From the above decisions, in our considered view, the following general

principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

[4] An appellate Court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court."

15. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the Trial Court.

16. The Apex Court in **"SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66** has held as under:

"That appellate Court is empowered to reappraise the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."

17. The Apex Court recently in **Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219**, has laid down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read as follows:

"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or

misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittal. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.

*.....It is relevant to note the observations of this Court in the case of **Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606**, which reads thus:*

"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

18. The Apex Court recently in **Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750**, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption stands reinforced, reaffirmed and strengthened by the trial court and in **Samsul Haque v. State of Assam, (2019) 18 SCC 161** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

19. We have perused the deposition of prosecution witnesses, documents proved during trial, arguments advanced by learned counsel for the parties and meticulously examined the judgment under appeal. The reasoning given by learned Additional Session Judge is logical and legal as well. The finding of learned trial court need not be disturbed in present appeal for reasons stated in foregoing discussion.

20. The factual scenario in the present case does not permit us to take a different view than that of taken by learned trial court. We find no reason to disagree with the reasoning and finding of learned trial court, thus we concur findings of the court below.

21. Consequently keeping in view the facts and circumstances of the case, evidence adduced during trial and reasons given by learned trial court and binding precedent of Apex Court as cited above, we are of the considered view that there is no

good ground to grant leave to appeal in the instant case, which accordingly is refused, consequently the government appeal also stands **dismissed**, at the stage of admission itself.

22. Let lower court record be send back immediately for necessary action alongwith certified copy of this judgment.

(2024) 9 ILRA 391

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 18.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters Under Article 227 No. 4392 of 2024

Rakesh

...Petitioner

Versus

The Permanent Lok Adalat, Lko. & Anr.

...Respondents

Counsel for the Petitioner:

Ajeet Kumar, Anjali Verma, Arvind Kumar, Devendra Kumar Verma, Rinku Verma, Sarvesh Kumar

Counsel for the Respondents:

Civil Law-The Constitution of India, 1950- Article 227 - The Code of Civil Procedure, 1908-Section 22 - The Legal Services Authority Act, 1987- Section 22-Territorial jurisdiction of Lok Adalat- There is no provision contained in the Legal Services Authorities Act governing the territorial jurisdiction of Permanent Lok Adalat and in these circumstances, the general principles regarding territorial jurisdiction contained in the Civil Procedure Code shall apply to proceeding before Permanent Lok Adalat also. Section 20 of the Civil Procedure Code provides that 'a suit may be instituted within the court, within the local limits of whose jurisdiction and defendants reside or carry on business or personally works for gain. When the defendant in the claim-

Universal Sompo General Insurance Company Ltd has its office at Lucknow and it carries on business within the limits of Lucknow, the Permanent Lok Adalat at Lucknow has territorial jurisdiction to entertain the claim filed by the petitioner. **(Para 4)**

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

1. Sri Rinku Verma, the learned counsel for the petitioner and perused the record.

2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioner has challenged validity of an order dated 01.05.2024 passed by the Permanent Lok Adalat, Lucknow in Miscellaneous Case No.02 of 2024, whereby the claim petition filed by the petitioner was rejected at the admission stage for the reason that the accident, giving rise to the cause of action for filing the claim, took place within the limits of District Ayodhya. The Insurance policy of the vehicle was issued by Universal Sompo General Insurance Company Ltd. through its web portal and the pollution 'under control' certificate was issued from District Unnao. The rejection under letter dated 28.11.2023 issued by the Insurance Company rejecting the petitioner's claim mentions that the petitioner may take action at one of the four levels mentioned in the letter and he has an option to file a complaint before the Insurance Ombudsman, but the petitioner has not exercised those options. From the aforesaid facts, the Permanent Lok Adalat came to a conclusion that it has no jurisdiction to entertain the claim.

3. The learned counsel for the petitioner submits that the opposite party M/s Universal Sompo General Insurance Company Ltd has its office at Lucknow. Although Section 22D

of the Legal Services Authority Act, 1987 provides that 'the Permanent Lok Adalat shall be guided by the principles of natural justice, objectivity, fair play, equality and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908, Section 22 of the aforesaid Act provides that 'the Permanent Lok Adalats have the same powers as are the vested in a Civil Court under the Civil Procedure Code, 1908 while trying a suit in respect of certain matters enumerated in that section.

4. There is no provision contained in the Legal Services Authorities Act governing the territorial jurisdiction of Permanent Lok Adalat and in these circumstances, the general principles regarding territorial jurisdiction contained in the Civil Procedure Code shall apply to proceeding before Permanent Lok Adalat also. Section 20 of the Civil Procedure Code provides that 'a suit may be instituted within the court, within the local limits of whose jurisdiction and defendants reside or carry on business or personally works for gain. When the defendant in the claim-Universal Sompo General Insurance Company Ltd has its office at Lucknow and it carries on business within the limits of Lucknow, the Permanent Lok Adalat at Lucknow has territorial jurisdiction to entertain the claim filed by the petitioner.

5. In view of the above discussion, this Court is of the considered view that the order dated 01.05.2024 passed by the Permanent Lok Adalat, Lucknow dismissing the petitioner's claim at the admission stage on the ground of lack of territorial jurisdiction, is not sustainable in law and the same is liable to be set aside.

6. So far as the observations of Permanent Lok Adalat regarding

alternative remedy is concerned, the Beema Lok Pal has been constituted by a notification issued by the Central Government and it has not been constituted under any statute. The remedy before Insurance Lok Pal is not a statutory remedy and it does not bar the petitioner's right to file a claim before the Permanent Lok Adalat.

7. Accordingly, the petition is **allowed**. The order dated 01.05.2024 is set aside and the matter is remanded to the Permanent Lok Adalat Lucknow for passing fresh orders regarding admission of the claim in accordance with law, keeping in view the observations made in this order.

(2024) 9 ILRA 393

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 19.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters Under Article 227 No. 4474 of 2024

Smt. Chandravati Singh ...Petitioner
Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:

Yogeshwar Sharan Srivastava

Counsel for the Respondents:

C.S.C.

Civil Law - U.P. Consolidation of Holdings Act Rules, 1954 - Rule 109-A (1) - U.P.Consolidation of Holding Act, 1953 - Section 52 - Plea for expeditious disposal of application - Petitioner filed application under Rule 109 after more than 30 years, since impugned order dated 24.04.1993, a certified copy whereof has not been produced by petitioner along with

application for execution of order - The photocopy of said order filed along with execution application was not admissible - Original record of proceedings in court of Consolidation Officer stands weeded out - Photocopy of order appears to be forged. (Para 6)

A combined reading of Section 52 (2) of Act, 1953 and Rule 109-A (2) of Rules ,1954 makes it clear that only orders passed by Court of competent jurisdiction in cases of writs filed under provisions of Constitution of India, or in cases of proceedings pending under Act on date of issue of notification under sub-section (1), shall be given effect to - Nothing on record to indicate any writ petition was filed or proceedings were pending on date of notification u/s 52 (1) of Act, 1953 - In these circumstances, said order cannot be implemented long after closure of consolidation operations - Declined to give direction. (Para 9, 10)

Petition dismissed. (E-13)

List of Cases cited:

Chandrajeet Ram Vs St. of U.P., 2009 SCC OnLine All 2446 ; (2009) 108 RD 190

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

1. Heard Sri Yogeshwar Sharan Srivastava, the learned counsel for the petitioner.

2. By means of the instant petition filed under Section 227 of the Constitution of India, the petitioner has sought a direction to the opposite party no. 2-Consolidation Officer (Purana) for expeditious disposal of Case No. 65 of 2024, which is an application filed under Rule 109-A (1) of U.P. Consolidation of Holdings Act Rules, 1954 (which will hereinafter be referred to as 'the Rules of 1954'), for execution of an order dated

24.04.1993 passed by the Consolidation Officer, Nawabganj in Case No. 3939.

3. Sri Hemant Kumar Pandey, the learned Standing Counsel for the State of U.P. has raised a preliminary objection that the application under Rule 109-A has been filed after more than 30 years since passing of the alleged order dated 24.04.1993, a certified copy whereof has not been produced by the petitioner along with the application for execution of the order. The photocopy of the order dated 24.04.1993 filed alongwith the execution application is not admissible. In these circumstances, the photocopy of the order dated 24.04.1993 prima facie appears to be forged. The original record of the proceedings in the court of Consolidation Officer stands weeded out. There is no method to verify the genuineness of the petitioner's claim regarding order dated 24.04.1993 in absence of a certified copy of the order dated 24.04.1993 having been filed by the petitioner along with his application dated 07.11.2023.

4. The learned Standing Counsel relied on a decision of this Court in case of **Chandrajeet Ram v. State of U.P.**, 2009 SCC OnLine All 2446 = (2009) 108 RD 190, in which a coordinate bench of this Court has recorded that the Court is daily coming across such matters where people come out with certified copies of orders alleged to have been passed 25 to 40 years before by Consolidation Courts and start asserting that the order must be mutated. In most of the cases such certified copies are forged. In normal course of things if an order is passed by Consolidation Court in favour of a person then either it is implemented forthwith in normal course or he will immediately take steps for getting that mutated in the revenue records. A wait

of more than 12 years always raises a grave doubt regarding the genuineness of the order sought to be enforced. In most of such cases certified copies of non existent orders are manufactured after the loss/weeding out of original records. It is also the experience of the court that Rule 109-A is being utterly misused. It is not meant for rampant use. It cannot be invoked after notification under section 52 of the Act to enforce orders passed before the notification.

5. The learned counsel for the petitioner could not give any reply to the aforesaid legal submissions raised by the learned Standing Counsel.

6. The application filed by the petitioner under Rule 109 has been filed after more than 30 years since the alleged order dated 24.04.1993, a certified copy whereof has not been produced by the petitioner along with the application for execution of the order. The photocopy of the order dated 24.04.1993 filed alongwith the execution application is not admissible. The original record of the proceedings in the court of Consolidation Officer stands weeded out. In these circumstances, there is no method to verify the genuineness of the petitioner's claim regarding order dated 24.04.1993 in absence of a certified copy of the order dated 24.04.1993 having been filed by the petitioner along with his application dated 07.11.2023.

7. Further, Section 52 of the U. P. Consolidation of Holdings Act, 1953 provides as follows: -

“52. Close of consolidation operations. - (1) As soon as may be, after fresh maps and records have been prepared under sub-section (1) of Section

27, the State Government shall issue a notification in the Official Gazette that the consolidation operations have been closed in the unit and the village or villages forming a part of the unit shall then cease to be under consolidation operations:

Provided that the issue of the notification under this section shall not affect the powers of the State Government to fix, distribute and record the cost of operations under this Act.

(1-A) The notification issued under sub-section (1) shall be published also in a daily newspaper having circulation in the area and in such other manner as may be considered proper.

(2) Notwithstanding anything contained in sub-section (1), any order passed by a Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or in cases of proceedings pending under this Act on the date of issue of the notification under sub-section (1), shall be given effect to by such authorities, as may be prescribed and the consolidation operation shall, for that purpose, be deemed to have not been closed.

* * *

8. Rule 109-A of the Rules of 1954 provides as follows: -

"109A. - (1) Orders passed in cases covered by sub-section (2) of Section 52 shall be given effect to by the consolidation authorities, authorised in this behalf under sub-section (2) of Section 42. In case there be no such authority the Assistant Collector, incharge of the sub-division, the Tahsildar, the Naib-Tahsildar, the Supervisor kanungo, and the Lekhpal of the area to which the case relates shall, respectively, perform the functions and discharge the duties of the Settlement

Officer, Consolidation, Consolidation Officer, the Assistant Consolidation Officer, the Consolidator and the Consolidation Lekhpal respectively for the purpose of giving effect to the orders aforesaid.

(2) If for the purpose of giving effect to any order referred to in sub-rule (1) it becomes necessary to reallocate affected chaks, necessary orders may be passed by the 28 Consolidation Officer, or the Tahsildar, as the case may be, after affording proper opportunity of hearing to the parties concerned.

(3) Any person aggrieved by the order of the Consolidation Officer, or the Tahsildar, as the case may be, may, within 15 days of the order passed under sub-rule (2), file an appeal before the Settlement Officer, Consolidation, or the Assistant Collector incharge of the sub-division, as the case may be, who shall decide the appeal after affording reasonable opportunity of being heard to the parties concerned, which shall be final.

(4) In case delivery of possession becomes necessary as a result of orders passed under sub-rule (2) or sub-rule (3), as the case may be, the provisions of Rules 55 and 56 shall, *mutatis mutandis*, be followed."

9. A combined reading of Section 52 (2) of the Act of 1953 and Rule 109-A (2) of the Rules of 1954 makes it clear that only the orders passed by a Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or **in cases of proceedings pending under this Act on the date of issue of the notification under sub-section (1)**, shall be given effect to. The learned Counsel for the petitioner could not dispute that the consolidation operations stand closed long ago. There is

nothing on record to indicate that any writ petition was filed in this matter or any proceedings under the Act were pending on the date of notification under Section 52 (1) of the act of 1953. In these circumstances, the order dated 24.04.1993 cannot be implemented long after closure of the consolidation operations.

10. When this Court is of the view that the order dated 24.04.1993 cannot be implemented, there is no occasion for this Court to give a direction for expeditious disposal of the application for implementation of the order filed after more than 30 years since passing of the order.

11. Accordingly, the petition is *dismissed*.

(2024) 9 ILRA 396

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 13.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters Under Article 227 No. 5133 of 2023

Harmeet Singh	...Petitioner
Versus	
Desh Deepak Gupta	...Respondent

Counsel for the Petitioner:

Ratnesh Chandra, Ishan Singh Popli,
Madhav Om

Counsel for the Respondent:

Gopesh Tripathi

**Civil Law- The Constitution of India, 1950-
Article 227 - The Code of Civil Procedure,
1908 - The Uttar Pradesh Regulation of
Urban Premises Tenancy Act, 2021-
Section-38(1)-Act of 2021 confers jurisdiction**

on rent authority/rent tribunal to entertain petitions filed by landlord or eviction/ejectment of tenant for recovery of arrears of rent and damages etc. but there is no provision in the aforesaid act which confers jurisdiction on the rent authority/rent tribunal to entertain a suit for perpetual injunction filed by a tenant against his dispossession otherwise then in accordance with the law. Therefore, the jurisdiction of Civil Courts to entertain suits for injunction filed by tenants against their landlords, is not barred by the provisions of the Act of 2021 and the Civil Court continues to have jurisdiction to entertain the suits for injunction even after enactment of the Act of 2021. Impugned order set aside.
(Para 10)

Petition allowed. (E-15)

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

1. Heard Shri Ratnesh Chandra, the learned counsel for the petitioner and Shri Gopesh Tripathi, the learned counsel for the opposite party.

2. The learned counsel for the opposite party does not propose to file a counter affidavit and the petition is being heard finally with the consent of the learned counsel for the parties.

3. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioner has challenged validity of the judgment and order dated 15.11.2022 passed by the learned Civil Judge (Junior Division), Court No.16 Raebareli in Civil Miscellaneous Case No.630 of 2022, whereby the suit filed by the petitioner for the relief of perpetual injunction restraining the defendant/landlord from evicting him from a property in his tenancy, otherwise than in accordance with the law, has been dismissed at the admission stage on the ground that Section 38(1) of the U.P Regulation of Urban Premises Tenancy

Act, 2021 (hereinafter referred to as ‘**the Act of 2021**’) provides that no civil court shall entertain any suit or proceeding insofar as it relates to the provisions of the Act of 2021.

4. The petitioner has also challenged validity of the judgement and order dated 07.08.2023 passed by the learned First Additional District Judge, Raebareli in Civil Revision No.35 of 2022, whereby the revision has been dismissed and the order dated 15.11.2022 passed by the Civil Judge has been affirmed.

5. Sri. Ratnesh Chandra, the learned counsel for the petitioner has submitted that the Act of 2021 has been enacted to regulate renting of premises and to protect the interests of the landlords and tenants and to provide speedy adjudication mechanism for resolution of disputes and matters connected therewith or incidental thereto. It contains provisions enabling the landlord to file a suit for ejectment/eviction of tenant and for recovery of arrears of rent and damages etc. but it does not contain any provision under which a tenant can file a suit for perpetual injunction for restraining the landlord from dispossessing him from the property in his tenancy otherwise in accordance with law.

6. The learned counsel for the opposite party contends that the landlord is not making any effort to dispossess the petitioner otherwise then in accordance with law and the petitioner has got no cause of action to file a suit against the landlord. However, he does not dispute the legal submission of the learned counsel for the petitioner that the Rent Act, 2021 does not empower the rent authority /rent tribunal to entertain a suit for perpetual injunction filed by the tenant.

7. The Uttar Pradesh Regulation Of Urban Premises Tenancy Act, 2021 [Act No. 16 Of 2021] is “*An Act to establish Rent Authority and Rent Tribunals to regulate renting of premises and to protect the interests of landlords and tenants and to provide speedy adjudication mechanism for resolution of disputes and matters connected therewith or incidental thereto.*”

8. Various sections of the Act of 2021 contain provisions for making applications by the landlord and the tenant. A tenant can file an application under Section 10 of the Act requesting the Rent Authority to determine the revised rent in case of dispute. Section 14 authorises a tenant to file an application before the Rent Authority for depositing the rent where the landlord refuses to accept any rent and other charges payable or refuses to give a receipt. Section 20 of the Act empowers a tenant to file an application before the Rent Authority in case a landlord withholds any essential supply or service in the premises occupied by the tenant.

9. Section 21 of the Act of 2021 is titled “Protection of tenant against eviction” and it provides that “A tenant shall not be evicted during the continuance of tenancy agreement unless otherwise agreed to in writing by the landlord and tenant, except in accordance with the provisions of sub-section (2) or in accordance with the provisions of section 22” but Section 21(2) of the Act provides that on an application made to it by the landlord, the Rent Authority may make an order for eviction and recovery of possession of the premises. This Section also does not contain any provision enabling a tenant to file an application for protection against apprehended eviction otherwise than in accordance with the law.

10. Having gone through the provisions of the Act of 2021, this Court is of the considered view that the Act of 2021 confers jurisdiction on rent authority/rent tribunal to entertain petitions filed by landlord or eviction/ejectment of tenant for recovery of arrears of rent and damages etc. but there is no provision in the aforesaid act which confers jurisdiction on the rent authority/rent tribunal to entertain a suit for perpetual injunction filed by a tenant against his dispossession otherwise then in accordance with the law. Therefore, the jurisdiction of Civil Courts to entertain suits for injunction filed by tenants against their landlords, is not barred by the provisions of the Act of 2021 and the Civil Court continues to have jurisdiction to entertain the suits for injunction even after enactment of the Act of 2021.

11. By declining to admit the suit for perpetual injunction filed by the petitioner, the Civil Judge has failed to exercise a jurisdiction vested in it by law, which makes the order passed by the Civil Judge, as also the order passed by the revisional court affirming the order of Civil Judge, unsustainable in law.

12. Accordingly, the petition is **allowed**. Order dared 15.11.2022 passed by the learned Civil Judge (Junior Division), Court No.16 Raebareli and the order dated 07.08.2023 passed by the learned First Additional District Judge, Raebareli are **set aside**. The Civil Judge is directed to pass fresh orders regarding admission of the suit keeping in view the observations made in this order.

(2024) 9 ILRA 398
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2024

BEFORE

THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Matters Under Article 227 No. 5486 of 2024
 (Criminal)

Sachin Kumar Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Rahul Kumar Jadaun

Counsel for the Respondents:
 G.A.

Criminal Law- The Constitution of India, 1950-Article 227 - The Code of Criminal Procedure, 1973-Section 457 - The Uttar Pradesh Prevention of Cow Slaughter Act, 1955-Section 7(3)- Petitioner/Trust preferred a Criminal Revision for claiming the expenses incurred by him to the tune of Rs. 2,52,700/ spent in taking care of the said cattle from the period 23.08.2023 to 03.10.2023 and seeking further relief to get the said cattle released in favour of the Trust-Section 7 (3) Any Goshala or any institution may receive any cow, bull or bullock for custody from police or any other person which may be released to the owner on such terms and conditions and in such manner and on payment of such charges as may be prescribed-The Court below has rightly released the cattle in favour of the respondent no. 4 being the owner of the seized cows and the calves The petitioner is at liberty to claim the necessary expenses incurred by him in taking care of the cattle before the competent authority. **(Para 7 to 10)**

Petition disposed of. (E-15)

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard learned counsel for the petitioner, Sri S.C. Mishra, learned AGA 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 issue an order or direction to set aside the impugned order dated 12.12.2023 passed by learned Revisional Court/learned Court of Session Judge, Ghazipur and impugned order dated 21.09.2023 passed by learned Court of Civil Judge (Junior Division)/Judicial Magistrate, Court No. 1, Mohammadabad, Ghazipur.

3. It has been submitted by learned counsel for the petitioner that petitioner is the Trustee/Co-President of Sarvashva Narayan Gau Raksha Evam Samaj Seva Trust (in short the Trust) established in the year 2015.

4. The instant matter arises out of an FIR No. 0133 of 2023 dated 20.08.2023 registered under Section 3/5A/5B/8 of the U.P. Prevention of Cow Slaughter Act, 1955 wherein the respondent no. 4 Vikram Kumar Gupta was named as an accused and about 18 cows and four calves were seized from his truck. On 23.8.2023, the Station House Officer of Police Station Bahwarkol, District Ghazipur handed over the seized cattle to the petitioner's Trust to take care and to look after the cattle by arranging the fodder etc.

5. The respondent no. 4 being the owner of the seized cattle filed an application under Section 457 Cr.P.C. before the learned Judicial Magistrate, Court No. 1, Mohammadabad, Ghazipur seeking release of his cattle. □

6. Accordingly, vide order dated 21.09.2023, the said cattle were released in favour of Respondent No. 4-Vikram Kumar Gupta/owner by the Civil Judge (Junior Division)/Judicial Magistrate, Court No. 1, Mohammadabad, Ghazipur after seeking an undertaking and a

personal bond of Rs. 3,00,000/- and a surety of the like amount.

7. Aggrieved by the said order, the petitioner/Trust preferred a Criminal Revision bearing Criminal Application No. 668 of 2023 claiming the expenses incurred by him to the tune of Rs. 2,52,700/ spent in taking care of the said cattle from the period 23.08.2023 to 03.10.2023 and seeking further relief to get the said cattle released in favour of the Trust. But the said Criminal Revision was dismissed in limine as the petitioner had no locus to challenge the said order.

8. At this juncture, it is relevant to quote Section 7, sub-section (3) of U.P. Prevention of Cow Slaughter Act, 1955 which specifically provides as follows:

"Section 7 (3) Any Goshala or any institution may receive any cow, bull or bullock for custody from police or any other person which may be released to the owner on such terms and conditions and in such manner and on payment of such charges as may be prescribed."

9. Considering the aforesaid facts and circumstances as well as the provision as quoted above, the Court below has rightly released the cattle in favour of the respondent no. 4 being the owner of the seized cows and the calves after seeking an undertaking and executing a personal bond of Rs. 3,00,000/- and a surety of the like amount which is not illegal. The order dated 12.12.2023 has been passed after proper application of judicial mind. □

10. However, the petitioner is at liberty to claim the necessary expenses incurred by him in taking care of the cattle.

11. The writ petition is accordingly disposed of.

3. Briefly stated, facts stated in the petition are that marriage of the parties was solemnized on 11.02.2008 at New Delhi. Out of the wedlock between the parties, a daughter was born on 15.02.2011 at Belfast, Northern Ireland and a son was born on 14.02.2013 in Scotland. The petitioner is a British citizen and she is domicile of United Kingdom. The respondent also had the intention to settle in the United Kingdom but he could not qualify the entrance examination required for medical practitioners to obtain employment in United Kingdom and

consequently, he returned to India. The petitioner is residing in Scotland along with both her minor children and she is currently employed in N.H.S. Grampian, as a Consultant Psychiatrist at Westholme Woodend Hospital, Scotland.

4. The opposite party has filed the aforesaid suit for a decree of divorce on 07.02.2019. On 28.01.2020, the petitioner filed an application in the suit stating that she is residing in United Kingdom and she has executed a power of attorney in favor of her mother, who would represent the petitioner in the suit. The power of attorney dated 08.07.2019 filed before the Family Court authorizes the petitioner's mother to prosecute the suit and proceedings, to sign and verify all the pleadings, applications and documents etc., to enter into a compromise in the suit and to appear before the Family Court at the first motion and the second motion in a petition for mutual consent and generally to do all other acts and things for conduct of the suit, as the petitioner could have done herself if she was personally present.

5. The plaintiff-opposite party had filed objections against the aforesaid application but the petitioner's application was allowed by means of an order dated 02.03.2020 passed by the Family Court permitting the petitioner to participate in the proceedings through her power of attorney holder subject to the condition that upon being directed, the petitioner shall appear before the Court in person.

6. The written statement filed in the suit has been signed and verified by the power of attorney holder of the petitioner. The plaintiff-opposite party has been examined as PW-1 and thereafter, the petitioner filed an application in the suit requesting for

recording of her evidence through video conferencing or to allow her power of attorney holder to physically appear and give evidence on behalf of the petitioner. The said application has been rejected by the impugned order dated 06.09.2023 for the reasons that there is no law laying down the procedure for recording evidence of a person from some other country through virtual mode and that there is a time difference of six hours between India and United Kingdom. The petitioner has not disclosed the name of the Court of United Kingdom, in which she will be physically present for getting her statement recorded through virtual mode and the Family Court also does not have any list of such Courts of United Kingdom, where the petitioner can be directed to be present for recording of her evidence. While allowing the petitioner's application for being represented through her power of attorney holder, the Family had granted permission to the petitioner to be represented through her power of attorney subject to the condition that the petitioner will appear in person before the Court whenever directed by the court and will participate in the proceedings of the Court personally.

7. In view of the aforesaid observations, the Family Court rejected the petitioner's application for recording of her evidence through video conferencing.

8. The opposite party has filed a counter affidavit opposing the writ petition inter alia stating that the petitioner's mother and power of attorney holder Smt. Kusumlata Verma has already appeared as DW-1 in the suit and her examination-in-chief and cross-examination has already been recorded.

9. While assailing validity of the aforesaid order, learned counsel for the

petitioner has submitted that the Rules for Video Conferencing for the Courts in the State of Uttar Pradesh, 2020 provide for recording of evidence of witnesses through video conferencing and the Family Court has erred in rejecting the petitioner's application for being examined through video conferencing.

10. Per contra, learned counsel for the opposite party has submitted that the petitioner had prayed before the Family Court for recording of her evidence through video conferencing and she had made an alternative prayer for recording of evidence of her power of attorney holder in her place. Prayer No.2 in the petition filed before this court is for issuance of a direction to the Family Court for permitting the petitioner for recording her evidence through video conferencing or through her power of attorney holder. The alternative prayer made by the petitioner for recording of evidence through power of attorney holder of the petitioner, has become infructuous as statement of the power of attorney holder has already been recorded.

11. In reply to this objection, the learned Counsel for the petitioner has submitted that PW-1 has been examined in her personal capacity and she has not been examined as the power of attorney holder of the plaintiff.

12. What appears from the facts of the case mentioned above is that although the parties got married at New Delhi on 11.02.2008, shortly thereafter they moved to United Kingdom. The petitioner and both children of the parties are citizens of United Kingdom and they are domicile of United Kingdom. The husband – opposite party resides in India and he has filed a suit for divorce. Although the plaintiff-opposite party

had opposed the defendant's request for being permitted to appear through her power of attorney holder, the Family Court allowed the request by means of an order dated 02.03.2020 subject to the condition that upon being directed, the petitioner shall appear before the Court in person. The defendant – petitioner has not appeared in the suit personally and she is defending the suit through her mother, in whose favour she has executed a power of attorney and she has filed the written statement also through her power of attorney holder. In her application, the petitioner requested for recording of her evidence through video conferencing or to allow her power of attorney holder to physically appear and give evidence on behalf of the petitioner. The evidence of the petitioner's mother and power of attorney holder has already been recorded as PW-1. Therefore, the alternative prayer made in the petitioner filed before this Court - to allow her power of attorney holder to physically appear and give evidence on behalf of the petitioner, has become infructuous.

13. PW-1 has not stated that she has appeared as a witness only as the power of attorney holder of the petitioner and she simply got herself examined on behalf of the petitioner. PW-1 cannot be expected to state different facts on oath while appearing in her personal capacity and in the capacity of the power of attorney holder of the petitioner. Therefore, the contention of the learned Counsel for the petitioner that PW-1 has not been examined as the power of attorney holder of the petitioner, is not acceptable.

14. The statutory provision contained in Rule 3-A of Order XVII C.P.C. would also be relevant in the present case, which provides as follows:

“3-A. Party to appear before other witnesses.—Where a party himself

wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.”

(Emphasis added)

15. In case the petitioner – plaintiff herself wished to appear as a witness, she should have appeared before her mother and power of attorney holder. As the plaintiff did not appear as a witness before her mother and power of attorney holder, she cannot be permitted to be examined now in absence of any special reasons. It is significant to note that the plaintiff has not appeared before the trial Court even once and she has not even signed the pleadings. Therefore, there appears to be no special reason to permit the petitioner to appear as a witness now when her mother and power of attorney holder has already been examined.

16. For the foregoing reason, I find no illegality in the order dated 06.09.2023 passed by the learned Additional Principal Judge-IV, Family Court, Lucknow in Case No.440 of 2019 under Section 13 of the Hindu Marriage Act. As the evidence of the petitioner’s power of attorney holder has already been recorded, there is no need to direct the Family Court to record the plaintiff’s evidence through video conferencing.

17. The petition lacks merits and the same is **dismissed**. The parties shall bear their own costs of the petition.

(2024) 9 ILRA 403
ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.09.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 9108 of 2024
(Civil)

Mansur Ahmad ...Petitioner
Vijay Bahadur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mansoor Ahmad

Counsel for the Respondents:
C.S.C., Sri Ten Singh

Civil Law- The Constitution of India, 1950- Article 227 - The Uttar Pradesh Municipalities Act, 1916 - Section 19 & 43- Question-Whether Section 19 of the Act, 1916 provides for election dispute of members only and petition relating to the election of President is not maintainable under the said provision of law-**Answer-** The perusal of Section 43(3) of the Act, 1916 shows that Act and the rules framed there under in relation to election including disputes relating to election and electoral offences of a member shall, mutatis mutandis, apply in relation to election of the President, meaning thereby that provision of Section 19 of the Act, 1916, so far as it pertains to election dispute shall also be applicable in the election dispute of President-Section 19, so far as it relates to election dispute shall also be applicable for the dispute of election and electoral offences of President. **(Para 9 & 10)**

Petition dismissed. (E-15)

(Delivered by Hon’ble Neeraj Tiwari, J.)

1. Heard Sri Mansoor Ahmad, learned counsel for the petitioner, Sri S.P. Singh, learned Additional Chief Standing Counsel and Sri Ten Singh, learned counsel for the private respondents.

2. Present petition has been filed with the following prayer:□

"i. to set aside the impugned order dated 16.07.2024 passed in Case No. 2 of 2023 and remand back the matter to Ld. Court concerned to pass a fresh and appropriate order."

3. Learned counsel for the petitioner submitted that Election Petition no. 2 of 2023 has been filed by respondent No. 1 challenging the election of petitioner as Chairman/Pesident of Nagar Palika Parishad, Chunar, Mirzapur under Section□ 19 of the U.P. Municipalities Act, 1916(hereinafter, referred to as, 'Act, 1916'). He next submitted that petitioner has filed objection dated 10.06.2023 on the ground that election of President may not be challenged under Section 19 of the Act, 1916 as it belongs to election of members, therefore Election Petition no. 2 of 2023 may be dismissed as not maintainable.□ He next submitted that objection of petitioner has been rejected vide□ impugned order dated 16.07.2024. He further submitted that Section 19 of the Act, 1916 provides for election dispute of members only and petition relating to the election of President is not maintainable under the said provision of law, therefore, impugned order dated 16.07.2024 is bad and liable to be set aside.

4. Sri S.K. Singh, learned Additional Chief Standing Counsel as well as Sri Ten Singh, learned counsel for the private respondents vehemently opposed the submission of learned counsel for the petitioner and submitted that Section 43 of the Act, 1916 itself provides that provisions for election to the post of a member shall mutatis mutandis apply to the election for

the post of President, therefore, there is no illegality in the impugned order dated 16.07.2024.

5. I have considered the rival submissions made by learned counsel for the parties and perused provisions of law.

6. Section 19 of the Act, 1916 pertains to power to question the municipal election by petition. The same is being quoted hereinbelow:

"19. Power to question municipal election by petition. - (1) *The election of any person as a member of a [Municipality] may be questioned by an election petition on the ground, -*

(a) that such person committed during or in respect of the election proceedings a corrupt practice as defined in Section 28;

(b) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or any other reason was not duly elected by a majority of lawful votes;

(c) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of the petitioner was improperly rejected.

(2) The election of any person as a member of a [Municipality] shall not be questioned, -

(a) on the ground that the name of any person qualified to vote has been omitted from, or the name of any person not qualified to vote has been inserted in the electoral roll or rolls;

[(b)] on the ground of any non-compliance with this Act or any rule, or of any mistake in the forms required thereby, or of any error, irregularity or informality on the part of the officer or officers charged with carrying out this Act or any

rules, unless such non-compliance, mistake, error, irregularity or informality has materially affected the result of the election."

7. From the perusal of the aforesaid provision, it shows that it is for dispute of election of members.□

8. Section 43 of the Act, 1916 pertains to election of President. Same is being quoted hereinbelow:

"43. Election of President. - (1)
The President of the municipality shall be elected on the basis of adult suffrage by the electors in the municipal area.

(2) An outgoing President shall be eligible for re-election.

(3) The provision of this Act and the rules framed thereunder in relation to election (including disputes relating to election and electoral offences) of a member shall, mutatis mutandis, apply in relation to election of the President.

(4) If in a general election a person is elected both as member and President of the municipality or being a member of the municipality is elected President thereof in any bye-election, he shall, except as provided in Section 49, cease to be a member from the date of his election as President.] "

9. From the perusal of Section 43(3) of the Act, 1916, it again shows that Act and the rules framed thereunder in relation to election including disputes relating to election and electoral offences of a member shall, mutatis mutandis, apply in relation to election of the President, meaning thereby that provision of Section 19 of the Act, 1916, so far as it pertains to election dispute shall also be applicable in the election dispute of President.

10. Therefore, in light of Section 19□ and 43 of the Act, 1916, this Court holds that provision of Section 19, so far as it relates to election dispute shall also be applicable for the□ dispute of□ election and electoral offences of President. Therefore, I found no illegality or infirmity in the impugned order dated 16.07.2024.

11. Petition lacks merit and is hereby **dismissed.**

12. No order as to costs.

(2024) 9 ILRA 405
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2024

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482 No. 651 of 2019

Maan Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Mohammad Zakir, Nanhe Lal Tripathi

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

Criminal Law - Criminal Procedure Code, 1973 – Section 482 - Indian Procedure Code, 1860-Section 498 A- Quashing of Proceedings – Complaint under Sections 498A, 323, 504, 506 IPC, and 3/4 Dowry Prohibition Act – Marriage of Applicant No. 1 and Opposite Party No. 2 declared null and void – Applicability of Section 498A IPC and Dowry Prohibition Act – No demand or agreement for dowry – Allegations of harassment and torture vague and general – Proceedings under Section 498A IPC, 3/4 Dowry Prohibition Act, and Sections 323, 504, and 506 IPC not maintainable – proceedings quashed.

Application allowed. (E-9)**List of Cases cited:**

1. Application U/s 482 No. 38288 of 2023 (Akhilesh Keshari & ors.Vs St. of U.P. & anr.)
2. Shivcharan Lal Verma Vs St. of M.P. (2007) 15 SCC 369
3. P. Shivakumar & ors.Vs St. Criminal Appeal Nos. 1404-1405 of 2012

(Delivered by Hon'ble Anish Kumar
Gupta, J.)

1. Heard Sri Mohammad Zakir and Sri Nanhe Lal Tripathi, learned counsel for the applicants, Sri Anand Kumar Singh, learned counsel for the opposite party no. 2 and Ms. Harshita, learned AGA for the State.

2. This application under Section 482 Cr.P.C. has been filed to quash the entire proceeding of Complaint Case No. 4827 of 2016 (Savita Devi Vs. Maan Singh and others) under section 498A, 323, 504, 506 IPC and 3/4 D.P. Act, Police Station Sarai Akil, District Kaushambi pending in the Court of C.J.M. Kaushambi.

3. The brief facts of the case are that the instant complaint case has been filed by the opposite party no. 2 alleging therein that the marriage of applicant no. 1 with the opposite party no. 2 was solemnized on 27.04.2012 and since after the marriage she was discharging her matrimonial obligations up to four years without any dispute. It is further alleged that the applicant no. 1 was already married prior to the marriage of the opposite party no. 2 with the applicant and out of that wedlock there was a child born which is applicant no. 3 herein. It is alleged in the complaint that after four years of marriage the

applicant herein started harassing the opposite party no. 2 for demand of dowry and the applicants were not happy with the gifts and dowry given by the father of the opposite party no. 2. When the aforesaid was intimated to the father by the opposite party no. 2 he came and there was a settlement and they continue to live together. Subsequently, it has been alleged that on 17.10.2016 all the opposite parties forcibly taken her in a car and dropped her at village Pure-Ghasiram and told that unless she brings Rs. Two Lacs and a car they will not take her back. It is further alleged that the intimation of such incident was given to the police, when no action was taken the instant complaint case was filed by opposite party no. 2 under section 498A, 323, 504, 506 IPC and 3/4 D.P. Act. Thereafter, the statements of witnesses were recorded under section 200 and 202 Cr.P.C. In her statement recorded under section 200 Cr.P.C. the opposite party no. 2 has alleged that the applicant no. 2 is the first wife of the applicant no. 1 and she was residing with her in the same house. However, it has been stated that at the time of marriage the applicant no. 1 had misrepresented that his first wife had died. It is further stated that she did not raise any objection and did not file any case for such misrepresentation as she thought that she and the applicant no. 2 will live together as sisters and wives of applicant no. 1. The aforesaid averments have also been supported by the witnesses Dharmraj and Nirmala Devi and both of them had categorically admitted that till four years from the date of marriage i.e. 27.04.2012, there was no dispute and there was no demand of any sought by the applicants herein, however the demands have been raised by the applicants after four years of marriage. Admittedly as per the complaint, the date of marriage is 27.04.2012 and the

date when opposite party no. 2 was finally thrown out from the house is 17.09.2016 thereby till the end of the April, 2016 there was no dispute of any kind with regard to the dowry and there was no harassment for dowry. Subsequent thereto the allegations of demand of dowry has been made.

4. Learned counsel for the applicants has submitted that since from the facts, admittedly the opposite party no. 2 is the second wife of the applicant herein, therefore, she is not competent to maintain the proceedings against the applicant for the offences under sections 498A IPC. So far as the allegations of demand of dowry and torture is concerned i.e. from the facts as alleged there was no demand of dowry or harassment up to four years of marriage and subsequent thereto the allegations have been made with regard to demand of dowry. Since the marriage of opposite party no. 2 with the applicant no. 1 was admittedly a nullity, therefore, neither the offence under section 498A IPC nor the offence u/s 3/4 Dowry Prohibition Act would be attracted in the instant case. Even if the demand has been made, the demand would not be said to have been made in connection with the marriage as the marriage itself is a nullity, therefore, learned counsel for the applicant seeks quashing of the entire proceedings relying upon the judgment of co-ordinate Bench of this Court vide order dated 28.03.2024 passed in **Application U/s 482 No. 38288 of 2023 (Akhilesh Keshari and others Vs. State of U.P. and Another)**.

5. Per contra learned counsel for the opposite party no. 2 submits that in her statement under section 200 Cr.P.C. the opposite party no. 2 has categorically stated that the applicant no. 1 had misrepresented her and on such misrepresentation she has

solemnized the marriage with applicant no. 1 and now her life has been spoiled by the applicant no. 1 and as per the allegations as made in the complaint she has been beaten up by all the applicants, therefore, the proceedings against the applicants so far as the other offences under sections 323, 504, 506 IPC are maintainable against the applicants and cannot be quashed.

6. Learned AGA also submits that from the facts of the case since it was a second marriage the offences u/s 498A IPC as well as from the allegations as made the provisions of Dowry Prohibition Act would not be attracted in the instant case.

7. Having heard the rival submissions as made by learned counsel for the parties, this Court has carefully gone through from the record of the case, from the facts as have been stated herein above it is crystal clear that it was the second marriage of opposite party no. 2 and there was no dispute between the applicant no. 1 and opposite party no. 2 till four years of such marriage and the opposite party no. 2 was fully aware about her second marriage which is apparent from her own statement recorded u/s 200 Cr.P.C. that despite knowing the fact that it is her second marriage she continued to live without raising any objection from such marriage. In view thereof since the marriage of applicant no. 1 and the opposite party no. 2 was a nullity the provisions of Section 498A IPC would not be attracted, the aforesaid view is fully supported from the law laid down by the Hon'ble Apex Court in ***Shivcharan Lal Verma v. State of M.P (2007) 15 SCC 369***. The view taken in Shivcharan Lal Verma, has also reiterated by the Apex Court in ***P. Shivakumar and others Vs. State Criminal Appeal Nos. 1404-1405 of 2012. In Shivcharan Lal***

Verma (supra) the Apex Court has held as under :-

"This matter had not been taken up for hearing for this length of time as the judgment of this Court holding Section 306 of the I.P.C. to be unconstitutional, was under re-consideration by the constitution bench. The constitution bench finally disposed of the matter in criminal case No. 274 of 1984 and batch and set aside the earlier judgment of this Court and held that Section 306 is constitutionally valid. In view of the aforesaid constitution bench decision, two questions arise for consideration in this appeal. One, whether the prosecution under Section 498A can at all be attracted since the marriage with Mohini itself was null and void, the same having been performed during the lifetime of Kalindi. Second, whether the conviction under Section 306 could at all be sustained in the absence of any positive material to hold that Mohini committed suicide because of any positive act on the part of either Shiv Charan or Kalindi.

There may be considerable force in the argument of Mr. Khanduja, learned counsel for the appellant so far as conviction under Section 498A is concerned, inasmuch as the alleged marriage with Mohini during the subsistence of valid marriage with Kalindi is null and void. We, therefore, set aside the conviction and sentence under Section 498A of the I.P.C. But so far as the conviction under Section 306 is concerned, the evidence of the three witnesses already referred to, make it absolutely clear that it is on account of torture by both Kalindi and Shiv Charan that Mohini committed suicide inside the house of Shiv Charan in another room. The learned sessions judge as well as the High Court have appreciated the evidence of the aforesaid three

witnesses and on going through the evidence of these three witnesses, we do not find any error committed by the courts below either in the matter of appreciation or in their approach relating to the evidence in question. We, therefore, do not find any infirmity with the conviction of the appellants under Section 306 of the I.P.C. So far as the sentence is concerned, they have been sentenced to undergo rigorous imprisonment for seven years but having regard to the facts and circumstances of this case, we reduce the sentence to five years. This appeal is accordingly disposed of. Bail bonds of the appellants would stand cancelled, and they must surrender to undergo the remaining period of sentence."

8. And in **P. Shivakumar (supra)** the Apex Court has held as under:-

"Undisputedly, the marriage between the appellant No.1 and PW-1 has been found to be null and void. As such, the conviction under Section 498-A I.P.C. would not be sustainable in view of the judgment of this Court in the case Shivcharan Lal Verma's case supra. So far as the conviction under Sections 3 and 4 of the Dowry Prohibition Act is concerned, the learned trial judge, by elaborate reasoning, arrived at after appreciation of evidence, has found that the prosecution has failed to prove the case beyond a reasonable doubt. In an appeal/revision, the High Court could have set aside the order of acquittal only if the findings as recorded by the trial court were perverse or impossible."

9. In view of the categorical finding recorded by the Hon'ble Apex Court the proceedings under section 498A IPC by the second wife is not maintainable. So far as the proceedings under section 3/4 D.P. Act

is concerned, it would be relevant to take note of the provisions of section 2 of the Dowry Prohibition Act which reads as follows:-

"2. Definition of "dowry".- *In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly-*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before [or any time after the marriage][in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (shariat) applies."

10. From the plain reading of the aforesaid provision the dowry means any property or valuable security given or **"agreed to be given"** in connection with the marriage of the parties.

11. However, in the entire complaint the allegations of demand of dowry which have been made that has neither given nor agreed to have been given, therefore, the considered opinion of this Court the provision of section 3/4 Dowry Prohibition Act would also not attract in the instant case. So far as the allegations of harassment and torture are there with regard to the same it would be relevant that there is no specific allegation, and only general and vague allegations have been made by opposite party no. 2 without there being any specific issue, who actually and when had assaulted the opposite party no. 2, therefore, in the considered opinion of the Court offence u/s 323, 504, 506 IPC are also not attracted in the instant case.

12. In view thereof the instant application is **allowed** and the entire proceeding of the instant case are hereby quashed.

(2024) 9 ILRA 409
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 No. 1488 of 2020

Sanjeev Chaddha ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Avanish Kumar Shukla, Mithilesh Kumar Shukla

Counsel for the Opposite Parties:

Dinesh Kumar Singh, G.A.

Criminal Law - Criminal Procedure Code, 1973 - Section 482 - The Indian Penal Code, 1860 - Section - 406 - Application u/s 482 - for quashing of impugned Charge-sheet as well as summoning order - FIR - complainant alleged that his elder brother has committed criminal breach of trust that he has not returned Rs. 2.20 Lakh given him on different dates - court finds that, neither there was an 'entrustment' nor any proof of 'dishonestly misappropriated' nor there was any evidence regarding violation of any legal contract and none of ingredient of offence of criminal breach of trust is made out - therefore, the impugned criminal proceeding appears to be initiated by the complainant only to put pressure on his elder brother to negotiate since there is a Will wherein the complainant is not a beneficiary - held, it is a fit case to invoke inherent jurisdiction where criminal proceedings was initiated only for purpose of wrecking vengeance - hence - entire proceedings arising out of charge-sheet, as well as impugned summoning

order are quashed - complainant is directed to pay Rs. 25,000/- as cost of litigation - directions issued, accordingly - application is allowed - with a remark that we always cherish sacrifice of the 'Bharat', younger brother of the Bhagwan Shri Ram but the complainant for his conduct towards his elder brother could be termed as a 'Kalyugi Bharat' with a remark -(Para - 16, 17, 18, 19, 20)

Application Allowed. (E-11)

List of Cases cited:

1. St. of Har.Vs Bhajan Lal (1992 SU.P.p (1) SCC 335,
2. Deepak Gaba & ors.Vs St. of U.P. & anr.(2023 vol. 3 SCC 423),

(Delivered by Hon'ble Saurabh Shyam Shamsbery, J.)

1. Heard Sri Mithilesh Kumar Shukla, learned counsel for applicant and Sri Rajiv Chaddha (complainant in person) and Sri Rakesh Kumar Mishra, learned A.G.A. for State.

2. Applicant has approached this Court to quash a charge-sheet dated 28.01.2019 under Section 406 I.P.C, Police Station- Kidwai Nagar, District- Kanpur Nagar (arising out of Case Crime No.344 of 2017), cognizance as well as summoning order dated 08.02.2019 passed in Criminal Case No. 2330 of 2019, pending before the Court of A.C.M.M, Court No.-7, Kanpur Nagar.

3. Facts of present case are unfortunate, that two real brothers are at loggerheads and their relation became so inimical that after death of their father, they are now entangled in present criminal proceeding. The complainant, an Advocate, has alleged that applicant, his elder brother, has committed offence of criminal breach

of trust that he has not returned Rs. 2.20 lakh given to him on different dates for his business, but despite earlier repeated assurance of returning it, he after death of their father, refused to return it.

4. The complainant has also alleged that on basis of an alleged Will, applicant has not only opened a joint account with his father but after his death, he withdrew money without his consent. An FIR was lodged by the complainant against his elder brother i.e. applicant for above referred offence on 12.11.2017, wherein after investigation, a charge-sheet was filed on 28.01.2019, for an offence under Section 406 I.P.C., only for allegation that applicant has not returned Rs.2.20 lakh. The other allegations were not found to be true. In this regard, 'brief facts of case' as mentioned in charge-sheet at its serial No. 16, being relevant are reproduced hereinafter :-

“ महोदय निवेदन है कि मुकदमा उपरोक्त वादी श्री राजीव चट्टा की तहरीर के आधार पर पंजीकृत होकर विवेचना उ०नि० श्री प्रदीप कुमार मौर्या को सुपुर्द हुई उनके माघ मेला ड्युटी चले जाने के उपरान्त विवेचना उ०नि० श्री विशेष कुमार को सुपुर्द हुई उनका स्थानान्तरण हो जाने के बाद यह विवेचना मुझ उ०नि० को प्राप्त हुई अब तक की तमामी विवेचना बयान वादी, बयानात गवाहान, निरीक्षण घटनास्थल आदि में अभियुक्त संजीव चट्टा पुत्र स्व० वीरेन्द्र नारायण चट्टा नि० १९८ एन ब्लाक किदवई नगर कानपुर नगर द्वारा अपने भाई वादी मुकदमा श्री राजीव चट्टा से दो लाख बीस हजार रुपया कारोबार के सिलसिले में लिया था और यह कहा था शीघ्र ही वापस कर देंगे लेकिन अभियुक्त द्वारा अमानत में खयानत करके बड़े भाई का रूपया हड़प लिया है जिसका यह कार्य धारा ४०६ भादवि की हद को पहुंचता है। अभियुक्त संजीव चट्टा उपरोक्त का चालान जरिये आरोप पत्र सं० 19/2019 दिनांक 28.01.2019 को माननीय न्यायालय किया जा रहा है अतः महोदय से अनुरोध है कि सबूत तलब कर दण्डित करने कि कृपा करें।”

(Emphasis Supplied)

5. On above referred charge-sheet, cognizance of offence was taken and a case

was registered on 08.02.2019. On same day, summons were issued to present applicant. The order dated 08.02.2019 is reproduced hereinafter :-

“08-02-2019- आज थाना किदवाई नगर से मु० अ० सं० 344/2017 में आरोप पत्र मय केस डायरी के प्रस्तुत।

एफ० आई० आर० केस डायरी आरोप पत्र का अवलोकन किया। अभियुक्त संजीव चड्ढा के विरुद्ध धारा 406 आई० पी० सी० का केस बनना पाया जाना है। संज्ञान लेने हेतु आधार पर्याप्त है। संज्ञान लिया जाना है। मुकदमा दर्ज रजिस्टर हो। विवेचक द्वारा अभियुक्त को न्यायालय में उपस्थित हेतु नोटिस तामीला कराया गया है। अभियुक्त जरिये बी० डब्लू० दिनांक- 05-03-2019 को तलब हो।”

(Emphasis Supplied)

6. The applicant has challenged the above referred charge-sheet, cognizance as well as summoning order in present application filed under Section 482 Cr.P.C., which is pending for last four years. During proceedings of present case, at a later stage, since both parties, being real brothers, have shown readiness to negotiate following order dated 21.02.2024 was passed :-

“*Heard Sri Mithlesh Kumar Shukla, learned counsel for the applicant, Sri Rajiv Chadda, opposite party no.2, in person, who is an Advocate of this Court and Sri Vijay Kumar assisted by Sri Ajay Kumar Singh, learned AGA for the State.*

This matter was fixed for hearing in chamber today.

Applicant and opposite party no.2 are real brothers and they are present in Court today. On the request of both the parties, matter was heard today.

Some dispute with regard to the Will executed by their father arose between them. In the negotiation held between the parties through learned counsel for the parties assisted by learned AGA, they

arrived at an amicable settlement of the dispute to be reduced in writing and to be filed before this Court by 02.04.2024. It is also agreed upon between the parties that the applicant shall also consult his sister Mrs. Priti Kapoor, who is presently residing in Agra. The applicant and opposite party no.2 shall extend their No Objection Certificates in continuation to the arrangement of the house situated at Preetam Nagar, Prayagraj as well as Kidwai Nagar, Kanpur Nagar, so that names of the applicant and opposite party no.2 may be mutated in the records of the respective Municipal Corporations.

So far as the payment of amount as mentioned in the Will executed by the father of the parties is concerned, as per negotiation, the settled amount is Rs.4.95 lakhs for which a provision is made in paragraph 5 of the Will dated 26.5.2016 by Late V.N. Chadda, former ADJ plus Rs.5.00 lakhs, as settlement amount, total of which comes to Rs.9.95 lakhs. The parties have agreed that Rs.2.20 lakhs has to be deducted from the total amount, which is already accepted by opposite party no.2. Now, opposite party no.2 is entitled for Rs.7.75 lakhs out of which, Rs.4.95 lakhs is lying in the Bank which, he would receive after completing necessary formalities with the Bank. Rest amount of Rs.2.80 lakhs shall be paid by the applicant through a Demand Draft before this Court within 30 days from today through his counsel, Sri M K Shukla.

So far as transaction of shares, a SBBL gun and a Rifle of the father of the applicant and opposite party no.2 is concerned, that will be settled between them to which, opposite party no.2 is entitled to receive. The applicant and the sister of the parties shall also give NOCs to opposite party no.2 to get his name entered

according to the provisions of the Arms Act.

A Wagon-R Car, bearing Registration No.UP 78 CK 8403, shall stand transferred according to the arrangement made in the Will and opposite party no.2 shall provide NOC in favour of the applicant.

Put up this case on 02.04.2024 at 3:30 pm in Chamber.

Interim order, if any, is extended till the next date of listing.

In view of the aforesaid proposed agreement, sister of the applicant and opposite party no.2, Mrs Priti Kapoor, may make herself present before this Court on the next date, if so desired.

However, it is made clear that the terms and conditions mentioned above, are drawn on the basis of the negotiations made in the presence of the applicant and opposite party no.2 as well as their respective counsels. Therefore, in case of any failure for agreement upon the aforesaid conditions, no right of any party shall be prejudiced."

7. Thereafter, parties were granted time to finalise negotiation and, therefore, present matter was adjourned on various dates i.e. 04.07.2024, 02.04.2024, 09.04.2024, 09.05.2024, 22.05.2024 and lastly on 20.08.2024, however, when parties have not able to reach to any mutual agreement, the Court decided to hear it finally. During final hearing also, the Court tried to mediate, however, unfortunately, adamant approach of parties, particularly of the complainant, no final agreement could arrive and matter was heard finally.

8. Sri Mithilesh Kumar Shukla, learned counsel for applicant has submitted that charge-sheet was filed only for offence under Section 406 I.P.C. on an allegation

that complainant has paid Rs.2.20 lakh on different dates to applicant i.e. his elder brother for business purpose, however, despite assurance same was not returned. All other allegations about withdrawing money from a joint account by the applicant by way of cheating and of a forged Will were found false.

9. Learned counsel also submitted that during negotiations, the applicant has returned the said amount (Rs.2.20 lakh) to the complainant, which has not been seriously disputed by the complainant appearing in person. Learned counsel by referring the contents of Section 406 I.P.C. submitted that there was no entrustment, rather if allegations are considered to be true, it would be a commercial dispute, i.e. a civil dispute. The complainant has pointed it with colours of criminality.

10. The complainant has not stated during investigation that money was given as an entrustment. There was no written agreement between parties. Learned counsel also submitted that summoning order as referred has not assigned any reasons that there are sufficient grounds to proceed.

11. The above submissions are opposed by Sri Rajiv Chaddha, the complainant appearing in person. He submitted that applicant has committed cheating also. The alleged Will is a document of fraud, however, failed to convince the Court on basis of above referred brief facts of charge-sheet as well as evidence collected during investigation. The only allegation which was found sufficient to file charge-sheet was that amount of Rs.2.20 lakh was not returned to complainant.

12. The allegation of cheating was not even found sufficient to file charge-sheet. The complainant has also not filed any civil

litigation to challenge the Will. The argument of unfair investigation could not be taken in present application and for that there may be an alternative remedy.

13. In order to appreciate the rival submission, I have also carefully perused the case diary, provided by the complainant that applicant has provided relevant documents such as copy of the Will and details of opening of joint account. The Investigating Officer has also considered the report submitted by concerned Bank that it was a joint account duly signed by applicant and his father and operation of account was 'either of survival', therefore, there is no error committed during investigation for non-filing the charge-sheet for offence of cheating.

14. Sri Rakesh Kumar Mishra, learned A.G.A. for State has supported the charge-sheet but has not denied the ingredients of Section 406 I.P.C., in given facts may not be made out.

15. In aforesaid circumstances, the Court proceeds to consider whether on basis of material available, offence of criminal breach of trust would be made out or not. In this regard, following paragraphs of a judgment passed by Supreme Court in **Deepak Gaba and others Vs. State of U.P. and another (2023) 3 SCC 423**, being relevant are reproduced hereinafter :-

"15. For Section 405IPC to be attracted, the following have to be established:

(a) the accused was entrusted with property, or entrusted with dominion over property;

(b) the accused had dishonestly misappropriated or converted to their own use that property, or dishonestly used or

disposed of that property or wilfully suffer any other person to do so; and

(c) such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

16. Thus, criminal breach of trust would, inter alia, mean using or disposing of the property by a person who is entrusted with or otherwise has dominion. Such an act must not only be done dishonestly, but also in violation of any direction of law or any contract express or implied relating to carrying out the trust. [Sudhir Shantilal Mehta v. CBI, (2009) 8 SCC 1 : (2009) 3 SCC (Cri) 646].

17. However, in the instant case, materials on record fail to satisfy the ingredients of Section 405IPC. The complaint does not directly refer to the ingredients of Section 405IPC and does not state how and in what manner, on facts, the requirements are satisfied. Pre-summoning evidence is also lacking and suffers on this account. On these aspects, the summoning order is equally quiet, albeit, it states that "a forged demand of Rs 6,37,252.16p had been raised by JIPL, which demand is not due in terms of statements by Shubhankar P. Tomar and Sakshi Tilak Chand". A mere wrong demand or claim would not meet the conditions specified by Section 405IPC in the absence of evidence to establish entrustment, dishonest misappropriation, conversion, use or disposal, which action should be in violation of any direction of law, or legal contract touching the discharge of trust. Hence, even if Respondent 2 complainant is of the opinion that the monetary demand or claim is incorrect and not payable, given the failure

to prove the requirements of Section 405IPC, an offence under the same section is not constituted. In the absence of factual allegations which satisfy the ingredients of the offence under Section 405IPC, a mere dispute on monetary demand of Rs 6,37,252.16p, does not attract criminal prosecution under Section 406IPC.

16. As referred above, for purpose of Section 406 Cr.P.C., the requirement for commission of an offence of criminal breach of trust is that there must be entrustment with property, which was dishonestly misappropriate or converted to his own use and it must be in violation of any direction of law or any legal contract express or implied, however, in present case, neither there was an 'entrustment' in such sense nor there was any proof that it was 'dishonestly misappropriate' nor there was any evidence that such act was in violation of any legal contract express or implied, therefore, on basis of material, none of ingredient of offence of criminal breach of trust is made out.

17. The Court at this stage, also takes note that alleged amount has already been returned during pendency of this application, when parties were trying to negotiate. The proceedings appears to be initiated by the complainant only to put pressure on his elder brother to negotiate since there is a Will wherein the complainant is not a beneficiary.

18. The said Will has been alleged to be a creature of fraud but no civil proceeding has been still initiated by complainant. The facts of present case are not only squarely covered by facts as well as on law as observed in **Deepak Gaba (supra)** but it is a fit case to invoke inherent jurisdiction in terms of paragraph 102(7) of **State of Haryana v.**

Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 that present criminal proceedings was initiated by the complainant only for purpose of wrecking vengeance. For reference para 102(7) of Bhajan Lal (supra) is reproduced hereinafter:

"(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. In the aforesaid circumstances, not only the ingredients of Section 406 I.P.C. are not made out but proceedings are also creature of malafides and were initiated only to harass the applicant by giving cloak of a criminal case to a dispute which was essentially of a civil nature, therefore, entire proceedings arising out of charge-sheet dated 28.01.2019 under Section 406 I.P.C., Police Station- Kidwai Nagar, District- Kanpur Nagar (arising out of Case Crime No. 344 of 2017) as well as cognizance and summoning order dated 08.02.2019 passed by the Court of A.C.M.M., Court No.-7, Kanpur Nagar are hereby quashed and the complainant is directed to pay Rs.25,000/- as a cost of litigation to the applicant within four weeks and a proof of it be placed on record of this case.

20. The Court deems fit to conclude this judgment with a parting remark that we always cherish sacrifice of the Bharat (भारत), younger brother of the Bhagwan Shri Ram but the complainant for his conduct towards his elder brother could be termed as a 'Kalyugi Bharat (कल्युगी भारत)'.

21. Accordingly, Application is **allowed.**

(2024) 9 ILRA 415
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.09.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application U/S 482 No. 7720 of 2024

Piyush Singh @ Bobby Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:

Shailendra Singh, Ankit Tiwari, Neelam Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - The Indian Evidence Act - Section 103- Plea of Alibi -Criminal Procedure Code, 1973 – Section 482 –

Criminal Proceedings — Quashing of Proceedings —plea of alibi is a question of fact- which must be proved during trial with clear and cogent evidence-the plea of alibi, if raised, should be considered only after the prosecution has successfully proven its case-the burden of proof rests on the accused to establish an alibi with certainty- this court in exercise of its jurisdiction should not meticulously examine the evidence filed along with charge-sheet by the Investigating Officer- same is an issue relating to appreciation of evidence- the power exercised by this Court is discretionary in nature.

Application dismissed. (E-9)

List of Cases cited:

1. Binay Kumar Singh Vs St. of Bihar [(1997) 1 SCC 283]
2. Rajendra Singh Vs St. of U.P., (2007) 7 SCC 378
3. Dudh Nath Pandey Vs St. of U.P. [(1981) 2 SCC 166 : 1981 SCC (Cri) 379]

4. St. of Mah. Vs Narsingrao Gangaram PIM.P.le [(1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]

5. Gurcharan Singh Vs St. of Pun. [AIR 1956 SC 460 : 1956 Cri LJ 827]

6. Chandrika Prasad Singh Vs St. of Bihar [(1972) 4 SCC 140 : AIR 1972 SC 109]

7. St. of Har. Vs Sher Singh [(1981) 2 SCC 300 : 1981 SCC (Cri) 421 : AIR 1981 SC 1021]

8. Shaikh Sattar Vs St. of Mah. [(2010) 8 SCC 430]

9. Gurpreet Singh Vs St. of Har. [(2002) 8 SCC 18 : 2003 SCC (Cri) 186]

10. Mohd. Allauddin Khan Vs The St. of Bihar & ors.(2019) 6 SCC 107)

11. R. P. Kapur Vs St. of Pun. AIR 1960 SC 866

12. St. of Har. & ors.Vs Ch. Bhajan Lal & ors.1992 Supp. (1) SCC 355

13. St. of Bihar & anr. Vs P. P. Sharma & anr.; 1992 Supp (1) SCC 222

14. Zandu Pharmaceuticals Works Ltd. & Ors. Vs Mohammad Shariful Haque & anr.; 2005 (1) SCC 122

15. M. N. Ojha Vs Alok Kumar Srivastava; 2009 (9) SCC 682

16. Rajeev Kourav Vs Baisahab & ors.(2020) 3 SCC 317

17. St. of U.P. Vs Akhil Sharda & ors.2022 SCC OnLine SC

18. Salib @ Shalu @ Salim Vs St. of U.P. & ors.]

19. Harshendra Kumar D. Vs Rebatilata Koley & ors., (2011) 3 SCC 351

20. G. N. Mishra & anr.Vs Smt. Divya Awasthi & anr., MANU/UP/1879/2012

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard counsel for the applicant and Sri Nirmal Kumar Pandey, learned A.G.A. for the State.

2. By means of the present application, the applicant has assailed the pending criminal proceedings against him arising out of Case Crime No. 89/2023, under Section 323, 364, 143, 147, 341, 342, 427 IPC, Police Station Hasanganj, District Unnao and summoning order dated 28.06.2023, passed by Additional Chief Judicial Magistrate, Court No. 3, Unnao whereby the applicant has been summoned under Section 323, 147, 143 IPC. The relevant portion of the order dated 28.06.2023 reads as under:-

"पत्रावली प्रस्तुत हुई आज दिनांक 28.06.2023 को तलबशुदा अभियुक्तगण अभय सिंह यादव, आदेश यादव, ललित यादव, जरिये वी०सी०आर० न्यायालय के समक्ष पेश किया गया। विवेचक/ उपनिरीक्षक श्री अरविन्द कुमार सरोज द्वारा उपरोक्त अभियोग में विवेचनोपरान्त पर्याप्त साक्ष्य पाये जाने के फलस्वरूप आरोप-पत्र के साथ अभियोग दैनिकियों तथा विवेचक द्वारा विवेचना के दौरान संकलित पत्र अभियोग दैनिकियों एवं संलग्नक दैनिकियों एवं संलग्नक प्रपत्रों का सम्यक परिशीलन किया गया जिसके आधार पर मु०अ०सं०- 89/2023 अभियुक्तगण अभय सिंह यादव, आदेश यादव, ललित यादव, सतीश के विरुद्ध धारा- 323, 364, 143, 147, 341, 341, 427 भा.दं.सं. तथा अभियुक्तगण हर्षवर्धन सिंह व पियूष सिंह उर्फ बाबी यादव के विरुद्ध धारा- 323, 147, 143 भा.दं.सं में संज्ञान लिये जाने के आधार पर्याप्त हैं।"

3. The applicant has assailed the impugned order on the sole ground that the applicant was not present at the situs/ place of crime, as appears from the submissions advanced by the counsel for the applicant, as also from the averments made in Para 12 and 13 of the affidavit filed in support of the application. The same are extracted hereunder:-

"12. That being a matter of fact the petitioner was not there at point of Offence at Unnao and was there at Lucknow at his Rented Accommodation Near Budheshwar Temple P.S. Para Dist. Lucknow.

13. That the Petitioner has also stated his version before the investigating officer by means of the Clarification Letter and also has handed over a Pen drive Containing the CCTV Footage of him Being at the Residence at Lucknow along with Photographs depicting the same. Copy of the Letter and Photographs are annexed as Annexure No. 6 to this petition."

4. From the aforesaid, it is apparent that the case of the applicant is based on the plea of 'Alibi'.

5. Sri Nirmal Kumar Pandey, learned A.G.A. for the State also stated that the plea of 'Alibi' is a question of fact to be entertained and decided only after evidence of the prosecution takes its evidence to prove the incident, and the participation of the accused as well.

6. The Latin word 'Alibi' means 'elsewhere'. Plea of 'Alibi' is a rule of recognized in Section 11 of the Evidence Act. The plea of Alibi disputes the case of prosecution. Thus plea of 'Alibi' is question of fact. It is settled law that when an accused raises plea of 'Alibi', the burden is on accused to prove the same. A plea of 'Alibi' is a question of fact which is required to be proved by the accused at the stage of trial to show that he/ she was elsewhere and was falsely implicated and the accused is also required to prove the same by adducing appropriate evidence.

7. Under Section 103 of the Evidence Act the burden rests on the accused who

raises the plea of 'Alibi'. Section 103 of the Evidence Act provides:—

"103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

(b) B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it."

8. In **Binay Kumar Singh v. State of Bihar [(1997) 1 SCC 283]**, the Hon'ble Apex Court observed as under:

"23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person;

(i) the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime.

(ii) The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi.

(iii) The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.

(iv) But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute

certainty so as to exclude the possibility of his presence at the place of occurrence.

(v) When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.

*(vi) But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey v. State of U.P. [(1981) 2 SCC 166 : 1981 SCC (Cri) 379]*; *State of Maharashtra v. Narsingrao Gangaram Pimple [(1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]*".*

9. In **Rajendra Singh v. State of U.P., (2007) 7 SCC 378** the Hon'ble Apex Court has held as under:—

"8. That apart, the plea taken by the respondent Kapil Dev Singh in his petition under Section 482 CrPC was that of alibi. Section 103 of the Evidence Act says that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact lie on any particular person.

The second illustration to Section 103 reads as under:

"B wishes the Court to believe that at the time in question, he was elsewhere. He must prove it."

This provision makes it obvious that the burden of establishing the plea of alibi set up by Respondent 2 in the petition filed by him under Section 482 CrPC before the High Court lay squarely upon him. There is hardly any doubt regarding this legal proposition. (See Gurcharan Singh v. State of Punjab [AIR 1956 SC 460 : 1956 Cri LJ 827], Chandrika Prasad Singh v. State of Bihar [(1972) 4 SCC 140 : AIR 1972 SC 109] and State of Haryana v. Sher Singh [(1981) 2 SCC 300 : 1981 SCC (Cri) 421 : AIR 1981 SC 1021].) This could be done by leading evidence in the trial and not by filing some affidavits before the High Court. In such a case the prosecution would have got an opportunity to cross-examine those witnesses and demonstrate that their testimony was not correct. Learned counsel for the appellant has submitted that in fact no affidavits were filed in the High Court but what was filed were copies of two or three affidavits which were given by some persons before the Superintendent of Police, Allahabad. Thus, there was absolutely no legal evidence in support of the plea of alibi of Kapil Dev Singh, which the High Court chose to rely upon and accept for the purpose of quashing the order passed by the learned Sessions Judge.

13. Having considered the submissions made by learned counsel for the parties, we are of the opinion that the statements of the witnesses under Section 161 CrPC being wholly inadmissible in evidence could not at all be taken into consideration. The High Court relied upon wholly inadmissible evidence to set aside the order passed by the learned Sessions

Judge. That apart, no finding on a plea of alibi can be recorded by the High Court for the first time in a petition under Section 482 CrPC. As mentioned above, the burden to prove the plea of alibi lay upon the accused which he could do by leading evidence in the trial and not by filing some affidavits or statements purported to have been recorded under Section 161 CrPC. The whole procedure adopted by the High Court is clearly illegal and cannot be sustained."

10. In **Shaikh Sattar v. State of Maharashtra [(2010) 8 SCC 430]**, the Hon'ble Apex court has observed as under:-

"35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in Gurpreet Singh v. State of Haryana [(2002) 8 SCC 18 : 2003 SCC (Cri) 186] as follows : (SCC p. 27, para 20)

"20. ... This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact."

13. It is the prosecution to prove its case by adducing evidence. The petitioner is at liberty to take the plea of alibi as his defence and to establish the same with positive evidence. Before prosecution adduce evidence to establish the incident, and to prove participation of the accused, there is no scope for entertaining a defence plea of alibi."

11. From the observations made by the Hon'ble Apex Court in the judgments referred above, what appears is as under:

(i) The prosecution has to prove its case including the role of the accused in that incident.

(ii) Only when prosecution succeeds in discharging the burden by establishing its case including participation of the accused in the crime/incident, the plea of 'Alibi' put up by the accused needs to be considered.

(iii) The burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime.

(iv) The burden would not be lessened by the mere fact that the accused has adopted the defence of 'Alibi'.

(v) The plea of 'Alibi' of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.

(v) It is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.

(vii) When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-

evidence to the effect that he was elsewhere when the occurrence happened.

(viii) If the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy.

(ix) Strict proof is required for establishing the plea of 'Alibi'. [vide: **Dudh Nath Pandey v. State of U.P. (1981) 2 SCC 166 : 1981 SCC (Cri) 379; State of Maharashtra v. Narsingrao Gangaram Pimple (1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]**"].

12. Section 482 of CrPC (Now repealed) and Section 528 of BNSS, enforced w.e.f. 01.07.2024, are pari mareria. This Court in exercise of jurisdiction under the said provisions should not meticulously examine the evidence filed along with charge-sheet by the Investigating Officer, as the same is an issue relating to appreciation of evidence and the same can be gone into by the concerned court during trial when the entire evidence is adduced by the parties. The power exercised by this Court is discretionary in nature. This Court in exercise of its inherent powers cannot go into the disputed question of facts. In exercise of power under the said provisions, this court is required to consider the case set up by the prosecution/complainant for coming to the conclusion as to whether the criminal proceedings are required to be quashed at the initial stage. The accused person during trial is required to place and prove/ establish its defence in

accordance with the law of evidence. The defence of the accused is required to be taken note of in the trial by the trial Court. At this stage, a mini trial is not permissible. At the stage of framing of charge as also while exercising power under the said provision, the material/ evidence collected during investigation by the Investigating Officer and in the case of complaint the documents and evidence produced by the complainant before the court concerned can only be considered. [See: **Mohd. Allauddin Khan Vs. The State of Bihar And Others (2019) 6 SCC 107**; **R. P. Kapur Vs. State of Punjab AIR 1960 SC 866**; **State of Haryana And Others Vs. Ch. Bhajan Lal And Others 1992 Supp. (1) SCC 355**; **State of Bihar & Anr. Versus P. P. Sharma & Anr.; 1992 Supp (1) SCC 222**; **Zandu Pharmaceuticals Works Ltd. & Ors. Versus Mohammad Shariful Haque & Anr.; 2005 (1) SCC 122**; **M. N. Ojha Vs. Alok Kumar Srivastava; 2009 (9) SCC 682**; **Rajeev Kourav Vs. Baisahab & Others (2020) 3 SCC 317**; **State of U.P. Vs. Akhil Sharda & Others 2022 SCC OnLine SC**; **Salib alias Shalu alias Salim Vs. State of U.P. and Others**]. The defence which is irrefutable/ indisputable/ undeniable/ unquestionable/ irrefragable/ beyond suspicion may be considered in exceptional circumstances in the peculiar facts of a given case by this Court while exercising its power/ jurisdiction under the said provisions. [See: **Harshendra Kumar D. Vs. Rebatilata Koley and Others, (2011) 3 SCC 351**; **G. N. Mishra And Another Vs. Smt. Divya Awasthi And Another, MANU/UP/1879/2012**].

13. Learned counsel for the applicant has not shown any material to establish that the evidence, which to the view of this Court is not beyond suspicion, relied upon

in this application was verified by the Investigating Officer during investigation. In this view of the matter, the same cannot be considered at this stage.

14. Having considered the aforesaid facts as also the observations made by the Hon'ble Apex Court in the judgments, referred above, this Court is of the view that no interference is required in this case on the basis of plea of 'Alibi' taken by the applicant.

15. Accordingly, the present application is **dismissed**. No order as to costs.

16. The Court records the valuable assistance given by Ms. Urmish Shankar, Research Associate, attached with me in drafting this judgment and finding out case laws applicable in the present case.

(2024) 9 ILRA 420
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Application U/S 482 No. 8349 of 2024

Ajay Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Pradeep Kumar Srivastava, Sanjay Misra

Counsel for the Opposite Parties:

G.A.

Criminal Law - Criminal Procedure Code, 1973 – Section 482 – Quashing of Summoning Order –Challenge to summoning

order under Sections 323, 504 & 506 IPC – Grounds for challenge – Non-summoning of all named persons – Section 204(2) Cr.P.C. – List of witnesses not provided before issuance of summons – Discretion of court to summon persons involved in the offence – No prejudice caused by non-compliance with Section 204(2) – Provision of Section 204(2) Cr.P.C. held to be directory in nature – Mere non-compliance does not vitiate proceedings unless prejudice is shown.

Application dismissed. (E-9)

List of Cases cited:

1. Rosy & anr. Vs St. of Kerela, reported in 2000 (2) SCC 230
2. Dilip Kumar Basu Vs St. of W.B. & ors. reported in 2015 (8) SCC 744
3. Bachanan Devi & anr. Vs Nagar Nigam, Gorakhpur & anr. reported in 2008 (12) SCC 372
4. Moti Lal & ors. Vs St. of U.P. & anr.

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

1. Heard.

2. Under challenge is the order dated 09.07.2024 passed by learned Additional Sessions Judge / Special Judge, P.C. Act, Lucknow in Criminal Revision No. 10 of 2023 in re: Vidya Sagar and others vs State of U.P. and others, a copy of which is annexure 2 to the application, by which the revision filed by the applicants has been rejected. Also under challenge is the order dated 28.05.2019, a copy of which is annexure 1 to the application, whereby the applicants have been summoned for offences under Sections 323, 504 and 506 I.P.C.

3. Only two grounds which are raised in order to challenge the said orders are (a)

of nine persons who are named in the application under Section 156(3) Cr.P.C. only four persons have been summoned and (b) prior to summoning the provisions of Section 204 (2) Cr.P.C. has not been followed.

4. No other ground has been urged.

5. So far as ground (a) is concerned suffice to states that it is the discretion of court to summon any person who is found to be prima facie involved in an offence. Merely because various persons may have been named in an application filed under Section 156(3) Cr.P.C. it cannot be construed that all persons named in application should be summoned.

6. Thus, the ground (a) is rejected.

7. So far as ground (b) is concerned i.e. the list of witnesses was not indicated which appears in terms of Section 204(2) Cr.P.C. that no summon or warrant shall be issued against the accused under Section 204(1) Cr.P.C. until a list of prosecution witnesses are filed, the said ground may also not detain Court considering the law laid down by this Court at Allahabad in order dated 14.09.2022 passed in APPLICATION U/S 482 No. - 19772 of 2022 in re: **Moti Lal And 2 Others vs State of U.P. and Another** wherein this Court has held as under:

"13. Although, in Section 204 (2) Cr.P.C. the word "shall" is used but it does not mean that whenever there is a word "shall" has been used under any Act in respect of a provision then the provision will be mandatory one.

14. The Apex Court in the case of Bachanan Devi and another Vs. Nagar

Nigam, Gorakhpur and another reported in 2008 (12) SCC 372 observed as:

"14. ".....Mere use of word 'may' or 'shall' is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue."

15. The Apex Court in the case of *Dilip Kumar Basu Vs. State of W.B. and others* reported in 2015 (8) SCC 744 again observed that mere use of word "may" or "shall" is not conclusive and it has to be decided according to the object and scheme of the Act and the contest and back ground against which the word has been used.

16. Therefore, from the above judgments of the Apex Court, it is apparent that on the basis of mere word "may" or "shall", it cannot be conclusively held that "may" means directory and "shall" denotes mandatory provision rather it depends upon various factors, namely, object and scheme of the Act, the context and background against which the word "may" and "shall" has used and purpose and advantageous sought to be achieved by using these words.

17. No doubt, in Section 204(2) Cr.P.C. the word "shall" has been used by legislature but whether word 'shall' used in section 204(2) Cr.P.C. is mandatory or directory it can be decided only after considering the legislative intent coupled

with the fact that whether any prejudice was caused to the accused by its violation. If any prejudice can be caused to accused by violation of section 204(2) Cr.P.C. then the provision is mandatory. □

18. The legislative intent behind the provision of section 204(2) Cr.P.C. is only to provide the list of witnesses to the accused so as he can effectively defend himself during trial and this requirement can very well be fulfilled by the complainant at the time of appearance of accused before the trial court pursuant to the summons issued to him. Therefore, from the legislative intent provision of Section 204(2) Cr.P.C. appears to be non-mandatory.

19. Further, as complainant can provide the list of the witnesses to the accused at the time of his appearance before the trial court, therefore, it can not be said that non-compliance of the provisions of Section 204(2) Cr.P.C. causes prejudice to him as □ after obtaining the list of witnesses from complainant accused can effectively defend himself during trial. Therefore, from this angle too provision of Section 204(2) Cr.P.C. appears to be directory in nature.

20. The Apex Court in the case of □ *Rosy and another Vs. State of Kerela*, reported in 2000 (2) SCC 230 in para-20 deduced certain principles with regard to Sections 200, 202 and 204 Cr.P.C. as under:

"20. Hence, what emerges from the above discussion is :

I. (a) Under Section 200 Magistrate has jurisdiction to take cognizance of an offence on the complaint after examining upon oath the complainant and the witnesses present;

(b) When the complaint is made in writing by a public servant acting or

purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses.

(c) In such case Court may issue process or dismiss the complaint.

II. (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person ac-cused. Such inquiry can be held by him or by the police officer or by other person authorised by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the court of Sessions, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant under Section 204 (2) before issuance of the process,

(c) The irregularity or non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. if he fails to raise such objection at the earliest stage. he is

precluded from raising such objection later."

21. From the perusal of the above judgment of the Apex Court it is undoubtedly clear that mere non-compliance of the provisions of Section 204(2) Cr.P.C. would not vitiate further proceedings unless and until prejudice is caused or likely to be caused by not following the provisions."

8. From the perusal of aforesaid judgement of this Court in the case of **Moti Lal (supra)** which judgement has been passed after considering the judgement of Hon'ble Supreme Court in the case of **Rosy (supra)** it emerges that mere non-compliance of provisions of Section 204(2) Cr.P.C. would not vitiate further proceedings unless and until prejudice is caused in not following the provisions.

9. A perusal of the application filed by the applicants would indicate the applicants have failed to indicate prejudice that has either been caused or likely to be caused by not following the provisions of Section 204(2) Cr.P.C.

10. Further the provisions of Section 204(2) Cr.P.C. are only directory and thus unless prejudice is shown by the applicants simply on the basis of non-compliance of the aforesaid provisions neither proceedings pending against the applicants can be said to be vitiated nor summoning order can be quashed.

11. Keeping in view the aforesaid discussion, no case for interference is made out.

12. Accordingly, the application is **dismissed.**

(2024) 9 ILRA 424
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.09.2024

(Delivered by Hon'ble Anish Kumar
Gupta, J.)

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482 No. 9112 of 2019

Smt. Neha Tripathi @ Neha ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:

Pradeep Kumar Singh, Santosh Kumar Upadhyay

Counsel for the Opposite Parties:

Dhirendra Singh, Dinesh Kumar Maurya, G.A.

Criminal Law - Indian Penal Code, 1860- Section 498-A-Criminal Procedure Code, 1973 – Section 482 – Quashing of proceedings – Scope of Section 498-A Indian Penal Code and The Dowry Prohibition Act, 1961 –

Malicious Prosecution – The applicant is a friend of the coM.P.lainant's husband, -seeks the quashing of the entire proceedings -she was neither the husband nor a relative of the husband of the coM.P.lainant- the applicant was allegedly iM.P.licated solely based on call details- showing conversations with the coM.P.lainant's husband who was a former classmate-only the husband or his relatives can be charged for subjecting a woman to cruelty-no evidence to show that the applicant conspired with the husband of the coM.P.lainant to cause harm or to further any unlawful object, such as facilitating divorce or cruelty- unnecessarily iM.P.licated due to the coM.P.lainant's suspicion about an illicit relationship-which was not supported by any evidence of wrongful conduct.-the prosecution against the applicant is malicious, proceedings quashed.

Application allowed. (E-9)

1. Heard Shri Rishabh Kumar Pandey holding brief of Shri Santosh Kumar Upadhyay, learned counsel for the applicant, Shri Ramesh Chand Yadav, learned counsel for the opposite party no. 3 and Shri Kamlesh Kumar Tripathi, learned A.G.A. for the State.

2. The instant application under section 482 Cr.P.C. has been filed seeking quashing of the entire proceedings of Criminal Case No. 11843 of 2018 (State of U.P. Vs. Naveen Kumar Verma and others) arising out of Case Crime No. 490 of 2017 under section 498-A, 506, 120-B I.P.C. and 3/4 of Dowry Prohibition Act, 1961 (in short, 'the D.P. Act'), Police Station- Civil Lines District Allahabad, pending in the court of Chief Judicial Magistrate, Allahabad as well as charge sheet No. 134 of 2018 dated 30.6.2018.

3. Learned counsel for the applicant submitted that no offence, whatsoever can be said to have been made out against the applicant herein as for the offence under section 498-A I.P.C., the accused must be either husband or relative of the husband of the victim. The applicant herein is neither the husband nor the relative of the husband of the opposite party no. 3, therefore, she is not covered within the provisions of section 498-A I.P.C. and no offence whatsoever can be said to have been made out against the applicant herein. Similarly no offence under section 3/4 of D.P. Act can be said to have been made out against the applicant as she is not a family member or remote family member of the husband of the opposite party no. 3. It is further submitted that though the applicant herein has been implicated in the instant case only on the

basis of some call details according to which husband of the opposite party no. 3 and applicant were having long conversation but the fact is that the husband of the opposite party no. 3 and the applicant were classmate and are good friends and the instant F.I.R. has been lodged only on the basis of suspicion on the part of the opposite party no. 3. No overt act has been alleged against the applicant except that she was in the talking terms with the husband of the opposite party no. 3. Similarly no offence under section 120-B I.P.C. would be made out against the applicant herein.

4. *Per contra*, learned counsel for the opposite party no. 3 submitted that it is only because of the applicant, the matrimonial life of the opposite party no. 3 has been spoiled and she has been ignored by her husband and various allegations have been made against the applicant and the husband of the opposite party no. 3 and a divorce petition has been filed by the husband of the opposite party no. 3 due to intervention by the applicant herein. Therefore, she was abetting the husband of the opposite party no. 3 to divorce the opposite party no. 3 with object to torture and harass her, therefore, she was also involved in view of the provisions of the section 120-B I.P.C. in the offence.

5. Learned A.G.A. on the other hand submitted that as per call details collected by the Investigating Officer, it is established that there was continuous conversation between the applicant and the husband of the opposite party no. 3, therefore, it should be presumed that she was abetting the husband of the opposite party no. 3 to divorce his wife/opposite party no. 3 for which cruelty was being committed by the husband upon the opposite party no. 3 at the behest of the

applicant herein. Therefore she is also involved in the offence.

6. Having considered the rival submissions made by learned counsels for the parties, this Court has carefully gone through the record of the case. From the record of the case it is apparent that the applicant herein is allegedly the friend of the husband of the opposite party no.3. As they were the college friends and used to talk to one another, the applicant herein has been implicated in the instant case for demand of dowry and harassment by the husband and the in-laws of the opposite party no.3. She has been implicated in the instant case with the strength of Section 128 I.P.C.

7. Before proceeding further it would be relevant to take note of the provisions of Sections 498-A, 506, 120B I.P.C. as well as 3/4 of the D.P. Act, for which the applicant has also been charged.

Sections 120-B, 498A, 506 I.P.C.

"120-B. Punishment of criminal conspiracy.-(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

Section 498-A. Husband or relative of husband of a woman subjecting

her to cruelty- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purposes of this section, "cruelty means"—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]

"Section 506. Punishment for criminal intimidation.- Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt, etc — and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

Sections 3 and 4 of the D.P. Act.

"3. Penalty for giving or taking dowry.—

(1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he

shall be punishable [with imprisonment for a term which shall not be less than five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more]:

Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than [five years].

[(2) Nothing in sub-section (1) shall apply to, or in relation to,—

(a) presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf):

Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;

(b) presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf):

Provided that such presents are entered in a list maintained in accordance with the rules made under this Act:

Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given].

4. Penalty for demanding dowry.--If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months."

8. From the plain reading of Section 498-A I.P.C., the offence can be made out under Section 498-A I.P.C. only against the husband or the relative of the husband of a woman, who allegedly subjects such woman to cruelty. The explanation under Section 498-A of I.P.C. defines what 'cruelty' means for the purpose of Section 498-A I.P.C. It provides that, (1) *any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (2) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet demand.*

9. From the allegations as made in the instant case, there is no allegation of any harassment about the demand of dowry on the part of the applicant herein.

10. The applicant herein is neither the husband nor the relative of the husband but a friend of the husband and a friend of a husband cannot be in any way covered within the phrase of relative of the husband. Further, there is no allegation in the instant case with regard to any demand of dowry made by the applicant no.1 or any harassment for such demand of dowry. Further, there is no allegation of any wilful conduct by the applicant no. 1 herein, which is likely to try the opposite party no.2 to commit suicide or cause grave

injury or danger to life, limb or health. Therefore, from the facts of the instant case no offence under Section 498-A I.P.C., is made out against the applicant herein.

11. Similarly, the provisions of 3/4 D.P. Act, would also not attract towards the applicant herein as there is no allegation of any demand of dowry by the applicant herein nor she can by any stretch of imagination be said to be the beneficiary of such dowry, if it is fulfilled. Further, there is no allegation of any sort that the applicant herein has ever talked or directly interfered in the matrimonial life of the opposite party no.2 and her husband except she was in talking terms with the opposite party no.2.

12. Therefore, in the considered opinion of this Court none of the offences as alleged in the instant case against the applicant herein can be said to have been made out and the applicant herein has been made an accused and has been maliciously prosecuted by the opposite party no.3 due to her suspicion of illicit relationship of the applicant with the husband of the opposite party no.3., without there being any action. They were alleged to have been on talking terms, being the college friends. Therefore, the instant case is nothing but a malicious prosecution of the applicant herein by the opposite party no.3. Consequently, the instant application is **allowed** and the entire proceedings of Criminal Case. No. Criminal Case No. 11843 of 2018 (State of U.P. Vs. Naveen Kumar Verma and others) arising out of Case Crime No. 490 of 2017 under sections 498-A, 506, 120-B I.P.C. and 3/4 of D.P. Act, Police Station- Civil Lines, District Allahabad, pending in the court of Chief Judicial Magistrate, Allahabad as well as charge sheet No. 134 of 2018 dated 30.6.2018, are hereby quashed qua the applicant herein.

3. The facts in brief are that the opposite party no.2 herein initially submitted a complaint dated 12.11.2018 before the Additional Director General of Police, Agra Zone, Agra, seeking registration of the F.I.R. and strict action against the applicant herein. On the aforesaid complaint, as per the direction of the Additional Director General of Police, the instant F.I.R. has been registered at Women Police Station, Agra, on 15.11.2018, whereby the Case Crime No. 211 of 2018 was registered for the offences under Sections 504, 506, 328, 34, 376

I.P.C. against the applicant and the entire family members of the applicant.

4. As per the F.I.R., both the applicant as well as the opposite party no.2 are highly educated persons and belong to a higher social status. Both of them were studying together in Agra and used to meet each other. The allegation in the F.I.R. is that once in the year, 2016, the entire family members of the applicant came to the house of the opposite party no.2 and proposed the marriage of applicant with the opposite party no.2. The aforesaid proposal was rejected by the opposite party no.2. Therefore, all the family members of the applicant have returned back. However, the said applicant continued to talk with the applicant herein. The opposite party no.2 herein went to Delhi for her studies. Subsequently, after about a year on 16.10.2017, in the morning at 10:00 A.M. the applicant went to the house of the opposite party no.2 and informed her about the illness and hospitalization of his mother and asked the opposite party no.2 to donate the blood. In view thereof, the opposite party no.2 accompanied the applicant herein, however, instead of taking her to the hospital the applicant took her to his house, where, except the mother all other family members met and welcomed her in the house. The sisters-in-law (bhabhis) of the applicant herein went in the kitchen to bring tea for her. Subsequently, applicant's elder brother Ashish brought tea and brothers- Ketan Kumar and Atul brought biscuits and namkeen etc. After consuming the tea, she became unconscious. When she regained her consciousness, she found herself without clothes and she realized that she has been raped. Then, the aforesaid sisters-in-law of the applicant brought clothes of the opposite party no.2, then, she wore the said clothes. Then, the opposite

party no.2 told them that she will complain about this incident to the police. Then, the applicant putting the revolver on his head told her that he loves her and wanted to marry her, if she refused, he will commit suicide right then. Then, all the family members came inside the room and called her a bride and at the same time all the persons shown the nude pictures of the opposite party no.2, which they have taken during the aforesaid incident. Thereby, the opposite party no.2 got frightened. Thereafter, on the basis of the aforesaid nude pictures taken by the applicant and other family members, they started blackmailing the opposite party no.2. In such a compelling circumstances, the opposite party no.2 agreed to marry the applicant herein. Thereafter, after sometime all the family members except the father of the applicant herein came to the house of the opposite party no.2 and a golden ring was given to the opposite party no.2. Thereafter, under the pretext of marriage the applicant started physical exploitation of the opposite party no.2 by taking her at different places and hotels and on one occasion he has filled vermilion (सिंदूर) in parting of her hair (मांग). Thereafter, the family members of the applicant took the opposite party no.2 in various relations and introduced her as the wife of the applicant and started exchanging gifts. Subsequently, the parents of the opposite party no.2 also agreed to marry the opposite party no.2 with the applicant herein. Subsequently, the opposite party no.2 went to Delhi for preparation of IAS Exams and also started doing private job there. The applicant also came there and continued to exploit the opposite party no.2 physically. Thereupon, after physical exploitation he used to take all the salary of the opposite party no.2 forcibly. Fed up with all this, the opposite party no.2 left the job and came back to her

house and the last time the applicant herein established physical relationship with the opposite party no.2 at the house of the opposite party no.2. Subsequently thereto, when the opposite party no.2 pressurized the applicant to marry the opposite party no.2, then, he started avoiding the same and told the opposite party no.2 that once they had gone with a proposal to marry the opposite party no.2, then, she has rejected the proposal of marriage and thereby she has insulted him and his family members, therefore, by doing the aforesaid incidents as narrated hereinabove, they have taken a revenge of that insult committed by the opposite party no.2. Now, they will not marry the applicant with the opposite party no.2. The applicant also threatened her of dire consequences and told that she should commit suicide. Thereafter, he switched off his phone. When she called the mother of the applicant she also threatened her that if she will make any complaint, poster of her nude pictures shall be placed in the entire locality of the opposite party no.2. On the basis of the aforesaid narration of the facts in the F.I.R. she has asked for a strict action against the applicant and the entire family members of the applicant.

5. In view of the aforesaid F.I.R., a detailed investigation was carried out by the Investigation Agency. During the investigation, the statements under Sections 161 and 164 Cr.P.C. of the opposite party no.2 was recorded and the medical examination of the opposite party no.2 was also conducted. In the medical examination no forcible act of rape was found to be committed on the opposite party no.2 and no injury of any sort was found on the body of the opposite party no.2. In her 164 Cr.P.C. statement, she has tried to improve the case by adding the allegation of insertion of a bottle in her private part.

However, the same was disbelieved by the Investigation Agency and the offence under Section 377 I.P.C. was not added in the charge-sheet, specifically relying upon the F.I.R. and 161 Cr.P.C. statement, which was recorded under the videography. During the investigation, except the victim even the parents of the opposite party no.2 have not supported any allegation of rape, however, the parents of the opposite party no.2 have admitted that there was a continuous relationship between the applicant and the opposite party no.2. The mother of the opposite party no.2 has categorically admitted that the applicant and the opposite party no.2 both were in very deep relationship with one another and the applicant as well as the opposite party no.2 used to frequently move together at any place of their choice as per the averments made in the F.I.R. as well as 161 Cr.P.C. statement. She has categorically admitted that the applicant used to take her to various hotels and they used to stay there and the applicant also used to get decorations to celebrate the memorable moments. On the request of the opposite party no.2 the Investigation Officer has also visited the hotels concerned where the receptionist has identified her and has told that the opposite party no.2 and the applicant used to stay there in the hotel and the record was also produced by the receptionist of the hotel. The doctor was also examined during the investigation, who has examined the victim/opposite party no.2 and he has also stated that no element of forcible sexual activity was found on the body of the opposite party no.2.

6. After due investigation, the charge-sheet was filed on 13.12.2018 only against the applicant herein for the offences under Sections 376, 504, 506 I.P.C. and the

names of all other accused in the F.I.R. were dropped by the Investigation Officer. Various witnesses during the investigation have deposed that the opposite party no.2 used to visit the house of the applicant, when the other family members were not present in the house.

7. Therefore, from the entire material available on record, the sum and substance of the allegations made by the opposite party no.2 is that the applicant and the opposite party no.2 both were adults and highly educated persons. The applicant used to study together. The applicant has developed liking towards the opposite party no.2, which was intimated by him to the other female friends of both the parties and as per the allegation the applicant alongwith other family members have visited the house of the opposite party no.2, with a proposal to marry the opposite party no.2, however, the aforesaid proposal was rejected by the opposite party no.2, thereupon, the applicant and his family members felt insulted and thereupon after about one year of the said rejection by the opposite party no.2, the applicant has taken her to his house on the pretext of the illness of his mother. Thereupon, in the house in presence and in collusion with the other family members she was given an intoxicated tea which was consumed by the opposite party no.2, whereupon, she became unconscious and when she regained her consciousness she found herself without clothes and the clothes were given by the sisters-in-law of the applicant and she was shown her nude pictures and thereafter, the applicant on the basis of the said nude pictures, continued to have physical relationship with the opposite party no.2 by blackmailing her and subsequently, the opposite party no.2 has also accepted the relationship and she was

in intimate relationship with the applicant herein continuously for a long period of time and she has never raised any objection to such relationship and it is only when the applicant and his family members had refused to marry her, the instant complaint has been filed by the opposite party no.2.

SUBMISSION BY APPLICANT

8. Learned counsel applicant submits that applicant and the opposite party no.2 were known to each other and were studying together and both were preparing for the Civil Services Examination. They developed a consensual physical relationship and such relationship continued for a long period of time. Even as per allegations in the F.I.R. such relationship continued for more than a year.

9. Learned counsel for the applicant has also relied upon the averments in the F.I.R. as well as 164 Cr.P.C. statement and also the statement of the parent of the opposite party no.2, to suggest that both the applicant and the opposite party no.2 were in consensual physical relationship with one another. Therefore, learned counsel for the applicant submits that since it was a longstanding continuous consensual physical relationship between the parties, therefore, no offence whatsoever under Section 376 I.P.C. can be said to have been made out against the applicant herein.

10. Learned counsel for applicant has also relied upon the judgements of the Apex Court in ***Dhruvaram Murlidhar Sonar vs. State of Maharashtra : (2019) 18 SCC 191, Shivashankar vs. State of Karnataka and Ors. (2019) 18 SCC 204, Pramod Suryabhan Pawar vs. the State of Maharashtra and Another : (2019) 9 SCC 608*** and the judgement of this Court in

Jiyaullah vs. State of U.P. and Another
(Application u/S 482 No. 5419 of 2021).

SUBMISSION BY A.G.A.

11. Per contra, learned A.G.A. submits that the inception of the relationship between the parties is based on cheating and it was a forcible act on the part of the applicant herein, for which no consent was there on the part of the opposite party no.2. Therefore, *prima facie* an offence under Section 376 I.P.C. is made out. However, the subsequent relationship between the parties was due to the threat perception created by the applicant and his family members. Therefore, even if there was subsequent relationship between the parties and the same cannot be said to be a consensual relationship but was a relationship under threat perception created by the applicant and his family members.

ANALYSIS

12. Having heard the submissions made by learned counsel for the parties, this Court has carefully gone through the record of the case.

13. Learned counsel for the applicant has submitted that since it was a longstanding continuous consensual relationship between the parties, no offence whatsoever under Section 376 I.P.C. can be said to have been made out against the applicant herein. In support of his submissions learned counsel for the applicant has relied upon the judgements of Apex Court in ***Dhruvaram Murlidhar Sonar (supra)***, ***Shivashankar (supra)***, ***Pramod Suryabhan Pawar (supra)*** and the judgement of this Court in ***Jiyaullah (supra)***.

14. Before proceeding further, it would be relevant to note the provisions of Section 375 I.P.C. as relevant to the instant case, which reads as under:

"375. Rape.- A man is said to commit "rape" if he—

1. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

2. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

3. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

4. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

Firstly- against her will.

Secondly- Without her consent.

Thirdly-.....

Fourthly-.....

Fifthly-.....

Sixthly-.....

Seventhly-....."

15. It would be further relevant to note provisions of Section 90 of I.P.C., which deals with the consent given under fear or misconception, which reads as under:

"90. Consent known to be given under fear or misconception.—

A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear

of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.— *if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or*

Consent of child.— *unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."*

16. Therefore, a man establishes a sexual relationship with a woman against her will and without her consent is said to have committed rape on the woman. However, if a man establishes sexual relationship with a woman with her consent, then, such sexual activity would not amount to rape. However, if such consent was given by the woman under fear or misconception, such sexual activity with such tainted consent would amount to rape.

17. In **Kaini Rajan v. State of Kerala, (2013) 9 SCC 113**, the Apex Court has held that the consent for the purpose of Section 375 I.P.C. requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the morality, quality of the act but after fully exercising the choice between the resistance and assent whether there was consent or not is to be ascertained only after careful study of the relevant circumstances.

18. In **Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1**, the Apex Court has held as under:

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 IPC and can be convicted for the offence under Section 376 IPC."

19. In **Deepak Gulati v. State of Haryana, (2013) 7 SCC 675**, the Apex Court while dealing with the consent for the offence under Section 375 I.P.C. has held that the Court must examine whether the consent involved was given after wholly understanding the nature and consequence of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of misrepresentation made to her by the accused.

20. In **Pramod Suryabhan Pawar (supra)**, while dealing with the consent for the offence under Sections 375, 376 I.P.C. the Apex Court has observed as under:

"18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a

promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

21. It was further held that misconception of fact must be a fact which had an immediate relevance to the consent given by the prosecutrix.

22. Thus, in the light of the judgements of the aforesaid position of law, if the facts of the instant case are examined, we will find that though the applicant and the opposite party no.2 were friends, the opposite party no.2 had never agreed for any relationship with the applicant other than the friendship and that is apparent from the fact that initially the opposite party no.2 has rejected the proposal of marriage with the applicant. However, she was continuously in talking terms with the applicant. As per the allegations in the F.I.R., which are supported in her 161 Cr.P.C. statement as well as in her 164 Cr.P.C. statement, the applicant herein has taken opposite party no.2 to his house on the pretext of illness and hospitalization of his mother where she has been given tea which was intoxicated and after consuming the said tea the opposite party no.2 became unconscious and she was sexually assaulted without her consent and nude pictures of the opposite party no.2 were taken, thereafter, she was blackmailed to give consent to the relationship. Therefore, for the initial incident as alleged in the F.I.R. there was no consent on the part of the opposite party no.2 herein. Therefore, the offence of rape is prima facie constituted

against the applicant, however, the subsequent relationship of the applicant with the opposite party no.2 was initially under threat perception created by the applicant and his family members and subsequently a promise of marriage was also stated to have been given by the applicant, which was accepted by the opposite party no.2 under the threat perceptions created by the applicant and his family members. However subsequently, they are stated to have been in consensual relationship for sufficiently a long period of time and applicant and his family member have refused to marry the opposite party no.2, the instant F.I.R. has been lodged and the fact that they were in continuous physical relationship is sufficiently established during the investigation and even by the photographs annexed as Annexure '21' in the instant application, which has also been found established during the investigation from the examination of the hotel staff where they used to stay.

CONCLUSION

23. Therefore, in the considered opinion of this Court since the initial relationship was established by the applicant with an element of cheating, threat etc., against the will of the opposite party no.2, prima facie an offence under Section 376 I.P.C. is made out against the applicant. Though, the subsequent relationship, which appears to be a consensual relationship under the promise of marriage, however, such consent is also stated to be given by the opposite party no.2 initially under the threat perception created by the applicant herein. Therefore, in the considered opinion of this Court the judgements relied upon by the applicant in ***Shivashankar (supra), Pramod Suryabhan***

Pawar (supra) and Jiyaullah (supra) are of no help to the applicant, in view of the initial act committed against the will of the opposite party no.2. Therefore, this Court does not find any good reason to quash the proceedings as prayed by the applicant, in view thereof, the instant application is accordingly **dismissed**.

24. However, the observation made hereinabove are made only for the purpose of deciding the instant application and the trial court shall not be influenced by any of the observations made hereinabove and shall proceed in accordance with law.

(2024) 9 ILRA 435

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 11.09.2024

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Application U/S 482 No. 13307 of 2020

Mritunjay Tiwari & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Anand Pal Singh, Rajiv Lochan Shukla

Counsel for the Opposite Parties:
Bishram Tiwari, G.A., Vimal Kumar Pandey

Corpus Delicti- Applicants alleged that the victim (wife) ran away from their house and despite searched for days, she was not located-complainant (father of the victim) alleged that his daughter (wife of applicant No.1) died under otherwise than normal circumstances and her dead body was concealed by applicants. - evidence on record that applicant No.1 has illicit relationship with co-accused- and it was repeatedly objected by his wife - in given circumstances to establish **corpus delicti** is not

necessary - at this stage High Court cannot undertake to conduct a mini trial.

Application dismissed. (E-9)

List of Cases cited:

1. Sevaka Perumal Vs St. of T.N., (1991) 3 SCC 471
2. Mani Kumar Thapa Vs St. of Sikkim, (2002) 7 SCC 157
3. Sanjay Rajak Vs St. of Bihar, (2019) 12 SCC 552
4. Rama Nand Vs St. of H.P. [Rama Nand Vs St. of H.P., (1981) 1 SCC 511 : 1981 SCC (Cri) 197
5. Priyanka Jaiswal Vs St. of Jharkhand & ors., 2024 SCC OnLine SC 685
6. Akhil Sharda , 2022 SCC OnLine SC 820

(Delivered by Hon'ble Saurabh Shyam
Shamshery, J.)

1. Heard Sri Rajiv Lochan Shukla, learned counsel for applicants, Sri Vimal Kumar Pandey, learned counsel for opposite party No.2 and Sri Rakesh Kumar Mishra, learned A.G.A. for State.

2. Applicant No.1 got married with Manju Tiwari (daughter of the complainant) in 2014, whereas other applicants are relatives of applicant No.1. It is the case of applicants that on 23.09.2016 at about 9.00 p.m., Smt. Manju Tiwari ran away from their house and despite searched for days, she was not located. Applicants have lodged missing report as well as publications were made in newspaper also.

3. The complainant side was also making efforts along with applicants side to search her but all attempts were failed. In the aforesaid circumstances, complainant after about six weeks filed an application

under Section 156 (3) Cr.P.C. on 11.01.2017, alleging that his daughter (wife of applicant No.1) died under otherwise than normal circumstances and her dead body was concealed by applicants. On order of learned Magistrate, an FIR was lodged on 25.11.2016 against applicants (Case Crime No.1203 of 2017) under Sections 498-A, 304-B, 201 I.P.C. and ¼ of D.P. Act, Police Station- Kotwali Padrauna, District- Kushinagar.

4. The Investigating Officer recorded statements of witnesses and made attempts to locate victim either alive or dead but she was not found alive nor her dead body was recovered. Investigation was not proper, therefore, a writ petition was filed before this Court by the complainant for referring investigation to CBI. The writ petition was remained pending and orders were passed against Police Officers.

5. Initially, a charge-sheet No.31 of 2017 was filed only under Section 498-A I.P.C. and ¼ of D.P. Act. The learned Chief Judicial Magistrate, Kushinagar at Padrauna, by order dated 02.11.2017, returned the charge-sheet with direction to conduct investigation properly. Relevant part of order is mentioned hereinafter :-

“सुना तथा पत्रावली का सम्यक परिशीलन किया।

पुलिस द्वारा प्रस्तुत प्रपत्रों के अवलोकन से प्रथम दृष्टया स्पष्ट है, कि विवेचक द्वारा सभी तथ्यों की विस्तृत जाँच किये बिना मात्र खानापूति करते हुये आरोप पत्र न्यायालय में प्रेषित कर दिया गया है। यहाँ यह उल्लेखनीय है, कि आवेदक द्वारा धारा-498A, 304B, 201 भा०द०सं० व धारा- 3/4 डी०पी० एक्ट के तहत मुकदमा पंजीकृत कराया गया था। आवेदक द्वारा अपने प्रार्थना पत्र अन्तर्गत धारा- 156(3) द०प्र०सं० में आधार लिया गया था, कि दहेज के लिये उसकी लड़की की हत्या कर उसकी लाश गायब कर दी गयी है। इस सम्बन्ध में विवेचक द्वारा उसके तथा अन्य निकटतम सम्बन्धियों के C.D.R निकलवायी गयी, परन्तु विवेचक द्वारा उससे क्या निष्कर्ष निकला यह अपने केस डायरी में

उल्लेखित नहीं किया है, तथा उसकी गुमसुदगी के सम्बन्ध में पेपरों में तथा सभी सम्बन्धित लोगों व गुमसुदगी के सम्बन्ध में जरिये रेडियो व दूरदर्शन आस-पास के जिलों से कराया गया था। परन्तु बिना किसी समुचित निष्कर्ष पर आये विवेचक द्वारा यह आरोप पत्र न्यायालय के समक्ष प्रस्तुत कर दिया गया है। प्रथम दृष्टया स्वयं विवेचना अपूर्ण की जानी प्रतीत होती है। अतः इस निर्देश के साथ विवेचक को केस डायरी वापस प्रेषित की जाती है, कि वह सभी तथ्यों को दृष्टिगत रखते हुये निष्पक्षतापूर्वक विवेचना सम्पादित कर आख्या प्रेषित करें।”

6. It appears that Investigating Officer has submitted other charge-sheet also. Learned Magistrate has decided another protest petition by order dated 17.07.2018, whereby said charge-sheet was also returned for further investigation. Relevant part of it is reproduced hereinafter :-

“सुना तथा पत्रावली का सम्यक परिशीलन किया।

पुलिस द्वारा प्रस्तुत प्रपत्रों के अवलोकन से प्रथम दृष्टया स्पष्ट है, कि विवेचक द्वारा सभी तथ्यों की विस्तृत जाँच किये बिना मात्र खानापूति करते हुये आरोप पत्र न्यायालय में प्रेषित कर दिया गया है। यहाँ यह उल्लेखनीय है, कि आवेदक द्वारा धारा-498A, 304B, 201 भा०द०सं० व धारा-3/4 डी०पी० एक्ट के तहत मुकदमा पंजीकृत कराया गया था। आवेदक द्वारा अपने प्रार्थना पत्र अन्तर्गत धारा 156 (3) द०प्र०सं० में आधार लिया गया था, कि दहेज के लिये उसकी लड़की की हत्या कर उसकी लाश गायब कर दी गयी है। इस सम्बन्ध में विवेचक द्वारा उसके तथा अन्य निकटतम सम्बन्धियों के फोनो की C.D.R. निकलवायी गयी, परन्तु विवेचक द्वारा उससे क्या निष्कर्ष निकला यह अपने केस डायरी में लिखित नहीं किया है, तथा उसकी गुमसुदगी के सम्बन्ध में पेपरों में तथा सभी सम्बन्धित लोगों व गुमसुदगी के सम्बन्ध में जरिये रेडियो व दूरदर्शन आस-पास के जिलों से कराया गया था। परन्तु बिना किसी समुचित निष्कर्ष पर आये विवेचक द्वारा यह आरोप पत्र न्यायालय के समक्ष प्रस्तुत कर दिया गया है। प्रथम दृष्टया स्वयं विवेचना अपूर्ण की जानी प्रतीत होती है। अतः इस निर्देश के साथ विवेचक को केस डायरी वापस प्रेषित की जाती है, कि वह सभी तथ्यों को दृष्टिगत रखते हुये निष्पक्षतापूर्वक अग्रिम विवेचना सम्पादित कर रिपोर्ट प्रेषित करें।”

7. Meanwhile, applicants' attempt to quash FIR was failed, whereas attempts of

complainants for fair and further investigation remained successful.

8. The writ petition filed by the complainant got disposed of by order dated 24.02.2020. Relevant part of it is reproduced hereinafter :-

“ 6. Today, an affidavit has been filed by Investigating Officer (hereinafter referred to as 'I.O.') stating therein that charge-sheet has been submitted by I.O before Chief Judicial Magistrate, Kushi Nagar whereupon, Magistrate has taken cognizance and issued summons on 18.2.2020 to accused.

7. Learned counsel for accused respondent-5 submits that superficial investigation has been conducted and without collecting any credible evidence, charge-sheet has been submitted. If petitioner has any grievance regarding submission of charge-sheet, same can be raised before the Magistrate concerned at the time of framing of charge or by challenging order taking cognizance before Revisional Court.

8. Since charge-sheet has already been submitted and Magistrate has taken cognizance in the matter, no further cause of action survives in present writ petition. Writ petition is, accordingly, dismissed as infructuous. Personal appearance of Mr. Vinod Kumar Mishra, Superintendent of Police, Kushi Nagar and Mr. Netesh Pratap Singh Deputy Superintendent of Police (Circle Officer, Tamkuhiraj), District Kushi Nagar is dispensed with. ”

9. In the aforesaid circumstances, finally a charge-sheet was filed on 12.02.2020 i.e. after about 3 years on which cognizance was taken and applicants were summoned by order dated 05.03.2020.

10. The said charge-sheet, cognizance and summoning order were challenged by way of present application. Initially, this Court has granted an interim order on 21.09.2020, which was extended on subsequent dates also, however, on 28.03.2022 it was discharged. In the aforesaid circumstances, applicants have filed respective discharge applications before learned Trial Court, which are still pending.

11. Sri Rajiv Lochan Shukla, learned counsel for applicants has submitted that offence under Section 304-B I.P.C. could not be made out, since there is no material or evidence that wife of the applicant No.1 has died under otherwise than normal circumstances since there is no evidence that she has died as well as if she already died, still there is no evidence about manner of her death. Her dead body was not recovered. Learned counsel also submitted that complainant's side along with applicants side was taking various efforts to locate wife of applicant No.1 and they have not raised any suspicion for about more than one and a half month.

12. Learned counsel also referred litigation filed before this Court that charge-sheet was filed only under threat of contempt proceedings initiated by complainant against police officers. The complainant himself has raised a suspicion that his daughter may have eloped with other person though on investigation there was no break through in that direction. The charge-sheet was filed only on assumption without any evidence to support allegation of dowry death.

13. The aforesaid submissions are opposed by Sri Rakesh Kumar Mishra, learned A.G.A. for State and Sri Vimal

Kumar Pandey, learned counsel for complainant side that in such cases, it is not necessary to establish *corpus delicti*. It is the case of complainant side that deceased has died under otherwise than normal circumstances within seven years of marriage and that she has suffered with cruelty for demand of dowry soon before her death and her dead body was concealed by applicants side.

14. Learned counsel for complainant submitted that applicants were initially successful in misdirecting the complainant that it was a case of missing and kept him busy in order to delay in lodging FIR and from prompt commencement of investigation. Applicants have already filed respective discharge application which will be considered in accordance with law. No circumstance exists to interfere with charge-sheet. Learned counsel for complainant has placed reliance on judgments of Supreme Court passed in **Sevaka Perumal Vs. State of Tamil Nadu, (1991) 3 SCC 471** and **Mani Kumar Thapa Vs. State of Sikkim, (2002) 7 SCC 157**.

15. Heard counsel for parties and perused the record.

16. It is well settled that at the stage of challenge to charge-sheet, no mini trial could be conducted by this Court. The only consideration before this Court is that in given circumstances, when dead body of wife of applicant No.1 was not recovered, whether it could be deemed that she died under otherwise than normal circumstances or in given set of circumstances, the argument that there is no requirement to establish *corpus delicti* has merit.

17. In order to consider above submissions, a judgment passed by

Supreme Court in the case of **Sanjay Rajak Vs. State of Bihar, (2019) 12 SCC 552** would be relevant and its few paragraphs are reproduced hereinafter :-

“9. It is not an invariable rule of criminal jurisprudence that the failure of the police to recover the corpus delicti will render the prosecution case doubtful entitling the accused to acquittal on benefit of doubt. It is only one of the relevant factors to be considered along with all other attendant facts and circumstances to arrive at a finding based on reasonability and probability based on normal human prudence and behaviour. In the facts and circumstances of the present case, the failure of the police to recover the dead body is not much of consequence in the absence of any explanation by the appellant both with regard to the victim last being seen with him coupled with the recovery from his house of the belongings of the deceased. Rama Nand v. State of H.P. [Rama Nand v. State of H.P., (1981) 1 SCC 511 : 1981 SCC (Cri) 197], was a case of circumstantial evidence where the corpus delicti was not found. This Court upholding the conviction observed: (SCC pp. 522-23, para 28)

“28. ... But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature where the discovery of the dead body is impossible. A blind adherence to this old “body” doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever

enough to destroy the body of their victim. In the context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eyewitness, or by circumstantial evidence, or by both. But where the fact of corpus delicti i.e. "homicidal death" is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth. That is why under Section 3 of the Evidence Act, a fact is said to be "proved", if the court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculcating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned."

10. *Sevaka Perumal v. State of T.N.* [Sevaka Perumal v. State of T.N., (1991) 3 SCC 471 : 1991 SCC (Cri) 724], was also a case where the corpus delicti was not found yet conviction was upheld observing: (SCC pp. 476-77, para 5)

"5. ... In a trial for murder it is not an absolute necessity or an essential ingredient to establish corpus delicti. The fact of death of the deceased must be

established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. Take for instance that a murder was committed and the dead body was thrown into flowing tidal river or stream or burnt out. It is unlikely that the dead body may be recovered. If recovery of the dead body, therefore, is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed, etc. and would afford a complete immunity to the guilty from being punished and would escape even when the offence of murder is proved. What, therefore, is required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum of death was committed and it must be proved by direct or circumstantial evidence, although the dead body may not be traced."

(Emphasis Supplied)

18. It is case of complainant that under a bonafide impression, believing that applicant No.1 i.e. (husband of his daughter) was undertaking bonafide steps to search his wife, no prompt FIR was lodged but later on when it was clear that attempts of applicants side were nothing but to distract the complainant from real issue, an FIR was lodged after about six weeks. The police was not conducting fair investigation, therefore, the complainant has filed a writ petition wherein various orders were passed and after two charge-sheet were returned with direction of further investigation by concerned Magistrate, finally impugned charge-sheet was filed.

19. In order to consider rival submissions, above referred circumstances are very relevant as well as no

circumstance exist to support the story put forward by the applicants that his wife ran away on 23.09.2016 and remained missing except a vague story that she has an illicit relationship with some other person and she may elope with him, which was later on, after an inquiry was found false. In above background claim of complainant side that applicants side has misdirected them during initial period for about six weeks that his wife was missing but later on their intention were exposed, has substance.

20. No reason even remote was brought on record which could be ground for applicant No.1's wife to run away from her matrimonial house. Only on a ground that her dead body was not recovered, it could not be said that she is still alive. There are evidence on record that applicant No.1 has illicit relationship with co-accused and it was repeatedly objected by his wife and her family members as well as that there are allegations of committing cruelty for or in regard to demand of dowry also, therefore, the Court is of considered opinion that argument of learned counsel for complainant and the State has more force at this stage that in given circumstances to establish corpus delicti is not necessary and applicants have a liberty to raise all such arguments during consideration of their discharge application pending before learned Trial Court or during trial, as the case may be. The **Sanjay Rajak (supra)** is applicable in full force in present case in support of prosecution case.

21. The Court also takes note of ;brief facts of the case; mentioned in the impugned charge-sheet and for reference relevant part of it is reproduced hereinafter :-

“मुकदमा उपरोक्त की अब तक की कार्यवाही विवेचना से यह स्पष्ट हो चुका है कि मृतका गायब नहीं हुई थी बल्कि गुमशुदगी के पूर्व वादी द्वारा प्रस्तुत विवरण के अनुसार ससुराल पक्ष द्वारा दहेज के लिये उसको प्रताड़ना करते हुये मन्जू तिवारी की मृत्यु करित कर साक्ष्य का लोप करने हेतु शव को गायब कर दिया गया। वादी द्वारा इस सम्बन्ध में मुख्य न्यायिक मजिस्ट्रेट कुशीनगर के न्यायालय में सशपथ शपथ पत्र प्रस्तुत करते हुये उपरोक्त तथ्यों की पुष्टि की गयी है। जिसकी छायाप्रति संलग्न की जा रही है।... प्रथम सूचना रिपोर्ट के अनुसार वादी की पुत्री मंजू तिवारी की शादी दिनांक 17-02-2014 को मृत्युन्जय तिवारी निवासी ग्राम भिसवा सरकारी थाना कोतवाली पडरौना जिला कुशीनगर के साथ सम्पन्न हुई। इस तथ्य की पुष्टि में शादी के फोटो ग्राफ व शादी की कार्ड साक्ष्य रूप में उपलब्ध है। शादी के पश्चात मृत्युन्जय तिवारी, राधेश्याम तिवारी, राजेन्द्र तिवारी, देवेन्द्र तिवारी पुत्रगण धुपही तिवारी, कुमारी डिम्पल तिवारी पुत्र घनश्याम तिवारी, गायत्री देवी पत्नी घनश्याम तिवारी, द्रोपदी देवी पत्नी देवेन्द्र तिवारी सा० निसवा सरकारी थाना कोतवाली पडरौना कुशीनगर द्वारा मंजू तिवारी की प्रताड़ना सम्बन्धी साक्ष्य वादी के शपथ पत्र व धारा 161 सीआर०पी०सी० के बयान वादी व वादी की पत्नी श्रीमती निर्मला दीक्षित व लड़का मानवेन्द्र दीक्षित गवाहान श्री जटाशंकर मिश्रा पुत्र छेदी मिश्रा व अनिल कुमार मिश्रा पुत्र जटाशंकर मिश्रा सा० बेलवा मिश्र पकड़ी थाना कोतवाली पडरौना कुशीनगर व श्री बलीराम यादव पुत्र राधे किशुन सा० परसौना थाना कसया जनपद कुशीनगर के बयान से सिद्ध होता है। इन्ही गवाहों द्वारा प्रथम सूचना रिपोर्ट के तथ्यों की पुष्टि की गयी है। विवाहित मंजू तिवारी के मोबाईल नं० 9120442 के सी०डी०आर० के अवलोकन करने पर इस तथ्य की पुष्टि हुई है कि उसकी बात अपने माता पिता से दिनांक 23-09-16 को 20-07-46 बजे 1177 सेकेण्ड 9120810387 हरिशंकर दीक्षित के मोबाईल नं० पर बात हुई है तथा इस बात की भी पुष्टि हो रही है कि रात में सवा दस बजे के आस पास मन्जू तिवारी के मोबाईल से उसके पति द्वारा मन्जू के माता पिता । वादी। को फोन करके उसके घर से गायब होने की सूचना दी गयी। वादी द्वारा यह भी अवगत कराया गया है कि अभियुक्त पक्ष द्वारा विवाहिता के स्वयं गायब होने सम्बन्धी सूचनावादी पक्ष को और गुमशुदगी के माध्यम से पुलिस को भी देकर गुमराह करने का प्रयास किया गया है जबकि अभियुक्तगणों द्वारा विवाहिता मंजू के स्वयं गायब हो जाने का समुचित कारण न तो वादी को बताया गया और न तो पुलिस को विवेचना के दौरान बताया गया। विवाहिता मन्जू तिवारी स्वस्थ महिला थी जिसके पास एक छोटा दुधमुहां बच्चा भी था जो ऐसा कोई निर्णय नहीं ले सकती थी. जो उसके बच्चे के हित के विरुद्ध हो तथा उसके स्वयं के जीवन के लिये उचित न हो। दहेज सम्बन्धी प्रताड़ना की बात उसने

अपने माता पिता मायके वालों को बताया था, जिसकी पुष्टि साक्ष्यों से हो चुकी है। अचानक स्वयं गायब हो जाना अपने बच्चे को अनाथ छोड़कर चले जाना, अपने माता पिता को कोई सूचना नहीं देना, यह सभी तथ्य अभियुक्तगणों द्वारा अपने बचाव में निर्मित किये गये हैं। विवाहिता की विवाह के सात वर्षों के भीतर अस्वभाविक रूप से दहेज के लिये उत्पीडित करते हुये अस्वभाविक मृत्यु। हत्या। कर अभियुक्त पक्ष द्वारा उसके शव को साक्ष्य का लोप करने के लिये गायब किया जाना, समस्त परिस्थितियों व साक्ष्यों के विश्लेषण से सिद्ध है। श्रीमान् जी अब तक की तमामी तफ्तीश बयान वादी व बयानात गवाहान व अन्य सबूतों के आधार पर मुकदमा उपरोक्त से सम्बन्धित अभियुक्तगण 1- मृत्युन्जय तिवारी पुत्र धुपई तिवारी 2-राधेश्याम तिवारी पुत्र धुपई तिवारी, 3-राजेन्द्र तिवारी पुत्र धुपई तिवारी 4 देवेन्द्र तिवारी पुत्र धुपई तिवारी 5-डिम्पल तिवारी पुत्री घनश्याम तिवारी 6 गायत्री देवी पत्नी घनश्याम तिवारी 7 द्रोपदी देवी पत्नी देवेन्द्र तिवारी साकिनान भिसवा सरकारी थाना कोतवाली पडरौना कुशीनगर के विरूद्ध जुर्म धारा 498ए, 304बी, 201 आई०पी०सी० व 3/4 डी०पी०एक्ट का अपराध बखूबी साबित हो रहा है।”

22. The above referred conclusion is supported by statements of various witnesses recorded during long investigation. In the charge-sheet 25 witnesses were proposed as prosecution witnesses. Statement of all proposed witnesses are not enclosed with present application as well as it has been recently reiterated by the Supreme Court that at this stage High Court cannot undertake to conduct a mini trial or enter into appreciation of evidence of a particular case, in the case of **Priyanka Jaiswal Vs. State of Jharkhand and others, 2024 SCC OnLine SC 685** and relevant part of it is mentioned hereinafter :-

“13. We say so for reasons more than one. This Court in catena of Judgments has consistently held that at the time of examining the prayer for quashing of the criminal proceedings, the court exercising extra-ordinary jurisdiction can neither undertake to conduct a mini trial nor enter into appreciation of evidence of a particular case. The correctness or otherwise of the allegations made in the

complaint cannot be examined on the touchstone of the probable defence that the accused may raise to stave off the prosecution and any such misadventure by the Courts resulting in proceedings being quashed would be set aside. This Court in the case of Akhil Sharda, 2022 SCC OnLine SC 820 held to the following effect:

“28. Having gone through the impugned judgment and order passed by the High Court by which the High Court has set aside the criminal proceedings in exercise of powers under Section 482 Cr. P.C., it appears that the High Court has virtually conducted a mini trial, which as such is not permissible at this stage and while deciding the application under Section 482 Cr. P.C. As observed and held by this Court in a catena of decisions no mini trial can be conducted by the High Court in exercise of powers under Section 482 Cr. P.C. jurisdiction and at the stage of deciding the application under Section 482 Cr. P.C., the High Court cannot get into appreciation of evidence of the particular case being considered.””

23. In the aforesaid circumstances, I do not find that there is any ground to quash the charge-sheet as well as cognizance and summoning order. Accordingly, present application is **rejected**.

(2024) 9 ILRA 441

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 27.09.2024

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482 No. 19596 of 2024

Shashwat Agrawal

...Applicant

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Applicant:

Anurag Pathak, Harshit Pathak

9. St. of Punj. & anr. Vs Jalour Singh & ors., AIR 2008 (2) SCC 660

Counsel for the Opposite Parties:

G.A., Saurabh Kumar

10. Bharvagi Construction Vs Kothakapu Muthyam Reddy & ors., AIR 2017 SC 4428

(Delivered by Hon'ble Anish Kumar Gupta, J.)

Lok Adalat-Negotiable Instrument Act-

Section 138-Dishonor of cheques issued by the applicant- applicant entered into a settlement and agreed to make the payment-an award was passed by the Lok AdalatLok Adalat erroneously imposed the conditions no.2 and 3, which were not there in the compromise. - the Presiding Officer of a Lok Adalat is not empowered to include any condition beyond the compromise/settlement between the parties-an award passed by the Lok Adalat- can be challenged only by way of a petition under Section 226 or 227 of the Constitution of India and not otherwise- being a decree passed by civil court- not amenbale to the criminal jurisdiction under Section 482 Cr.P.C. **Petition disposed with** directions to St. Legal Services Authority as well as all the District Legal Services Authorities. (E-9)

1. Heard Sri Anurag Pathak, learned counsel for the applicant, Sri Anil Srivastava, learned Senior Counsel assisted by Sri Saurabh Kumar, learned counsel for the opposite party no.2 and Sri Raj Bahadur Verma, learned AGA for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of the order dated 22.01.2024 passed by the learned Additional Court, Saharanpur in Complaint Case No. 25882 of 2022, under Section 138 of the Negotiable Instruments Act (in short the 'N.I.Act').

List of Cases cited:

1. Supreme Court of United St. in Weems Vs U. S., (1909) 54 LEd 793 (801)

2. Francis Corallie Mullin Vs Administrator AIR 1981 SC 746

3. Ganesh Chandra Bhatt Vs D.M. Almora AIR 1993 All 993

4. Badshah Vs Sou. Urmila Badshah Godse, AIR 2014 SC 869

5. St. of Maha. Vs Dr Praful B. Desai (2003) 4 SCC 601

6. M/s Meters and Instruments Pvt. Ltd.& anr.Vs Kanchan Mehta AIR 2017 SC 4594

7. Shrimati Rani Gaur Vs St. of U.P. (2023)124 ACC 891 (All)

8. Damodar S. Prabhu Vs Sayed Babalal (2010) 5 SCC 663

3. The brief facts of the case are that the opposite party no.2 has filed a complaint case under Section 138 of the N.I. Act for dishonour of three cheques bearing cheque no. 418192 dated 28.06.2022, amounting Rs. 5,00,000/-, cheque no. 418193 dated 28.06.2022, amounting Rs. 5,00,000/- and cheque no. 418194 dated 28.06.2022, amounting Rs. 6,72,000/- respectively issued by the applicant herein, which were paid in terms of the sale deed executed by the opposite party no.2 in favour of the applicant herein. The said cheques were presented for encashment and were dishonoured. Thereupon a legal notice dated 19.07.2022 was sent, which was not complied with. Thereafter a complaint case was filed on 24.08.2022 by the opposite party no.2 under Section 138 of N.I.Act. Subsequently during the pendency of the aforesaid

complaint case, the applicant herein entered into a settlement with the opposite party no.2 and agreed to make the entire payment of the aforesaid cheque amount. A compromise dated 05.01.2024 has arrived at between the parties and the applicant has admitted his liability with regard to the aforesaid three cheques and has agreed to make the payment by the 5th of February 2024. In terms of the aforesaid settlement, the matter was taken up in the Lok Adalat on 22.01.2024 and the following order was passed:

"Parties are present along with their learned counsel.

The present complaint has been filed by the complainant against the accused in respect of dishonour of dishonour of following three cheques---

1. Cheque No. 418192 dated 28-6-2022 for the sum of Rs. 500,000/-

2. Cheque No. 418193 dated 28-6-2022 for the sum of Rs. 500,000/-

3. Cheque No. 418194 dated 28-6-2022 for the sum of Rs. 672,000/-

Subsequently the parties entered into a compromise and thereafter on 05-01-2024 filed a compromise deed through paper No. 15-B, stating that they have settled their dispute to the effect that the accused has issued following two cheques in favour of the complainant---

1. Cheque No. 947560 for the sum of Rs 150,000/- and

2. Cheque No. 947561 for the sum of Rs. 150,000/-

It has also been agreed that remaining amount shall be paid positively by 05-02-2024 Accordingly it is prayed that the complaint case should be decided in terms of compromise 15-B.

The aforesaid compromise was verified by me on 08-01-2024. The present complaint has been filed against the

accused under Section 138 NI Act. The offence under Section 138 of NI Act is compoundable. Therefore the complaint case is disposed of in terms of aforesaid compromise as under---

1. That out of the settled amount the accused has already paid a sum of Rs. 300,000/ through aforementioned two cheques. Remaining settled amount shall be paid positively by 05-02-2024.

2. On default of payment of the settled amount as aforesaid the accused will have to undergo three months simple imprisonment.

3. On default of payment of amount in terms of compromise the complainant will be entitled to interest at the rate of 9% on the amount due by then, till realisation of entire amount.

Accordingly the complaint is decided in terms of compromise 13-8. Let the file be consigned to record room with the further direction that on being informed by the complainant about the default in payment, the file will be summoned from the record Room and recovery warrant and NBW will be issued forthwith against the accused."

4. Learned counsel for the applicant submits that the Lok Adalat has erroneously imposed the conditions no.2 and 3, which were not there in the compromise. Therefore, learned counsel for the applicant states that it was not open for the Lok Adalat to impose the conditions no.2 and 3 by admitting the compromise and disposing of the case on the basis of the settlement / compromise. Being aggrieved by the aforesaid order passed by the Lok Adalat, the instant application has been filed initially on 07.08.2024, in which this Court has passed the following order:

"1. Heard Sri Anurag Pathak, learned counsel for the applicant and Sri

Rajeev Kumar Singh, learned AGA for the State.

2. *Learned counsel for the applicant submits that the applicant is aggrieved by the order dated 22.1.2024, whereby the Complaint Case No.25882 of 2022 under Section 138 of N.I. Act was disposed of in terms of the settlement, which was duly verified by the trial court on 8.1.2024. Learned counsel for the applicant further submits that the trial court has recorded that the parties are present along with their learned counsels and he disputes that neither the applicant nor his counsel was present before the court on that date.*

3. *Further, learned counsel for the applicant is aggrieved by other two conditions imposed, which was not part of the compromise, namely, on default of payment of the settled amount as aforesaid, the accused will have to undergo three months of imprisonment and on default of payment of amount in terms of the compromise, the complainant will be entitled to interest at the rate of 5% of the amount duped by them till realization of the entire amount.*

4. *In view thereof, let a report be called from the Presiding Officer, Additional Court, Saharanpur with regard to the material facts specifically the presence of the parties and the conditions imposed beyond the compromise.*

5. *Put up this matter on 21.8.2024, as fresh."*

5. *In pursuance to the aforesaid order, a detailed report has been submitted by the Presiding Officer, Additional Court, Saharanpur justifying the imposition of the conditions in view of various judgments of the Apex Court and this Court as well.*

6. *The report submitted by the learned Magistrate reads as under :*

"Please be kind enough to take notice of the letter dated 30-7-2024 whereby I have been directed to submit my explanation about the complaint case No. 25882 of 2022 Kanishka Kund Jain vs. Shaswata Agrawal u/s Section 138 of NI Act in Lok Adalata held on 22-01-2024.

Special Lok Adalata for NI Act cases was held on 22-01-2024, when the aforementioned complainant case was also decided. The accused has filed a petition before Hon'ble the High Court challenging the order on the following grounds---

1. *The court has imposed default clause in case of default in payment of the settled amount which was not part of the compromise.*

2. *That neither the applicant/accused nor his learned counsel was present on the date but both have been shown as present on that date.*

So I have been directed to submit my report with regard to presence of parties and conditions imposed beyond the compromise.

In this respect my explanation is as under—

1. *Since the impugned order was passed in Special Lok Adalata held on 22-01-2024, therefore according to the Section 21 of "The Legal Services Authorities Act, 1987", the order will be deemed as a decree. Section 21 of "The Legal Services Authorities Act, 1987", reads as under—*

"Section 21---Award of Lok Adalat-

1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section(1) of section 20, the court-fee paid in such case shall be refunded in the

manner provided under the Court-fees Act, 1870 (7 of 1870).

2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award."

2. Mode and procedure for execution of decree of a Civil Court has been prescribed in Chapter II (Section 36 to 74) and Order 21 of Civil Procedure Code. Relevant provisions are mentioned as under-

A. Order 21 Rule- 30 Decree for payment of money. Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

B. Section 51---Powers of Court to enforce execution-Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

a) by delivery of any property specifically decreed;

b) by attachment and sale or by the sale without attachment of any property;

c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section

d) by appointing a receiver; or

e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the

Court, for reasons recorded in writing, is satisfied-

a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-

i. is likely to abscond or leave the local limits of the jurisdiction of the Court, or

ii. has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation-In the calculation of the means of the

judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

C. Section 55---Arrest and detention-

1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the State Government may appoint for the detention of persons ordered by the Courts of such district to be detained:

Provided firstly- that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise:

Provided, secondly- that no outer door of a dwelling- house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found:

Provided, thirdly- that, if the room is in the actual occupancy of a woman who is not the judgment- debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:

Provided, fourthly- that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

2) The State Government may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf.

3) Where a judgment-debtor is arrested in execution of a decree for the

payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he 1 [may be discharged) if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

D. Section 56---Prohibition of arrest or detention of women in execution of decree for money-Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

E. Section 57-Subsistence-allowance-The State Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

F. Section 58-Detention and release-

1) Every person detained in the civil prison in execution of a decree shall be so detained-

a) where the decree is for the payment of a sum of money exceeding five thousand rupees for a period not exceeding three months, and,

b) where the decree is for the payment of a sum of money exceeding two

thousand rupees, but not exceeding five thousand rupees, for a period not exceeding six weeks.

Provided that he shall be released from such detention before the expiration of said period of detention-

On the amount mentioned in the warrant for his detention being paid to the officer-in-charge of civil prison or

On the decree against him being otherwise fully satisfied, or

On the request of the person on whose application he has been so detained or

Iv. On the omission by the person on whose application he has been so detained to pay subsistence allowance.

Provided also that he shall not be released from such detention under clause II or III, without the order of the court,

1A) For the removal of doubts, it is hereby declared that no order for detention of the judgment-debtor in civil prison in execution of a decree for the payment of money shall be made, where the total amount of the decree does not exceed two thousand rupees.

2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

3. Thus perusal of the aforesaid scheme and all provisions it becomes clear that the term "decree" is not a like a bubble of water or bed of rose for wrong doers, instead of it, it is more drastic and stringent. In case of money decree exceeding Rs. 5000/-, the executing Court on application of the decree holder may adopt any one following mode---

1) The Court may execute the decree by attachment or sale of movable or

immovable properties of the judgment debtor or

2) The Court may direct civil imprisonment of the judgment debtor which shall not exceed three months to be commenced only after payment of subsistence allowance in terms of Section 57 of Civil Procedure Code, or

3) In addition to above Section 51 (e) of Civil Procedure Code confers some more powers in the form of inherent powers of the Court when it says that- "In such other manner as the nature of the relief granted may require"

4. In this Court nearly 8000/ complaint cases relating to Section 138 of NI Act are pending. Due to non-cooperation of the police the Court despite striving hard is not able to achieve the desired results. Due to non- execution of decree or other processes NBW, summons or notices, the functioning of the Court has been paralyzed. Parties ceased to take any interest to settle the disputes by way of compromise due to failure of getting the benefit of the decree for want of execution/service of processes by the police or District magistrate. In this respect the court was compelled to write several letters to SSP Saharanpur but in vain. Photocopies of some letters are attached with the report.

5. So in order to combat gargantuan pendency of complaint cases under Section 138 of NI Act and the ever increasing melancholy by expeditious disposal it became the need of hour to motivate the parties for settlement by way of compromise I took recourse to Section 51 (e) of Civil Procedure Code which has recognized the inherent powers of the courts, and while exercising the inherent powers of the Court added default clauses in the form of imprisonment and interest and affixed the sample of proposed order in

the notice board of the Court, in the office and Court-room also. In addition to it before taking on record any compromise I always made the parties and their counsels aware of the proposed order. The same practice was followed by me in this case also before verifying the compromise deed and only when the parties assented to the proposed order which was passed on 22-01-2024 the compromise deed was verified by me.

6. This power of the Court to adapt itself and interpret the law according to the changing needs of the society has been recognized by our Hon'ble the Constitutional Courts in the followings cases—

1. The luminous guideline in the interpretation of a constitutional provision is provided by the Supreme Court of United States in *Weems v. U. S.*, (1909) 54 LEd 793 (801)---

"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than mischief which gave it birth. This is peculiarly true of Constitutions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it. "The future is their care, and provisions for events of good and bad tendencies of which no prophecy can be made in the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles

would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in the words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed, against narrow and restrictive construction.

This principle of interpretation which requires that a constitutional provisions must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges, applied with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest, it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human persons." (Francis Corallie Mullin v. Administrator AIR 1981 SC 746)

2. Interpretation of the provisions-The Court is supposed to adapt itself according to the contemporary needs of the society- Justice M. Katju while criticizing the old licensing policy and its applicability in the then social needs observed as under—

"37. As a matter of fact, the vast expansion of the scope of Articles 14, 19 and 21 by the Supreme Court in the last 20 years or so itself proves that our Supreme Court has adopted the organic (or dynamic) approach. And this is very appropriate, since Courts must apply the law to flesh and blood, and not dry bones. Today our country is facing gigantic

problems, social, economic and political, and unless a dynamic and activist approach is adopted the judiciary will be living in an ivory tower unconnected with reality. (*Ganesh Chandra Bhatt vs. DM Almora AIR 1993 All 993*)

3. *Badshah v. Sou. Urmila Badshah Godse, AIR 2014 SC 869*. This case related to standard of proof of legal marriage in a case under section 125 of the Code, the Supreme Court made a very emphatic observation regarding the ambit and object of the law provided by section 125 of the Code observed as under—

"Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125, Cr.P.C. While dealing with the application of destitute wife or helpless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society."

The Supreme Court further observed-

"Of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social

justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently: "It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social- economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."

It further observed.....

"The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory

interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law."

Therefore, the Court held---

"Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the Individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour."(Badshah v. Sou. Urmila Badshah Godse, AIR 2014 SC 869)

4. Ongoing statute---Power to adapt itself according to the changing needs of the society or public at large with the passage of time--Criminal Procedure Code is an ongoing statute---Supreme Court while explaining the meaning of ongoing statute observed that the Criminal Procedure Code is an ongoing statute, in the following words---

"In case of an ongoing statute, it is presumed that the Parliament intended the Court to apply a construction that continuously updates its wordings to allow for changes and is compatible with the contemporary situation. In paragraph 14 of the said decision, the Court observed thus-

"14. It must also be remembered that the Criminal Procedure Code is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled *Statutory Interpretation*, 2nd Edn. p. 617---

"It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application

on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters.... That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for the wording.

***An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials." (State of Maha. vs. Dr Praful B. Desai (2003) 4 SCC 601)

7. So in order to overcome the burden of increasing number of cheque bounce cases, when the police is not complying with the orders and the wrongdoers are not willing to pay the cheque amount despite orders of the court, need of the hour is to strengthen the hands of judicial officers and say good-bye to traditional approach of

interpretation and instead of it to adopt renovative and dynamic approach.

8. Compromise means when both parties are willing to perform certain act in a certain manner in other words generally it is bilateral in nature. But in the following cases our Hon'ble the Apex Court and Hon'ble the High Court after having taken note of the increasing number of cases recognized the inherent powers of the court and thus empowered the court to decide the case even when the adversary was not ready to accept the proposal---

1. *M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta* AIR 2017 SC 4594" --In this case Hon'ble the Apex Court while recognizing the inherent powers of the court in para 18 (3) observed as under---

"The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court. Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused."

2. *Shrimati Rani Gaur vs. State of UP* (2023)124 ACC 891 (All) ---While following the judgment rendered in *M/s Meters and Instruments Private Limited and Another vs. Kanchan Mehta* AIR 2017 SC 4594 observed as under..

"8. I studied both the judgments. The Supreme Court did not say that the requirement of consent for compounding

may just be done away with. Instead widening the compensatory aspect of cases filed under Section 138 of the Negotiable Instrument Act, the Apex Court has carved out a window in the existing scheme of things saying that the case can be disposed of without obtaining direct consent of the complainant under certain circumstances. The circumstances included offering an amount just fair and acceptable which in the opinion of the court is appropriate for duly compensating the complainant, That is under certain circumstances the court can proceed in absence of direct consent. The court is empowered to apply its discretion in terms of provisions of Section 258 Cr.P.C. It may be made clear that this aspect of the matter is distinct and separate from compounding of the case where both the parties agree. The revisional court has remanded the matter to decide it afresh as per law laid down in *M/s Meters and Instruments Private Limited and Another* (supra). By the aforesaid judgment the Apex Court has emphasized that where an appropriate amount has been offered/deposited, the trial court may consider to drop the proceeding. Definitely the objections, if any, raised by complainant in this regard shall be taken into consideration before the court concerned decides to act upon on the basis of offer/deposit of appropriate amount as compensation. A pertinent question may arise as to criteria to be adopted for determination of amount of compensation which may be termed as just, fair and acceptable. In my opinion, provisions of section 138 N.I. Act regarding fine may act as the best guide coupled with all the peculiar facts and circumstances of each case to determine the amount of compensation being just, fair and acceptable. The court must record its satisfaction as regard above before it

proceeds to finally decide and drop the proceedings under Section 258 Cr.P.C. Definitely the court is expected to apply its mind and judicial discretion when it proceeds to decide the matter in the light of *M/s Meters and Instruments Private Limited and Another* (supra). The court has not lost its power of discretion in such matters. In view of the above i do not find any cause for interference.”

9. Hon'ble the Supreme Court has always impressed upon the disposal of cheque bounce cases by way of amicable settlement. In order to motivate the parties to settle their disputes at the earliest stages it has formulated a graded scheme of imposing costs. In the case of "*Damodar S. Prabhu vs. Sayed Babalal* (2010) 5 SCC 663" Hon'ble the Supreme Court in para 21 has propounded thus-

21. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed

a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or

second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.”

10. So in the light of law laid down by Hon'ble the Supreme Court in *Damodar S. Prabhu* case, the accused was required to pay 10% of the cheques' amount as the costs in the District Legal Services Authority. The present complaint case was filed in respect of following three cheques---

1. Cheque No. 418192 dated 28-6-2022 for the sum of Rs. 500,000/

2. Cheque No. 418193 dated 28-6-2022 for the sum of Rs. 500,000/ and

3. Cheque No. 418192 dated 28-6-2022 for the sum of Rs. 672,000/

11. Thus it becomes clear that the complaint case involved huge amount and the compromise was confined only up to the cheques' amount, but in order to encourage the compromise, the accused was exempted from paying 10% costs in the Legal

Services Authority. Despite this fact the accused did not pay the settled amount till date. Why should the complainant suffer for the wrongs of accused for infinite time?

12. In this respect for the guidance of the subordinate courts of the Country Hon'ble the Supreme Court in the following cases has held that---

1. Sentencing policy---Uniform exercise of powers---Up to twice the cheque amount and interest at the rate of 9% per annum---The Apex Court in order to bring the uniformity in sentencing policy observed thus-

"As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the court should unless there are special circumstances in all cases of conviction uniformly exercise the power to levy fine up to twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at reasonable rate. Uniformity and consistency in deciding similar cases by different courts not only increases the credibility of the cheque as a negotiable instrument, but also the credibility of courts of justice." (R Vijayan vs. Baby (2012)1 SCC (Cri) 520)

2. Section 138 NI Act---Dishonour of cheque---Powers of the court to close proceedings---In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act

read with Section 258 Cr.P.C. (M/S Meters And Industries Private Ltd vs Kanchan Mehta Criminal Appeal No 1731 of 2017 DOD 5-10-2017).

3. Dishonour of cheque---Compensation with interest at the rate of 9% per annum---Object of the Chapter XVII of NI Act---Punitive, compensatory and restitutive as well---Providing single window for all claims---As regard to the claim of compensation raised on behalf of the respondent, we are conscious of the settled principles that the object of Chapter XVII of the NIA is not only punitive but also compensatory and restitutive. The provisions of NIA envision a single window for criminal liability for dishonour of cheque as well as civil liability for realization of the cheque amount. It is also well settled that there needs to be a consistent approach towards awarding compensation and unless there exist special circumstances, the Courts should uniformly levy fine up to twice the cheque amount along with simple interest at the rate of 9% per annum. (M/S Kalamani Tex vs. P. Balasubramanian Criminal Appeal 123 of 2021 (DOD 10 February, 2021) SC) (Three Judge Bench)

13. So in order to avoid further loss of the bona-fide cheque holders due to delaying tactics adopted by the drawers of the cheque, in payment of the settled amount, payment as interest at the rate of 9% has been recognized by Hon'ble the Supreme Court. Therefore keeping in mind the general tactics of the dishonest drawers, the Court while passing the impugned order and in exercise of its inherent powers also added the condition of payment of interest at the rate of 9% in the order. The purpose of this addition is two folded one is to compensate the future/further loss to the bona-fide cheque holders and another is to make the

wrongdoers aware that if the order is not obeyed they will not be able to take any advantage of delay and thus as a deterrence in the minds of wrong doers.

14. So, while passing the impugned order, the Court has not gone beyond the provisions or procedure prescribed by law. To the contrary what is implicit in the word "decree" has been made explicit by disclosing each and every consequence to be followed in case of non-compliance as deterrence in the mind of wrong doers. Had he obeyed the order he would not have faced the enumerated consequences.

15. As far as the question of presence of the parties is concerned on 22-01-2024 the impugned order was passed in Special Lok Adalata. On that day in total 169 cases were fixed and 57 cases were disposed of. The impugned order was passed by me on my lap-top. On my direction case was called out by the court peon/orderly and then order was typed by me on my lap top. As impugned order was passed more than 7 months earlier, so I have no personal knowledge about the presence of the parties. The orderly had told the parties present in the court. However, mistake in hearing cannot be ruled out due to heavy rush in court. It may be possible that the accused might be present but he deliberately might have avoided his signature on the order and in view of his conduct the later possibility appears more possible.

16. Thus order was passed with bona-fide intention simply to revive the faith of the general public which had been lost due to non-compliance by the police and the wrong-doers as well. However whatever directions are issued will be honoured and complied with utmost respectfully and sincerely.

17. Accordingly report is submitted for kind perusal."

7. From the aforesaid report, it appears that the learned Magistrate while exercising the jurisdiction sitting as a Presiding Officer of the Lok Adalat has confused himself that he is still exercising the powers of a Magistrate, who can pass the appropriate orders on the basis of a compromise compounding the offences under Section 138 of the N.I.Act. The moment, the same officer, who was holding the post of Magistrate takes up the matter as a Presiding Officer of the Lok Adalat seizes the power of the Magistrate and in Lok Adalat, the Presiding Officer's role is only that of a conciliator, who can facilitate the parties to arrive at a compromise and if the parties disagreed and did not settle their dispute, then the Lok Adalat is deprived of any powers of a Magistrate to adjudicate the dispute between the parties.

8. It is settled view that even if a criminal proceeding has been referred to the Lok Adalat, the award passed by the Lok Adalat shall be treated as a decree of a civil court and a decree of civil court cannot impose any penalty. In the instant case, the learned Magistrate is said to have been confused, while holding the Lok Adalat that is still having the power of a Magistrate to pass the appropriate orders in the in the interest of justice, which is reflected from the aforesaid report submitted by the learned Magistrate.

9. In the **State of Punjab and another vs. Jalour Singh and others, AIR 2008 (2) SCC 660**, three Judges Bench of the Apex Court has held as under:

"8. It is evident from the said provisions that Lok Adalats have no

adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. **When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does.** It discusses the subject matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. **When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat.**

9. But we find that **many sitting or retired Judges, while participating in Lok Adalats as members, tend to conduct Lok Adalats like courts, by hearing parties, and imposing their views as to what is just and equitable, on the parties.**

Sometimes they get carried away and proceed to pass orders on merits, as in this case, even though there is no consensus or settlement. Such acts, instead of fostering alternative dispute resolution through Lok Adalats, will drive the litigants away from Lok Adalats. Lok Adalats should resist their temptation to play the part of Judges and constantly strive to function as conciliators. The endeavour and effort of the Lok Adalats should be to guide and persuade the parties, with reference to principles of justice, equity and fair play to compromise and settle the dispute by explaining the pros and cons, strength and weaknesses, advantages and disadvantages of their respective claims.

12. It is true that where an award is made by Lok Adalat in terms of a settlement arrived at between the parties, (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. **If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat.** The question of challenging such an order in a petition under Article 227 does not arise. As already noticed, in such a situation, the High Court ought to have heard and disposed of the appeal on merits."

10. The aforesaid view has been further affirmed by the Apex Court in *Bharvagi Construction vs. Kothakapu Muthyam Reddy and others*, AIR 2017 SC 4428, wherein the Apex Court has held as under :

"27. In our considered view, the aforesaid law laid down by this Court is binding on all the Courts in the country by virtue of mandate of Article 141 of the Constitution. This Court, in no uncertain terms, has laid down that challenge to the award of Lok Adalat can be done only by filing a writ petition under Article 226 and/or Article 227 of the Constitution of India in the High Court and that too on very limited grounds.

28. In the light of clear pronouncement of the law by this Court, we are of the opinion that the only remedy available to the aggrieved person(respondents herein/plaintiffs) was to file a writ petition under Article 226 and/or 227 of the Constitution of India in the High Court for challenging the award dated 22.08.2007 passed by the Lok Adalat. It was then for the writ Court to decide as to whether any ground was made out by the writ petitioners for quashing the award and, if so, whether those grounds are sufficient for its quashing."

11. Thus, in the considered opinion of this Court, the report submitted by the Magistrate is not the correct understanding the powers of the Lok Adalat and the Magistrate is confused while sitting as a Presiding Officer of a Lok Adalat, he still have a power of the Magistrate. Therefore, in view of the aforesaid settled view as has been laid down by the Apex Court in the aforesaid judgments, the Presiding Officer of a Lok Adalat is not empowered to include any condition beyond the

compromise/settlement between the parties. Thus, the conditions of punishment in case of default of the payment of settlement amount and payment of interest at the rate of 9% could not have been imposed by the learned Magistrate as the same were not the part of the compromise arrived at between the parties. Had the Magistrate concerned passed the similar orders while passing the orders under Section 147 of the N.I. Act, while compounding the offences under Section 138 of the N.I. Act, it would be open for him to impose just the appropriate conditions in the interest of justice but while exercising the jurisdiction and powers of a Lok Adalat, the Magistrate concerned was debarred from exercising the power of Magistrate and it was not open for him to impose such conditions.

12. However, Sri Anil Kumar Srivastava, learned Senior Advocate appearing for the opposite party no.2 placing reliance upon the aforesaid two judgments submits that an award passed by the Lok Adalat is a decree passed by a civil court, which can be challenged only by way of the writ petition under Article 226 and 227 of the Constitution of India. The powers of the High Court under Section 482 Cr.P.C. against an award passed by the Lok Adalat cannot be invoked.

13. Per contra, learned counsel for the applicant submits that since the punishment of imprisonment in case of default has been imposed in the award passed by the Lok Adalat in a proceeding arising out of a criminal complaint case, the powers of Section 482 Cr.P.C. are amenable to a party aggrieved by such an award passed by Lok Adalat.

14. As has been held by the Apex Court in *Jalour Singh* (supra) against an

award passed by the Lok Adalat. The same can be challenged only by way of a petition under Section 226 or 227 of the Constitution of India and not otherwise and the aforesaid views have already been affirmed in Bharvagi Construction (supra) by the Apex Court. In view thereof, the instant application under Section 482 Cr.P.C. against the award of Lok Adalat is not maintainable. Therefore, this Court while exercising the jurisdiction under Section 482 Cr.P.C. cannot interfere with the Award passed by the Lok Adalat, which is a decree passed by civil court, and is not amenable to the criminal jurisdiction under Section 482 Cr.P.C.

15. With the aforesaid observations, the instant application is **disposed of**.

16. The Registrar (Compliance) is directed to communicate this order to the State Legal Services Authority as well as all the District Legal Services Authorities, who shall communicate this order to all the Presiding Officers holding the Lok Adalat.

(2024) 9 ILRA 457
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2024

BEFORE

THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.

Application U/S 482 No. 24716 of 2024

Mukesh Kharwar ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
 Kailash Pati Singh Yadav

Counsel for the Opposite Parties:

G.A.

Criminal Law - Criminal Procedure Code, 1973 – Section 156(3) –an application under Section 156(3) Cr.P.C. was moved by the applicant-rejected-iM.P.ugned-no sufficient reason disclosed to treat the application under section 156(3) Cr.P.C. as a coM.P.laint-merely because the facts are in the knowledge of the Applicant- direction to lodge FIR cannot be refused-the gravity/seriousness of the offence-the requirement of the evidence and interest of justice need be considered in passing the order under Section 156(3) Cr.P.C-iM.P.ugned order does not assign any valid reason nor reflects application of judicious mind and has been passed in a mechanical manner-iM.P.ugned order set aside.

Application allowed. (E-9)

List of Cases cited:

1. Anmol Singh Vs St. of U.P. & ors.reported in 2021 (1) ADJ 400
2. Sukhwasi Vs St. of U.P., 2007(59) ACC 739
3. Lalita Kumari Vs Government of U.P. & anr., reported in 2014 (2) SCC 1
4. Suresh Chand Jain Vs St. of M.P. & anr.reported in (2001) 2 SCC 628
5. Lalaram Vs St. of U.P. & ors. passed in Criminal Revision No. 1611 of 2020, decided on 18.12.2020 (Neutral Citation No. - 2020:AHC:119365)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Manish Kumar Singh, Advocate holding brief of Mr. Kailash Pati Singh, learned counsel for the applicant as well as Mr. D.P. Singh, learned AGA for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed to quash the

impugned order dated 08.05.2024 passed by Special Judge SC/ST Act Chandauli in Criminal Misc. Case No.78 of 2024 (Mukesh Kharwar vs. Arun Kumar and Others), Police Station- Baluwa, District- Chandauli as well as stay the further proceedings of the aforesaid case, pending in the court of Special Judge SC/ST Act Chandauli.

3. Considering the nature of the order under challenge as well as order proposed to be passed, as purely equal question is involved, no fruitful purpose will be served in keeping this matter pending, therefore, the matter is being decided at this stage without calling for counter affidavit.

4. Brief facts of the case are that an application under Section 156(3) Cr.P.C. was moved by the applicant with the allegations that the applicant is an elected Member of Kshetra Panchayat, Kshetra Sankhya 83, Kshetra Papaura Vikas Khand Chahaniya, District- Chandauli. On 04.03.2024, the applicant along with 66 Kshetra Panchayat Members had gathered at the office of the District Magistrate, Chandauli to propose no confidence motion against Arun Kumar Jaiswal, Block Pramukh Chahaniya, District- Chandauli. Annoyed by the aforesaid, on 14.03.2023 at about 08:15 am when the applicant was performing pooja at the village's Radha Krishna Mandir, villagers namely Gopal Singh @ Bablu and Monu Singh reached there and forced the applicant to sign on the affidavit in favour of Block Pramukh. When the applicant refused to sign the same, they used abusive language, caste indicative words and assaulted him. They forcefully tried to take him on the motorcycle and assaulted him with hand and fist. Hearing the noise, the applicant's wife and other villagers reached there and

tried to intervene. It has been further alleged that the applicant tried to lodge an FIR by giving an application before the concerned police station but of no avail, therefore, the present application has been filed. The aforesaid application was treated as complaint case thus, refusing the prayer to issue direction to lodge the FIR on the ground that the facts of the case were known to the applicant.

5. Learned counsel for the applicant submits that the application under Section 156(3) Cr.P.C. discloses commission of cognizable offence and as such the Magistrate must have directed for registration of first information report and investigation by the police, instead of treating the application as a complaint case. He further submits that the order impugned has been passed mechanically and in a routine manner, which does not manifest the application of judicious mind to the facts of the case and law applicable therein. In support of his submission, he has placed reliance upon the judgment passed by this Court in the case of **Anmol Singh vs. State of U.P. and Others** reported in **2021 (1) ADJ 400**.

6. Learned A.G.A. on the other hand has supported the impugned order and has pointed out that the grievance of the applicant has not gone unattended by the court below. The court below after taking into consideration the entire gamut of the facts and circumstances of the case has rightly concluded to treat the application filed by the applicant under Section 156 (3) Cr.P.C. as a complaint. The applicant shall still have an opportunity to prove his case before the court below.

7. Having heard the learned counsel for the parties, the following question has

come up for consideration before this Court :-

8. Whether the Magistrate is bound to pass an order on each and every application under Section 156(3) Cr.P.C. containing allegations of commission of a cognizable offence for registration of the F.I.R. and its investigation by the police even if those allegations, prima-facie, do not appear to be genuine and do not appeal to reason, or he can exercise judicial discretion in the matter and can pass order for treating it as 'complaint' or to reject it in suitable cases?

9. In other words, the question arises that when a Magistrate is approached by a complainant with an application praying for a direction to the police under Section 156(3) Cr.P.C. to register and investigate an alleged cognizable offence, why he should :-

(a) grant the relief of registration of a case and its investigation by the police under Section 156(3) Cr.P.C. and when should he

(b) treat the application as a complaint and follow the procedure of Chapter XV of Cr.P.C.

10. Before dealing with the question, it will be appropriate to discuss some provisions to answer the aforesaid question.

11. Section 154 and 156 Cr. P. C. provides for the registration and investigation of complaint. The same are reproduced herein under:-

"154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a

police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

12. Section 156 Cr.P.C. is quoted herein below:-

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

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

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the

case was one which such officer was not empowered under this section to investigate.

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

13. From the perusal of the aforesaid provision as well as Section 154 Cr.P.C., it is evident that the police can investigate into matters relating to commission of 'cognizable offences' brought to its notice under section 154 Cr.P.C. Officer-in-charge of police station has power to investigate U/S 156(1) in such case. Magistrate has power to take cognizance u/s 190 Cr.P.C. on receiving the 'complaint'. Thus the matter relating to section 156 (3) relates to power of Magistrate to order investigation by police in matters relating to cognizable offences brought before it through complaint. Complaint has been defined in section 2(d) Cr.P.C. of as follows : "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but does not include a Police report." Code of Criminal Procedure has given different type of powers to deal with such matters relating to commission of cognizable offences when brought before it. A Division bench of this Court in the case of '**Sukhwasi v. State of U.P., 2007(59) ACC 739**' held as under:

"Applications under section 156(3) Cr.P.C. are coming in torrents. Provisions under section 156(3) Cr.P.C. should be used sparingly. They should not be used unless there is something unusual and extra ordinary like miscarriage of justice which warrants a direction to the Police to register a case. Such application should not be allowed because the law

provides them with an alternative remedy of filing a complaint; therefore, recourse should not normally be permitted for availing the provisions of section 156(3) Cr.P.C.

The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application section 156(3) Cr.P.C. and there is no such legal mandate."

However, the said judgement does not provide any reason as to why FIR should not be registered in respect of a cognizable offence.

14. The Apex Court in the case of **Lalita Kumari Vs Government of Uttar Pradesh and another**, reported in **2014 (2) SCC 1** has discussed as follows :-

"i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

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

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

iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who

do not register the FIR if information received by him discloses a cognizable offence.

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

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

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

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

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

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

viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary

inquiry must also be reflected, as mentioned above."

15. From the above discussion, it is clear that the scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some "investigation" is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police upon whom statute has conferred the powers essential for investigation, for example

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where for production before Court at the trial (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of case property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation.

16. Thus, where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done

only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted. It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation. Besides even after taking cognizance and proceeding under Chapter XV the Magistrate can still under Section 202(1) Cr. P.C. order investigation, even thought of a limited nature.

17. The position has been clarified in the judgement passed by the Apex Court in the case of **Suresh Chand Jain vs. State of M.P. and Another reported in (2001) 2 SCC 628** which while dealing with the issue has held as follows :-

"Any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps

contemplated in Chapter XII of the Code only thereafter."

18. The Co-ordinate Bench of this Court while dealing with the issue in the case of **Lalaram v. State of U.P. and 13 others passed in Criminal Revision No. 1611 of 2020, decided on 18.12.2020 (Neutral Citation No. - 2020:AHC:119365)** has summarized the following propositions :-

"40. From the aforesaid judgments, some of the following proposition of law, well settled, may be summarized as under :-

(40.01). Under Section 154 of the Code, if the information discloses commission of a cognizable offence it is the mandatory duty of the police officer in charge to register the FIR. He cannot avoid his duty of registering offence, if cognizable offence is made out.

(40.02). If FIR is not registered, the person aggrieved by a refusal to record the information has remedy to approach the Superintendent of Police by submitting an application in writing and by post to enable him to satisfy if such information discloses the commission of a cognizable offence and in case of such satisfaction, either to investigate himself or direct an investigation to be made by any police officer subordinate to him.

(40.03). If the person still feels aggrieved from inaction of the police authorities he has the remedy to approach the Magistrate by way of application under Section 156(3) Cr.P.C.,

(40.04). On such an application having been made, if, the Magistrate finds that a cognizable offence is made out, the Magistrate may direct the police to register

the FIR and investigate the matter, without taking cognizance.

(40.05). The other option open to the Magistrate is to take cognizance on the complaint, register it as a complaint case and proceed as per the procedure prescribed under Chapter

XV Cr.P.C. The Magistrate would record the statement of the complainant and the witnesses if any present, under Section 200 Cr.P.C. He may, if he thinks fit and shall in cases where accused resides outside the area of exercise of jurisdiction of the Magistrate concerned, either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, under Section 202(1) Cr.P.C. Thereafter, he shall pass order, either under Section 203 dismissing the complaint, for brief reasons to be recorded, or he shall issue process under Section 204 Cr.P.C.

(40.06). In either case, i.e. issuing direction for investigation by the police officer under Section 156(3) Cr.P.C. or taking cognizance and registering it as a complaint case, the Magistrate has to apply judicial mind. There cannot be mechanical exercise of jurisdiction or exercise in a routine manner. Mere statement in the order that he has gone through the complaint, documents and heard the complainant will not be sufficient. What weighed with the Magistrate to order investigation or to take cognizance should be reflected in the order, although a detailed expression of his view is neither required nor warranted.

(40.07). The exercise of discretion by the Magistrate is basically guided by interest of justice, from case to case.

(40.08). However, where some investigation is required which is of a nature that is not possible for the private

complainant and which can only be done by the police officer upon whom statute has conferred the powers essential for investigation, the option to direct the registration of the FIR and its investigation by the police officer should be exercised, for example:-

(i) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(ii) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(iii) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved, and to illustrate this, by few example cases may be visualised where for production before Court at the trial

(a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or

(b) recovery of case property is to be made and kept sealed; or

(c) recovery under Section 27 of the Evidence Act; or

(d) preparation of inquest report; or

(e) witnesses are not known and have to be found out or discovered through the process of investigation.

(40.09). Where the complainant is in possession of the complete details of all the accused and the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case should be adopted.

(40.10). Category of cases falling under para 120.6 in Lalita Kumari (Supra) i.e.

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases,

(d) Corruption cases

(e) Cases where there is abnormal delay in filling criminal complaint etc. may fall under Section 202 Cr.P.C.

(40.11). The Magistrate should also keep in view that primarily, it is the duty of the State/police to investigate the cases involving cognizable offence. Generally, the burden of proof to bring the guilt of the accused is on the State and this burden is a heavy burden to prove the guilt beyond all reasonable doubts. This burden should not unreasonably be shifted on an individual/complainant from the State by treating the application under Section 156(3) Cr.P.C. as a complaint case.

(40.12). The investigation which the police officer or such other person makes in pursuance of the direction of the Magistrate under Section 202(1) Cr.P.C. is the same kind of investigation as is required to be conducted by police officer, under Chapter XII Cr.P.C. which ends with submission of the report as per Section 173(2) Cr.P.C.

(40.13). The distinction between the investigation by the police officer under Section 156(3) and under Section 202(1) Cr.P.C. is that the former is at the pre-cognizance stage and the latter is at post cognizance stage, when the Magistrate is seisin of the case. The investigation under Section 202(1) Cr.P.C. is for the purpose of ascertaining the truth or false hood of the complaint for helping the Magistrate to decide, whether or not there is sufficient ground, for him to proceed further against the accused by issuing process, whereas, the inquiry report under Section 173(2)

Cr.P.C. of the investigation made by the police of its own or under the directions of the Magistrate under Section 156(3) Cr.P.C. is for the purpose of enabling the Magistrate to take cognizance of an offence under Section 190(1)(a) Cr.P.C.

(40.14). Once cognizance is taken on the application under Section 156(3) Cr.P.C. by the Magistrate and he embarks upon the procedure embodied in Chapter XV, he would not be competent to revert to the pre-cognizance stage under Section 156(3) Cr.P.C.

(40.15). If the Magistrate did not order for police investigation under Section 156(3) Cr.P.C. and took cognizance of the case, that would not be bar to the exercise of the power of the Magistrate for directing the police investigation under Section 202(1) Cr.P.C."

19. Perusal of the impugned order shows that no sufficient reason has been disclosed, on the basis of which, the Magistrate has proceeded to treat the application under section 156(3) Cr.P.C. as a complaint. Merely because the facts are in the knowledge of the applicant, direction to lodge FIR cannot be refused. The gravity/seriousness of the offence; the requirement of the evidence for the purpose of launching a successful prosecution, and basically the interest of justice depending on the facts of each case, need be considered in passing the order under Section 156(3) Cr.P.C. The impugned order does not assign any valid reason nor reflects application of judicious mind and has been passed in a mechanical manner only on the ground that the facts of the case were within the knowledge of the applicant, thus, the same is liable to be **set-aside**.

20. The present Application U/S 482 is **allowed**.

21. Accordingly, the impugned order dated 08.05.2024 is set aside with the direction to the court concerned to pass a fresh order on the application under Section 156(3) Cr.P.C. filed by the applicant after affording opportunity of hearing to both the parties, in accordance with law, within a period of **one month** from the date of production of certified copy of this order.

(2024) 9 ILRA 465
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2024

BEFORE

THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.

Application U/S 482 No. 28390 of 2024

Mohammad Rizvan Khan & Ors.

...Applicants

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Applicants:

Shyam Sunder Mishra

Counsel for the Opposite Parties:

G.A.

Summoning order-impugned-passed without reason-failure to provide reasons in judicial decisions undermines the principles of natural justice-such orders may be deemed arbitrary and unjust-quashed-direction to pass a fresh and speaking order.

Application allowed. (E-9)

List of Cases cited:

Sant Lal Gupta & ors. Vs Modern Co-operative Group Housing Society Ltd. & ors.

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. आवेदक के लिए विद्वान अधिवक्ता श्री श्याम सुंदर मिश्रा के संक्षिप्त धारक विद्वान अधिवक्ता श्री राजीव द्विवेदी, और राज्य के लिए विद्वान ए.जी.ए. श्री डी.पी. सिंह को सुना गया और अभिलेख का परिशीलन किया गया।

2. दं.प्र.सं. की धारा 482 के अंतर्गत यह आवेदन, आरोप पत्र दिनांकित 09.10.2022 और संज्ञान आदेश/समन आदेश दिनांकित 23.02.2024 के साथ-साथ मुकदमा अपराध संख्या 171/2024 अन्तर्गत धारा 354, 452, 504, 323 भा.दं.सं., थाना-कोतवाली, जिला-फतेहपुर से उद्भूत अपराधिक मुकदमा सं. 171/2024 (राज्य बनाम मोहम्मद रिजवान खान और अन्य), जो सिविल जज (जूनियर डिवीजन)/ एफ.टी.सी/ सी.ए.डब्ल्यू, फतेहपुर की अदालत में लंबित है, की सम्पूर्ण कार्यवाही को रद्द करने के लिए दायर किया गया है।

3. आवेदकों के विद्वान अधिवक्ता ने प्रस्तुत किया कि दिनांक 13.09.2022 की घटना के लिए, आवेदक मोहम्मद रिजवान खान, गुड्डू उर्फ मोहम्मद रेहान और मोहम्मद नदीम खान के खिलाफ प्रतिपक्षी संख्या 2 द्वारा दिनांक 15.09.2022 को लगभग 17:21 बजे भा.दं.सं. की धारा 354, 452, 323, 504 के तहत एफआईआर दर्ज की गई है। विवेचना के बाद आवेदकों के खिलाफ दिनांक 09.10.2022 को आरोप पत्र प्रस्तुत किया गया, जिस पर संबंधित न्यायालय ने केवल दो व्यक्तियों, यानी मोहम्मद रिजवान खान और गुड्डू उर्फ मोहम्मद रेहान के खिलाफ दिनांक 23.02.2024 को संज्ञान लिया, बिना यह उल्लेख किए कि आरोपी मोहम्मद नदीम खान को दोषमुक्त क्यों

किया गया और उन्हें समन क्यों नहीं किया जा रहा है। इस प्रकार, संबंधित अदालत ने दिनांक 23.02.2024 का संज्ञान/समन आदेश बिना न्यायिक विवेक का प्रयोग किये और बिना कोई कारण बताए पारित किया है और यह अस्पष्ट, संदिग्ध और निरर्थक है। उन्होंने आगे दलील दी कि समन आदेश के अवलोकन से पता चलता है कि कार्यालय को आवेदकों, यानी मोहम्मद रिजवान खान और गुड्डू उर्फ मोहम्मद रेहान को समन करने का निर्देश देने के अलावा, इसके समर्थन में कोई कारण नहीं बताया गया है। इसलिए, उन्होंने दलील दी कि 23.02.2024 के आक्षेपित संज्ञान/समन आदेश को रद्द किया जाना चाहिए।

4. विद्वान ए.जी.ए. आवेदकों के विद्वान अधिवक्ता द्वारा प्रस्तुत किए गए तर्कों की सत्यता पर प्रतिवाद नहीं किया और यदि संज्ञान/समन आदेश को रद्द कर दिया जाता है तो उन्हें कोई आपत्ति नहीं है।

5. पक्षकारों के विद्वान अधिवक्ता द्वारा प्रस्तुत तर्कों पर विस्तृत और गहन विमर्श करने के पश्चात, तथा आवेदन के समस्त अभिलेखों का सूक्ष्म और समग्र अवलोकन करने के उपरांत, यह माननीय न्यायालय इस निष्कर्ष पर पहुँचती है कि दिनांक 23.03.2024 का संज्ञान/समन आदेश अधीनस्थ न्यायालय द्वारा बिना समुचित विवेकाधीन शक्ति के प्रयोग और बिना किसी स्पष्ट कारण के पारित किया गया है। उक्त आदेश में यह उल्लेखित नहीं किया गया कि अभियुक्त मोहम्मद नदीम खान को दोषमुक्त किए जाने का कारण क्या था, अथवा

उसे न्यायालय के समक्ष प्रस्तुत होने के लिए क्यों नहीं बुलाया गया।

6. यह विधिक सिद्धांत दीर्घकाल से स्थापित और सुव्यवस्थित है कि किसी भी आदेश, चाहे वह प्रशासनिक प्रकृति का हो या न्यायिक, उसमें तर्कपूर्ण और विधिक आधारों के रूप में स्पष्ट कारणों का उल्लेख अपरिहार्य होता है। यह केवल एक विधिक औपचारिकता नहीं, बल्कि न्यायिक प्रक्रिया का एक बुनियादी और अभिन्न अंग है। कारण किसी भी निर्णय की आधारशिला होते हैं और निर्णय के पीछे की न्यायिक मंशा और तर्कशीलता को प्रकट करते हैं। यदि किसी आदेश में कारणों का अभाव हो, तो वह आदेश न केवल विधिक दृष्टि से दुर्बल हो जाता है, अपितु न्यायिक प्रक्रिया के मूल सिद्धांतों के साथ भी अन्याय करता है।

7. अतिरिक्त रूप से, न्यायिक प्रक्रिया में कारण लेखन की अनिवार्यता का प्रमुख ध्येय यह है कि यह न्यायाधीश की व्यक्तिनिष्ठता को नियंत्रित करते हुए निष्पक्ष और वस्तुनिष्ठ निर्णय प्रदान करता है। यह सुनिश्चित करता है कि कोई भी निर्णय पूर्वाग्रह या निजी दृष्टिकोण के आधार पर नहीं, बल्कि तथ्यों और प्रमाणों के निरपेक्ष विश्लेषण के आधार पर पारित किया जाए। इसके साथ ही, निर्णय में कारण दर्ज करने की यह प्रक्रिया निर्णय की पारदर्शिता को भी प्रकट करती है, जिससे संबद्ध पक्षों को यह समझने में सहायता मिलती है कि उनके मामले में न्यायालय द्वारा किस प्रकार का विवेकाधिकार प्रयोग किया गया है और किन आधारों पर निर्णय लिया गया है।

8. यह भी अत्यंत महत्वपूर्ण है कि कारण लेखन की यह प्रक्रिया 'प्राकृतिक न्याय' के सिद्धांत का अंग मानी जाती है। यह न्यायिक निष्पक्षता, पारदर्शिता, और निर्णय की उत्तरदायित्वता सुनिश्चित करने का आवश्यक साधन है। यदि किसी आदेश या निर्णय में समुचित कारण दर्ज नहीं किए गए हैं, तो संबद्ध पक्षों के लिए यह समझ पाना कठिन हो जाता है कि उनके खिलाफ किस प्रकार के आधारों पर आदेश पारित किया गया है, जिससे न्याय का उद्देश्य असफल हो सकता है। न्यायपालिका का यह परम कर्तव्य है कि वह प्रत्येक निर्णय में पारदर्शिता, निष्पक्षता और तर्कशीलता का पालन करे, ताकि विधि के शासन में जनता का विश्वास दृढ़ और अक्षुण्ण बना रहे।

9. सर्वोच्च न्यायालय द्वारा संत लाल गुप्ता और अन्य बनाम मॉडर्न कोऑपरेटिव ग्रुप हाउसिंग सोसाइटी लिमिटेड और अन्य¹, के मामले में निम्नानुसार अवधारित किया है:

"27. यह एक स्थापित कानूनी प्रस्ताव है कि न केवल प्रशासनिक बल्कि न्यायिक आदेशों को भी इसमें दर्ज कारणों द्वारा समर्थित होना चाहिए ...

कारण प्रत्येक निष्कर्ष का मूल है। यह एक आदेश में स्पष्टता लाता है और इसके बिना, आदेश बेजान हो जाता है। कारण व्यक्तिपरकता को वस्तुनिष्ठता से बदल देते हैं। कारणों की अनुपस्थिति एक आदेश को अप्रतिरोध्य/अस्थायी बना देती है, खासकर जब आदेश को उच्च मंच के समक्ष आगे चुनौती दी जा सकती है। कारणों की रिकॉर्डिंग प्राकृतिक न्याय का सिद्धांत है और प्रत्येक न्यायिक

आदेश को लिखित रूप में दर्ज कारणों द्वारा समर्थित होना चाहिए। यह निर्णय लेने में पारदर्शिता और निष्पक्षता सुनिश्चित करता है। जिस व्यक्ति पर प्रतिकूल प्रभाव पड़ता है, उसे पता होना चाहिए कि उसका आवेदन क्यों खारिज किया गया है।"

(हिंदी अनुवादित)

10. इस प्रकरण में सर्वोच्च न्यायालय द्वारा प्रतिपादित विधिक सिद्धांतों का अनुकरण करते हुए, इस न्यायालय का यह स्पष्ट मत है कि दिनांक 23.02.2024 को पारित आक्षेपित संज्ञान/समन आदेश में किसी प्रकार के विधिक तर्क या कारण का अभाव है। किसी भी न्यायिक आदेश का ठोस कारणों और विधिक आधारों पर समर्थित होना अनिवार्य है, और उक्त आदेश का इन आवश्यकताओं से रहित होना इसे विधिक दृष्टि से दुर्बल और अस्थिर बनाता है। अतः यह आक्षेपित संज्ञान/समन आदेश न्यायिक दृष्टिकोण से बलहीन है और विधिक परिप्रेक्ष्य में पोषणीय नहीं कहा जा सकता।

11. तदनुसार, इस न्यायालय द्वारा यह निर्णय लिया जाता है कि दिनांक 23.02.2024 को संबंधित न्यायालय द्वारा पारित संज्ञान/समन आदेश को निरस्त किया जाए, क्योंकि यह विधिक मानदंडों और न्यायिक विवेक के अभाव में पारित किया गया है। यह आदेश न्यायिक प्रक्रिया के उन मौलिक सिद्धांतों का उल्लंघन करता है जिनके अंतर्गत किसी भी न्यायिक निर्णय में पर्याप्त कारणों का उल्लेख किया जाना आवश्यक है।

12. इसके अतिरिक्त, यह निर्देश दिया जाता है कि संबंधित न्यायालय, इस न्यायालय द्वारा पारित आदेश की प्रमाणित प्रति प्राप्त होने की तिथि से एक माह के भीतर, समस्त अभिलेखों और तथ्यों का सम्यक अवलोकन कर, विधि के अनुसार, एक नया, विधिसम्मत, आख्यायित एवं तर्कसंगत आदेश पारित करेगा। नया आदेश पारित करते समय न्यायालय यह सुनिश्चित करेगा कि उस आदेश में पर्याप्त तर्क, प्रमाणिक आधार और विधिक निष्कर्ष स्पष्ट रूप से उल्लिखित हों, ताकि न्याय की प्रक्रिया का सम्यक निर्वहन हो सके।

13. यह भी सुनिश्चित किया जाना चाहिए कि संबंधित न्यायालय अपने निर्णय में उचित कारणों का उल्लेख करते हुए, पक्षकारों के अधिकारों और तथ्यों की विस्तृत समीक्षा के बाद निष्कर्ष पर पहुँचे। इस प्रकार का आदेश न केवल विधि की दृष्टि से उचित होगा, बल्कि न्यायालय की निष्पक्षता, पारदर्शिता और उत्तरदायित्व का भी प्रमाण होगा, जो कि न्यायिक प्रक्रिया के मूलभूत सिद्धांतों में से एक है।

14. उपरोक्त निर्देशों एवं टिप्पणियों के आलोक में, प्रस्तुत आवेदन स्वीकृत किया जाता है।

15. कार्यालय को निर्देशित किया जाता है कि इस आदेश की प्रमाणित प्रति एक सप्ताह की अवधि के भीतर संबंधित न्यायालय को प्रेषित की जाए, ताकि विधिक प्रक्रिया का सम्यक् अनुपालन सुनिश्चित हो सके।

(2024) 9 ILRA 468

**APPELLATE JURISDICTION
CIVIL SIDE**

**DATED: ALLAHABAD 12.09.2024
BEFORE**

**THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.**

Special Appeal No. 590 of 2024

**The State of U.P. & Ors. ...Appellants
Versus
Santu Prasad Chaudhary & Ors.
...Respondents**

Counsel for the Appellants:

Abhishek Srivastava, Ratan Deep Mishra

Counsel for the Respondents:

Kamla Singh

A. Service Law – UP Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 – Rule 4 – Termination – Assistant teacher – Appointed as untrained in 1977 and worked upto 2007 – Discontinued from service in 2007, when the institution was upgraded – Permissibility – Held, the provisions of Rules, 1978 were not retrospective, therefore, appointment of an untrained teacher prior to these Rules could not be held to be illegal only on that account – The petitioners possessed the minimum qualification of training in view of Rules, 1978 – However, the Division Bench relegated the matter to the Authority to ascertain entire working since 2012. In case they have worked in the institution, they will be entitled to salary but if it is found that they were not working in the institution, they will not be entitled for the salary from July, 2012 till their superannuation on the principle of 'no work no pay'. (Para 32, 35, 41 and 49)

Special Appeal partly allowed. (E-1)

List of Cases cited:

1. Rikh Pal Singh Vs District Basic Education Board, Allahabad; 1990 UPLBEC 351

2. Pati Ram Yadav Vs St. of U.P. & ors.; (1999) 3 UPLBEC 2379

3. Ram Sarup Vs St. of Har. & ors.; AIR 1978 SC 1536

4. Dr. M.S. Mudhol & anr. Vs S.D. Halegkar & ors.; (1993) 3 SCC 591

5. Rajendra Prasad Srivastava Vs District Inspector of Schools, Gorakhpur, Now Maharajanj; 1994 ACJ 781

6. Smt. Shanti Devi Verma Vs Deputy Director of Education; 1982 UPLBEC 365

7. Ashok Kumar Sharma & anr. Vs Chandra Shekhar & anr.; 1993 Supp. (2) SCC 611

8. Roshni Devi Vs St. of Har. & ors.; (1998) 8 SCC 59

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.

&

Hon'ble Prashant Kumar, J.)

1. Heard Shri Ratan Deep Mishra, learned Standing Counsel for State-appellants and Mrs. Kamla Singh, learned counsel for the opposite parties-petitioners.

2. The instant intra court appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules has been preferred assailing the validity of the judgment and order dated 27.09.2023 passed by learned Single Judge in Writ-A No.13353 of 2013 (Santu Prasad Chaudhary & Ors. v. State of U.P. & Ors.), the operative portion of which, for ready reference, is reproduced as under:-

“.....14. On precise query made before the learned Standing Counsel, the legal terminology related to irregularity and illegality submitted through counter affidavit in consonance with the wordings mentioned in the order which impugned in

the present petition is not clear, if in any case, any illegality found in the appointment that does not relate to the matter which has been decided by the respondent no. 2 while adjudicating the controversy in the strict compliance of the order direction passed by co-ordinate bench of this Court.

15. More so, no illegality is apparent on the face of record at the time of adjudication of writ petition No. 12216 of 2010, wherein interim protection has been extended at the time of admission and later on considering the bonafide of the petitioner, the matter has been remitted back to the respondent no. 2 for deciding afresh.

16. Learned Standing Counsel sought attention of the court over the ground which has formed the basis of passing the order dated 12.09.2012 but at the same time fails to apprise that once the decision has been taken up by the respondent no. 1 in favour of the respondent no. 5, wherein the same position was prevalent as mentioned in the order which impugned in the present petition how the case of the petitioner are different with respondent no. 5, whereas, the allegation which has been put forward by the respondent no. 5 was only against one Mohd. Sayeed and not at all against the petitioners. The reasoning behind order dated 12.09.2012 is contrary to the order 03.08.2010.

17. It is also informed by learned counsel for the petitioners are not paid their salaries till June, 2012 and thereafter retired during pendency of the instant writ petition.

18. After having the rival submissions extended by learned counsel for the parties and after perusal of the counter affidavit preferred by respondent no. 5 which more or less supporting the

case of the petitioners, the order dated 12.09.2012 is hereby set aside. All the petitioners are thereby treated as permanent incumbent of the institution, arrears of salary from July, 2012 till date of their retirements be extended. Since there is hardly any case made out by the respondents that the petitioners never rendered their services for the institution and thereafter, retiral benefits admissible to the petitioners be also extended within a period of six months from the date of production of certified copy of this order.

19. The writ petition stands allowed accordingly."

FACTS

3. The facts in a nutshell relevant and essential for disposal of instant appeal are noted herein below.

4. The opposite parties-petitioners while preferring the writ petition had challenged the order dated 12.09.2012 passed by Director of Education (Basic), U.P. on the ground that he had rejected the representation of the petitioners overlooking the order dated 03.08.2012 passed by Special Secretary, Government of U.P. and also prayed for direction to the respondents to pay the salary and all the emoluments to the petitioners.

5. The claim of the petitioners is that they are serving in Lal Bahadur Shastri Purwa Madhyamik Vidyalaya, Jagdishpur, Raja, Siddharth Nagar¹, which is a recognized and aided Junior High School and governed under the U.P. Junior High School (Payment of Salaries) Act, 1978. The institution was granted temporary recognition on 4.6.1980 and the permanent recognition was granted on 31.10.1984. The institution had received grant-in-aid on

01.12.2006. On the said date, salary of 01 Head Master, 04 Assistant Teachers, 01 clerk and 03 Class-IV employees were approved. The Asstt. Director of Education (Basic), Gorakhpur vide order dated 31.3.2007 had approved the salary against the said posts.

6. The petitioner no.1 was appointed in the institution in question on 02.07.1977. Petitioner nos.2 and 3 were appointed as Assistant Teachers in the said institution on 02.07.1977 and petitioner no.4 was appointed as Assistant Teacher on 05.07.1977. The petitioner no.5 was appointed as Clerk on 2.7.1977 and petitioner nos.6, 7 and 8 were appointed as Peon on 02.07.1977 and 26.09.1989 respectively. The services of all the petitioners were affirmed by the then District Basic Education Officer, Siddharth Nagar vide order dated 23.3.1985. The services of the teachers are covered by the provisions of U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 and the service of the Ministerial Staff and Group-D employees is covered by the provisions of Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984.

7. The controversy had raked up when one Kanhaiya Lal, who was Asstt. Teacher in the institution made a complaint against one Md. Sayeed, Asstt. Teacher (Urdu). He had also later on filed Writ Petition No.44836 of 2009, which was disposed of on 26.08.2009 directing the Director of Education, Basic, U.P. Lucknow to pass reasoned and speaking order. In response to the said mandate, the Director of Education (Basic), U.P. Lucknow passed an order

dated 17.2.2010 recognising the services of those teachers and employees, who were being paid salary after obtaining the reports and documents from the Asstt. Director of Education, Basic, Gorakhpur; District Basic Education Officer, Siddharth Nagar and Manager/ Principal of the institution and accordingly cancelled the earlier order dated 31.3.2007 by which the salary was approved by the Asstt. Director of Education, Basic, Gorakhpur.

8. The order dated 17.2.2010 was challenged by the petitioners in Writ Petition No.12216 of 2010, wherein interim order was accorded on 11.3.2010 permitting the petitioners to continue and be paid salary till further orders. In spite of the aforesaid order, once the salary was not released, the petitioners preferred contempt application. In response to the order dated 6.8.2012 passed by the Contempt Court the salary was released in favour of the petitioners-opposite parties. Later on the said writ petition was allowed on 30.07.2012 on the ground of non-adherence to principles of natural justice. The order dated 17.2.2010 passed by the Director of Education, Basic, U.P. was set aside and the matter was remitted back to the Director of Education, Basic to pass appropriate order. In compliance to the Writ Court order, the Director of Education, U.P. Lucknow, after giving opportunity to all the stake holders, passed an order dated 12.09.2012 derecognising the services of petitioners-opposite parties and other employees, stating them to be illegally appointed and the salary was also stopped since August, 2012. The said order was impugned in the Writ Petition No.13353 of 2013 in which learned Single Judge has passed the judgment dated 27.09.2023, which has been assailed in the present special appeal.

9. It is averred that the minimum qualification of Head-Master and Asstt. Teacher is provided under unamended Rule 4 of the Rules, 1978, (which were applicable at the relevant time), which for ready reference is reproduced as under:-

“4. Minimum qualification-(1)

The minimum qualifications for the post of Assistant Teacher of recognised school shall be Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh or equivalent examination (with Hindi and a teacher's training course recognised by the State Government or the Board such as Hindustani Teaching Certificate, Junior Teaching Certificate, Basic Teaching Certificate, or Certificate of Training).

(2) The minimum qualifications for the appointment to the post of Head-master of a recognised school shall be as follows:

(a) A degree from a recognised University or an equivalent examination recognised as such;

(b) A teacher's training course by the State Government or the Board, such as Hindustani Teaching Certificate, Junior Teaching Certificate, Certificate of Training or Basic Teaching Certificate; and

(c) Three years teaching experience in a recognised school.”

10. Rule 5 of the Rules, 1978 deals with eligibility for appointment and specially bars any appointment as Headmaster or Assistant Teacher in substantive capacity in recognized schools unless-

(A) He possesses the minimum qualification prescribed for such posts;

(B) He is recommended for such appointment by the Selection Committee.

11. Rule 7 of the Rules, 1978 prescribes for advertisement of vacancy, which is as follows:-

“7. Advertisement of vacancy.--
(1) No vacancy shall be filled, except after its advertisement in at least newspapers one of whom must have adequate circulation all over the State and the other in a locality the school is situated.]

(2) In every advertisement and intimation under clause (1), the Management shall give particulars as to the name of the post the minimum qualifications and age-limit, if any, prescribed for such post and the last date for receipt of applications in pursuance of such advertisement.”

12. Rule 10 of the Rules, 1978 provides for procedure for selection, which for ready reference, is also reproduced as under:-

“10. Procedure for selection.-(1) The Selection Committee shall, after interviewing such candidates as appear before it on a date to be fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment.

(2) The list prepared under clause (1) shall also contain particulars regarding the date of birth, academic qualifications and teaching experience of the candidates and shall be signed by all the members of the Committee.

(3) The Selection Committee shall, as soon as possible, forward such list, together with the minutes of the proceedings of the Committee to the management.

(4) The Manager shall within one week from the date of receipt of the papers under clause (3) send a copy of the list to the District Basic Education Officer.

(5)(i) If the District Basic Education Officer is satisfied that-

(a) the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

(b) the procedure laid down in these rules for the selection of Headmaster or Assistant Teacher, as the case may be, has been followed he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the Management within two weeks from the date of receipt of the papers under clause (4).

(ii) If the District Basic Education Officer is not satisfied as aforesaid, he shall return the papers to the Management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee.”

ARGUMENTS OF STATE APPELLANTS

13. Shri Ratan Deep Mishra, learned Standing Counsel for State-appellants has submitted that in the present matter the teachers have been shown to have been appointed in the year 1997. At the time of their alleged appointment admittedly they were lacking the essential qualification as they were all untrained and the same was also contrary to the order dated 08.11.1974,

which was issued by the Basic Shiksha Parishad, whereby specific direction was given for appointing trained teachers in the recognised institutions. He submitted that the institution in question was accorded temporary recognition in the year 1980. Clause 4 and 14 of the recognition order specifically provides:-

"4- अप्रशिक्षित अध्यापको के स्थान पर प्रशिक्षित अध्यापको की नियुक्ति की जाए

14-विभागीय आदेशों / नियमों का अक्षरशः पालन किया जाए"

14. He has further placed reliance on the permanent recognition order of the institution dated 31.10.1984 (Paper Book p.322). Clause 2 & 4 of the said order specifically states as follows:-

"2-विद्यालय में विभागीय नियमों एवं आदेशों की किसी प्रकार की अवहेलना करने तथा तथ्यों को छिपाने पर मान्यता निरस्त करने का अधिकार विभाग को सुरक्षित है।

4-विभाग द्वारा निर्धारित न्यूनतम योग्यताओं से विभूषित अध्यापको की नियुक्ति नियमानुसार की जाए तथा अप्रशिक्षित अध्यापको के स्थान पर प्रशिक्षित अध्यापको की नियुक्ति की जाए"

15. He submitted that from the aforesaid it is apparent that the institution had to follow the Rules prevailing at the time of recognition of the institution. The Rules of 1978 got notified on 13.02.1978. In Rule 4 (1) of the Rules, 1978, qualification is prescribed but the institution continued with the teachers not having the qualification prescribed as per Rule 4 (1) of Rules, 1978.

16. Learned counsel for the State-appellants further argued that the alleged appointments of Group-C and D posts were also contrary to the Rules, 1984. For the selection of Ministerial Staff as well as the Class-IV employees, neither any vacancy

was advertised in the newspaper nor prescribed procedure for selection was adhered to. No selection committee was constituted nor any proceeding for interview was held. Moreso the appointments were made without preparation of any merit list and without getting approval of the competent authority prior to the appointment. They also got the salary only from the month of March, 2010 to July, 2012. Surprisingly, the Manager's Return (MR) submitted by the Management did not accompany any order of sanction of posts. He submitted that as the salary had to be paid by the State exchequer, the Authority had every right to see whether the alleged appointments were made strictly in accordance with the procedure prescribed under the Rules, 1978 and the Rules, 1984.

17. He vehemently submitted that while issuing temporary and permanent recognition to the institution, rider was put for ensuring that the appointment of teachers must be as trained teachers. It, therefore, appears that a purported claim had been set up on the basis of some alleged appointment of the year 1977 and the claim had been cleverly set up to be prior to the invocation of Rules, 1978. The contention that the Rules, 1978 would not be applicable is unsustainable as while according temporary recognition in the year 1980 and the permanent recognition in the year 1984 specific clauses were incorporated for appointing trained teachers. On the one hand they got recognition and on the other hand they had not ensured the terms and conditions of the recognition.

18. He lastly submitted that in the facts and circumstances while passing the judgment and order, learned Single Judge

has erred in law and even not touched the Rules applicable in the instant matter and without ascertaining from the record, indulgence was accorded to the petitioners, as such the impugned judgment is per se unsustainable.

**SUBMISSIONS ON BEHALF OF
OPPOSITE PARTIES- PETITIONERS**

19. Per contra, Mrs. Kamla Singh, learned counsel for the opposite parties-petitioners vehemently opposed the special appeal and submitted that there was absolutely no reason for raising the controversy after approximately three decades of appointment and continuous working of opposite parties-petitioners. She submitted that merely non-possession of trained certificate at the time of their initial appointment and due to this reason holding all of them ineligible in terms of Rules, 1978 is per se illegal as the appointment of Asstt. Teachers were made in the year 1977.

20. She further submitted that in writ proceeding, in response to the order passed by learned Single Judge detailed supplementary affidavit was filed, wherein it had been indicated that after completion of building and other infrastructure of the institution, the Committee of Management had decided to appoint Asstt. Teachers and non-teaching staff. Thereafter, the meeting of Committee of Management was convened on 18.6.1977. The agenda of meeting had also been appended along with the supplementary affidavit. Accordingly, it is claimed that the opposite parties-petitioner nos.1 to 4 were appointed on 29.6.1977 and they joined the institution on 1.7.1977 and 2.7.1977. Even the District Basic Education Officer vide

order dated 6.7.1982 had temporarily approved the services of first petitioner as Head Master. Admittedly after fulfilling the minimum required norms the institution was recognised. Initially temporary recognition was accorded on 4.6.1980 and permanent recognition was accorded on 31.10.1984. Therefore, at this belated stage, it cannot be presumed that the Asstt. Teachers and Group-C & D employees were not working in the institution.

21. In this backdrop, she further submitted that even before according permanent recognition, the services of petitioners were approved by the then District Basic Education Officer on 23.09.1985 on probation of one year i.e. from 02.07.1984 and after verifying the infrastructure and working strength of teachers and other employees, after making due enquiry, the institution was also taken on grant-in-aid list on 05.02.2007 and financial approval was accorded on 31.03.2007. While issuing the order dated 05.02.2007 for putting the various institutions on grant-in-aid list, direction was also issued to Asstt. Director of Education, Basic, Gorakhpur Division, Gorakhpur for ensuring due enquiry of the institutions, which were to be put on grant-in-aid list. She submitted that only, thereafter, adequate notices were issued to the institutions including the institution in question for submitting details so that actual salary of teachers and other staff may be ensured w.e.f. 10.03.2007.

22. Mrs. Singh, learned counsel assertively submitted that exhaustive procedure was adopted while putting the institution on grant-in-aid list. Even at the said stage, due verification was again made

and adequate information was submitted by the Manager of the institution. Only, thereafter, final approval was accorded on 31.03.2007.

23. She submitted that in most arbitrary manner, on the basis of some complaint, the appointments of entire teachers and non-teaching staff were cancelled and financial approval was withdrawn vide order dated 17.02.2010, which was subject matter of challenge in Writ Petition No.12216 of 2010. Learned Single Judge vide order dated 11.3.2010 had accorded interim protection in favour of the petitioners and the direction was also issued for payment of salary. Later on the said writ petition was allowed and the matter was relegated. She submitted that learned Single Judge has rightly appreciated the record and decided the writ petition. The order impugned does not suffer from any infirmity, which may warrant any interference in the instant appeal.

ANALYSIS & REASONING

24. We have given thoughtful consideration to the submissions advanced at Bar and have gone through the impugned judgment and material placed on record.

25. Before examining the merits of the arguments of learned counsel for the parties, it would be apt to cite the provisions governing the appointment of teachers in the recognised basic schools.

26. The U.P Basic Education Act, 19724 was enacted for establishment of the Board of Basic Education and to deal with the matters connected therein. As per section (2), the definition Clause, the "Basic Education" means education up to

the VIIIth Class imparted in schools other than high schools or intermediate college. "Junior Basic School" means a Basic School in which education is imparted up to Class-V. "Junior High School" means a basic school in which education is imparted to boys and girls or to both from Class-VI to Class-VIII. Section 3 contemplates setting of the Board of Basic Education. The function of the Board under Section 4 (1) is to organize, coordinate and control the imparting of basic education and teachers' training in the State in order to raise its standards and to co-relate it with the system of education as a whole in the State.

27. In exercise of powers conferred under section 19 of the Act, 1972, to carry out the purposes of the Act, three sets of Rules have been framed regulating the recruitment and conditions of service of persons appointed to the post of teachers. The "U.P recognized Basic schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules, 1975" was framed to govern the recognized Basic Schools imparting education up to Class-V, not being an institution belonging to or wholly maintained by the Board or any local body. The Rules 1978 was framed to govern the service conditions of teachers of recognized Junior High School, i.e. an institution other than a High School or Intermediate College imparting education from Class-VI to Class-VIII (both inclusive). The "U.P Basic Education Teachers Service Rules, 19816" was framed to govern the service conditions of teachers of the Junior Basic Schools imparting instructions in Nursery and Class I to VIII established by the U.P Board of Basic Education. The academic/eligibility qualifications for appointment to the post of Assistant

Teacher in a Nursery and Junior Basic Schools (I to V) established by the Board as per Rules, 1981 are as follows:-

(i) Mistress of Nursery School	Bachelors degree from a University established by law in India or a degree recognised by the Government equivalent thereto together with certificate of teaching (Nursery) from recognised training institution of Uttar Pradesh and any other training course recognised by the Government as equivalent thereto and teacher eligibility test passed conducted by the Government or by the Government of India.
(ii) Assistant Master and Assistant Mistress of Junior Basic School	(ii)(a) Bachelors degree from a University established by law in India or a degree recognised by the Government equivalent thereto together with any other training course recognised by the Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate (BTC), two years BTC (Urdu) Vishisht BTC. Two year Diploma in Education (Special Education) approved by the Rehabilitation Council of India or four year degree in Elementary Education (B.El.Ed.), two year Diploma in Elementary Education (by whatever name known) in accordance with the National

	Council of Teacher Education (Recognition, Norms and Procedure) Regulations, 2002 or any training qualifications to be added by National Council for Teacher Education for the recruitment of teachers in primary education and teacher eligibility test passed conducted by the Government or by the Government of India and passed Assistant Teacher Recruitment Examination conducted by the Government.

28. In Rules, 1981, a Junior Basic School has been defined to mean a Basic School where instructions are imparted from Class-I to V; whereas a "Senior Basic School" means a Basic School where instructions are imparted from Class-VI to VIII. A "Nursery school," on the other hand, means a school in which children ordinarily of the age up to 8 years are taught in the Class lower than Class-'I'.

29. In so far as Rules, 1975 governing service conditions of teachers of a recognized Junior Basic School (Class-I to V) is concerned, Rule 9 thereof provides that for appointment on a teaching post in any recognized school a person must possess such qualification as are specified by the Board in this behalf and previous approval to whose appointment has been granted by the District Basic Education Officer in writing.

30. Under Rules, 1978 pertaining to service conditions of teachers in a recognized Senior Basic School or Junior

High School, (Class VI to VIII) the minimum qualification as provided in Rule 4 of the Original Rule has been quoted in the foregoing part of this judgment.

31. Rule 5 of the Original Rules, 1978 further puts a condition that no one shall be appointed as Assistant Teacher in substantive capacity in any recognized school; unless (a) he possess minimum qualification prescribed for such post; (b) he is recommended for such appointment by the Selection Committee.

32. The question that arises for consideration in the instant appeal is *whether the services of the opposite parties-petitioner nos.1 to 4, who were appointed as untrained teachers in the year 1977 and have worked continuously since then, could be deemed to have come to an end after the institution was upgraded and came on grant-in-aid list with effect from 2007 because they were not trained Asstt. Teachers on the date of their appointment, even though they acquired necessary qualification and became trained teachers during service either after upgradation of the institution or it's coming on grant-in-aid list in the year 2007.*

33. When the Rules, 1978 were enacted, the minimum educational qualification prescribed for appointment of Asstt. Teacher was Intermediate only. The petitioner nos.1 to 4 were thus educationally qualified to be appointed as Asstt. Teacher in Junior High School. It may now be examined whether the untrained teachers could be appointed permanently and whether such appointments were illegal. Before 10.03.1971 the services of Asstt. Teachers in Junior High School were

governed by the provisions of the Education Code.

34. Chapter-V of Education Code dealt with recognised Junior and Senior Basic schools. It has two Sections 'A' and 'B'. The former dealt with school for boys and later for girls. No qualification was prescribed for an Asstt. Teacher in boys school. But paragraph 196 in 'B' Section provided that no untrained teacher shall be appointed permanently in a recognized school. This did not apply to boys' schools. As such there was no bar on permanent appointment for an untrained teacher in boys schools. The State Government had issued the order in 1971, which purported to revise the salary of Asstt. Teachers in junior high schools but it made obligatory for any untrained teacher appointed after the notification was issued to acquire training certificate within five years of his appointment otherwise he would be paid the initial salary only. There was thus no restriction on the management of a Junior Basic School in appointing an untrained teacher permanently.

35. Training became essential qualification under Rules, 1978. The appointment of petitioner nos.1 to 4, however, being prior to it and in accordance with law in force on the date of their appointment does not suffer from any defect. The provisions of Rules, 1978 were not retrospective, therefore, appointment of an untrained teacher prior to these Rules could not be held to be illegal only on that account. Ref. **Rikh Pal Singh v. District Basic Education Board, Allahabad**⁷. These Rules did not in any manner effect the appointments made after the Government Order of 1971. An untrained teacher, therefore, could be appointed permanently between 1971 and 1978.

36. In similar facts and circumstances in **Pati Ram Yadav v. State of U.P. & Ors.**⁸ a learned Single Judge of this Court has considered the appointment of Asstt. Teacher in Boys Junior High School, which were made prior to G.O. dated 10.03.1971 and observed that the same stood governed by Education Code. Chapter-V, Section A of the Education Code provides for no training qualification. The G.O. dated 10.03.1971 brought a change. It raised no objection for appointment of an untrained candidate as permanent teacher but put up a condition that it should obtain training qualification within five years. In case it fails to do so, then it would continue an initial scale of pay. Learned Single Judge observed that for the first time Rules, 1978 prescribed 'training' as essential qualification for appointment and appointment of an untrained teacher on permanent basis between 10.03.1971 to year 1970 is valid and regular.

37. In **Ram Sarup v. State of Haryana & Ors.**⁹, the Supreme Court examined whether the appointment of Labour-cum-Conciliation Officer, who did not possess five years experience in the working of Labour Laws would be void and observed that it would not be void but merely irregular and the observations are:-

"..... The appellant could not, therefore, be legitimately appointed to the post of Labour-cum-Conciliation Officer unless, amongst other things, he possessed five years' experience in the working of Labour laws as Labour Inspector, Deputy Chief Inspector for Shops or Wage Inspector, which he admittedly did not.

The question then arises as to what was the effect of breach of Cl. (1) of R. 4 of the Rules. Did it have the effect of

rendering the appointment wholly void so as to be completely ineffective or merely irregular, so that it could be regularised as and when the appellant acquired the necessary qualifications to hold the post of Labour-cum-Conciliation Officer. We are of the view that the appointment of the appellant was irregular since he did not possess one of the three requisite qualifications but as soon as he acquired the necessary qualification of five years' experience of the working of labour laws in any one of the three capacities mentioned in Cl. (1) of R. 4 or in any higher capacity, his appointment must be regarded as having been regularised. The appellant worked as Labour-cum-Conciliation Officer from 1st Jan., 1968 and that being a post higher than that of Labour Inspector or Deputy Chief Inspector of Shops or Wage Inspector, the experience gained by him in the working of Labour Laws in the post of Labour-cum-Conciliation Officer must be regarded as sufficient to constitute fulfilment of the requirement of five years' experience provided in Cl. (1) of R. 4. The appointment of the appellant to the post of Labour-cum-Conciliation Officer, therefore, became regular from the date when he completed five years after taking into account the period of about ten months during which he worked as Chief Inspector of Shops. Once his appointment became regular on the expiry of this period of five years on his fulfilling the requirements for appointment as Labour-cum-Conciliation Officer and becoming eligible for that purpose, he could not thereafter be reverted to the post of Statistical Officer. The order of reversion passed against the appellant was, therefore, clearly illegal and it must be set aside."

(emphasis supplied)

38. In **Dr. M.S. Mudhol & Anr. v. S.D. Halegkar & Ors.**¹⁰, the Supreme

Court observed that even though the first respondent did not have the requisite educational qualification to be selected for the post of Principal but as the default was on the part of the Director of Education in illegally approving the said appointment made in 1981 as a result of which the said respondent continued to work on the post for 12 years, it would be inadvisable to disturb him from the said post, particularly when the infraction of the statutory Rule regarding the qualification was not that grave taking into consideration all the other relevant facts. The observations of the Apex Court in the said judgment are as under:-

“4. The contention of the respondents that M.Ed. IInd Division was equivalent to M.A. IInd Division is obviously fallacious. We have, therefore, no doubt that the 1st respondent did not have the requisite educational qualifications to be selected for the post of the Principal.

5. As regards the teaching experience, the 1st respondent's contention is that he had worked as a teacher for 9 years in a High School and Higher Secondary School which had upto 11 standards. According to him, he also worked as a Lecturer in History. His further contention is that the post of the School Inspector in Karnataka where he was working as such and that of the teacher were interchangeable. Hence the selection committee had taken into consideration his experience in both the capacities. These facts are not controverted before us and in any case today, he has the requisite experience of teaching as he has been teaching the 11th and the 12th class continuously for 12 years now, since 1981. It can, therefore, be said that at least as on date when his removal from the post of

Principal is sought, he cannot be said to be disqualified on account of the lack of required teaching experience.

6. Since we find that it was the default on the part of the 2nd respondent, Director of Education in illegally approving the appointment of the first respondent in 1981 although he did not have the requisite academic qualifications as a result of which the 1st respondent has continued to hold the said post for the last 12 years now, it would be inadvisable to disturb him from the said post at this late stage particularly when he was not at fault when his selection was made. There is nothing on record to show that he had at that time projected his qualifications other than what he possessed. If, therefore, inspite of placing all his cards before the selection committee, the selection committee for some reason or the other had thought it fit to choose him for the post and the 2nd respondent had chosen to acquiesce in the appointment, it would be inequitous to make him suffer for the same now. Illegality, if any, was committed by the selection committee and the 2nd respondent. They are alone to be blamed for the same.

7. Whatever may be the reasons which were responsible for the non-discovery of the want of qualifications of the 1st respondent for a long time, the fact remains that the Court was moved in the matter after a long lapse of about 9 years. The post of the Principal in a private school though aided, is not of such sensitive public importance that the Court should find itself impelled to interfere with the appointment by a writ of quo warranto even assuming that such a writ is maintainable. This is particularly so when the incumbent has been discharging his functions continuously for over a long period of 9 years when the court was

*moved and today about 13 years have elapsed. **The infraction of the statutory rule regarding the qualifications of the incumbent pointed out in the present case is also not that grave taking into consideration all other relevant facts. In the circumstances, we deem it unnecessary to go into the question as to whether a writ of quo warranto would lie in the present case or not, and further whether mere laches would disentitle the petitioners to such a writ.***

(emphasis supplied) ”

39. The aforesaid decision of the Supreme Court in *Dr. M.S. Mudhol & Anr. (Supra)* was followed by the Division Bench of this Court in **Rajendra Prasad Srivastava v. District Inspector of Schools, Gorakhpur, Now Maharajganj**¹¹ and the observations are:-

*"It is true that the appointment of the appellant was in violation of Regulation 4 of Chapter III and was as such, illegal, but he has worked in the institution from 1971 to 1978, when his service was terminated. But this order of termination was stayed by this Court, on account of which he continued to work upto the time when his writ petition was dismissed in August, 1991. It will be highly unfair to remove a person from service after about 20 years, on the ground that his initial appointment was illegal. Division Bench of this Court in *Committee of Management v. District Inspector of Schools, 1990 (1) UPLBEC 189* has held that it will be unfair and unjust to unsettle the career of an employee who has worked for about eight years. In *Smt. Rani Srivastava v. State of U.P. & ors. 1990 All CJ 243* another Division Bench did not permit the appointment of Head mistress to be put to an end after five years, even though there*

*was infirmity in making her appointment. Supreme Court in *Dr. M.S. Mudhol v. S.D. Halegkar (supra)* has observed that it would be undesirable to disturb a principal after 12 years on the ground that he was not eligible at the time of his appointment, because it would be inequitous to make him suffer after such a long time."*

40. In **Ram Swarup v. State of Haryana & Ors. (Supra)**, Hon'ble the Apex Court held that appointment of an employee, who did not have five years experience as required on the date of appointment but continued to work for nine years was not void but only irregular, therefore, it did not suffer from any defect. In **Smt. Shanti Devi Verma v. Deputy Director of Education**¹², the High Court held that lack of prescribed qualification at the time of appointment if not obtained by fraud, then it did not render the appointment void and the teacher could obtain necessary qualification after appointment.

41. In the instant matter, the petitioner nos.1 to 4 claimed to be appointed as Asstt. Teachers in the year 1977. Their services were affirmed by the then District Basic Education Officer, Siddharth Nagar vide order dated 23.03.1985. It is claimed that they continued to teach till their superannuation. Vide order impugned their services were not recognised only on the ground that they did not possess the minimum qualification of training. The record reflects that they all acquired the qualification later on. Therefore, they possessed the minimum qualification of training in view of Rules, 1978.

42. While passing the order dated 12.09.2012 (impugned in the writ petition) the appellants-respondents had taken an

objection that the opposite parties-petitioner nos.1 to 4, who were working as Head Master and Asstt. Teachers were not inhering the qualification in view of Rules, 1978. Admittedly the institution was not recognized. The temporary recognition was accorded in the year 1980; the permanent recognition was accorded in the year 1984 and the institution was put on grant-in-aid list in the year 2006. Even the financial approval was also accorded in the year 2007. While making an enquiry at the said stage, no such objection was raised, contrarily the approval was accorded on the basis of their working in the institution, which was also one of the relevant consideration. Therefore, at this belated stage, raising an objection that the procedure had not been adopted at the stage of their initial engagement in the light of Rules, 1978 qua Asstt. Teacher is unsustainable. At their initial inception and later on while successive exercises, which had been carried out by the Authorities, no such objection was raised. We are surprised that in case they were not working in the institution, as to under what circumstances in absence of teachers (temporary and permanent) recognition was accorded to the institution and later on the same was also put on grant-in-aid list. Similarly the objection that for appointment of opposite party-petitioner no.5, who was working as Clerk and opposite party-petitioner nos.6 to 8, who were working as Peon at the initial stage of their appointment, the Rules, 1984 were not followed, the said objection can also not be accepted.

43. While passing the order (impugned in the writ petition), the order putting the institution on grant-in-aid list was withdrawn. We are surprised that why the management has not questioned the said order and only the petitioners had put

up their case for salary and continuity of their services.

44. The Apex Court in the case of **Ashok Kumar Sharma and another Vs. Chandra Shekhar and another**¹³, came to the conclusion that the results of the examination of the qualification that was required to be possessed on the date of interview had not been declared for no fault of the applicants, but were announced immediately before the date of interview. This did not dis-entitle the applicants as being disqualified and the Supreme Court upheld their selection and appointment in spite of that infirmity. The minority view of the third Hon'ble Judge even though agreed with the conclusion but held the applicants to be ineligible on the date when the application was to be filed. The minority view held that such practice should be discouraged as a person not qualified on the date of the application, cannot be subsequently given any benefit. However, since the conclusion was in favour of the applicants, their appointments were upheld.

45. The Supreme Court in the case of **Roshni Devi Vs. State of Haryana and others**¹⁴, again came across such a case where it passed an order in exercise of powers under Article 142 of the Constitution of India and upheld the appointment.

CONCLUSION

46. We have carefully examined the record and find that the writ petition was instituted in the year 2013 and since then the matter is pending consideration without any interim order. Even the pleading has not been set up before learned Single Judge that all the petitioners continued to work in the institution and in absence of any

pleading qua their working in the institution, learned Single Judge has erred in law while setting aside the order dated 12.09.2012 and holding the petitioners to be treated as permanent incumbent of the institution and also holding that they were also entitled for arrears of salary from July, 2012 till the date of their retirement. The said finding of fact could not be substituted by learned Single Judge on his own accord without returning the concrete finding on the same. In absence of any pleading and material on record, we are unable to accord arrears with effect from July, 2012.

47. However, we corroborate the other reasoning recorded by learned Single Judge to the effect that petitioner nos.1 to 5, those were working as Head Master and Asstt. Teachers and were appointed in the institution much prior to the invocation of Rules, 1978 and petitioner nos.6 to 8, who were also appointed in the institution prior to invocation of Rules, 1984, the rightful claim cannot be denied merely on the ground that the petitioner nos.1 to 5 were lacking the training, whereas the record amply demonstrate that the financial approval was accorded by the competent authority way back on 4.5.2007 and admittedly all the petitioners were fulfilling the eligibility as required at the relevant point.

48. Surprisingly the entire case has been set up by the appellant-respondents that the Rules of 1978 were applicable at the time of initial engagement of petitioner nos.1 to 5 in the institution. The said objection is unsustainable as on the basis of Manager's Return (MR) the temporary and permanent recognition of the institution was accorded in the year 1980 and 1984 respectively and later on financial approval was also accorded in the year 2007. The

said approval could not have been accorded in the absence of actual strength of teacher and other employees in the institution. On one hand while according temporary and permanent recognition the appellants-respondents had considered the working strength in the institution and on the other hand at the belated stage the objection has been raised that the petitioners' induction in the institution was dehorse the Rules, 1978 and the Rules, 1984. Both the things cannot move simultaneously. Therefore, we find that the reasoning assigned by learned Single Judge does not require any interference. But we are not in a position to return any concrete finding at this belated stage whether the petitioners were working in the institution since then.

49. We, therefore, approve the finding returned by learned Single Judge qua the petitioners' initial engagement in the institution as admittedly the petitioners were paid salary in response to the financial approval accorded in the year 2007 and in the light of the order passed by the Writ Court from 2010 to 2012. But so far as payment of salary to the petitioners with effect from July, 2012 till their superannuation, only for this limited purpose, the matter is relegated to the Authority to ascertain entire working since 2012. In case they have worked in the institution, they will be entitled to salary but if it is found that they were not working in the institution, they will not be entitled for the salary from July, 2012 till their superannuation on the principle of 'no work no pay'.

50. It is made clear that in either of the case, the opposite parties-petitioners shall certainly be entitled for all consequential benefits qua their initial engagement in the institution being found

in accordance with law. Accordingly, the order impugned passed by learned Single Judge is modified to the above extent.

51. With the above observations and directions, the appeal stands **partly allowed**.

(2024) 9 ILRA 483

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 26.09.2024

BEFORE

**THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.**

THE HON'BLE PRASHANT KUMAR, J.

Special Appeal No. 596 of 2024

University of Allahabad & Ors.

...Appellants

Versus

Dr. Raghvendra Mishra & Anr.

...Respondents

Counsel for the Appellants:

Kunal Shah, Sr. Advocate

Counsel for the Respondents:

A.S.G.I., Sankalp Narain, Shahsi Shankar Tripathi

A. Service Law – Termination – Appointment on probation as Assistant Professor – Non-disclosure of the crime number and details of offence – Effect – Gravity of offence or acquittal after trial, how far relevance – Held, an employee on probation can be discharged from service on the ground of unsatisfactory antecedents and suppression of material information or making false St.ment in reply to queries relating to pendency of the criminal case as it shows a current dubious conduct and absence of character at the time of making the declaration, thereby making him unsuitable for the post – Neither the gravity of the criminal

offence nor the ultimate acquittal therein was relevant – The employer/University is well within its domain in not continuing the petitioner, who is facing grave charge of molestation and is bailed out in the criminal case.. (Para 33, 46 and 56)

B. Service law – Termination of probationer – Ordinance XLI, Conditions of Service of teachers of the University – Clause 5 (a) – Principle of natural justice, how far relevance – Held, principles of natural justice need not be followed while terminating the services of a probationer. Neither any notice is required to be given to the probationer nor any opportunity of hearing is to be accorded to him. Merely because the order terminating probationer's service, refers to his unsatisfactory performance not suitable for confirmation, the order cannot be said to be stigmatic. (Para 39)

Special Appeal allowed. (E-1)

List of Cases cited:

1. Gujarat Steel Tubes Ltd. Vs Gujarat Steel Tubes Mazdoor Sabha; 1980 (2) SCC 593
2. Dipti Prakash Banerjee Vs Satyendra Nath Bose National Centre for Basic Sciences, Calcutta & ors.; (1999) 3 SCC 60
3. Pavanendra Narayan Verma Vs Sanjay Gandhi PGI of Medical Sciences & anr.; (2002) 1 SCC 520
4. Daya Shankar Yadav Vs U.O.I. & ors.; (2010) 14 SCC 103
5. Kendriya Vidyalaya Sangathan Vs Ram Ratan Yadav; (2003) 3 SCC 437
6. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. & anr. Vs Anil Kanwariya; (2021) 10 SCC 136
7. Satish Kumar Yadav Vs U.O.I.; (2023) 7 SCC 536
8. Mathew P. Thomas Vs Kerala St. Civil Supply Corpn. Ltd. & ors.; (2003) 3 SCC 263

9. Rajasthan High Court Vs Ved Priya & ors.; (2021) 13 SCC 151

10. Muir Mills Unit of NTC (U.P.) Ltd. Vs Swayam Prakash Srivastava & anr.; (2007) 1 SCC 491

11. St. of W.B. & ors. Vs Tapas Roy; (2006) 6 SCC 453

12. Rajesh Kumar Srivastava Vs St. of Jharkhand & ors.; (2011) 4 SCC 447

13. St. of Uttar Pradesh & anr. Vs Kaushal Kishore Shukla; (1991) 1 SCC 691

14. St. of Madhya Pradesh & ors. Vs Abhijit Singh Pawar; (2018) 18 SCC 733

15. Avtar Singh Vs U.O.I.; (2016) 8 SCC 471

16. Parshotam Lal Dhingra Vs U.O.I.; AIR 1958 SC 36

(Delivered by Hon'ble Mahesh Chandra
Tripathi, J.
&
Hon'ble Prashant Kumar, J.)

1. Heard Shri Amit Saxena, learned Senior Counsel assisted by Shri Kunal Shah, learned counsel for the appellants-respondents and Shri G.K. Singh, learned Senior Counsel assisted by Shri Sankalp Narain & Sri Srivats Narain, learned counsel for the respondent-petitioner.

2. Present Special Appeal has arisen from a judgment and order of the learned Single Judge dated 23.05.2024 passed in Writ A No.17284 of 2023 (Dr. Raghvendra Mishra vs. Union of India and 3 others) by which the writ petition filed by the petitioner has been allowed.

FACTS

3. The respondent-petitioner belongs to the category of 'Economically Weaker

Section' and he has 50% permanent visual impairment. He is an academic scholar having Bachelor's and Master's degrees and completed M.Phil. and Ph.D. from Jawahar Lal Nehru University, New Delhi. In pursuance of the advertisement No.UoA/Asst. Prof/01/2021 dated 28.09.2021 published by the University of Allahabad¹, he applied for post of 'Assistant Professor' in the Department of Sanskrit, Pali, Prakrit and Oriental Languages of the University on 16.10.2021. At the time of filling up the application form in column under the head of '**Disclosure**' containing the query 'Do you have any criminal case pending against you in a Court of Law?', the petitioner-respondent had mentioned 'Yes' and under column of details, he had mentioned '**FOR STUDENTS POLITICAL ISSUES**'. Thereafter, the petitioner appeared in different stages of selection and on the basis of the recommendation of the Selection Committee dated 18.05.2022 and approval by the Executive Committee in its meeting dated 21.05.2022, he was selected on the post of Assistant Professor (PWBD-A (EWS) in the Department of Sanskrit, Pali, Prakrit and Oriental Languages of the University.

4. Consequently, the University had issued an appointment letter dated 21.05.2022 in favour of the petitioner on the terms and conditions mentioned therein. In pursuance thereof, the petitioner joined the said post and started working on probation of one year. Subsequently, vide notification dated 08.8.2023, the probation period of all newly appointed teachers was extended by one year in terms of Resolution of the Executive Council dated 20.06.2023. Thereafter, the meeting of the Executive Council of the University was held on 15.09.2023, wherein the Executive

Council vide resolution No.06/78 dated 15.09.2023 had unanimously resolved to not extend the services of Dr. Vidhu Khare Das, Associate Professor, Centre of Theatre and Films and Dr. Raghvendra Mishra, Assistant Professor, Department of Sanskrit of the University (petitioner) and to terminate their contract of service under Clause 5 (a) of the Ordinance XLI, Conditions of Service of teachers of the University. For ready reference, Resolution No.06/78 of the Executive Council is reproduced hereinafter:-

“After due deliberation on the service rendered by Dr. Vidhu Khare Das, Associate Professor, Centre of Theatre and Films, University of Allahabad and Dr. Raghvendra Mishra, Associate Professor, Department of Sanskrit, University of Allahabad, it was unanimously resolved by the Executive Council to not extend their services (currently under probation) and to terminate their contract of service under clause 5 (a) of the Ordinance XLI: Conditions of Service of Teachers of the University. It has been decided to make a payment of a sum equivalent to one month's salary in lieu of a notice of termination. The services of Dr. Vidhu Khare Das and Dr. Raghvendra Mishra shall be considered to be dispensed with, with effect from the date of the meeting. Hon'ble Members of the Executive Council unanimously approved the same.

Dr. Deepali Pant Joshi, nominee of the Hon'ble Chancellor in the Executive Council said that a teacher is a role model and it is good to nip any problem in the bud, for smooth functioning and future of the institution.”

5. Consequently, the Registrar of University vide order dated 15.09.2023 had dispensed with the services of the

petitioner-respondent with effect from 15.09.2023. For ready reference, the same is reproduced herein under:-

“To,
Raghavendra Mishra
Vill. Jhadapi – Jhadapa
(Gotibandh)
Post – Nandana, Dist.
Sonbhadra
Robertsganj, Uttar Pradesh –
231213

Subject: Termination of services
with effect from 15.09.2023

Sir,
By the appointment letter no.05/R/1499/2022 dated 21.05.2022, you were appointed to the post of Assistant Professor (PWDB-A, EWS Category) in the Department of Sanskrit, University of Allahabad. Your probation period was 1+1 years as per the aforementioned appointment letter.

Vide Resolution No.06/78 of Executive Council dated 15.09.2023, it has been resolved not to extend your service (currently under probation) and to terminate your contract of service under clause 5 (a) of the Ordinance XLI: conditions of service of teachers of the University.

It has been decided to make a payment of a sum equivalent to one month's salary in lieu of a notice of termination. Therefore, your services are being dispensed with, with effect from 15.09.2023.

Thanking you,

(Prof. N.K. Shukla)
Registrar”

6. Aggrieved by the termination order, the respondent-petitioner preferred

Writ A No.17284 of 2023 interalia seeking the following reliefs:-

“i. to issue a writ, order or direction in the nature of certiorari quashing the impugned resolution no.6/78 passed by the Executive Council of the University of Allahabad, Prayagraj in its 78th meeting dated 15th September, 2023 in so far as it resolved to terminate the services of the petitioner as an Assistant Professor in terms of Clause-5 (a) of Ordinance XLI (Annexure-7 to the writ petition).

ii. to issue a writ, order or direction in the nature of certiorari quashing the first consequential letter dated 15.9.2023 terminating the services of the petitioner as Assistant Professor in the Department of Sanskrit, University of Allahabad issued by the Registrar of the University (Annexure-8 to the writ petition).

iii. to issue a writ, order or direction in the nature of certiorari quashing the second consequent relieving order dated 15.9.2023 issued by the Registrar relieving the petitioner from his service (Annexure-9 to the writ petition).

iv. to issue a writ, order or direction in the nature of mandamus commanding the respondent-authorities not to interfere with the peaceful functioning of the petitioner as an Assistant Professor in the University and ensure payment of month to month salary to him.

v. to issue any other writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

vi. to award cost of the writ petition to the petitioner.”

7. After considering the pleadings and submissions of the parties, learned Single

Judge has accepted the submissions of the respondent-petitioner and accordingly, allowed the writ petition vide impugned judgement and order dated 23.05.2024, which is under challenge in the instant Special Appeal. Relevant portion of the judgment is reproduced herein below:-

“17. The outcome of above factual and legal analysis is that the petitioner was appointed under a due process. He has completed satisfactory service on probation of one year and on basis of his satisfactory service, his probation was extended for a period of one year. On basis of material available which also includes the material provided by University in a sealed envelope that within a few months of passing an order of extension of probation period of one year, the Executive Council considered the case of petitioner even without being part of agenda with permission of Chair and terminated his services under clause 5(a) of the Ordinance XLI.

18. It is a definite stand of the University that there were some material before the Executive Council which were considered and as referred above, the material was a complaint of Co-ordinator, wherein there are allegations against petitioner as well as a news cutting that petitioner was involved in a criminal case. It is also stand of University that material was not considered to be such which requires an inquiry to consider its truthness but it was not conducted, therefore, from last paragraph of resolution which has already been reproduced earlier, it could be held that definitely the said materials were considered and found adverse to petitioner and for that the Court is of the considered opinion that order becomes stigmatic since all the resolutions are on the website of University and open for view of general

public also and in case, petitioner applies in any other University, the said material will definitely become adverse to his future prospects.

19. The Court takes note that it is stand of University that truthfulness of allegations were not verified, therefore, petitioner was penalized only on basis of complaints whose contents were not verified and even before completing the extended period of probation of one year. Accordingly, the case of petitioner would fall under clause 2(e) and (f) as contended by the petitioner and not under clause 5(a) of Ordinance XLI as contended by the respondent-University and admittedly procedure prescribed under clause 5(a) was not followed, therefore, impugned Resolution and impugned termination order become illegal. The procedure adopted by University thus has legal flaws and was also against the legal principle discussed in Ved Priya (supra). The Court is of the considered opinion that Resolution dated 20.06.2023 qua to petitioner and order of termination dated 15.09.2023 are illegal, therefore, liable to be set aside and ordered accordingly.

20. It would also be relevant to observe that the effect of judgment of this Court would be only that petitioner will be remained in probation till one year from the date of his extension of probation and thereafter respondent University would be at liberty to take a decision in terms of relevant clauses of Ordinance XLI.

21. The petitioner was out of service from 15.9.2023 to till date of this judgment and same will be considered on principle of 'No Work No Pay' and his satisfactory service at the end of extended period of probation will be considered on basis of period he worked. The University is directed to allow petitioner to work on post concerned forthwith.

22. The petitioner is also put on caution that he will diligently discharge his duties of a teacher and he will not indulge in any activity which is adverse to his profession and will also remain polite with his co-employees and shall disclose complete details of criminal case and it would also be a factor for consideration for his confirmation.

23. Accordingly, writ petition is allowed with aforesaid observations and directions."

SUBMISSIONS ON BEHALF OF THE APPELLANT

8. Sri Amit Saxena, learned Senior Advocate appearing for the appellant University vehemently submitted that respondent-petitioner was selected and offered appointment on the post of Assistant Professor on 21.05.2022. The service conditions of the teaching staff of the University are regulated by Ordinance No.XLI. In view of Clause 2 (a), the respondent-petitioner was to remain on probation for a period of one year, which could be extended by one year. In the instant matter, the Executive Council vide resolution dated 20.06.2023 had extended the probation period of all the newly appointed teaching staffs including the petitioner and accordingly, a notification in this regard was issued by the Registrar of the University on 08.08.2023. As the respondent-petitioner was on his extended period of probation, certain materials against him were brought into the notice and upon consideration thereof, the University had decided not to go into the merits of the allegations and in the meeting of the Executive Council dated 15.09.2023, it was unanimously resolved to dispense with the services of the respondent-petitioner by passing a simplicitor order of

termination, as envisaged under Clause 5 (a) of Ordinance XLI. A consequential order of termination and relieving was passed by the University on 15.09.2023.

9. Sri Amit Saxena further submitted that the grounds taken for challenging the action of the University before the Writ Court were mainly:-

1. Termination from service was bad in law as the same was in derogation to the procedure for termination of probationers enshrined in Clause 2 (f) of the Ordinance XLI. Only after service of notice to the respondent and after eliciting his explanation in respect of the grounds on which his services were proposed to be terminated, could the order of termination have been passed by the University.

2. The order dismissing the Respondent is stigmatic in as much as it casts aspersions on the working of the Respondent, upon the statement made by Dr. Deepali Pant Joshi, the nominee of the Hon'ble Chancellor, who in the meeting of the Executive Council while considering the issue of further continuity of the services of the Respondent and another probationer said "that a teacher is a role model and it is good to nip any problem in the bud for smooth functioning and future of the institution".

3. If the statement of Dr. Deepali Pant Joshi is taken on its face value it suggests that there was some problem vis-a-vis the respondent and since the problem is relatable to the respondent which has resulted in discontinuation of his services, the University ought to have followed the procedure prescribed in Clause 2 (e) read with Clause 2 (f) of the Ordinance.

10. Learned Senior Counsel for the appellant University submitted that while

filing the detailed counter affidavit, the appellant University had taken categorical stand that there were materials before the Competent Authority and after consideration of the same, it chose not to go into the truthfulness and on merits of the same and unanimously resolved not to continue the services of the respondent-petitioner. Thus, the same classified as a simplicitor order of termination, which is envisaged under Clause 5 (a) of the Ordinance. The statement of Dr. Deepali Pant Joshi was made in reference to the exalted stature of a teacher as visualized in Indian society and such general observations could not be taken as stigmatic. It was further endeavour of the appellant University to ensure that no stigma is casted upon the respondent-petitioner, and in this backdrop the appellant University sought leave of the learned Single Judge to exempt it from bringing on record the materials, which were there before the University on the basis of which the order of termination simplicitor was passed and to produce the same by way of a sealed cover.

11. It was urged by the learned Senior Counsel that in the midst of the proceeding before the learned Single Judge and as per direction of learned Single Judge, two set of materials were placed before the Court i.e. (i) a confidential letter dated 13.09.2023 by the Coordinator, Department of Sanskrit, Pali, Prakrit & Oriental Languages addressed to the Vice Chancellor of the University, wherein certain complaints were made against the respondent and (ii) materials demonstrating the act of concealment of material particulars by the respondent-petitioner as regards the disclosure in the form, which he was required to make about the details of the criminal case pending against him as

well as the nature of the offence for which the respondent-petitioner is facing criminal trial.

12. Learned Senior Counsel submitted that the learned Single Judge committed an egregious error in passing the impugned judgement dated 23.05.2024 and recorded perverse finding in para-19 of the impugned judgment to the effect that *“truthfulness of allegations were not verified, therefore, petitioner was penalized only on basis of complaints whose contents were not verified and even before completing the extended period of probation of one year.”* He submitted that said finding militates against the fundamental principles governing service jurisprudence, which envisaged dispensation of services of the probationer by way of a simplicitor termination order without assigning any reason.

13. He assertively submitted that in the instant matter, it is admitted case that the appellant-University neither held any enquiry nor called for any report vis-a-vis material before it and chose to simply discharge the respondent-petitioner under Clause 5 (a) of the Ordinance with a view to give him a chance to make good in other walks of life without a stigma. In support of his submission, he has placed reliance on the judgements in **Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha**²; **Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others**³; **Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences & Anr.**⁴ and **Daya Shankar Yadav vs. Union of India and others**⁵.

14. Sri Saxena further argued that the learned Single Judge has also erred in law

while placing too much emphasis upon the statement of Dr. Deepali Pant Joshi, and having regards to the fact, that there were adverse materials before the University, the order of termination becomes stigmatic. It was submitted that stigma is something that detracts the character or reputation of a person. He submitted that an order can be said to be stigmatic only if it is couched in a language, which imputes something over and above mere unsuitability for the job. In the instant matter, Dr. Deepali Pant Joshi had only made a statement that a teacher is a role model and it is good to nip any problem in the bud for smooth functioning and future of the institution. The general role of the teacher as being a role model has been stated and as such, nothing more can be attributed to such statement of Dr. Deepali Pant Joshi. There is no material contained either in the impugned order of termination or in the resolution to which the impugned order makes a reference that imputes anything over and above the unsuitability for the job. Learned Single Judge has failed to appreciate the fact that the statement of Dr. Deepali Pant Joshi was also not individually directed towards the respondent-petitioner inasmuch as the Executive Council was considering the issue of further continuity of the services of not only the respondent-petitioner but also of another probationer. More so, the statement of Dr. Joshi is to be taken in individual capacity and the same cannot be taken as the statement made by the Executive Council.

15. Sri Amit Saxena, learned Senior Advocate submitted that even though there is admitted case of concealment of criminal case by the respondent-petitioner, but the learned Single Judge has utterly failed to ascribe due weightage to the factum of concealment of material particulars in the

application form by the respondent-petitioner as well as nature of offence qua which the respondent-petitioner was facing criminal prosecution. He vehemently argued that assuming the respondent-petitioner was not guilty of suppression of material particulars, still the appellant University is fully justified and competent to discharge the services of the petitioner-respondent during the probation. Even on his own admission before the learned Single Judge that the respondent-petitioner had not made complete disclosures of the material particulars regarding pendency of the criminal case against him. The learned Senior Counsel placed strong reliance on the judgements in **Kendriya Vidyalaya Sangathan vs. Ram Ratan Yadav**⁶; **Rajasthan Rajya Vidyut Prasaran Nigam Limited and another v. Anil Kanwariya**⁷ and **Satish Kumar Yadav v. Union of India**⁸ to fortify his submission that probationer, who has secured appointment by suppressing material information with respect to prosecution in a criminal case, can be terminated from service.

16. It was next submitted by Sri Saxena that the learned Single Judge during the midst of the argument had also raised certain queries from the respondent-petitioner regarding the criminal case to which he was having no satisfactory answer and contrarily, learned Single Judge has held that pendency of the criminal case was in the knowledge of the University and it chose not to seek details from the candidate. Further the pendency of the criminal case was not considered to be adverse by the appellant University either at the stage of selection process or at the stage of extension of period of probation. The said finding of learned Single Judge is also not sustainable. Neither, it was the case of the respondent-petitioner in the writ petition nor

there is anything on record to even remotely suggest that the adverse materials were available before the appellant University at the stage of selection process or at the stage of extension of period of probation. It was argued that even if the University had not rejected the application form of the respondent-petitioner at the stage of selection process on the ground of non-disclosure of complete particulars of pendency of criminal case, even in that situation the appellant University could not be estopped from dispensing with his services on the said ground, in view of the undertaking extended by the respondent-petitioner in his application form as well as Clauses 5 and 6 of the appointment letter.

17. In support of his submission, Sri Amit Saxena, learned Senior Advocate has also placed reliance on paras 14 and 15 of the judgment impugned. For ready reference, paras 14 and 15 of the judgment are reproduced herein under:-

“14. The other document is the copy of application form submitted by petitioner at the time of applying for the post. The Court perused the same and found that in the column Disclosure, do you have any criminal case pending against you in a court of law. The petitioner has declared, Yes, however, in the column of details, it was only mentioned that ‘FOR STUDENTS’ POLITICAL ISSUES’. The details of offence were not disclosed. In papers provided by Registrar, Allahabad University, there is a document which is a news published on a website, namely, Khabar, that petitioner was arrested in a case of a harassment of a girl in JNU Campus.

15. During hearing, petitioner was present in person. The Court has asked a query about nature of criminal case

against him. He fairly submits that a case of outrage of modesty was lodged against him wherein after investigation charge-sheet has been filed and it is at the stage of trial and presently he is on bail. The Court also asked a query that why he has not disclosed the details of it in the form, however, he had no satisfactory answer to it. At this stage, it would be relevant to mention that the issue of pending criminal case was not considered to be adverse either at the stage of selection process or at the stage of extension of period of probation; though it might be considered against petitioner during the meeting of Executive Council held on 15.09.2023. It would be relevant to note that information in regard to a criminal case was available with the University since it was disclosed in application form though details were neither mentioned nor sought by the University.”

18. He further submitted that during the course of hearing of the writ petition the respondent-petitioner was present in person in the Court room and once the Court had asked the query about the nature of criminal case against him then he fairly submitted that a case of outrage of modesty of a woman was lodged against him, wherein, after investigation the chargesheet has been filed and it is at the stage of trial and presently, he is on bail. The learned Single Judge has even observed in the impugned judgement that ***“the Court also asked a query that why he has not disclosed the details of it in the form, however, he had no satisfactory answer to it”***. In this backdrop, he has placed reliance on the judgement passed by the Apex Court in **Daya Shankar Yadav vs. Union of India and others** (supra) and submitted that even if the respondent-petitioner is not guilty of willful suppression of material facts relating to pendency of criminal case

against him, however, if the employer having regard to the nature and gravity of the criminal case, the information of which he may acquire through any means can choose to discharge the probationer from service. He submitted that even the nature of offence for which the respondent-petitioner is facing criminal trial cannot be characterized as trivial. The offence for which the respondent-petitioner has been charged, shocks the moral conscience of the society.

19. He further argued that learned Single Judge has returned the erroneous finding that the proceeding of Executive Council was suspicious and prejudicial inasmuch as there was no agenda. Learned Single Judge has further recorded erroneous finding that the materials, which were there before the University at the time of dispensation of the service of the petitioner, were not considered adverse at the stage of extension of probation period of the petitioner, which occasioned on 20.06.2023. He submitted that learned Single Judge has proceeded on an erroneous assumption in law that the extension of probation envisages rendition of satisfactory service by the probationer. Even since the confidential letter of the Coordinator, Department of Sanskrit, Pali, Prakrit & Oriental Language is of date 13.09.2023 and the same would have no relevance in the matter, in view of the provision under Clause 2 (c) (ii) (1) of the Ordinance XLI, which provides *“not being a teacher of a University College maintained by the University, except after considering the report of the concerned Head of the Department, Director of the University Institute or Head of the independent Centre or, where the post is not assigned to a specific Department, University Institute of independent Centre,*

of the officer or functionary under whom the teacher has been placed in accordance with the said arrangements". In the instant matter, by no stretch of imagination, the confidential letter dated 13.09.2023 sent by the Coordinator could be taken as a report in view of provision under Clause 2 (c) (ii) (1) of the Ordinance. As a complaint, the Coordinator of the department concerned has only indicated the behaviour of the respondent-petitioner.

20. In the last, the learned counsel submitted that the order impugned in the writ petition was not stigmatic in nature as no allegation has been made against the respondent-petitioner and it was unanimously resolved in the meeting of the Executive Council not to continue his service as per the procedures prescribed in Clause-5 (a) of the Ordinance. Therefore, the judgement and order passed by learned Single Judge is unsustainable under the facts and circumstances and the same is liable to be set aside.

SUBMISSIONS ON BEHALF OF RESPONDENTS

21. Per contra, Sri G.K. Singh, learned Senior Advocate appearing for the respondent-petitioner, vehemently opposed the instant appeal and submitted that in most arbitrary manner, the services of the respondent-petitioner were terminated and the same was stigmatic in nature. Admittedly, the appellant University had not followed the procedure prescribed in Clause 2 (e) and (f) of the Ordinance XLI. Even though there was no such concealment of fact in the application form in the column under the head of 'disclosure', which required 'Do you have any criminal case pending against you in a Court of Law?', the

respondent-petitioner had mentioned 'Yes' and under column of details, he mentioned 'For Students Political Issue'. Therefore, it cannot be said that he had concealed the criminal proceeding. In the facts and circumstances, learned Single Judge was absolutely right in holding that the truthfulness of the allegations were not verified and the petitioner was penalized only on the basis of complaint so made by the Head of the Department. Even in view of Clause 2 (e) and (f) of the Ordinance, there is detailed procedure but the said procedure was not followed. Even the said issue was not in the agenda and therefore, learned Single Judge has rightly held that the proceedings of the Executive Council were certainly suspicious and prejudicial inasmuch as there was no agenda for the same.

22. Sri G.K. Singh, learned Senior Counsel further submitted that learned Single Judge has rightly held that details of so-called material were not disclosed. Even though the appellant University had filed counter affidavit and in the last paragraph of the resolution No.06/78, which was adopted on 15.09.2023, it was stated that Dr. Deepali Pant Joshi, who is nominee of the Hon'ble Chancellor in the Executive Council, said that a teacher is a role model and it is good to nip any problem in the bud, for smooth functioning and future of the institution. The learned counsel for the respondent-petitioner placed strong reliance on the judgement of the Apex Court in **Mathew P. Thomas vs. Kerala State Civil Supply Corpn. Ltd. and others**⁹ to fortify his submission that if the services of a probationer were terminated by an order of termination simplicitor but the language of material to support it either show that it was punitive or stigmatic on the fact of it, the Court may leave the way to consider

the attending circumstances for such order of termination.

23. Learned Senior Counsel further submitted that during the proceeding before learned Single Judge, a sealed envelop was placed by the Registrar of the University, which contained the documents including a letter of Prof. Prayag Narayan Mishra dated 13.09.2023, Coordinator Sanskrit, Pali, Prakrit Evam Prachya Bhasha Vibhag, which was addressed to the Vice Chancellor of the University, wherein the Coordinator had mentioned some complaints in regard to behaviour of the respondent-petitioner and even learned Single Judge has also taken note of the said complaint into notice. Once the complaint was entertained then the Executive Council has only to adopt the procedure in terms of Clause 2 (e) and (f) of the Ordinance XLI and not under Clause 5 (a) of the Ordinance. Accordingly, learned Single Judge has rightly observed that truthfulness of allegations were not verified and the petitioner was penalized only on the basis of complaints whose contents were not verified and even before completing the extended period of probation of one year. Learned Single Judge has rightly observed that the case of the petitioner falls under Clause 2 (e) and (f) of the Ordinance XLI and the same would not fall under Clause 5 (a) of the Ordinance. Admittedly, the appellant University had not followed its own mandate, which provides detailed procedure under Clause 2 (e) and (f) of the Ordinance XLI and therefore, the same is unsustainable. The judgement and order passed by learned Single Judge is liable to be approved and the instant appeal is liable to be dismissed.

FINDINGS OF THE LEARNED SINGLE JUDGE

24. The main contention urged before the learned Single Judge was that the order terminating the services of the respondent-petitioner was punitive in nature and it attached stigma to him. The learned Single Judge observed that undisputedly, the petitioner had completed his probation period of one year successfully and satisfactorily and therefore, by a unanimous decision of Executive Council vide a resolution 20.06.2023, the probation period of petitioner and other appointees was extended further for one year from the date of Executive Council dated 20.06.2023 vide notification dated 08.08.2023. The learned Single Judge further observed that in normal circumstances, extension of probation period for one year by a Notification dated 8.8.2023 would mean that the petitioner has a satisfactory service and, therefore, he was found fit to continue on probation for further one year and final decision would be taken on his confirmation only after one year or any time earlier.

25. Learned Single Judge further considered the question that once after considering service of petitioner, the Executive Council adopted the resolution dated 26.06.2023 and extended the probation period of petitioner for one year, which would come to end in August, 2025, then under what circumstances the matter of petitioner was taken up for consideration within a short period of three months. The learned Single Judge recorded a finding that the Executive Council in its 78th meeting, without being a part of the circulated agenda but with permission of the Chair, considered the agenda on the subject without any apparent reason and therefore, procedure adopted appears to be suspicious and suffered with prejudice also. Learned Single Judge further observed that

in this regard, the stand of the University as specifically mentioned in their counter affidavit, was that there were certain materials against the petitioner before the Executive Council, however, a decision was taken not to hold any inquiry and passed the order not to extend the probation and to terminate the petitioner from service. In counter-affidavit, details of so-called materials were not disclosed and in the last paragraph of Resolution No. 06/78 adopted on 15.9.2023 it has been stated that Dr. Deepali Pant Joshi, nominee of the Hon'ble Chancellor in the Executive Council said that a teacher is a role model and it is good to nip any problem in the bud for smooth functioning and future of the institution.

26. Learned Single Judge further observed that at the time of hearing, the petitioner was present in person and the Court had asked a query about nature of criminal case against him. The petitioner fairly submitted that a case of outrage of modesty was lodged against him, wherein after investigation the charge-sheet has been filed and it is at the stage of trial and presently he is on bail. Learned Single Judge also asked a query that why he has not disclosed the details of it in the form, however, he had no satisfactory answer to it. Learned Single Judge further observed that the issue of pending criminal case was not considered to be adverse either at the stage of selection process or at the stage of extension of period of probation. The information with regard to a criminal case was available with the University since it was disclosed in application form, though details were neither mentioned nor sought by the University.

27. Learned Single Judge had relied upon the judgement of the Apex Court in the case of **Rajasthan High Court vs. Ved**

Priya and 2 others¹⁰, in which the Apex Court has dealt with the issue of termination during probation and if it was a stigmatic order then its consequence. Learned Single Judge observed that the petitioner was appointed under a due process. He had completed satisfactory service on probation of one year and on basis of his satisfactory service, his probation was extended for a period of one year. On the basis of material available, which also includes the material provided by University in a sealed envelope, the Executive Council considered the case of petitioner even without being part of agenda with permission of Chair and terminated his services under clause 5(a) of the Ordinance XLI. It was the stand of the University that there were some material before the Executive Council, which were considered and the material was a complaint of Co-ordinator, wherein there are allegations against the petitioner as well as a news cutting that petitioner was involved in a criminal case. It was also stand of University that the material was not considered to be such, which requires an inquiry to consider its truthfulness but it was not conducted. Therefore, from last paragraph of resolution, it could be held that definitely the said materials were considered and found adverse to petitioner. In such circumstances, learned Single Judge was of the considered opinion that order becomes stigmatic since all the resolutions are on the website of University and open for view of general public also and in case, petitioner applies in any other University, the said material will definitely become adverse to his future prospects.

28. Learned Single Judge had recorded a categorical finding that it is stand of University that truthfulness of allegations were not verified, therefore, the

petitioner was penalized only on basis of complaints whose contents were not verified and even before completing the extended period of probation of one year. Accordingly, the case of petitioner would fall under clause 2(e) and (f) as contended by the petitioner and not under clause 5(a) of Ordinance XLI as contended by the respondent-University. Admittedly, procedure prescribed under the Ordinance was not followed, The procedure adopted by University thus has legal flaws and was also against the legal principle discussed in **Ved Priya** (supra). In the aforesaid circumstances, learned Single Judge has allowed the writ petition and set aside the Resolution dated 20.06.2023 qua the petitioner and order of termination dated 15.09.2023.

ANALYSIS AND FINDINGS BY THE COURT

29. We have carefully considered the submissions made by the learned counsel for the parties and perused the documents annexed along with writ petition and the instant appeal.

30. It is not in dispute that the petitioner-respondent was appointed in the University in pursuance of appointment letter dated 21.05.2022. The appointment letter contains the terms & conditions governing petitioner's services. Clause-1 of the appointment letter contains duration of probation period and its extension as well as confirmation on satisfactory completion of probation period. Clause-5 of the appointment letter states that the offer of appointment was further subject to police verification of his antecedent and character and production of a medical certificate of fitness by the Senior Medical Officer, University Health Centre, University of

Allahabad within three months of joining. Clause-6 of the appointment letter further provides that if any declaration or information furnished by him is proved to be false or if he was found to have willfully suppressed any information, he was liable to be dismissed from service and also subject to other legal action as University may deem necessary under rules applicable.

31. It is also not in dispute that by notification dated 08.8.2023, the probation period of the petitioner was extended for further one year from the date of meeting of the Executive Council dated 20.06.2023. During the extended period of probation, it was found that the petitioner had not disclosed crime number and details of offence for which he is facing criminal trial. After due deliberation on the service rendered by the respondent-petitioner, the Executive Council vide resolution No.06/78 dated 15.09.2023 resolved not to extend the services of the petitioner-respondent and to terminate his contract of service under clause 5 (a) of the Ordinance XLI: Conditions of Service of teachers of the University.

32. The main contention urged before the learned Single Judge was that the order terminating the services of the respondent-petitioner was punitive in nature and it attached stigma to him. The learned Single Judge observed that the petitioner was appointed under a due process. He had completed satisfactory service on probation of one year and on basis of his satisfactory service, his probation was extended for a period of one year. During the extended period of probation, the Executive Council had considered the case of petitioner and terminated his services under Clause 5 (a) of the Ordinance LXI. Learned Single

Judge has allowed the writ petition and recorded a finding that truthfulness of allegations were not verified and the petitioner was penalized only on the basis of complaints.

33. As regards the disclosure, the petitioner was required to give details of the criminal case pending against him as well as the nature of offence for which he is facing criminal trial. Admittedly, a criminal case relating to outraging of modesty of woman was registered against him and after investigation, charge-sheet has been filed against him. The petitioner had suppressed the material fact and in column details under the head of 'Disclosure', he mentioned 'For students political issues'. An employee on probation can be discharged from service on the ground of unsatisfactory antecedents and suppression of material information or making false statement in reply to queries relating to pendency of the criminal case as it shows a current dubious conduct and absence of character at the time of making the declaration, thereby making him unsuitable for the post. We, therefore, do not agree with the findings of learned Single Judge in this regard.

34. In the case of **Ved Priya & another (supra)**, which was relied by learned Single Judge, while allowing the writ petition, the respondents therein were initially appointed as Judicial Officer along with others and at the time of considering the candidature of those Judicial Officers for confirmation, the High Court, after taking into consideration the overall performance and the other requirement of a Judicial Officer under the service rules, have confirmed services of ninety Judicial Officers, extended probation of one judicial officer, the services of two Judicial

Officers, who were before the Court, were not confirmed and they were discharged. It is in those facts of the case, Hon'ble Supreme Court has held that the respondents therein failed to establish that the High Court intended or has actually punished him for any defined misconduct, it stands crystallized that the object of the High Court on the administrative side was to verify the suitability and not to enquire into the allegations against the first respondent. Hon'ble Supreme Court did not find that the foundation was the allegations but it was based upon a holistic assessment of the respondent's service records.

35. In **Ved Priya & Anr.** (supra), Hon'ble Apex Court reiterated that the purpose of any probation is to ensure that before the employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the authorities to pass appropriate orders. In other words, the scheme of probation is to judge the ability, suitability and performance of an officer under probation. This exercise is a necessary part of the process of recruitment, and must not be treated lightly. Written tests and interviews are only attempts to predict a candidate's possibility of success at a particular job. The true test of suitability is actual performance of duties, which can only be applied after the candidate joins and starts working. Such exercise is subjective and not objective. Probationers have no indefeasible right to continue in employment until confirmed. In case of a confirmed employee the scope of judicial interference would be more expansive given the protection under Article 311 of the Constitution or the Service Rules but such may not be true in the case of probationers, who are denuded of such protection while working on trial

basis. Relevant paras from the judgment rendered by Apex Court in **Ved Priya** (supra) are as under:-

“14. The present case is one where the first respondent was a probationer and not a substantive appointee, hence not strictly covered within the umbrella of Article 311. The purpose of such probation has been noted in *Kazia Mohammed Muzzammil v. State of Karnataka* (2010) 8 SCC 155:

“25. The purpose of any probation is to ensure that before the employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the authorities to pass appropriate orders. In other words, the scheme of probation is to judge the ability, suitability and performance of an officer under probation.”

15. Similarly, in *Rajesh Kumar Srivastava v. State of Jharkhand* (2011) 4 SCC 447 it was opined:

“9. ... A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At that stage and during the period of probation the action and activities of the probationer (appellant) are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service. ...”

16. It is thus clear that the entire objective of probation is to provide the employer an opportunity to evaluate the probationer's performance and test his suitability for a particular post. Such an exercise is a necessary part of the process

of recruitment, and must not be treated lightly. Written tests and interviews are only attempts to predict a candidate's possibility of success at a particular job. The true test of suitability is actual performance of duties which can only be applied after the candidate joins and starts working.

17. Such an exercise undoubtedly is subjective, therefore, Respondent No.1's contention that confirmation of probationers must be based only on objective material is far-fetched. Although quantitative parameters are ostensibly fair, but they by themselves are imperfect indicators of future performance. Qualitative assessment and a holistic analysis of non-quantifiable factors are indeed necessary. Merely because Respondent No. 1's ACRs were consistently marked 'Good', it cannot be a ground to bestow him with a right to continue in service.

18. Furthermore, there is a subtle, yet fundamental, difference between termination of a probationer and that of a confirmed employee. Although it is undisputed that the State cannot act arbitrarily in either case, yet there has to be a difference in judicial approach between the two. Whereas in the case of a confirmed employee the scope of judicial interference would be more expansive given the protection under Article 311 of the Constitution or the Service Rules but such may not be true in the case of probationers who are denuded of such protection (s) while working on trial basis.

19. Probationers have no indefeasible right to continue in employment until confirmed, and they can be relieved by the competent authority if found unsuitable. Its only in a very limited category of cases that such probationers can seek protection under

the principles of natural justice, say when they are 'removed' in a manner which prejudices their future prospects in alternate fields or casts aspersions on their character or violates their constitutional rights. In such cases of 'stigmatic' removal only that a reasonable opportunity of hearing is sine-qua-non. Way back in *Parshotam Lal Dhingra v. Union of India* AIR 1958 SC 36, a Constitution Bench opined that:

"28.... In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with."

(Emphasis supplied)

36. It is gainful to note that the Apex court in para-24 of the decision in the case of **Ved Priya** (supra) observed that the unsatisfactory performance of a probationer and resultant dispensation of service at the end of the probation period, may not necessarily be impacted by the fact that meanwhile, there were some complaints attributing specific misconduct, malfeasance or misbehavior to the probationer. If the genesis of the order of

termination of service lies in a specific act of misconduct, regardless of over all satisfactory performance of duties during the probation period, the Court will be well within its reach to unmask the hidden cause and hold that the simplicitor order of termination, in fact, intends to punish the probationer without establishing the charge(s) by way of an enquiry. However, when the employer does not pick-up a specific instance and forms his opinion on the basis of over all performance during the period of probation, the theory of action being punitive in nature, will not be attracted. Onus would thus lie on the probationer to prove that the action taken against him inheres punitive characteristics. In para-24 of the said judgement Hon'ble Supreme Court has also observed that since Respondent No.1 (therein) has failed to establish that the High Court intended or has actually punished him for any defined misconduct, it stands crystallized that the object of the High Court on the administrative side was to verify the suitability and not to enquire into the allegations against the first respondent.

37. Facts of the case in hand are entirely different from the facts of *Ved Priya*. In the case at hand, the petitioner-respondent was appointed on probation and he was terminated from service under Clause 5 (a) of the Ordinance XLI: Conditions of Service of teachers of the University. The petitioner's services were not confirmed at the time of evaluation of his suitability and after due deliberation on the service rendered by him, it was unanimously resolved by the Executive Council to not extend his services and to terminate his contract of service on making a payment of a sum equivalent to one month's salary in lieu of a notice of termination.

38. For ready reference, Clause 2 (e), 2 (f) and 5 (a) of the Ordinance XLI are quoted below:-

“Ordinance XLI : Conditions of service of Teachers of the University

1. xxx

2. (a) xxx

(b) xxx

(c) xxx

(d) xxx

(e) Where the work or conduct, or both, of a teacher appointed on probation is, or are, not considered satisfactory, the Executive Council may, during or on the expiry of the period, including extended period, of probation, after considering a report of the same officer or functionary responsible for making the report under sub-clause (c) in respect of the confirmation of such teacher, or any other report of a competent officer or functionary endorsed by the Vice-Chancellor, in respect of the work or conduct of such teacher, terminate his services.

(f) An order of termination of services, under sub-clause (e), shall not be made by the Executive Council, except after notice to the concerned teacher giving him an opportunity of explanation in respect of the grounds on which his services are proposed to be terminated: Provided that if such notice is given before, or on, the date of the expiry of the period, including extended period, of probation, the period shall stand extended up to the date on which the order of termination is communicated to the teacher concerned.

3. xxxx

4. xxxx

5. (a) Except in the case of a teacher referred to in sub-clause (e) of clause 2, the contract of service, and the engagement thereunder, of a teacher appointed on probation, or in temporary

capacity, may be terminated by one month's notice on either side, or by payment, by the party choosing to terminate the said engagement, of a sum equivalent to one month's salary in lieu of such notice:

Provided that where, in the case of a teacher appointed in temporary capacity

(i) such engagement is for a period of less than one month, or

(ii) the duration of such engagement has already been specified or notified to the teacher concerned in advance and the said engagement is terminated in accordance with the term so specified or notified; or

(iii) such engagement has been determined by the Executive Council under the provisions of sub-clause (a), (d), (e) or (1) of clause 7, neither notice, nor payment of salary in lieu of notice, shall be necessary.”

39. In view of Clause 5 (a) of the Ordinance XLI, principles of natural justice need not be followed while terminating the services of a probationer. Neither any notice is required to be given to the probationer nor any opportunity of hearing is to be accorded to him. Merely because the order terminating probationer's service, refers to his unsatisfactory performance not suitable for confirmation, the order cannot be said to be stigmatic. Such an order would not assume characteristics of a stigmatic order just because a prospective employer might be prejudiced.

40. In **Muir Mills Unit of NTC (U.P.) Ltd. v. Swayam Prakash Srivastava and another¹¹, State of W.B. and others v. Tapas Roy¹² and Rajesh Kumar Srivastava v. State of Jharkhand and Others¹³**, Hon'ble Supreme Court has repeatedly held that an order terminating

the services of a probationer on the ground of unsatisfactory performance is not a stigmatic order and there is no requirement of following the principles of natural justice in such a case.

41. In the case of **Dipti Prakash Banerjee** (supra), the Apex Court, while determining as to when a simple order of termination is to be treated as "founded" on the allegations of misconduct and when complaints could be only as motive for passing such a simple order of termination, a distinction is explained in para-21 as under: -

"21. 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."

42. In **Rajesh Kumar Srivastava** (supra) Hon'ble Supreme Court held that while taking a decision to terminate the services of a probationer, no notice is required to be given where the decision is taken by the employer considering the

employee's over all performance, conduct and suitability to the job and strictly speaking, these are not cases of removal but of discharge simplicitor.

43. In **State of Uttar Pradesh and another v. Kaushal Kishore Shukla**¹⁴, the Supreme Court held as under:-

"7. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well settled that the form of the order is not conclusive and it is open to the court to determine the true nature of the order. In *Parshotam Lal Dhingra v. Union of India* [1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544] , a Constitution Bench of this Court held that the mere use of expressions like 'terminate' or 'discharge' is not conclusive and in spite of the use of such expressions, the court may determine the true nature of the order to ascertain

whether the action taken against the government servant is punitive in nature. The court further held that in determining the true nature of the order the court should apply two tests namely: (1) whether the temporary government servant had a right to the post or the rank or (2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that the order of termination of a temporary government servant is by way of punishment.....”

44. In **Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and another (supra)**, the Supreme Court once again deliberated on the semantic concepts like ‘motive’ and ‘foundation’ and reiterated and re-affirmed the position that termination founded on misconduct is illegal but where misconduct is the motivating factor, termination warrants no interference.

45. The Apex Court in the case of **Daya Shankar Yadav (supra)** was faced with a similar issue, wherein a CRPF officer upon suppression of material facts was terminated from the service. The Apex Court, while referring to its previous decisions, summarised the position as follows:

“14. ... The purpose of seeking the said information is to ascertain the character and antecedents of the candidate so as to assess his suitability for the post. Therefore, the candidate will have to answer the questions in these columns truthfully and fully and any misrepresentation or suppression or false statement therein, by itself would demonstrate a conduct or character unbefitting for a uniformed security service.”

15. When an employee or a prospective employee declares in a verification form, answers to the queries relating to character and antecedents, the verification thereof can therefore lead to any of the following consequences:

(a) **If the declarant has answered the questions in the affirmative and furnished the details of any criminal case (wherein he was convicted or acquitted by giving benefit of doubt for want of evidence), the employer may refuse to offer him employment (or if already employed on probation, discharge him from service), if he is found to be unfit having regard to the nature and gravity of the offence/crime in which he was involved.**

(b) On the other hand, if the employer finds that the criminal case disclosed by the declarant related to offences which were technical, or of a nature that would not affect the declarant's fitness for employment, or where the declarant had been honourably acquitted and exonerated, the employer may ignore the fact that the declarant had been prosecuted in a criminal case and proceed to appoint him or continue him in employment.

(c) Where the declarant has answered the questions in the negative and on verification it is found that the answers were false, the employer may refuse to employ the declarant (or discharge him, if already employed), even if the declarant had been cleared of the charges or is acquitted. This is because when there is suppression or non-disclosure of material information bearing on his character, that itself becomes a reason for not employing the declarant.

(d) Where the attestation form or verification form does not contain proper or

adequate queries requiring the declarant to disclose his involvement in any criminal proceedings, or where the candidate was unaware of initiation of criminal proceedings when he gave the declarations in the verification roll/attestation form, then the candidate cannot be found fault with, for not furnishing the relevant information. But if the employer by other means (say police verification or complaints etc.) learns about the involvement of the declarant, the employer can have recourse to courses (a) or (b) above.

16. Thus an employee on probation can be discharged from service or a prospective employee may be refused employment:

(i) on the ground of unsatisfactory antecedents and character, disclosed from his conviction in a criminal case, or his involvement in a criminal offence (even if he was acquitted on technical grounds or by giving benefit of doubt) or other conduct (like copying in examination) or rustication or suspension or debarment from college etc.; and

(ii) on the ground of suppression of material information or making false statement in reply to queries relating to prosecution or conviction for a criminal offence (even if he was ultimately acquitted in the criminal case).

This ground is distinct from the ground of previous antecedents and character, as it shows a current dubious conduct and absence of character at the time of making the declaration, thereby making him unsuitable for the post.”

(emphasis supplied)

46. In **Kendriya Vidyalaya's** case (supra) the Apex Court held that the purpose of requiring an employee to

furnish information regarding prosecution/conviction, etc. in the verification form was to assess his character and antecedents for the purpose of employment and continuation in service; that suppression of material information and making a false statement in reply to the queries relating to prosecution and conviction had a clear bearing on the character, conduct and antecedents of the employee; and that where it is found that the employee had suppressed or given false information in regard to the matters which had a bearing on his fitness or suitability to the post, he could be terminated from service during the period of probation without holding any inquiry. The Apex Court also made it clear that neither the gravity of the criminal offence nor the ultimate acquittal therein was relevant when considering whether a probationer, who suppresses a material fact (of his being involved in a criminal case, in the personal information furnished to the employer), is fit to be continued as a probationer. Relevant portion of the judgement is reproduced as follows :-

"11. It is not in dispute that a criminal case registered under Sections 323, 341, 294, 506-B read with Section 34, IPC was pending on the date when the respondent filled the attestation form. Hence, the information given by the respondent as against columns 12 and 13 as "No" is plainly suppression of material information and it is also a false statement. Admittedly, the respondent is holder of B.A., B.Ed. and M.Ed. degrees. Assuming even his medium of instruction was Hindi throughout, no prudent man can accept that he did not study English language at all at any stage of his education. It is also not the case of the respondent that he did not study English at all. If he could understand

columns 1-11 correctly in the same attestation form, it is difficult to accept his version that he could not correctly understand the contents of columns 12 and 13. Even otherwise if he could not correctly understand certain English words, in the ordinary course he could have certainly taken the help of somebody. This being the position, the Tribunal was right in rejecting the contention of the respondent and the High Court committed a manifest error in accepting the contention that because the medium of instruction of the respondent was Hindi, he could not understand the contents of columns 12 and 13. It is not the case that columns 12 and 13 are left blank. The respondent could not have said "No" as against columns 12 and 13 without understanding the contents. Subsequent withdrawal of criminal case registered against the respondent or the nature of offences, in our opinion, were not material. The requirement of filling columns 12 and 13 of the attestation form was for the purpose of verification of character and antecedents of the respondent as on the date of filling and attestation of the form. Suppression of material information and making a false statement has a clear bearing on the character and antecedents of the respondent in relation to his continuance in service.

12. The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify the character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had the discretion to terminate his

services, which is made expressly clear in para 9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 was not to find out either the nature or gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not. The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature. In the present case the respondent was to serve as a Physical Education Teacher in Kendriya Vidyalaya. The character, conduct and antecedents of a teacher will have some impact on the minds of the students of impressionable age. The appellants having considered all the aspects passed the order of dismissal of the respondent from service. The Tribunal after due consideration rightly recorded a finding of fact in upholding the order of dismissal passed by the appellants. The High Court was clearly in error in upsetting the order of the Tribunal. The High Court was again not right in taking note of the withdrawal of the case by the State Government and that the case was not of a serious nature to set aside the order of the Tribunal on that ground as well. The respondent accepted the offer of appointment subject to the terms and conditions mentioned therein with his eyes wide open. Para 9 of the said memorandum extracted above in clear terms kept the respondent informed that the suppression of any information may lead to dismissal from service. In the attestation form, the respondent has certified that the information given by him is correct and complete to the best of his knowledge and

belief; if he could not understand the contents of columns 12 and 13, he could not certify so. Having certified that the information given by him is correct and complete, his version cannot be accepted. The order of termination of services clearly shows that there has been due consideration of various aspects. In this view, the argument of the learned counsel for the respondent that as per para 9 of the memorandum, the termination of service was nor automatic, cannot be accepted."

(emphasis supplied)

47. In the case of **State of Madhya Pradesh and Others vs. Abhijit Singh Pawar**¹⁵, when the employee participated in the selection process, he tendered an affidavit disclosing the pending criminal case against him and according to the disclosure, a case registered in the year 2006 was pending on the date when the affidavit was tendered. However, within four days of filing such an affidavit, a compromise was entered into between the original complainant and the employee and an application for compounding the offence was filed under Section 320 Cr.P.C. The employee came to be discharged in view of the deed of compromise. Thereafter the employee was selected in the examination and was called for medical examination. However, his character verification was also undertaken and after due consideration of the character verification report, his candidature was rejected. The employee filed a writ petition before the High Court of Madhya Pradesh challenging rejection of his candidature and learned Single Judge of the High Court of Madhya Pradesh allowed the said writ petition on 31.7.2014. The judgment and order passed by the learned single Judge directing the State to appoint the employee came to be confirmed by the Division Bench, which led to appeal before

the Apex Court. After considering catena of decisions on the point including the decision of this Court in the case of *Avtar Singh v. Union of India*¹⁶, the Apex Court upheld the order of the State rejecting the candidature of the employee by observing that as held in *Avtar Singh* (supra), even in cases where a truthful disclosure about a concluded case was made, the employer would still have a right to consider antecedents of the candidate and could not be compelled to appoint such candidate. After reproducing and/or re-considering para 38.5 of the decision in the case of *Avtar Singh* (supra), the Apex Court observed and held as under:-

"14. In *Avtar Singh* (supra), though this Court was principally concerned with the question as to non-disclosure or wrong disclosure of information, it was observed in paragraph 38.5 that even in cases where a truthful disclosure about a concluded case was made, the employer would still have a right to consider antecedents of the candidate and could not be compelled to appoint such candidate.

15. In the present case, as on the date when the respondent had applied, a criminal case was pending against him. Compromise was entered into only after an affidavit disclosing such pendency was filed. On the issue of compounding of offences and the effect of acquittal under Section 320(8) of Cr.P.C., the law declared by this Court in *Mehar Singh* (supra), specially in paragraphs 34 and 35 completely concludes the issue. **Even after the disclosure is made by a candidate, the employer would be well within his rights to consider the antecedents and the suitability of the candidate. While so considering, the employer can certainly take into account the job profile for**

which the selection is undertaken, the severity of the charges levelled against the candidate and whether the acquittal in question was an honourable acquittal or was merely on the ground of benefit of doubt or as a result of composition.

16. The reliance placed by Mr. Dave, learned Amicus Curiae on the decision of this Court in Mohammed Imran (supra) is not quite correct and said decision cannot be of any assistance to the respondent. In para 5 of said decision, this Court had found that the only allegation against the appellant therein was that he was travelling in an auto-rickshaw which was following the autorickshaw in which the prime accused, who was charged under Section 376 IPC, was travelling with the prosecutrix in question and that all the accused were acquitted as the prosecutrix did not support the allegation. The decision in Mohammed Imran (supra) thus turned on individual facts and cannot in any way be said to have departed from the line of decisions rendered by this Court in Mehar Singh (supra), Parvez Khan (supra) and Pradeep Kumar (supra).

17. We must observe at this stage that **there is nothing on record to suggest that the decision taken by the concerned authorities in rejecting the candidature of the respondent was in any way actuated by mala fides or suffered on any other count. The decision on the question of suitability of the respondent, in our considered view, was absolutely correct and did not call for any interference.** We, therefore, allow this appeal, set aside the decisions rendered by the Single Judge as well as by the Division Bench and dismiss Writ Petition No.9412 of 2013 preferred by the respondent. No costs."

(emphasis supplied)

CONCLUSION

48. Hon'ble Apex Court while considering **Pavanendra Narayan Verma's case** (supra) had considered what should be the test to determine whether a letter of termination of service was termination simplicitor or stigmatic termination. After referring to a number of authorities including the judgment in **Parshotam Lal Dhingra vs. Union of India**¹⁷ the Apex Court has held as under (vide para 19):

"..Courts continue to struggle with semantically indistinguishable concepts like motive" and "foundation"; and terminations founded on a probationer's misconduct have been held to be illegal while terminations motivated by the probationer's misconduct have been upheld. The decisions are legion and it is an impossible task to find a clear path through the jungle of precedents."

49. Hon'ble Apex Court has further formulated the judicial test to determine as to on which side of the fence the case lay, in the following words (vide para 21):-

"One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct (c) which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."

50. The real test to be applied in every situation where an employee is removed by an innocuous order of termination is: "Is he discharged as unsuitable or is he punished for his misconduct?". If the order of termination from service casts a stigma in the sense that it contains a statement casting aspersion on his conduct or his character, then it can be treated as an order of punishment but not if it merely amounts to highlighting the unsuitability of the employee.

51. In the instant matter, we have carefully examined the resolution of the Executive Council and the termination order. The finding of learned Single Judge qua the fact, that no agenda was there in the meeting of Executive Council, is unsustainable as the matter falling even outside the agenda can always be taken with the leave of the Vice Chancellor of the University and the case of the petitioner was taken into consideration by the Executive Council with the leave of the chair i.e. Vice Chancellor of the University.

52. The instant matter can also be seen from another angle that the petitioner, who was aggrieved with the order of termination being simplicitor by which his services were dispensed with, challenged the same in the writ petition and while responding the writ petition the University had taken a very innocuous and categorical stand that the order was simplicitor and no material was brought by the University with the counter affidavit, which could even reflect a glimpse of impression that the order of simplicitor could be presumed as stigmatic. No doubt, learned Single Judge has a right to lift the veil to find out the actual reason, which prompted the University to pass such an order. Thereafter, on the instance of learned

Single Judge the material was placed by the appellant University in a sealed cover. Till the submission of papers in the sealed cover, no document was in public domain except the resolution of the Executive Council. Therefore, we find that there was no reason or occasion to mention the papers, which were supplied by the University, on insistence of the learned Single Judge.

53. Surprisingly, the petitioner was present in the court room and learned Single Judge himself had asked certain queries to the petitioner in the open court. Even the details are averred in the impugned judgment, which also categorically reflect that the petitioner himself has failed to satisfy the Court qua the concealment of criminal proceeding. In such situation the employer i.e. University cannot be blamed and no onus can be shifted upon the University that the order of dispensation of petitioner's services as probationer is stigmatic. In the absence of any attempt by the University to place the complaint/report and newspaper cutting on affidavit or to bring it in public domain, the order of termination, as on the face of it, remains simplicitor.

54. As averred in the earlier part of the judgement, we find that a termination order, which explicitly states what is implicit in every order of termination of a probationer's appointment, does not ipso facto become stigmatic. Therefore, what emerges from the conspectus of the aforesaid judgements is that if an order is found on allegations, the order is stigmatic and punitive and services of an employee cannot be dispensed without affording him an opportunity of defending the accusations/allegations made against him in a full-fledged inquiry.

55. In the instant matter, the procedure adopted by the appellant University under Clause 5 (a) is just and proper as the said provision leaves it open upon the wisdom of the employer to part with the enquiry, if the employer did not find it proper to institute an enquiry. The term used 'may' in Clause 5 (a) leaves upon the discretion of the University to dispense with service of the probationer by simply payment of one month salary in lieu of notice.

56. The employer/University is well within its domain in not continuing the petitioner, who is facing grave charge of molestation and is bailed out in the criminal case. The factum of not disclosing the details/nature of criminal case against the petitioner may have independently invited the termination even in absence of any complaints. The requirement of integrity and high standard of conduct is of paramount importance in the service of teacher. However, in this case, it was not a case of termination on the ground of complaint, but was a simple discharge of probationer.

57. We are, therefore, of the considered opinion that the mere reiteration of a universal fact of Dr. Deepali Pant Joshi, does not amount to stigma by any stretch of imagination as it can at the best be taken as a general statement. The termination of the petitioner is, therefore, neither punitive nor stigmatic.

58. For the aforesaid reasons, we are of the firm view that the learned Single Judge has recorded contradictory findings of facts in the impugned judgement.

59. In view of the law laid down on the subject by the Apex Court and the

material placed on record, the judgement of learned Single Judge dated 23.05.2024 deserves to be set aside and is hereby set aside.

60. Accordingly, the Special Appeal stands allowed.

(2024) 9 ILRA 507
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2024
BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ A No. 5246 of 2024

Smt. Madhumita Pandey ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner
Ramesh Chandra Dwivedi

Counsel for the Respondents:
V.K. Singh (Sr. Adv.), Saumitra Singh,
Vinay Kumar Srivastava

A. Service Law – Post of Gramin Dak Sevak (GDS) – Qualification – Petitioner possessed Certificate of Prathama from Hindi Sahitya Sammelan – Notification dated 24.11.2009 require the qualification of High School form a recognized Board – However, the Notification dated 21.11.2006 recognized Certificate of Prathama as equivalence to High School – Effect – Held, Hindi Sahitya Sammelan is neither a University/Deemed University nor Educational Board but it is only a society registered under the Societies Registration Act and the degree offered by it has no sanctity, but what is to be seen is the stand of the Postal Department based upon the statutory rules with regard to the issue of equivalence – The recruitment rules itself provides for equivalent qualification and once the position being

so, in the backdrop of the notification dated 26.11.2006 as adopted from time to time by the Postal Department, it cannot be said that the selection and the appointment of the writ petitioner was illegal. (Para 18 and 19)

Writ allowed. (E-1)

List of Cases cited:

1. Rajasthan Pradesh Vidya Samiti V.S. Sardarshahar & anr. Vs U.O.I.& ors.; 2010 (12) SCC 609
2. Manish Kumar Vs St. of U.P.; 2010 (9) ADJ 762
3. Bedanga Talukdar Vs Saifudullah Khan & ors.; 2011 (12) SCC 85
4. Ankita Thakur & ors.Vs H.P. Staff Selection Commission & ors.; 2023 (7) Supreme Court 468
5. Ashish Kumar Vs St. of Uttar Pradesh; 2018 (3) SCC 55
6. Civil Appeal No. 152 of 2022; Employee St. Insurance Corporation Ltd. Vs U.O.I.decided on 20.01.2022
7. Zahoor Ahmad Rather & ors. Vs Sheikh Imtiyaz Ahmad & ors.; 2019 (2) SCC 404

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Impugned in the present proceedings at the instance of Smt. Madhumita Pandey (in short 'writ petitioner') is an order dated 20.03.2024 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad (in short 'Tribunal') in OA No. 1820 of 2010 (Smt. Kalpana Tripathi Vs. Union of India & 4 Others), whereby the original application preferred by Smt. Kalpana Tripathi (in short 'original applicant') questioning the order dated 15.07.2010 of the Post Master General, Gorakhpur Region, Gorakhpur,

third respondent (in short 'Postal Department') appointing the writ petitioner on the post of GDS, Branch Post Master, Baraon, Branch Office was set aside.

2. A joint statement has been made by the learned counsels for the parties that they do not propose to file any affidavits. With the consent of the parties, the writ petition is being decided at the fresh on the basis of the documents available on record.

Facts:

3. The case of the original applicant which was projected before the Tribunal as set out in the OA is that a recruitment exercise was undertaken by the Postal Department for filling up the post of GDS Branch Post Master, Baraon, Branch Office through District Employment Officer, Deoria. The original applicant along with the writ petitioner and others applied in pursuance of the said notification, thereafter, a merit list was prepared of five candidates on the basis of the percentage of marks obtained in the high school examination in which the original applicant's name found place at serial No. 4 whereas the writ petitioner was assigned ranking at serial No. 3. On 15.07.2010, an appointment order came to be issued in favour of the writ petitioner appointing her on the post of GDS, Branch Post Master, Baraon. The original applicant questioned the appointment of the writ petitioner on the said post while instituting proceedings, OA No. 1820 of 2010 seeking following reliefs:-

"A. To quash the order dated 15.07.2010 (Annexure No. 1) passed by the respondent No. 3 for the appointment of the respondent No. 4 the post of Post Master, Post Office Baraw, District Deoria.

B. To direct the respondent No. 3 to appoint the applicant on the post of Post Master, Post Office Baraw, District Deoria.

C. To pass such other and further order which may be deem fit and proper in the circumstances of the case.

D. To award the cost of this application to the applicant.”

4. The sheet anchor of the challenge raised to the appointment of the writ petitioner was on the premise that she was not eligible and qualified for being selected and appointed on the said post, as the minimum qualification as per the notification dated 24.11.2009 was possession of High School certificate from a recognized Board. Since, according to the original applicant, the writ petitioner possessed the certificate of Prathama examination conducted by the Hindi Sahitya Sammelan, Allahabad which was not the qualification specified in the notification, thus, the selection and the appointment of the writ petitioner was illegal.

5. The Tribunal entertained the original application while issuing notice to the writ petitioner and seeking response from the writ petitioner as well as the Postal Department. On contest, response was filed by the Postal Department and the writ petitioner to which rejoinder affidavits were filed and the O.A. came to be allowed while relying upon the decision in **Rajasthan Pradesh Vidya Samiti V.S. Sardarshahar & Anr. Vs. Union of India and others, 2010 (12) SCC 609 and Manish Kumar Vs. State of U.P. 2010 (9) ADJ 762** holding that the Hindi Sahitya Sammelan is neither a University nor an Educational Board and the certificate so

offered does not have legal sanctity, the appointment of the writ petitioner was set aside.

6. Questioning the order dated 20.03.2024 passed in OA No. 1820 of 2010, the writ petitioner has filed the present writ petition seeking following reliefs.-

“i. Issue a writ, order or direction in the nature of certiorari to quash the impugned order dated 20.03.2024 passed by Central Administrative Tribunal, Allahabad in Original Application No. 1820 of 2010 (Smt. Kalpana Tripathi Vs. Union of India and others).

ii. Issue a writ, order or direction in the nature of Mandamus directing the respondents not to interfere her working as Branch Postmaster Branch Baraon, District Deoria.

iii. Issue any other writ order or direction which this Hon’ble Court may deem fit and proper in the circumstances of the present case.

iv. Award costs of the writ petition to the petitioner.”

7. This Court on presentation of the writ petition on 15.04.2024 passed the following orders.-

“1. Supplementary affidavit, annexing the certified copy of the impugned order, filed today, is taken on record.

2. Sri B.B.P. Srivastava, Advocate, holding brief of Sri Vinay Kumar Srivastava, has entered appearance on behalf of respondent no. 5.

3. Counsel for the petitioner to provide him with complete set of pleadings.

4. As jointly prayed, list as fresh on 25.4.2024, showing the name of Sri

Vinay Kumar Srivastava as counsel for respondent no. 5.

5. The order has been passed in the presence of Sri Saumitra Singh, learned counsel for respondent nos. 1, 3 and 4.”

8. Thereafter, on 01.08.2024 the following orders were passed.-

“1. Despite grant of sufficient time, the Notification dated 21.11.2006, Annexure-6 (Page 111) published in Gazette has not been produced. However, a copy of the said notification as annexed with the petition has been again produced by learned A.S.G.I.

2. In view of the fact that the respondents themselves have relied on the said notification dated 21.11.2006, now the plea being raised on behalf of the respondents is that the advertisement did not indicate the equivalent qualification and in terms of the notification also, the same is only an equivalent qualification.

3. Counsel for the petitioner submits that the Rules provide equivalent qualification and prays for time to produce the same.

4. In view of the submissions made, list on 20th August, 2024, as fresh.”

Argument of counsel for writ petitioner:

9. Sri R.C. Dwivedi, learned counsel for the petitioner has sought to argue that the judgment and order of the Tribunal impugned in the present writ petition cannot be sustained for a single moment inasmuch as the Tribunal has misconstrued the entire controversy and has adopted an incorrect approach. Elaborating the said submission it is submitted that as per the statutory rules for Postal Gramin Dak Sevak, Section IV deals with the method of

recruitment and according to which for the post of ED/Post Master/ED Branch Post Master, the relevant qualification is matriculation or equivalent thereof.

10. Submission is that though matriculation is one of the qualification but besides it equivalent qualification as recognized by the Postal Department is also permissible for the recruitment on the post in question. According to the writ petitioner, in the case in hand the Postal Department had issued a notification dated 21.11.2006 under the signature of the Joint Secretary to the Government of India, Ministry of Human Resource Development, Department of High Education according to which in continuation of the departments notification dated 14.05.2004 the Government of India in its meeting held on 16.10.2006 had decided to extend the provisional recognition granted to the Prathama examination being conducted by Hindi Sahitya Sammelan, Allahabad for the purposes of employment under the Central Government for the post where the desired qualification is to pass matriculation for a period of three years from 27.07.2007 to 26.10.2010. It is, thus, contended that merely because the writ petitioner does not possess matriculation from U.P. High School and Intermediate Education, ICSE or CBSE, the same would not be a disqualification particularly when the Prathama from Hindi Sahitya Sammelan has been made equivalent. Additionally, it has been argued that the judgments in the case of **Rajasthan Pradesh** (supra) and **Manish Kumar** (supra) would not be applicable in the present case and, thus, the Tribunal erred in law in allowing the original application while setting aside the appointment of the writ petitioner, it is, therefore, prayed that the order of the Tribunal impugned in the present

proceeding be set aside and the writ petition be allowed while granting relief as claimed in toto.

Argument of counsels for Original Applicant:

11. Countering the submission of the learned counsel for the petitioner Sri V.K. Singh, learned Senior Counsel assisted by Sri Vinay Kumar Srivastava has submitted that the judgment and order of the Tribunal needs no interference in the present proceedings in view of the fact that the Tribunal has considered each and every aspect of the matter and has proceeded to pass an order which cannot be said to be suffering from any illegality. Argument is that the qualification as prescribed in the advertisement was matriculation from a recognized Board and once the writ petitioner as per her own saying possessed qualification of Prathama from Hindi Sahitya Sammelan which is not a recognized institution then by all eventuality the selection and appointment of the writ petitioner was illegal and has been rightly set aside by the Tribunal. Reliance has been placed upon the decision in **Bedanga Talukdar Vs. Saifudullah Khan & Ors., 2011 (12) SCC 85 and Ankita Thakur and Ors. Vs. H.P. Staff Selection Commission & Ors. reported in 2023 (7) Supreme Court 468** so as to contend that even if there exists power of relaxation of the rules then the same has to be specifically indicated in the advertisement otherwise it would be in violation of Articles 14 and 16 of the Constitution of India. Submission is that though the rule provides for possession of matriculation and equivalent examination but once relaxation is being accorded then it is to be specifically mentioned in the advertisement so as to give opportunity to

the other deserving candidates who would have applied in that regard. Since the advertisement did not prescribe for any equivalent qualification, thus, no benefit whatsoever could have been accorded to the writ petitioner. While driving force from the judgment in **Rajasthan Pradesh Vidya Samiti** (supra) and **Manish Kumar** (supra) it is contended that once there happens to be series of decisions on the subject that the Hindi Sahitya Sammelan being neither university/deemed university nor an educational board, thus, the question of equivalence itself stands extinguished, therefore, the writ petitioner is not entitled to relief and the writ petition be dismissed.

Argument of counsel for Postal Department:

12. Sri Saumitra Singh, learned counsel who appears for the Postal Department has supported the case of the writ petitioner while adding that the Postal Department in view of the notification dated 21.11.2006 considers the qualification of Prathama from Hindi Sahitya Sammelan as equivalent to matriculation and the same stands adopted also. According to him the selection and appointment of the writ petitioner is perfectly valid and on the basis of the sheer dint of merit she has been selected and accorded appointment and the Tribunal committed an error in allowing the original application preferred by the original applicant while setting aside the appointment of the writ petitioner.

Relevant Statutory Rules/Notifications

Section IV: Method of Recruitment (Postal Gramin Dak Sevak)

“2. Educational Qualifications:

ED Sub-Postmasters and ED Branch Postmasters:

Matriculation. [The selection should be based on the marks secured in the Matriculation or equivalent examinations. No weightage need be given for any qualification(s) higher than Matriculation.]”

“Notification Dated 24.11.2006

Government of India

Ministry of Human Resource Development

Department of Higher Educational

New Delhi, 21st November, 2006

Notification

No. F.24-4/2001-TS-III. In continuation of this Department’s Notification of even number dated 14.05.2004, the Government of India, on the recommendations of Higher Level Committee in its meeting held on 16.10.2006, has decided to extend the provisional recognition granted to the Prathama Examination being conducted by Hindi Sahitya Sammelan, Allahabad for the purpose of employment under the Central Government for the post for which the desired qualification is a pass in matriculation for a further period of 3 years from 27.10.2007 to 26.10.2010, after which the Committee will review the recognition granted.

(Ravi Mathur)

Joint Secretary to the Government of India”

“Notification Dated 24.11.2001

भारतीय डाक विभाग

कार्यालय अधीक्षक डाकघर देवरिया मण्डल देवरिया-274001

पत्रांक ए-672/ ई० डी०/ चै० III देवरिया दिनांक 24.11.09
सेवा में

सेवायोजन अधिकारी

देवरिया

महोदय,

यह सूचित किया जाता है कि शाखा डाकघर बरौव लेखा कार्यालय मदनपुर जनपद देवरिया में जी०डी०एस० शाखा पोस्टमास्टर बरौव का एक पद अनारक्षित के लिये रिक्त है। कार्यरत जी०डी०एस० कर्मचारी को रूपया 2745-50-4245 टी०आर०सी०ए० देय है एवं अन्य महंगाई भत्ता इसमें शामिल नहीं है। यह रिक्ति शाखा पोस्टमास्टर बरौव के त्यागपत्र के कारण स्थाई/अस्थायी तौर पर रिक्त है। इस पद पर नियुक्ति होने पर रूपया 10000/- का बचत पत्र/किसान विकास पत्र के रूप में सिक्योरिटी जमा करना अनिवार्य है। सिक्योरिटी की रकम नियम परिवर्तन होने पर निर्धारित सीमा तक बढ़ाना होगा।

आपसे अनुरोध है कि कम से कम तीन अभ्यर्थियों का नामांकन सूची जो उपरोक्त पद पर चयन हेतु निम्नलिखित आवश्यक शर्तें पूरी करते हों इस प्रकार प्रेषित करें कि नामांकन सूची इस कार्यालय में दिनांक 23.12.2009 तक अवश्य प्राप्त हो जाय। इस तिथि के पश्चात प्राप्त नामांकन सूची/ आवेदन पत्र रद्द समझा जायेगा एवं इस पर कोई बिचार नहीं होगा।

1. जीडीएस की भर्ती हेतु नामांकन प्राप्त होने की तिथि को न्यूनतम आयु 18 वर्ष तथा अधिकतम आयु 60 वर्ष हो।

2. अभ्यर्थी की शैक्षणिक योग्यता 10वीं कक्षा (हाई स्कूल) परीक्षा उत्तीर्ण होना चाहिये तथा बोर्ड द्वारा जारी अंकपत्र व प्रमाण पत्र मान्य होंगे।

3. अभ्यर्थी को मूल डाकघर ग्राम का निवासी होना अनिवार्य नहीं है परन्तु नियुक्ति हेतु चुने जाने वाले अभ्यर्थी को नियुक्ति के पूर्व डाकघर वाले ग्राम में डाकघर रखने के लिये सुरक्षित व उपयुक्त भवन उपलब्ध कराना होगा।

4. डाकघर में उपलब्ध नकदी एवं मूल्यवान वस्तुओं की सुरक्षा का उत्तरदायित्व जीडीएस शाखा पोस्टमास्टर की होगी।

5. आवेदन करने वाले उम्मीदवार/ अभ्यर्थी को अन्य रोजगार के श्रोतों से अपनी आय को पूरा करना होगा जिससे कि उसके पास अपना और अपने परिवार का भरण पोषण करने के लिये पर्याप्त साधन हो एवं इस सम्बन्ध में घोषणा पत्र देना होगा।

6. अभ्यर्थी को डाकघर के कार्य हेतु उपयुक्त भवन होना चाहिए जहाँ भविष्य में पी०सी०ओ० की व्यवस्था की जा सके।

7. अभ्यर्थी को दिवालिया नहीं होना चाहिए।

9. अभ्यर्थी का किसी भी राजनितिक पार्टियों से सम्बन्ध नहीं होना चाहिए एवं किसी चुनावी पद पर कार्यरत नहीं होना चाहिये एवं भारतीय जीवन बीमा निगम का एजेंट नहीं होना चाहिए तथा किसी भी सरकारी/प्राइवेट (मान्यता प्राप्त संस्थानों आदि) नौकरी में कार्यरत नहीं होना चाहिए।

10. जिन अभ्यर्थियों के आवेदन पत्र समय सीमा एवं निर्धारित शर्त के अनुरूप सीधे भी इस कार्यालय में प्राप्त होंगे उन पर भी बिचार किया जायेगा।

11. जिस जाति/कोटि के उम्मीदवार के लिये नोटिफिकेशन किया गया है उसी जाति/कोटि के ही अभ्यर्थी का नामांकन भेजा जाय तथा वे ही अभ्यर्थी केवल सीधे इस कार्यालय को आवेदन कर सकते हैं।

12. पुलिस में दर्ज प्राथमिकी के आधार पर कोई विवेचना लम्बित नहीं होना चाहिए।

13. आवेदन पत्र पंजीकृत पत्र से ही भेजने पर स्वीकार किया जायेगा अन्यथा उस पर कोई बिचार नहीं किया जायेगा।

ह०-

अधीक्षक डाकघर

देवरिया मण्डल देवरिया- 274001”

Notification Dated 24.11.2010

F.No.37-52/2006-SPB-I

Ministry of Communications & IT
Department of Posts

Dak Bhawan, New Delhi

Dated 23.09.2010

ADPS (Recruitment)

Office of the Chief Postmaster
General,

U.P. Circle, Lucknow.

Subject:- Regarding recognition of various examinations.

Ref:- Your letter No. Rectt/M-8/Ruling/10 dated 31st August, 2009

Sir,

I am directed to refer to your letter mentioned under reference on the subject cited above and to inform that:

(i) As per Notification No. 24-4/2001-TS-III dated 21st November, Ministry of HRD has extended the recognition of Prathama examination for a further period of 3 years from 27.10.2007 to 26.10.2010. A circular in the matter is being issued separately.

(ii) In respect of Recognition of Purva Mathyama and Uttar Padhyama Examination conducted by Sampurnanand

Sanskrit Vishwa Vidhyalaya, Varanasi, UP is concerned, it has to inform that this matter has been taken up with University Grant Commission. The requisite clarification in this regard shall be furnished as soon as the same is received from UGC.

(iii) A copy of Ministry of HRD Notification No. F.7-1/77-SKT.2. dated 22nd November 1979 issued regarding Adhikari Pariksha conducted by the Gurukul Vishwa Vidhyalaya, Vrindavan, Mathura, UP is enclosed herewith.

(iv) In respect of recognition of Purva Madhyama and Uttar Padhyama Examination conducted by the Uttar Pradesh Madhyamik Sanskrit Parishad, Lucknow, UP is concerned, it has to inform that necessary clarification is still awaited from the Department of Higher Education, Shastri Bhawan, New Delhi.

(v) In respect of Saraswati Prabadh Pariksha conducted by Bhartiya Shiksha Parishad, the requisite clarification is awaited from the Ministry of HRD.

Yours Faithfully,
(Suraj Bhan)

Assistant Director General (SPN)
dated at Lucknow 04.10.2010”

Analysis:

13. The facts are not in issue. It is not in issue that the notification came to be issued by the Postal Department for filling up the post of GDS, Branch Post Master Baraon wherein the qualification prescribed was possession of matriculation (High School) from a recognized Board. It is also not in dispute that the writ petitioner along with the original applicant and others applied in pursuance of the said notification and a merit list came to be published, in which as per the averments contained in para 5 of the reply filed by the Postal

Department before the Tribunal, it was asserted.-

“5. That, on receipt of applications from the District Employment Officer Deoria as well as from the candidates applying direct, the merit list was prepared for five candidates on the basis of percentage of marks obtained in the High School Examination and in the examination equivalent to High School Examination. The merit list was prepared as under:-

SI No	Name of candidates	Obtained Marks	Percentage	Name of Board
1.	Smt. Indubala Tripathi	447/600	74.5	HS & Intermediate Education U.P. Board Allahabad
2.	Sri Vipin Kumar Pandey	592/800	74.00	Hindi Sahitya Sammelan, Allahabad
3.	Smt. Madhumita Pandey	565/800	70.62	Hindi Sahitya Sammelan, Allahabad
4.	Smt. Kalpana Tripathi	407/600	67.83	HS & Intermediate Education U.P., Board Allahabad
5.	Sri Rajesh Singh	379/600	63.16	HS & Intermediate Education U.P. Board Allahabad

14. The bone of contention between the parties is whether it was open for the Postal Department to select the writ petitioner on the said post on the face of the fact that the writ petitioner did not possess matriculation from the recognized Board, U.P. Board of High School & Intermediate Education/ICSE/CBSC.

15. To address the said question, we are required to have a quick survey of the statutory rules, advertisement and the notifications issued from time to time on the said subject. Record reveals there exist Service Rules for Postal Gramin Dak Sevak for recruitment of Sub Postmasters and Branch Postmasters prescribing qualification of matriculation or equivalent examination. Though we find that the advertisement does not speak about any equivalence barring the qualification of matriculation but what is relevant is the statutory rules which would in all eventualities prevail in case of any inconsistency with the advertisement where the recruitment rules prescribe for equivalent qualification. The said aspect is no more res integra as the same stands crystallized in the case of **Ashish Kumar Vs. State of Uttar Pradesh 2018 (3) SCC 55** wherein the following was observed.-

“27. Any part of the advertisement which is contrary to the statutory rules has to give way to the statutory prescription. Thus, looking to the qualification prescribed in the statutory rules, the appellant fulfils the qualification and after being selected for the post denying appointment to him is arbitrary and illegal. It is well settled that when there is variance in the advertisement and in the statutory rules, it is the statutory rules which take precedence.”

16. Recently the Hon'ble Supreme Court in the case in **Civil Appeal No. 152 of 2022 the Employee State Insurance Corporation Ltd. Vs. Union of India** decided on 20.01.2022 held as under:-

“It is settled law that if an advertisement is inconsistent with the recruitment rules, the rules would prevail,

*as held by this Court in **Malik Mazhar Sultan & Anr. Vs. U.P. Public Service Commission & Ors., 2006 (9) SCC 507.***

17. Applying the principles of law as culled out in the above noted decision in the facts of the present case, an irresistible conclusion stands drawn that the recruitment rules will have precedence over the advertisement and the advertisement is to yield before the recruitment rules.

18. Now the next question which falls for consideration before us is regarding the issue of equivalence. Though there happens to be judgments on the subject that the Hindi Sahitya Sammelan is neither a University/Deemed University nor Educational Board but it is only a society registered under the Societies Registration Act and the degree offered by it has no sanctity, but what is to be seen is the stand of the Postal Department based upon the statutory rules with regard to the issue of equivalence. Apparently, there happens to be a notification issued by the Government of India, Ministry of Human Resource Development, Department of Higher Education dated 21.11.2006 on the subject that even in the past and in continuation of the notification dated 14.05.2004, the Government of India on the recommendation of the higher level committee in its meeting convened on 16.10.2006 had taken a decision to extend the provisional recognition granted to the Prathama examination being conducted by Hindi Sahitya Sammelan for the purposes of employment under the Central Government for the post for which desired qualification is to pass matriculation for a further period of three years from 27.10.2007 to 26.10.2010. The said notification specifically recognizes the qualification of Prathama examination and

adoptable to the post which are under the Government of India. Not only this, the Postal Department has also issued a circular adopting the said notification and making it applicable in the Postal Department. On examination, we find that the qualification of Prathama obtained by the writ petitioner from Hindi Sahitya Sammelan, Allahabad is of the year 2006 i.e. the period when the same was made equivalent to Prathama Hindi Sahitya Sammelan.

19. Bearing in mind the said factual backdrop, it becomes explicitly clear that the Postal Department being the employers has been treating the qualification of Prathama obtained from Hindi Sahitya Sammelan to be equivalent to matriculation and on the said basis the recruitment exercise stood undertaken pursuant to the notification dated 24.11.2009 and the writ petitioner was selected and granted appointment. Our views further stands amplified from the fact that the recruitment rules itself provides for equivalent qualification and once the position being so, in the backdrop of the notification dated 26.11.2006 as adopted from time to time by the Postal Department, it cannot be said that the selection and the appointment of the writ petitioner was illegal. So far as the reference so placed upon the judgment in the case of **Bedanga Talukdar** (supra) and **Ankita Thakur** (supra), the same would not apply in the facts of the case particularly when the issue before the Court in the said cases was with regard to the issue of relaxation whereas in the present case, the issue is of equivalence which is prescribed in the statutory recruitment rules.

20. Nonetheless, we are also not required to delve into the issue relatable to

the validity of the notification dated 21.11.2006 or the statutory rules providing for equivalence particularly when neither the same has been subject matter of challenge nor any pleadings or arguments have been advanced in that regard. Moreover, it is also not the case of the original applicant before the Tribunal or before us that any fraud, concealment or misrepresentation has been practised by the writ petitioner as rather to the contrary on the basis of the statutory rules and the qualification as exhibited by the writ petitioner, she was selected. Once the employers, the Postal Department had taken a stand before the Tribunal and is also maintaining it before us that the qualification of Prathama is equivalent to matriculation and invariably selections have been conducted of the candidates who are possessing the said qualification then it cannot be said that the selection and appointment of the writ petitioner was illegal.

21. There is another reason in subscribing to the contention raised by the writ petitioner that she is eligible and qualified particularly when nothing has been brought on record before us in the present proceedings that the notification dated 21.11.2006 had been done away with or there is any change in the recruitment rules on the said subject whereby the candidates who possessed Prathama from Hindi Sahitya Sammelan have been rendered ineligible.

22. Moreover the question of equivalence is to be left to the employer and it would not be a matter of judicial scrutiny by the Courts. Hon'ble Supreme Court in the case of **Zahoor Ahmad Rather and others Vs. Sheikh Intiyaz Ahmad and others: 2019 (2) SCC 404** has observed as under:-

“The prescription of qualifications for a post is a matter of recruitment policy. The

State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine”.

23. Accordingly, we are of the firm opinion that the Tribunal has overlooked the vital aspects which are germane to the controversy in question and has erred in law in setting aside the appointment of the writ petitioner while allowing the original application.

24. In view of the foregoing discussions, the writ petition stands **allowed**. The order dated 20.03.2024 passed by the Tribunal in O.A. No. 1820 of 2010 is set aside.

25. Consequently, the original application stands dismissed.

26. The natural and legal consequences shall follow.

(2024) 9 ILRA 516

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 26.09.2024

BEFORE

THE HON'BLE RAJAN ROY, J.

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 6056 of 2024
With other connected cases

Union of India & Ors.	...Petitioners
Versus	
Arun Prakash Srivastava	...Respondent

Counsel for the Petitioners:

Ashwani Kumar Singh

Counsel for the Respondents:

Savita Jain

Kumar Singh, learned counsel for the petitioners in all the petitions and Ms. Savita Jain, learned counsel for the private respondents.

A. Service Law – Modified Assured Career Progression Scheme (MACPS) – Entitlement – Three promotional upgradation have already been granted – Effect – Benefit of financial upgradation, extended to the employee/respondents was recovered – Exception to the Principle regarding non-recovery of excess payment from retired employee as laid down in *Rafiq Masih's case* explained – The respondents had notice of the fact that, if any, excess payment is made, the same would be liable to be recovered/refunded. Moreover, they themselves submitted an application that their pension be fixed after taking into consideration the audit objections raised on 17.05.2016 & ors.orders that too, except in one case, prior to their retirement – The excess payment had already been recovered prior to filing of the Original Applications. The same has not be refunded as yet – High Court quashed Tribunal' judgment passed on the Original Application of the respondents/ employees. (Para 16 and 17)

Writ allowed. (E-1)

List of Cases cited:

1. High Court of Punj. and Har. & ors.Vs Jagdev Singh; AIR 2016 SC 3523
2. St. of Punj. & ors. etc. Vs Rafiq Masih (White Washer) etc; (2015) 4 SCC 334
3. Civil Appeal No(s). 1635 of 2013; Jagdish Prasad Singh Vs St. of Bihar & ors. decided on 08.08.2024

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

(1) Heard Sri S.B. Pandey, learned Senior Advocate and Deputy Solicitor General of India assisted by Sri Ashwani

(2) By means of this bunch of writ petitions, similar orders of the same nature passed in separate Original Applications involving similar facts and case, have been challenged. Writ-A No.6056 of 2024 has been taken up as the leading writ petition with the consent of the parties.

(3) The case of the petitioners herein is that all the respondents in this petitions had been granted three promotions/financial upgradation, therefore, in view of three promotions already having been granted to them, they were not entitled to any financial upgradation under the 'Assured Career Progression Scheme (ACPS)' which came into force w.e.f. 01.09.2008 as modified. Nevertheless, they were wrongly granted the benefit of 'Modified Assured Career Progression Scheme (MACPS) (3rd financial upgradation)' w.e.f. 01.09.2008 in the form of Grade Pay Rs.4800/-. They were erroneously given the benefit of 3rd financial upgradation w.e.f. 01.09.2008 vide orders dated 26.07.2010, 18.02.2010, 12.08.2010, 19.04.2010, 15.02.2012, 25.10.2013 and their names figure in the list appended therein. One such order dated 26.07.2010 is annexed at page 26 to 28 of the supplementary affidavit filed by the petitioner in Writ-A No.6056 of 2024, the leading petition.

(4) Our attention has been drawn to point 2 of the said order dated 26.07.2010 which contains a specific condition to the effect - *"The pay fixation is subject to post audit and in the light of audit observation, over payment if any shall be recovered*

from the official in one lump-sum." Similar condition is there in other orders.

(5) The submission is that prior to retirement of the respondents, the account section scrutinized their service records and raised an objection on detection of an irregularity in grant of the aforesaid benefit of 3rd financial upgradation as noticed hereinabove and accordingly, a note was put up to the DDO on 17.05.2016 (Writ-A No.6056 of 2024) to the effect- *"please recover the over payment amount due to wrong fixation from 01.09.2008 to 31.05.2016 in the grade pay of Rs.4800/- and sent the recovery statement duly attested by DDO along with pension paper."* This was prior to the retirement of the respondents. Similar audit objections were raised in case of all the respondents albeit on different dates.

(6) It appears that the private respondents were aware of this audit objection which was referable to the condition mentioned in the order dated 26.07.2010 etc., as such, the respondents moved applications copies of which are on record having been annexed with the supplementary affidavit, asking the Deputy Director General, Doordarshan Centre, Lucknow to kindly finalize their pension matter taking into consideration the audit objection of the Accounts and Audit Officer dated 17.05.2016 etc., in pursuance to which, the pay fixation was corrected and thereafter the pension was fixed.

(7) While disbursing the post retiral dues, the excess payment was deducted therefrom as was permissible in view of the conditions mentioned in the orders dated 26.07.2010 and other orders which the respondents readily accepted without any demur and also in view of their own letter

given before their retirement for finalizing their pension in terms of the audit objections which in the context of Writ-A No.6056 of 2024 was served on 17.05.2016. In Writ-A No.7231 of 2024, respondent had given such letter after retirement.

(8) In the light of the aforesaid facts, reliance has been placed by the petitioners upon a judgment of Hon'ble the Supreme Court in the case of **High Court of Punjab and Haryana and Ors. vs. Jagdev Singh** reported in **AIR 2016 SC 3523** wherein Supreme Court of India considered its earlier decision in **State of Punjab and others etc. vs. Rafiq Masih (White Washer) etc : (2015) 4 SCC 334** and opined that the principle enunciated at point no. (ii) therein regarding non-recovery of excess payment from retired employees, or employees, who are due to retirement within one year of the order of recovery, being not applicable to a situation such as in the case at hand where the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. It was further observed in the said judgment that the officer furnished an undertaking while opting for revised pay scale is bound by undertaking, therefore, according to learned counsel, an exception was carved out to the application of the earlier decision in **Rafiq Masih (supra)** in the aforesaid manner.

(9) The submission is that in view of the aforesaid, in the facts of this case, neither the refixation of pay nor the recovery ensuing, as a consequence therefrom, was barred by law, in fact, the Tribunal has not interfered with the refixation but has interfered with the

recovery, ignoring the factual aspects as narrated hereinabove, and ignoring the documents referred above which were also on record of the Tribunal and without considering the subsequent decision of Hon'ble the Supreme Court in **Jagdev Singh (supra)** which was also brought on record by it.

(10) On being confronted, Ms. Savita Jain, counsel for the private respondents submitted that, in the case at hand, no undertaking has been given by the respondents permitting such refixation or recovery, however, she does not deny the fact that before the Tribunal, the order of refixation of salary or the audit objections were not challenged instead a relief was sought in the form of directions to the respondents therein to pay the post retiral dues, *inter alia*, albeit along with already deducted amount from the gratuity of the petitioners with the interest at market rate i.e. the amount deducted on account of excess payment.

(11) The contention of the counsel for the respondents was that the Accounts Officer was not entitled to refix the pay or order recovery, however, learned counsel did not deny the conditions mentioned in the orders dated 26.07.2010 and other orders as noticed hereinabove nor that the respondents had given an application for fixing their pension prior to retirement taking into consideration the audit objection dated 17.05.2016, except in Writ-A No.7231 of 2024. Moreover, the audit objection was not challenged by the respondent in the Original Application.

(12) She, however, laid great emphasis on another judgment of the Supreme Court of India rendered on **08.08.2024 in Civil Appeal No(s). 1635 of**

2013 : Jagdish Prasad Singh vs. State of Bihar and Others, wherein it has been held in para 20 that an order directing reduction in pay scale and recovery from the appellant therein was manifestly not preceded by any show cause notice and was, thus, passed in gross violation of principles of natural justice and also that no departmental action could have been initiated against the appellant therein after eight years following his superannuation because the employer employee relationship had come to an end after the appellant's superannuation, to contend that in the facts of the case the judgment of the Tribunal is justified and this Court should not interfere with the same.

(13) Having heard learned counsel for the parties and having perused the records and in view of the facts already noticed hereinabove, what comes out is that all the respondents had already been promoted/granted upgradation under ACP scheme thrice prior to coming into force of the 'Modified Assured Career Progression Scheme (MACPS)' and in the very nature of the said scheme, any financial upgradation would have been made available only if there was stagnation on any post without such promotion/upgradation and the benefits which were admissible thereunder were in the form of three financial upgradation depending upon how many promotions/upgradations have been made/given. In the case at hand, all the respondents had already been promoted/granted upgradation thrice, therefore, there was no application of the 'MACPS', yet erroneously the benefit of financial upgradation was extended to them vide order dated 26.07.2010 and other orders, however, as already noticed, the appellants herein were cautious enough to

incorporate a condition therein that the pay fixation consequent to grant of such financial upgradation was subject to post audit and in light of audit objection, over payment, if any, shall be recovered from the officials in one lump sum and that it was being extended to the respondents subject to the said condition. They are bound by it as they have never challenged the said order nor the said condition. Now in the light of the said condition, the Audit and Account Section raised an objection that there was over payment on account of erroneous grant of 3rd financial upgradation whereas all the officers had already availed three promotions and, therefore, the benefit was not available, accordingly, recovery was suggested so that the pension paper could be finalized. This audit objection was raised before retirement of the respondents except in the case of Amit Kumar Arora (Writ-A No.7231 of 2024) and was in terms of the condition already referred hereinabove. Most important, all the respondents, submitted separate applications to the higher officials for finalizing their pension taking into consideration these audit objections, therefore, this also while submitting such representation, they acceded to the objections raised by the audit department and cannot resile from the same.

(14) If the order dated 26.07.2010 and other similar orders were not on record of the Tribunal then not only the petitioners but also the respondents have to offer an explanation as to why they did not bring it on record because under this very order the benefit was extended to them. In any case, all these documents have been filed along with the supplementary affidavit before this Court, a copy of which was served upon the counsel for the respondents but till date no

response has been filed to the same nor these documents have been denied. These are official documents and there is no reason for us to disbelieve the same.

(15) In these cases at hand, there is one exception on facts, i.e., in Writ-A No.7231 of 2024, wherein, the respondent-Anil Kumar Arora retired on 31.08.2015 and the refixation of pay was done subsequent to his retirement, however, this does not make any difference as the condition contained in the order dated 17.08.2011 was already existing and he was bound by the same. Moreover, he had also submitted an application dated 21.10.2015 for finalizing his pension after taking into consideration the audit objection dated 06.10.2015.

(16) In view of the aforesaid discussions, the judgment relied upon by the counsel for the respondents in **Jagdish Prasad Singh (supra)** and **Rafiq Masih (supra)** are not attracted rather the exception to **Rafiq Masih (supra)** as carved out in the case of **Jagdev Singh (supra)** is squarely applicable. The respondents had notice of the fact that, if any, excess payment is made, the same would be liable to be recovered/refunded. Moreover, they themselves submitted an application that their pension be fixed after taking into consideration the audit objections raised on 17.05.2016 and other orders that too, except in one case, prior to their retirement, therefore, we are of the opinion that the Tribunal's judgment which is impugned herein cannot be sustained. The excess payment had already been recovered prior to filing of the Original Applications. The same has not been refunded as yet.

(17) The impugned judgments are quashed in all the petitions. The Original

Applications are dismissed. Petitions are allowed.

(2024) 9 ILRA 521
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.09.2024

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ A No. 6533 of 2024

Arvind Kumar Nirmal ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner
 Anupras Singh

Counsel for the Respondents:
 C.S.C., Naresh Chandra Mohan

A. Service Law – UP Government Servant (Discipline and Appeal) Rules, 1999 – GO dated 17.09.2023 – Post of Chief Engineer (Civil) – Departmental promotion – Deduction was made in bench marks on account of warning issued by the Managing Director and minor penalty – GO dated 17.09.2023 provide that only warnings issued by the St. Government (Shasan) shall be taken into consideration – Effect – Held, opposite parties have erred in deducting marks obtained by petitioner on account of warning issued by the Corporation. (Para 26)

B. Service Law – Post of Chief Engineer (Civil) – Promotion – Adverse entry prior to earlier promotion – Effect on subsequent promotion – Doctrine of Washing off – Applicability – *Babu Lal Jangir's case* relied upon – After promotion of an employee, adverse entries prior thereto would have no relevance and can be treated as washed off when the Government employee is to be considered for further promotion – Held, opposite parties have erred in

declaring to petitioner unsuitable for promotion on the post of Chief Engineer (Civil). (Para 27, 28 and 30)

C. Service law – Constitution of India, 1950 – Schedule VII to Article 246 – Sovereign power of St. – UP Government Servant (Discipline and Appeal) Rules, 1999 – Rule 2 (j) – Service – Government Corporation, whether come within definition of St. Government – Held, the provision also clearly indicates as to when a Corporation registered under the Companies Act can be deemed to be a Government Corporation but still does not indicate that any such Government Corporation would come within definition of the St. Government of Uttar Pradesh or that the employees or Managing Director of any such Government Corporation can be included to mean service and post in connection with the affairs of St. of Uttar Pradesh, which clearly would involve exercise of sovereign powers of St. as per Schedule VII to Article 246 of the Constitution of India – Managing Director of the Corporation would not come within definition of St. (Shasan). (Para 23 and 24)

Writ allowed. (E-1)

List of Cases cited:

Rajasthan St. Road Transport Corporation & ors.
 Vs Babu Lal Jangir; (2013) 10 SCC 551

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

1. Heard Mr. J.N. Mathur, learned senior counsel assisted by Mr. Anupras Singh, learned counsel for petitioner, learned State Counsel for opposite parties no. 1 & 2 and Mr. N.C. Mehrotra, learned counsel for opposite parties no. 3 & 4.

2. Counter affidavit filed today on behalf of opposite party no. 1 is taken on record.

3. Learned counsel for petitioner on the basis of instructions submits that

petitioner does not wish to file any response thereto.

4. Short counter affidavit by opposite parties no. 3 & 4 has already been filed and replied to. The petition, therefore, is being adjudicated upon finally.

5. Petition has been filed challenging the recommendations/decision of Departmental Promotion Committee dated 05.07.2024 so far as it relates to withholding of recommendation pertaining to petitioner for promotion on the post of Chief Engineer (Civil) of the U.P. State Construction and Infrastructure Development Corporation Limited. Further prayer for a direction to opposite parties to consider petitioner's case for promotion on the post of Chief Engineer (Civil) of the Corporation in accordance with Government Order dated 27.09.2019 and for a prohibition to opposite parties for making promotions on the aforesaid post till decision on petitioner's claim has also been sought.

6. Learned counsel for petitioner submits that for the purposes of promotion on the post of Chief Engineer (Civil) of the Corporation, a Departmental Promotion Committee was constituted to be held on 05.07.2024 and petitioner's name was duly forwarded by the Managing Director on 05.03.2024. It is submitted that the cut off bench marks for consideration of such promotion being 80 marks, petitioner having obtained 80.25, on the basis of his service his name was duly forwarded for consideration thereof.

7. Learned counsel for petitioner has drawn attention to minutes of the Departmental Promotion Committee brought on record by means of the

supplementary affidavit dated 04.09.2024 to submit that petitioner's name was thereafter disregarded on the ground that although he had cleared the bench mark with 80.25 marks but 10 marks therefrom were required to be deducted in view of two warnings which were issued to him earlier as well as the fact that he was visited with a minor penalty vide order dated 21.02.2018. It is submitted that due to aforesaid reasons, petitioner's case has not been considered.

8. Learned counsel has submitted that earlier a warning was issued to petitioner on 28.10.2014 by the Managing Director of the Corporation when he was posted as Assistant Engineer. Subsequently petitioner was promoted on the post of Executive Engineer (Civil) on 21.12.2016 but while working on such post, he was again issued a warning by the Superintending Engineer on 12.09.2017 whereafter he was also visited with the minor penalty dated 21.02.2018.

9. It is further submitted that thereafter a warning was issued to petitioner by the State Government on 05.02.2021 but was subsequently expunged vide order dated 30.01.2024. It is submitted that thereafter petitioner was promoted on the post of Superintending Engineer (Civil) on 16.12.2021 whereafter vide order dated 12.12.2023, the State Government approved upgradation of service entry in petitioner's service records for the year 2017-2018 from 'good' to 'very good'. Similarly vide order dated 11.01.2024, service entry in records of petitioner for the year 2017-2018 and 2018-2019 were also upgraded from 'good' to 'very good'.

10. Learned counsel has thereafter adverted to the Government Order dated

27.09.2019, particularly paragraph 7 (6) thereof to submit that as per directions issued by the State Government, only those warnings which were issued by the State Government are required to be taken into account for purposes of deduction in the bench mark for purposes of promotion and since in the present case, two warnings were issued by the Managing Director of the Corporation, the same were not required to be taken into account by the Departmental Promotion Committee. It is further submitted that in terms thereof, the only other warning issued by the State Government has thereafter already been expunged by the State Government itself and naturally the same was not taken into consideration by the Committee.

11. So far as the minor penalty is concerned, learned counsel for petitioner submits that the doctrine of washing off will be applicable with regard to said penalty since the same was imposed vide order dated 21.02.2018 whereafter petitioner was promoted on the post of Superintending Engineer on 16.12.2021 and whereafter also his entries in his service were recorded as very good vide order dated 12.12.2023.

12. Learned counsel for petitioner has also adverted to Form 4 dated 05.03.2024 whereby bench mark of 80.25 was awarded to petitioner while forwarding his name for consideration by the Departmental Promotion Committee. He has adverted to the aforesaid document to indicate that warnings issued by the Managing Director of the Corporation were rightly not taken into account in view of the provisions under paragraph 7 of the Government Order dated 27.09.2019.

13. In view thereof, it has been submitted that there was no occasion for the Departmental Promotion Committee to

have deducted 10 marks from the bench mark awarded to petitioner.

14. Learned counsel appearing on behalf of opposite parties, particularly opposite parties no. 3 & 4 has refuted submissions advanced by learned counsel for petitioner with the submission that paragraph 7 of the Government Order dated 27.09.2019 adverts two warnings being issued by the State (Shasan). It is submitted that the Corporation being a Government Corporation, the word 'Shasan' would include the Managing Director of the Corporation in terms of Rule 2 (g) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 and particularly in view of Rule of 2 (j) thereof which defines the word 'service' to mean public service and post in connection with the affairs of the State of U.P.

15. Learned counsel has also adverted to the U.P. State Construction and Infrastructure Development Corporation Limited Service Regulations to submit that Rule 17 (3) thereof clearly indicates that for the purposes of promotion on a Class-I post having pay scale of more than Rs. 18,300/- or more, the criteria is only merit and not even seniority. In terms thereof, he has submitted that the doctrine of washing off will not be applicable in the present case where promotion is required to be considered only on the basis of merit and not seniority. He has also adverted to the Government Order dated 17.09.2019 with paragraphs 2 and 7 to submit that for the purposes of promotion, service record of the recommended candidate for the past ten years is required to be taken into consideration which would include the minor penalty and warnings which were issued to petitioner.

16. Upon consideration of submissions advanced by learned counsel

for parties and perusal of material on record, it is evident that dispute centers around deduction made in the bench mark obtained by petitioner on account of two warnings issued to him by the Managing Director of Corporation as well as the minor penalty imposed upon him vide order dated 21.02.2018. As has already been indicated hereinabove, the warning issued to petitioner by the State Government on 05.02.2021 already stood expunged by order of State Government dated 30.01.2024 and has not been taken into consideration by the opposite parties themselves.

17. A perusal of format 4 dated 05.03.2024 forwarded by the Managing Director of the Corporation recommending name of petitioner for consideration by the Departmental Promotion Committee and awarding him marks of 80.25 clearly indicates the aspect that two warnings have been issued to petitioner by the Corporation and one by the State Government. The format also indicates that warning issued by the State Government has been discarded since it was expunged. It also indicates that the warnings issued by the Corporation have also not been taken into account while awarding marks to petitioner. The note appended thereto also indicates that the provisions of Government Order dated 27.09.2019 would govern promotions to be made on the post in question. It has also been indicated that there is no departmental or vigilance inquiry pending against petitioner.

18. So far as the question of warnings being issued to petitioner is concerned, paragraph 7 (6) of the Government Order dated 17.09.2023 indicates that despite there being no provision in the Rules of 1999 for issuance of any warnings to an

employee, it has been brought to the notice of State Government that such a procedure is still being followed by issuance of warnings to employees. The directions were therefore issued that in cases of promotion, only warnings issued by the State Government (Shasan) shall be taken into consideration and then too only in case adequate opportunity of hearing has been provided to the employee concerned whereafter five marks would be deducted for every such warning.

19. As is evident from Format-4 dated 05.03.2024, the Government Order dated 27.09.2019 appears to have been made applicable for purposes of promotion of employees of the Corporation and therefore the aforesaid paragraph 7 (6) would be applicable in the present case.

20. The material on record clearly denotes the fact that deduction from petitioner's marks have been effected on account of two warnings being issued to petitioner by the Managing Director of the Corporation.

21. Although, learned counsel for opposite parties has adverted to Rule 2 (g) (j) to submit that the Managing Director of the Corporation would come within definition of 'Shasan', the rule in its clear definition denotes otherwise. Rule 2 (g) of the Rules of 1999 clearly adverts to the definition of Government as meaning the State Government of Uttar Pradesh. No provision of law has been cited or indicated by learned counsel for opposite parties to indicate that the Managing Director of the Corporation would come within definition of the Government of Uttar Pradesh.

22. A perusal of Rule 2 (j) also indicates 'service' to mean public service

and post in connection with the affairs of the State of Uttar Pradesh. That by any stretch of imagination cannot be deduced that the affairs of the Government Corporation as defined under Section 617 of Companies Act would come within definition of the affairs of the State of Uttar Pradesh.

23. The aforesaid provision also clearly indicates as to when a Corporation registered under the Companies Act can be deemed to be a Government Corporation but still does not indicate that any such Government Corporation would come within definition of the State Government of Uttar Pradesh or that the employees or Managing Director of any such Government Corporation can be included to mean service and post in connection with the affairs of State of Uttar Pradesh, which clearly would involve exercise of sovereign powers of State as per Schedule VII to Article 246 of the Constitution of India.

24. In view of aforesaid discussion, the submission of learned counsel for opposite parties that the Managing Director of the Corporation would come within definition of State (Shasan) is hereby rejected.

25. In such circumstances, the provision of paragraph 7 (6) of the Government Order dated 27.09.2019 gains significance particularly since the State Government which issued the warning earlier to petitioner stood expunged and the only warnings due to which deductions have been made from petitioner's marks have been issued by the Corporation itself.

26. In view of aforesaid, it is quite evident that opposite parties have erred in deducting marks obtained by petitioner on

account of warning issued by the Corporation.

27. So far as the question of the minor penalty dated 21.02.2018 is concerned, learned counsel for petitioner has cited judgment rendered by Hon'ble Supreme Court in the case of **Rajasthan State Road Transport Corporation and others versus Babu Lal Jangir, (2013) 10 SCC 551** in which it has been clearly enunciated that after promotion of an employee, adverse entries prior thereto would have no relevance and can be treated as washed off when the Government employee is to be considered for further promotion. The only exception indicated is that the aforesaid theory would be inapplicable where an employee is being assessed for purposes of compulsory retirement.

28. In view of the fact that petitioner was visited with the minor penalty vide order dated 21.02.2018 whereafter he was promoted on the post of Superintending Engineer on 16.12.2021 as well as the fact that his service entry in service records was also upgraded on 12.12.2023 and 11.01.2024 to very good from good clearly makes the aforesaid doctrine of washing off applicable in the present facts and circumstances.

29. It is also relevant that as per paragraph 7 (5) of the Government Order dated 27.09.2023, it has been provided that an employee who has been visited with a minor penalty would not be considered for further promotion in at least two subsequent Departmental Promotion Committees but in the case of petitioner, he has been promoted subsequent to the minor penalty imposed upon him which clearly denotes the fact that petitioner's case was covered by the aforesaid provision of the

Government Order and the aforesaid minor penalty was considered by the opposite parties prior to his subsequent promotion on the post of Superintending Engineer and therefore also would lose its efficacy subsequently.

30. In view of discussion made hereinabove, it is evident that the opposite parties have erred in declaring to petitioner unsuitable for promotion on the post of Chief Engineer (Civil) by means of recommendation dated 05.07.2024.

31. In view thereof, the recommendations of the Departmental Promotion Committee dated 05.07.2024 to the extent it reduces petitioner's marks obtained by petitioner by 10 marks and declaring him unsuitable on that ground is hereby quashed by issuance of a writ in the nature of certiorari. A further writ in the nature of mandamus is issued commanding the opposite party no. 1 to reconstitute a Departmental Promotion Committee for purposes of consideration of promotion to the post of Chief Engineer (Civil) in the Corporation concerned and to consider petitioner's case afresh with regard to same without making any deductions for the two warnings issued to petitioner by the Corporation and the minor penalty dated 21.02.2018.

32. Since the recommendations of Departmental Promotion Committee dated 05.07.2024 are said to have already been given effect to with regard to names of other recommended persons, it is further directed that in case petitioner is found eligible for promotion on the post of Chief Engineer (Civil), such promotion would relate back to 05.07.2024.

33. Consequently, the petition succeeds and is **allowed**. Parties to bear their own cost.

(2024) 9 ILRA 526
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.09.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ A No. 6749 of 2024

Arun Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner
 Jitendra Bahadur, Shobh Nath Yadav

Counsel for the Respondents:
 C.S.C.

A. Service Law – UP Government Servant (Discipline & Appeal) Rules, 1999 – Rule 8 & 9 – Departmental enquiry – No charge was found proved – However, direction for re-enquiry was made before taking decision by the Disciplinary Authority – Validity challenged – Intervention before taking decision by Disciplinary Authority – Permissibility – Held, the Director General has got no say or authority to request the Disciplinary Authority to direct for re-enquiry. This power vests with the Disciplinary Authority under Rule 9 to agree with the findings of the Inquiry Officer or not to agree with the findings of the Inquiry Officer – High Court set aside the impugned order for re-enquiry. (Para 10 and 12)

Writ allowed. (E-1)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard.

2. Though this Court allowed the amendment application of the petitioner

vide order dated 29.08.2024 but the amendment has not been incorporated at appropriate place, therefore, learned counsel for the petitioner is permitted to incorporate the amendment at appropriate place indicating the date of the impugned order and the annexure number thereof properly, during the course of day.

3. This Court has passed the order dated 22.08.2024, which reads as under:-

"1. Heard Sri Upendra Singh, learned counsel for the petitioner and Sri Jogendra Nath Verma, learned Standing Counsel for the State-opposite parties no.1, 2 & 3.

2. By means of this petition, the petitioner has prayed following main reliefs:-

"1. Issue a writ order or direction in the nature of certiorari quashing the impugned suspension order dated 15.12.2022 passed by respondent no.2 on the recommendation of the respondent no.3 and impugned charge sheet dated 20.01.2023 issued by the respondent no.1 on the recommendation of the respondent no.3 against the petitioner (Annexure No.1 & 2 to the writ petition.)

2. Issue a writ order or direction in the nature of mandamus commanding the respondents to make the payment of salary regularly month to month as and when it falls due.

3. Issue a writ order or direction in the nature of mandamus commanding the respondents to pay the arrears of salary with 18% interest.

4. Issue a writ order or direction in the nature of mandamus commanding the respondents not to harass the petitioner in any manner on the name of alleged inquiry."

3. The precise contention of learned counsel for the petitioner is that pursuant to the impugned suspension order dated 15.12.2022, the petitioner was placed under suspension. Thereafter, Inquiry Officer was appointed and the petitioner was given charge sheet on 20.01.2023. The aforesaid disciplinary inquiry was concluded on 05.07.2023 whereby none of the charges has been proved against the petitioner. As per the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "the Rules, 1999"), after conclusion of disciplinary inquiry, the Inquiry Officer submits its inquiry report and findings before the disciplinary authority and the disciplinary authority passes appropriate order finalizing the disciplinary proceedings. Undisputedly, in the present case, the disciplinary/ appointing authority of the petitioner is the State Government and any appropriate decision in the case of the petitioner after concluding the disciplinary proceedings could have been taken by the disciplinary authority but before taking any appropriate decision by the disciplinary authority on the findings of the inquiry report, the Director General of Police/ Commandant General, Home Guards, U.P., Lucknow preferred a letter dated 29.08.2023 (Annexure No.31) to the Additional Chief Secretary of the Home Guards Department, Government of U.P., Lucknow indicating therein that the findings of the Inquiry Officer are not appropriate, such departmental inquiry has been conducted in a cursory manner, therefore, the findings of the Inquiry Officer may be rejected and direction for fresh inquiry may be issued.

4. Sri Upendra Singh, learned counsel for the petitioner, has rightly submitted that after initiating the departmental inquiry against any

employee, no officer can come within the Inquiry Officer and the disciplinary authority inasmuch as after conclusion of the departmental inquiry, the appropriate decision may only be taken by the disciplinary authority independently without being influenced from the opinion of any other authority but in the present case, the Director General of Police/ Commandant General, Home Guards, U.P., Lucknow has influenced the disciplinary authority to reject the inquiry report and to pass order for fresh departmental enquiry saying that that departmental inquiry has been concluded in a cursory manner and after being influenced from such letter of the Director General of Police/ Commandant General, Home Guards, the disciplinary authority passed an order dated 17.05.2024 for conducting fresh inquiry against the petitioner, therefore, the Office Memo dated 17.05.2024 has been passed in utter violation of Rule 9 of the Rules, 1999.

5. Learned counsel for the petitioner has further submitted that if the fresh departmental inquiry would be conducted against the petitioner pursuant to the order dated 17.05.2024, the petitioner would remain under suspension inasmuch as the impugned suspension order dated 15.12.2022 has not been revoked/ cancelled and about one year and nine months' period has passed since the petitioner is under suspension and the law is trite that prolonged suspension is not acceptable unless there is any cogent reason to that effect. In the present case, final order could have been passed by the disciplinary authority in the month of July, 2023 when the departmental inquiry was concluded against the petitioner but on account of unwarranted and unauthorized action on the part of the Director General of Police/ Commandant General, Home

Guards, the petitioner is under suspension, therefore, Sri Singh has requested that the impugned suspension order may be set aside.

6. Matter requires consideration.

7. Let a short counter affidavit be filed by opposite party no.2 i.e. Joint Secretary, Home Guards, Civil Secretariat, U.P., Lucknow within a period of ten days to explain under which provision of law, he has passed the order dated 17.05.2024 when the Inquiry Officer has submitted his findings exonerating the petitioner but on the letter being issued by the Director General of Police/ Commandant General, Home Guards, U.P., Lucknow on 29.08.2023, he passed the aforesaid order dated 17.05.2024.

8. List this case on 12.09.2024 as fresh.

9. This matter may be taken up after fresh cases."

4. Sri Vikas Singh, learned Standing Counsel has apprised that the short counter affidavit has been filed on 20.09.2024.

5. The short question involved in this writ petition is that as to whether after conclusion of the departmental inquiry, the inquiry report should be submitted before the Disciplinary Authority for taking appropriate decision or any other authority may intervene before taking any final decision or before passing any final order by the Disciplinary Authority.

6. To appreciate the aforesaid question, Rule 8 & 9 of Uttar Pradesh Government Servant (Discipline & Appeal) Rules, 1999 (here-in-after referred to as the "Rules, 1999") would be relevant to be examined. For convenience, Rule 8 & 9 read as under:-

"8. Submission of Inquiry Report. –

When the inquiry is complete, the Inquiry Officer shall submit its inquiry report to the disciplinary authority alongwith all the records of the inquiry. The inquiry report shall contain a sufficient record of brief facts, the evidence and statement of the findings on each charge and the reasons thereof. The Inquiry Officer shall not make any recommendation about the penalty.

9 Action on Inquiry Report. –

(1) The disciplinary authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the disciplinary authority, according to the provisions of Rule 7.

(2) The disciplinary authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.

(3) In case the charges are not proved, the charged Government servant shall be exonerated by the disciplinary authority of the charges and inform him accordingly;

(4) If the disciplinary authority having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The disciplinary authority shall, having regard to all the relevant records relating to the inquiry and

representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

7. Rule 8 of the Rules, 1999 categorically provides that when the inquiry is complete, the Inquiry Officer shall submit its inquiry report to the Disciplinary Authority along with all the records of the inquiry.□ Rule 9 (1) of the Rules, 1999 provides that the Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant.□ Rule 9 (2) of the Rules, 1999 provides that the disciplinary authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.

8. The present case is a glaring example of the violation of the rules inasmuch as in the present case the departmental inquiry was concluded on 05.07.2023 whereby none of the charges have been proved against the petitioner.□ The Disciplinary Authority, in the case of the present petitioner, is the State Government and appropriate decision may be taken by the Disciplinary Authority under Rule 9.

9. In the case of the petitioner, the Director General of Police/ Commandant General, Home Guards, U.P., Lucknow preferred a letter dated 29.08.2023 to the Disciplinary authority i.e.□ Additional Chief Secretary of the department indicating therein that the findings of the Inquiry Officer are not appropriate as□ the departmental inquiry has

13. The Disciplinary Authority shall take appropriate decision on the inquiry report dated 05.07.2023, strictly in accordance with law, to be more precise, under Rule 9 of the Rules, 1999.

Counsel for the Petitioner:

Sushil Kumar Pathak

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 – Rules 20, 23 & 25 – Failure in filing the statutory Appeal and Revision within time – Representation under Rule 25 filed seeking direction to decide it – Permissibility – Held, no direction can be issued to the authority concerned i.e. Principal Secretary, Home, to decide the representation as by means of it, the petitioner attempted to circumvent the statutory prescriptions to file appeal and revision within the time so prescribed under Rules 20 (6) & 23 (1) of the Rules, 1991. (Para 5 and 6)

Writ dismissed of. (E-1)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri S.K. Pathak, learned counsel for the petitioner and Ms. Deepshikha, learned Chief Standing Counsel-II for the State-opposite parties.

2. By means of this petition, the petitioner has prayed following reliefs:-

"(i) A writ, order or direction in the nature of Mandamus thereby commanding and directing the opp. party no. 1 i.e. the Principal secretary, Grah Police Anubhag-1, Home Department, Civil Secretariat, Lucknow to consider and decide the Representation of the petitioner dated 26/12/2023 under Rule 25 of U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991, as contained in Annexure No. 6 to this Writ Petition, by way of passing a speaking and reasoned order, within the stipulated period.

(ii) Any other order or direction which this Hon'ble Court may deem appropriate and proper in the circumstances and allow this Writ Petition with substantial costs, throughout."

3. Learned counsel for the petitioner has drawn attention of this Court towards Annexure No.6 of the writ petition, which is a representation of the petitioner being filed under Rule 25 of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as "the Rules, 1991") against five orders of punishment. The date of punishment orders are different i.e. orders dated 11.07.2014, 26.01.2017, 05.05.2018, 18.03.2019 and 27.04.2019. Learned counsel for the petitioner has stated that as per Rule 25 of the Rules, 1991, if any employee has not filed appeal, he/she may prefer his/her representation under Rule 25 of the Rules, 1991 and direction may be issued to the competent authority to decide the representation of the petitioner.□

4. *Per contra*, Ms. Deepshikha, learned Chief Standing Counsel-II, has submitted that invoking powers of the Government under Rule 25 of the Rules, 1991, the statutory prescriptions to file appeal and revision may not be circumvented. If any Police Officer is aggrieved from the punishment order, he may file appeal under Rule 20 of the Rules, 1991 and if he/ she is still aggrieved, revision may be filed under Rule 23 of the Rules, 1991. Power under Rule 25 of the Rules, 1991 is a power of the Government whereby the Government may on its own motion or otherwise call for and examine the records of any case decided by the authority against which no appeal has been preferred but this Rule does not permit the

Police Officer to prefer an application ignoring the statutory prescriptions relating to the appeal and revision.

5. Having heard learned counsel for the parties and having perused the material available on record as well as perusing the relevant provisions of law and Rules, 1991, I am of the considered opinion that on account of any provision of law authorizing the Government to call for and examine the record on its own motion or otherwise may not make the statutory prescriptions redundant, which have been provided earlier to such prescription. To be more precise, under Rule 20 of the Rules, 1991, any Police Officer may file statutory appeal challenging the punishment order within the prescribed period and if such officer is aggrieved from the order of the appellate authority, the revision may be filed under Rule 23 of the Rules, 1991 within specific period. If any Police Officer does not file statutory appeal and statutory revision within the time so stipulated and has slept over on the issue, then filing any representation under Rule 25 of the Rules, 1991 saying that since he has not filed any appeal and there is no limitation under Rule 25, therefore, the Government may pass any appropriate order invoking its power under Rule 25 of the Rules, 1991 may not be permissible under the law otherwise the earlier provisions i.e. Rule 20 and Rule 23 of the Rules, 1991 would be redundant and any Police Officer may likely ignore the appellate provision and revisional provision and will approach the State Government straight away under Rule 25 of the Rules, 1991 saying that since no time limit has been prescribed under Rule 25 of the Rules, 1991 and such representation may be preferred in the case where the appeal has not been filed, so the representation may be decided, in

that situation the statutory prescriptions would be circumvented deliberately and intentionally. No Court can permit to circumvent the statutory prescriptions, rather this has been the consistent view of the Apex Court as well as this Court to approach the statutory appellate and revisional authority before approaching any other authority, be it Court or State Government.

6. Therefore, in view of the above, since the petitioner has preferred a representation under Rule 25 of the Rules, 1991 challenging the punishment orders passed since 2014 till 2019 in a composite representation, therefore, no direction can be issued to the authority concerned i.e. Principal Secretary, Home, to decide the aforesaid representation as by means of aforesaid representation, the petitioner attempted to circumvent the statutory prescriptions to file appeal and revision within the time so prescribed under Rules 20 (6) & 23 (1) of the Rules, 1991.

7. Accordingly, this writ petition is **dismissed** being misconceived.

8. No order as to costs.

(2024) 9 ILRA 532

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 01.10.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ A No. 12611 of 2024

Along with

Writ A No. 11436 of 2024

Rajiv Kumar

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Vinod Kumar Singh

3. Writ A No. 5106 of 2023; Mayashankar Vs St. of U.P. & ors. decided on 13.08.2024

Counsel for the Respondents:

C.S.C., Sankalp Narain, Sharad Chandra

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

A. Service Law – UP Education Service Section Commission Act, 2023 – Establishment of an unified Commission – Object – Idea for setting up a unified commission was due to the difference in the level of efficiency related to selection by the above named Commission/ Institution, as the quality of selection of teachers was affected, there was no uniformity in the process of selection, timely selection of teachers was not being done, and there were several vacant posts of teachers in various institutions, which adversely affected the education/training of the students/trainees in the St.. (Para 6)

B. Service law – UP Education Service Section Commission Act, 2023 – Section 31 – Repeal and Saving clause – UP Secondary Education Service Selection Board Act, 1982 – C/M had already sent the requisition to the Board in the year 2019 – Sub-section (2) of Section 31, which is a non obstante clause, saves all those action taken and proceedings initiated under Act of 1982, and it shall be deemed to have been done or taken under the Act of 2023. The saving clause of Section 31 clearly saves all the action which were done pursuant to the Act of 1982 – Additional Director did not have the power to proceed with the single transfer taking benefit of the proviso to sub-rule (5) of Rule 28. (Para 18, 19 and 23)

Writ allowed. (E-1)**List of Cases cited:**

1. Prashant Kumar Katiyar Vs St. of U.P. & ors.; 2013(1)ADJ 523 (FB)

2. Hari Pal Singh Vs St. of U.P. & ors.; 2016 (8) ADJ 622

1. The question which needs adjudication by this Court, raised through these two petitions are as to “Whether once the requisition has been sent by the Committee of Management to the U.P. Secondary Education Service Selection Board (*hereinafter referred to as “the Board”*) in terms of sub-rule (4) of Rule 11 of U.P. Secondary Education Services Selection Board Rules, 1998 (*hereinafter called as “Rules of 1998”*) the post of Principal in an intermediate institution can be filled by way of transfer or the senior most teacher officiating as a Principal is to continue till a duly selected candidate is sent by the Board.”

2. Further, upon the enactment of Uttar Pradesh Education Service Section Commission Act, 2023 (*hereinafter called as “Act of 2023”*) enforced on 17.08.2023 published in official gazette on 21.08.2023 and the Uttar Pradesh Education Service Selection Commission Rules, 2023 (*hereinafter called as “Rules of 2023”*) having been enforced from 13.12.2023, whether anything done or action taken in pursuance of Rules of 1998 to continue or not.

3. The question relating to intimation of vacancy to the Board and cessation of power to fill up the vacancy by transfer was before the Full Bench in case of **Prashant Kumar Katiyar vs. State of U.P. and others 2013(1)ADJ 523 (FB)**. The Full Bench found that once the procedure as per Rule 11(4) was followed and necessary intimation was given to the Board, there

vest no power to fill up the vacancy by transfer. Relevant paras 38 to 41 of the judgment are extracted hereas under :

“38. In our opinion if the management has determined the vacancy or the District Inspector of Schools has done it as per Rule 11(4) then in that event the alteration of such determination and intimation is controlled only to the extent as provided by sub-rule (3) of Rule 11 which authorises the management and the Inspector to notify any fresh vacancy that may have occurred after such notification. The management or the District Inspector of Schools therefore has not been empowered under the rules to reverse the determination and it can only add to it, subject to the contingency as contemplated under sub-rule (3) of Rule 11. This however does not take away the power to correct any arithmetical or calculative errors that may have crept into such determination.

39. To our mind, the function of the management and the District Inspector of Schools, therefore, has to follow this procedure and it is trite law that if a statute requires a thing to be done in a particular manner then it should be done in that manner alone and not otherwise. The procedure under the Act and Rules is mandatory and it has to be done in that manner alone. Reference be had to Para 20 and 23 of the division bench judgment in the case of Km. Poonam Vs. State of U.P. 2008 (3) AWC Pg. 2852 and to Para 24 of the decision in the case of U.P. Secondary Education Service Selection Board Vs. State of U.P. 2011 (3) ADJ Pg. 340. The rules have been framed consciously by making a provision of limited alteration in the determination by adding to the vacancies on account of any fresh occurrence during the year of recruitment itself. Thus impliedly no power has been

conferred for altering the vacancies already determined and intimated to the Board for the purpose of notification under the Act and Rules. The requisition to fill up the vacancies after having sent to the Board therefore becomes unalterable as the Board proceeds with the advertisement under Rule 12 by publishing the vacancy in accordance with reservation rules and in accordance with the subject-wise and group-wise vacancies against which appointments are to be made inviting applications from candidates giving their preference of the institution which choice has to be indicated by the candidate. At this stage, to upset the procedure after advertisement by giving any further leverage would be to disturb the entire process of selection and if such a concession is given, the management can indulge into motivated manipulations which are not uncommon and give rise to uncalled for controversies ending up in litigation.

40. We would also like to put a note of caution for the District Inspector of Schools while performing his duty of verification of the determination of vacancies. There can be cases where the management deliberately modifies a requirement in the name of extending benefit to some candidate/teacher who may be desirous of seeking promotion but otherwise not eligible within the year of recruitment. The management can withhold such information and it is at this stage that the District Inspector of Schools has to exercise his powers under sub-rule (4). The management at times may not cooperate with the District Inspector of Schools and therefore the District Inspector of Schools has to determine the vacancy as per the records available in his office and inform the Board. The responsibility therefore rests on the District Inspector of Schools to

undertake this exercise by putting the management to clear notice during the year of recruitment itself. The District Inspector of Schools on coming to know of any additional vacancy if any that arises or the management having withheld such information is obliged to take action forthwith and disallow the management from taking any undue advantage in such situations. The vacancy that has occurred during the year of recruitment has to be mandatorily informed as noted hereinabove as no selection can be held except through the Board.

41. Once it is held that the power of the management and the District Inspector of Schools after determination, and intimation to the Board, to re-introduce any alteration is taken away then the management cannot be given the authority to adopt any other mode of recruitment.”

4. The matter again came up before Division Bench of this Court in case of **Hari Pal Singh Vs. State of U.P. and others, 2016 (8) ADJ 622** where the Court, relying upon the judgment of Full Bench rendered in **Prashant Kumar Katiyar (supra)**, held that logic of initiation of selection process has to be distinguished in the present process of recruitment where the initiation of determination of vacancy is relevant for the purpose of choosing the mode of recruitment. The Court further held that once determination and notification process is either made or there is a failure on the part of management to do so, then the DIOS has to perform his duty as per Rule 11(4). Once this contingency has occurred, then the option of the mode to recruit by transfer is not available. Relevant paras 15, 16 and 17 of the judgment are extracted hereas under :

“15. On a consideration of the ratio of the Full Bench in the case of Prashant Kumar Katiyar (supra), what we find is that the learned Single Judge in the impugned decision has extracted paragraphs 36, 37 and 38 of the said judgment and thereafter, it crosses over to paragraph - 43 of the judgment and has then reconciled it with the judgments in the cases of Asha Singh vs. State of U.P. And others 2007 (3) UPLBEC 2497 and Smt. Amita Sinha vs. State of U.P. And others 2008 (4) ESC 2799 to conclude that the appointment through transfer would be legally permissible up to the stage of advertisement only.

16. We are unable to uphold the said view of the learned Single Judge, inasmuch as it appears that the learned Single Judge has concluded that the process of direct recruitment starts with the issuance of advertisement and in such a situation, prior to that, the process of appointment by way of transfer would be permissible. The ratio of the Full Bench in the case of Prashant Kumar Katiyar (supra) in paragraphs 38, 39, 40 and 41 has clearly concluded that the power of the Management or the District Inspector of Schools or even the authority which is to give effect to any transfer cannot proceed to adopt any other mode of recruitment after the steps taken for determination and notification as per Rule 11 of the 1998 Rules. It has also been held that the alteration of any such determination is not permissible and cannot be reversed. This has been reiterated in paragraph - 39 of the decision. Not only this in paragraph - 40, the Full Bench also obliges the Committee and the District Inspector of Schools to fulfill their obligations as per Rule 11 for determination and intimation of vacancies. The ratio therefore of the Full Bench read with the aforesaid Rules is

clearly to the effect that the authorities, who are obliged to fill up the vacancies occurring in the year of recruitment, have to mandatorily perform their function of determining and notifying the vacancy. The failure by the Management or the District Inspector of Schools to act as per Rule 11 of the 1998 Rules would therefore not generate a right in favour of any person to seek transfer or even in the Committee of Management to defeat the very purpose of Rule 11 of determining or intimating the vacancies to the Selection Board for direct recruitment. The Committee of Management no doubt has the right to select the mode of recruitment when it has to be filled up directly in the event it has an option from a candidate seeking transfer. However, this conscious decision of the Committee of Management to adopt a particular mode has to be taken within the time frame as provided under Rule 11 of the 1998 Rules. If the Committee of Management is allowed to violate the time schedule, then it would be allowing the Committee of Management to have a free play to choose to determine its mode of recruitment at any time which is not the purpose of the Rules. For that matter, under Sub-Rule (4) of Rule 11, the District Inspector of Schools is also obliged to take a decision as per the specifications of the time schedule provided in Rule 11 itself for the Committee as well as for the District Inspector of Schools. This compliance has to be adhered to keeping in view the year of recruitment and also the eligibility of the candidate including his qualification as on the first day of the year of recruitment which would be the 1st of July of the year in question. However, any failure on their part would not extend the right of the Management to any stage beyond that for adopting the mode of appointment by way of transfer. It is this aspect which has been

insisted upon by the Full Bench in the paragraphs referred to here-in-above and which has not been noticed by the learned Single Judge in the impugned judgment. Consequently, we are of the opinion that the learned Single Judge has not correctly appreciated the ratio of the Full Bench and has therefore arrived at an incorrect conclusion that the option is open up to the stage of advertisement for making appointment by way of transfer. The impugned judgment therefore cannot be sustained to that extent.

17. There is yet another aspect which deserves to be explained, namely, that the process of determination and intimation of vacancy for direct recruitment is a distinct process under Rule 11 of the 1998 Rules. The stage of advertisement comes after the request is received by the Board. The stage of determination and notification of the vacancy is therefore a unique methodology in this process of selection which is a stage prior to advertisement. It is for this reason that the judgment in the case of Prashant Kumar Katiyar (*supra*), as noted above, has held that this process should not be avoided which is mandatory. Consequently, the learned Single Judge did not appreciate this distinction while applying the principles of commencement of the date of selection process on the strength of the judgments of the Supreme Court and the ratio of the judgments in the cases of Asha Singh (*supra*) and Smt. Amita Sinha (*supra*) respectively. The said logic of the initiation of the selection process has to be distinguished in the present process of recruitment where the initiation of the determination of vacancy is relevant for the purpose of choosing the mode of recruitment under the 1998 Rules. Consequently, we are of the opinion that once the determination and the notification

process is either made or there is a failure on the part of the Management to do so, then the District Inspector of Schools has to perform his duty as per Rule 11(4). Once this contingency has occurred, then the option of the mode to recruit by transfer is not available. This issue will therefore have to be taken into account by the Joint Director (Education) who would be under our orders in this appeal be now proceeding to examine the matter.”

5. U.P. Act No. 15 was enacted on 21.08.2023 with the object to bring in uniformity, transparency and timeliness in the recruitment process of teachers as there were five various commissions functioning in the State for selection of teachers, in the name of; (i) Uttar Pradesh Higher Education Service Commission for the selection of teachers of non-government aided colleges of the State; (ii) Uttar Pradesh Secondary Education Service Selection Board for the selection of teachers of non-government aided intermediate colleges; (iii) Concerned management committee for the selection of the posts of assistant teachers in aided junior high schools and affiliated primary schools; (iv) District Basic Education Officer and Secretary, Basic Education Council for selection of assistant teachers in council schools; (v) Uttar Pradesh Subordinate Services Selection Commission for the selection of instructors in the Department of Vocational Education.

6. The idea for setting up a unified commission was due to the difference in the level of efficiency related to selection by the above named Commission/Institution, as the quality of selection of teachers was affected, there was no uniformity in the process of selection, timely selection of teachers was

not being done, and there were several vacant posts of teachers in various institutions, which adversely affected the education/training of the students/trainees in the State. Apart from this, a lack of transparency is also evident in the selection process conducted by institution level selection committee which has resulted in litigations.

7. Section 31 is the repeal and saving clause, which is extracted hereunder :

“31. (1) The Uttar Pradesh Higher Education Services Commission Act, 1980, the Uttar Pradesh Secondary Education Service Selection Board Act, 1982 and the Uttar Pradesh Education Service Selection Commission, 2019 are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Acts referred to in sub-section (1) shall be deemed to have been done or taken under this Act, as if the provisions of this Act were in force at all material times.

(3) Save as otherwise provided in this Act, the repeal of the Acts referred to in sub-section (1) shall not have an adverse effect on the general application of section 6 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act no. 1 of 1904) in relation to the enforcement of provisions.”

8. Sub-section (2) of Section 31 is the saving clause which provides that anything done or any action taken under the Acts referred to in sub-section (1) shall be deemed to have been done or taken under this Act, as if the provisions of this Act were in force at all material times. Meaning thereby, that all the actions, which were done pursuant to Uttar Pradesh Secondary Education Service Selection Board Act, 1982 (*hereinafter called as “Act of 1982”*)

and the rules framed thereunder, were saved by sub-section (2) of Section 31.

9. Rules of 2023 was introduced on 13.12.2023. Sub-rule (2) of Rule 1 provides for commencement of Rules dated 13.12.2023, which came into force with effect from the date of its publication in the gazette. Rule 1 is extracted hereasunder :

“1(1) These rules may be called the Uttar Pradesh Education Service Selection Commission Rules, 2023.

(2) They shall come into force with effect from the date of their publication in the Gazette.”

10. Chapter V of Rules of 2023 provides for procedure of recruitment. Rule 28 is of great importance and relates to determination of notification of vacancies. It is somewhat pari materia to Rule 11 of Rules of 1998. Sub-rule (1) of Rule 28 provides for determination of vacancies in accordance with sub-section (1) of Section 10 of Act of 1923 by the Appointing Authority or Management or Authorized Officer and the same has to be notified through Director (Higher Education) or the Director (Secondary Education), or the Director (Basic Education) or the Director (Training and Employment) or Director General of Atal Residential Schools, as the case may be, to the Commission in the manner hereafter provided.

11. Similarly, sub-rule (2) provides that vacancies for each category of post to be filled in by direct recruitment, including the vacancies that are likely to arise on the last day of the year of recruitment has to be sent by the Appointing Authority or Management or Authorized Officer by July 15 of the year of recruitment to the Authorized Officer.

12. Sub-rule (3) of the Rule 28 envisages a situation that if, after vacancies have been notified under sub-rule (2), any vacancy in the post of teacher or instructor occurs, the Appointing Authority or Management or Authorized Officer shall, within fifteen days of its occurrence, notify the Authorized Officer in accordance with the said sub-rule and the Authorized Officer shall within ten days of its receipt by him send it to the Commission.

13. Sub-rule (4) further provides that where for any year of recruitment, the Appointing Authority or Management or Authorized Officer does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Authorized Officer shall on the basis of the record in his office, determine the vacancies in such institution in accordance with sub-section (1) of section 10 and notify them to the Commission in the manner and by the date referred to in the said sub-rule. The explanation appended to it clarifies that vacancies notified to the Commission under the sub-rule shall be deemed to be notified by the Appointing Authority or Management or Authorized Officer of such institution. Thus, explanation appended to sub-rule (4) is a deeming clause.

14. Sub-rule (5) is of great importance as it provides that post of notified vacancies shall not be filled by a single transfer. However, proviso to sub-rule (5) provides that in special circumstances, if a single transfer is necessary, then it will be necessary to bring the said process to the notice of the Commission as soon as possible, and the vacancy as a result of single transfer will be considered included in the posts notified by the Director, and this vacancy will also be covered by the

same selection process. After commencement of the selection process, no single transfer will be done under any circumstances.

15. Thus, it is clear from sub-rule (5) that notified vacancy is not to be filled by single transfer. However, in exceptional cases, when it is brought to the notice of Commission, the single transfer may be considered for the post which has been notified. It cannot be done in a routine manner.

16. Coming to the facts of the case, in Writ A No.12611 of 2024, the post of Principal became vacant on retirement of Principal on 31.03.2019. One Shri Ram Prakash Rathore, who was the senior most teacher, was appointed as an Officiating Principal with effect from 01.04.2019. The requisition for filling up the post of Principal was made online to the Board on 30.09.2019. Thereafter the Officiating Principal of the institution had also notified the DIOS through letter dated 29.05.2023. Thus, the vacancy was notified by the Management through online on 30.09.2019 and through Principal on 29.05.2023. Sri Ram Prakash Rathore attained the age of superannuation on 31.03.2024, thereafter Committee of Management had passed a resolution for appointing one Sri Khemkaran as Officiating Principal. The petitioner made a representation before the District Inspector of Schools, who accepted his claim on 26.04.2024 and appointed him as Officiating Principal and his signatures were attested. He assumed the charge on 27.04.2024 and since then he is working as Officiating Principal. By the order impugned dated 28.06.2024, 5th respondent has been transferred to the institution known as Late Gaya Prasad Verma Smarak Krishak Inter College, which is subject matter of dispute.

17. In Writ-A No.11436 of 2024 the post of Principal fell vacant on 30.06.2015 on the retirement of one Dharam Singh. There also stood vacancy of four Assistant Teachers alongwith that of Principal in the institution known as Sarvodaya Inter College, Nazirpur Sakeet, District Etah. Pursuant to the letter of District Inspector of Schools dated 15.7.2019, the Management notified the vacancy online to the Board. This fact was conveyed to the District Inspector of Schools through letter dated 22.07.2019. One Shyam Singh being the senior-most teacher was officiating as Principal of the institution. He attained the age of superannuation on 31.03.2022. The petitioner, who was the senior-most teacher, on 01.04.2022 was given the charge of Officiating Principal and his signatures were attested on 16.05.2022, since then he is working as Officiating Principal in the institution. The Committee of Management has given consent for transfer of the 4th respondent to the institution as he is the relative of the Manager. By the order impugned, the 7th respondent has been transferred in the institution on 28.06.2024.

18. In both these writ petitions, the Committee of Management had already sent the requisition to the Board in the year 2019 when the vacancy occurred on the post of Principal. In both the cases, requisition was made online as well as intimation was also sent in writing to the District Inspector of Schools.

19. Sub-section (2) of Section 31, which is a non obstante clause, saves all those action taken and proceedings initiated under Act of 1982, and it shall be deemed to have been done or taken under the Act of 2023. The saving clause of Section 31 clearly saves all the action which were done pursuant to the Act of 1982.

24. Selection and appointment to the post of Principal could only be made by the

28. In the result, both the writ petitions succeed and are hereby **allowed**. The transfer orders dated 28.06.2024 (Annexure 1 to Writ-A No.12611 of 2024) and 28.06.2024 (Annexure 1 to Writ A No.11436 of 2024) are not sustainable in the eyes of law and the same are hereby set aside.

...Respondents

Counsel for the Petitioner

Jeetendra Singh, Sr. Advocate

Counsel for the Respondents:

Yashwant Singh

A. Service Law – Constitution of India, 1950 – Article 226 – Writ – Alternative remedy – UP Cooperative Societies Act, 1965 – Section 128 – Dismissal of employee – Residuary power of Registrar against dismissal order – Exercise thereof – Held, the Registrar has been vested with all the residuary powers to deal with the resolutions adopted by the Committee of Management being of whatever nature and has power to annul such resolution – High Court upheld the preliminary objection regarding alternative remedy leaving it open to the petitioner to avail it. (Para 5, 7 and 9)

Writ disposed of. (E-1)**List of Cases cited:**

1. Writ A No. 39967 of 2008; Ranvijay Singh Bhadauria Vs St. of U.P. & ors. decided on 17.10.2014

2. Nand Kishor Vs St. of U.P. & ors.; 2008 (26) LCD 428

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

1. Heard Sri Jeetendra Singh, learned counsel for the petitioner and Sri Yashwant Singh, learned counsel for the respondent nos.1 to 4.

2. By means of this petition filed under Article 226 of Constitution of India, petitioner has assailed the order passed by the Secretary of the District Cooperative Bank Limited, Kanpur dated 01.06.2024 whereby he has been dismissed from the employment of the Bank through a resolution adopted by the Committee, dated 18.09.2023.

3. A preliminary objection has been raised by Sri Yashwant Singh, learned counsel for the respondent to the effect that the petitioner has efficacious remedy to challenge the resolution of the Committee of Management which has resulted in the order dated 01.06.2024 before the Registrar, Cooperative Societies under Section 128 of the U.P. Cooperative Societies Act, 1965. He has also placed reliance upon a judgment of a Coordinate Bench of this Court dated 17.10.2014 in the matter of *Ranvijay Singh Bhadauria v. State of U.P. and others* passed in Writ A No.39967 of 2008 whereunder the Court had declined to entertain the petition against the order of dismissal from the service on the ground that the Registrar, Cooperative Societies has requisite residuary and supervisory powers to deal with the resolution adopted by the Committee of Management and annul the same.

4. Meeting the arguments, Sri Jeetendra Singh, learned counsel for the petitioner has placed before the Court relevant provisions as contained under the U.P. Cooperative Societies Employees Service Regulations, 1975, according to which against the order of dismissal no forum of appeal has been provided. Sri Singh, learned counsel has also placed before the Court the provisions as contained under Section 84 which provide for penalties and one of them is Clause (iv) dismissal from service whereas other penalties are of different nature and vide Regulation 86 of the Regulations the penalties imposed under Clause (a) to (d) of Clause (i) of Regulation 84 only have been made appealable before the authority as mentioned in Appendix-D. The penalties as contained under Clause (e) and (G) sub-clause (i) of Clause 84 only the prior

permission concurrence of the Institutional Service Board is required. He further argues that since there is no forum of appeal therefore this Court may entertain this petition.

5. Having heard learned counsel for the parties and having perused the records and particularly after going through the relevant provisions as contained under Section 128 of U.P. Cooperative Societies Act, 1965, I find that the Registrar has been vested with all the residuary powers to deal with the resolutions adopted by the Committee of Management being of whatever nature and has power to annul such resolution. The relevant provision under Section 128 of the U.P. Cooperative Societies Act, 1965 are reproduced hereunder:

"128. Registrar's power to annul resolution of a co-operative society or cancel order passed by an officer of a co-operative society in certain cases.-The Registrar may –

(i) annul any resolution passed by the Committee of Management, or the general body of any co-operative society; or

(ii) cancel any order passed by an officer of a co-operative society;

if he is of the opinion that the resolution or the order, as the case may be, is not covered by the objects of the society, or is in contravention of the provisions of this Act, the rules or the bye-laws of the society, whereupon every such resolution or order shall become void and inoperative and be deleted from the records of the society....."

6. I further notice that a concurrent Bench of this Court in the matter of $\square$ Ranvijay Singh Bhadauria (Supra) has

already followed order and judgment of this Court of the Division Bench of this Court in the case of *Nand Kishor v. State of U.P. and others:2008(26) LCD 428* to hold that the power vested with Registrar, Cooperative Societies under Section 128 is wide enough to include all such resolutions which have even resulted in dismissal of employee of the Co-operative Societies vide paragraph nos.4 and 5 of the judgment it has been held thus:

"4. For appreciating the contentions raised on behalf of the respondents it is worthwhile to refer to Section 122 of the Act 1965 which confers a power upon the State Government to constitute an Authority for regulating the Service condition of the employees of the Cooperative Societies. The Authority in turn has been conferred powers to frame regulations for the purpose. In exercise of powers under Section 122 State Government as constituted Cooperative Societies Service Institutions Board at Lucknow. This Board has framed the Regulation of 1975. Under the Regulation 1986 an appeal to the Chairman against an order of the Managing Director has been provided for. It is in exercise of this power that the Chairman has decided the appeal filed by the petitioner against the order of Managing Director imposing the punishment of recovery of the loss caused. It is thus apparent that the source of power of the Chairman under the Regulations flows from this provisions under Section 122 of the Cooperative Societies Act. Section 128 of the Cooperative Societies Act contemplates that all orders passed by the officers of Cooperative Societies can be cancelled in the cases provided for under the said Section itself.

5. The power conferred under Section 128 is therefore available to an employee who is aggrieved by order of the

Chairman passed in appeal preferred by him under the Regulations. The power conferred upon the Registrar under Section 128 of the Act, i.e., the parent legislation is not diluted in any manner by the regulations framed by the Institutional Board which are in the nature of subordinate legislation as reference may also be had to the definition of "Officer" as contained in Section 20 of the Cooperative Societies Act which categorically refers to the Chairman as an officer of the Cooperative Societies. Therefore, the application filed by the petitioner under Section 128 of the Act 1965 was legally maintainable. The order of Additional Registrar dated 12.6.2007 holding otherwise is legally not justified."

7. In such above view of the matter, therefore, I do not see any justification to take a different view from what has already been taken by a coordinate Bench of this Court in the aforesaid case. Hence the preliminary objection raised by Sri Yashwant Singh, learned counsel for the respondent is upheld.

8. The law is well settled that no one can be left remediless. The highest authority under an enactment if is vested with the supervisory and superintending power or residuary power, which is not traceable in any other provision of the Act then such power should be permitted to be exercised to look into and decide the matter as a final authority on facts and I find it to be necessary for arresting any miscarriage of justice.

9. Hence, I decline to entertain the petition at this stage. However, it is left open for the petitioner to prefer an appeal/representation before the Registrar, Cooperative Societies taking aid to Section

128 of the U.P. Cooperative Societies Act, 1965 and in the event any such representation/appeal is filed within a period of four weeks from today, the same shall be dealt with and disposed of by Registrar, Cooperative Societies within a further period of two months.

10. With the aforesaid observations and directions, this petition stands **disposed of**.

(2024) 9 ILRA 543
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.09.2024

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ A No. 13992 of 2019
 with
 Writ A No. 29588 of 2019
 With
 Writ A No. 24592 of 2020

Dr. Vinod Chandra Jain & Ors.

...Petitioners

Versus

State of U.P. & Anr.

...Respondents

Counsel for the Petitioners:

Hari Prasad Gupta

Counsel for the Respondents:

C.S.C.

A. Service Law – Notional promotion – Entitlement – Earlier the Division Bench directed the respondents to grant benefit of notional promotion to the writ petitioners to the post of Additional Director – Effect – Held, reasons given in the impugned order for rejecting the case of the petitioners for grant of notional promotion are arbitrary in the face of observations made by Division Benches – Further held, the consequential benefits of

pension, gratuity & ors.retiral dues shall also be available to the petitioners – In the event, the payment is delayed beyond three months, the same shall carry 6% simple interest from the date of this judgment. (Para 28, 29 and 33)

Writ allowed. (E-1)

List of Cases cited:

1. Dr. Chandra Prakash & ors. Vs St. of U.P. & ors.; 2002 (10) SCC 710
2. Service Bench No. 2029 of 2015; Dr. Jagannath Prasad Gupta Vs St. of U.P. & ors. decided on 01.07.2021
3. Writ petition No. 2811 of 2004; Dr. Rajendra & ors. Vs St. of U.P. & ors. decided on 10.11.2005

(Delivered by Hon'ble Irshad Ali, J.)

01. Heard Sri Hari Prasad Shukla and Sri Ashok Shukla, learned counsel for the petitioners and Sri Shiv Ganesh Singh, learned Additional CSC for respondent - State.

02. This bunch of writ petitions is being decided by means of a common judgment and order as the controversy involved in the writ petitions is similar in nature treating Writ-A No.13992 of 2019 to be leading writ petition and the order passed thereon shall be equally applicable to all the connected matters.

03. The controversy involved in the present bunch of writ petitions arises due to denial of extension benefit granted by Hon'ble Supreme Court of India in Writ Petition No.43 of 1998; Dr. Chandra Prakash and others Vs. State of U.P. and others decided on 04.12.2002, reported in 2002 (10) SCC 710, the petitioners

preferred present writ petitions with following prayer:

i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 20.05.2005 upto extent of denial of promotion on higher post and denial of payment of arrears of salary and order dated 01.11.2018, whereby the respondents said that all the benefits have been given to the petitioners.

ii) Issue a writ, order or direction in the nature of mandamus commanding the respondents to examine the case of the petitioners to grant the benefit of judgment and order passed by this Hon'ble Court and Hon'ble Supreme Court of India in respect of grant of promotion and position, selection grade and arrears of salary from the date of notional promotion as the same has been given by the respondents to other similarly situated persons.

iii) Issue a writ, order or direction in the nature of mandamus commanding the respondents to promote and provide the position with all incidental and consequential benefits including selection grade of Rs.4500-5700 to the petitioners as per direction of Hon'ble Supreme Court of India.

iv) Issue a writ, order or direction in the nature of mandamus commanding the respondents to fix and revise the pension of the petitioners as per rules and pay the arrears of salary as well as arrears of pension with interest at market rate.

v) Issue a writ, order or direction in the nature of mandamus commanding the respondents to provide the selection grade for the post of Joint Director in the pay scale of Rs.4500-5700 as per Government Order dated 29.12.1997, as the same benefits have been given to other similarly situated persons.

vi) Any other writ, order or direction, as this Hon'ble Court may deem fit and proper and to award the cost of the petition to the petitioners.

04. There was a dispute in respect of determination of seniority and extension of benefit of promotion and position between the regularly selected and appointed medical officers and medical officers appointed by the Departmental Selection Committee (DSC) on adhoc basis finally deciding the case of Dr. Chandra Prakash (Supra) on 04.12.2002, wherein Hon'ble Supreme Court of India has held as under:

"We accordingly allow the writ petitions and declare that (1) the writ petitioners are not within the purview of Rules of 1979, (2) the State Government will fix the seniority of all doctors in PMHS Cadre from the date of orders of their initial appointment within a period of six weeks from the date of this order and give all consequential benefits including promotions and positions on the basis of such seniority list and, (3) those doctors, who were selected in year 1972 and 1977-78-79 by Principal Secretary and who were not issued orders of appointment and joined the service on the basis of Tandon's case, will be treated as having been appointed on the date they actually joined the service and their seniority will be counted from that date."

05. In compliance of judgment and order of Hon'ble Supreme Court of India dated 04.12.2002, on 05.06.2003 the respondents circulated the seniority list of medical officers of U.P. Medical and Health Department and in the seniority list, name of petitioners finds place.

06. On the basis of seniority list, by adopting the procedure of pick and choose, several medical excluding the petitioners got promoted to the post of Joint Director, Additional Director, Director and Director General.

07. In violation of order of Hon'ble Supreme Court, instead of extending the benefits of promotion and position to all on the basis of seniority list, vide impugned order dated 20.05.2005, the respondents notionally promoted the medical officers from senior grade to Joint Director grade in the pay scale applicable on the date and denied to pay the arrears of salary ignoring the fact that on the basis of seniority, they have already promoted several medical officers upto the post of Director General & Director and paid them arrears of salary.

08. The petitioners have been promoted on the post of Joint Director w.e.f. 10.05.1990, thus, as per Government Order dated 29.12.1997 and 31.07.2008, they are entitled for selection grade pay scale of Rs.4500-5700 w.e.f. 10.05.1990 but respondents are not extending the benefits to them.

09. Being aggrieved with the discriminatory action of the respondents, several writ petitions have been filed by medical officers of U.P. Medical and Health Department. In Writ Petition No.1543 (S/B) of 2004 vide judgment and order dated 18.09.2007, this Court has been pleased to dispose of the writ petition directing the respondent No.1 to grant all consequential benefits including notional promotion etc to the petitioners within two months from the date of production of a certified copy of the order.

10. Against judgment and order dated 18.09.2007; Writ Petition No.1543 (S/B) of 2004; Dr. Raghubeer Prasad Dixit and others Vs. State of U.P. and others, the State of U.P. preferred Review Petition NO.100 of 2008; State of U.P. and others Vs. Dr. Raghubeer Prasad Dixit and others, which was dismissed by this Court on 31.07.2008.

11. Due to discretionary action of the State Government, several medical officers of U.P. Medical and Health Department preferred writ petitions before this Court at Lucknow and Allahabad. The writ petitions filed at Lucknow Bench have been allowed but Writ-A No.7742 of 2004; Dr. Chandra Prakash and others Vs. State of U.P. and others, filed at Allahabad was dismissed on 10.11.2005.

12. Being aggrieved with the judgments of this Court, State Government preferred SLP (Civil), which was converted as Civil Appeal Nos.3041, 3043, 3044, 3045, 3046 of 2010 and Dr. Chandra Prakash filed SLP (Civil), which has been converted as Civil Appeal NO.3042 of 2010. All the civil appeals were connected on 05.09.2011 and Hon'ble the Supreme Court of India has held as under:

"On the facts and circumstances, particularly having regard to the fact that most of the contesting respondents are retired, we do not propose to stay the impugned order of the High Court. If appellants succeeds ultimately, it will be entitled to recover the amount paid in pursuance of the order of the High Court."

13. Subsequently, all the civil appeals were listed on 24.07.2024 and the civil appeal filed by the State of U.P. has been dismissed while the civil appeal NO.3042

of 2010; Dr. Chandra Prakash and others Vs. State of U.P. and others was allowed with following order:

"In view of the observation made above, we have no option but to set aside the part of the impugned order dated 10th November, 2005 passed by the High Court of Judicature at Allahabad in CMWP 7742/2004, whereby High Court refuse to grant arrear of salary in favour of the appellant."

The respondents are directed to pay the appellant the consequential benefits of arrears of pay pursuant to the said order in view of the notional promotion granted in favour of the appellant."

Impugned order passed by the High Court stands modified to the extent above."

The appeal is allowed with direction to the State to pay arrears of salary if it not yet paid within three months. On failure, the State of U.P. will be liable to pay interest @6% from the date of judgment of this Court."

14. In Compliance of judgment and order dated 24.07.2014 vide office order dated 21.10.2015, respondents extended all the benefits including arrears of salary with interest to Dr. Chandra Prakash and others.

15. Due to denial of benefit of judgment of Hon'ble Supreme Court of India, Dr. Virendra Singh Pachahara filed Writ Petition No.1461 (S/B) of 2009 and vide judgment and order dated 15.07.2013, this Court has observed as under:

"In view of above, the writ petition deserves to be allowed and is hereby allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 12.05.2009 commanding the

State Government to provide promotion and pay scale and promotional avenues under the judgment of Hon'ble Supreme Court of India in case of Dr. Chandra Prakash (Supra) expeditiously, say within a period of three months from the date of production of a certified copy of the order."

16. In compliance of the order dated 15.07.2013, vide office memo dated 18.02.2014 respondents extended the benefits including pay scale of Rs.4500-5700 with arrears subject to outcome of Civil Appeal No.3041 of 2010. In the said order, it has been said that the case of Virendra Singh Pachahara is same as of case of Dr. Raghubeer Prasad Dixit, even then respondents are not extending the benefits. The civil appeal was dismissed on 24.07.2014.

17. Due to discriminatory action of respondents, Dr. Ramji Pandey preferred Writ-A No.3334 of 2009, which was allowed by this Court on 31.08.2017 with following observation:

"Consequently, the writ petition is allowed. A direction is issued to the respondents to grant notional benefits of promotion to the petitioner as Additional Director as Director as and when it falls due in accordance with the rules as notified on 11th August, 2004 and the pay scale shall be re-fixed, which shall be complied with by making payment of arrears of salary of such re-calculation as expeditiously as possible preferably within three months from today. The consequential benefits of pension, gratuity and other retiral dues shall also be available to the petitioner to that effect. In the event, the payment is delayed beyond three months, the same shall carry 6%

simple interest from the date of judgment to the date of payment."

18. Against the judgment and order dated 31.08.2017 passed in Writ-A No.3334 of 2009, State of U.P. preferred SLP with Diary No.33951 of 2010 before the Apex Court and in the said SLP no order for stay has been granted and the SLP is pending.

19. Vide order dated 05.05.2015, the respondents rejected the claim of Dr. J.P. Gupta (Jagannath Prasad Gupta), who was petitioner of Writ Petition No.04 (S/B) of 2004, preferred writ petition No.2229 (S/B) of 2015, wherein vide judgment and order dated 01.07.2021, this Court allowed the writ petition with following observation:

"16. This writ petition is allowed in the same terms as the decision by this Court on 31.08.2017 in Writ-A No.3334 of 2009 (Ramji Pandey Vs. State of U.P.).

17. Let appropriate order be passed by opposite party No.2 making them subject to decision in SLP with Diary No.33951 of 2018 (State of U.P. Vs. Ram Ji Pandey).

18. A direction is issued to the respondents to grant notional benefits of promotion to the petitioner as Additional Director and Director as and when it falls due in accordance with the Rules as notified on 11th August, 2004 and the pay shall be re-fixed and payment of arrears of salary on such re-calculation shall be made as expeditiously as possible, preferably within three months from today. The consequential benefits of pension, gratuity and other retiral dues shall also be available to the petitioner. In the event the payment is delayed beyond three months, the same shall carry 6% simple interest

from the date of this judgment to the date of payment."

20. Learned counsel for the petitioners submitted that there is no iota of difference between the petitioner and other such medical officers to whom the benefit has been extended by the respondents.

21. He further submitted that the effect of the judgment dated 04.12.2002 passed in the case of Dr. Chandra Prakash ;(2002) 10 SCC 710 is rem in nature while the judgment passed in Writ-A No.3334 of 2009; Ramji Pandey (Supra), against which the State of U.P. has preferred SLP No.33951 of 2010 is personam in nature.

22. He next submitted that since denial to extend the benefit of promotion, position and pay scale with arrears and revision of pension at par with junior is discriminatory, illegal and arbitrary, thus, the impugned order dated 20.05.2005 and 01.11.2018 annexed as Annexure No.1 to the writ petition are liable to be quashed and the writ petition is liable to be allowed.

23. On the other hand, learned Additional CSC appearing for respondent - State opposed the submission advanced by learned counsel for the petitioners and submitted that the seniority list was prepared in compliance of Hon'ble Supreme Court's order in Dr. Chandra Prakash case on 05.06.2003. On the basis of seniority, notional promotion was granted on senior grade. There was no basis for granting notional promotion to the post higher than that of Joint Director i.e. Additional Director and Director Grade, as there were selection posts. He submitted that consequential order for revision of pension was also issued thereafter. The representation of the petitioners was

disposed of and as such, the order impugned is just and valid.

24. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

25. Learned counsel for the petitioners have submitted written submissions, wherein charts have been prepared reflecting the service details of the date from which the petitioners were granted notional promotion, which is being extracted below:

Writ-A No.13990 of 2019:

S . N o .	Nam e of Petit ioner s	Sou rce of Ap poi nt - me nt	Date of appoi nt- ment / Joini ng	Sen iorit y No.	Date of Noti onal Pro moti on	Date of Retir eme nt	Rem ark
1 .	Dr. Vино d Chandra Jain	DS C	28.01 /1973 / 01.03 .1973	159 9	10.0 5.19 90	30.0 4.20 05	Juni ors were pro mote d upto the post of Addl . Dire ctor with pay scale of Rs.4 500- 5700 with arrea rs of salar y and revis ion pens ion

							but the petitioners are being deprived of.
2.	Dr. Shashier Singh	DS C	14.06.1973 / 20.06.1973	1796	10.05.1990	31.08.2007	Do
3.	Dr. Ramesh Chandra Srivastava	DS C	14.11.1973 / 01.12.1973	2061	10.05.1990	31.07.2007	Do
4.	Dr. Anand Kumar Bhargwa	DS C	11.02.1974 / 14.02.1974	2306	10.05.1990	30.06.2008	Do

Writ-A No.29588 of 2019:

Petitioner No.	S.No. in Representation	Name of Petitioner	Seniority No. in Seniority List dated 05.06.2003	Date on which notional promotion granted in Senior Grade	Date on which Notional Promotion is granted on the post of Joint Director	Date of order granting promotion
2	24	Dr. Jagdish Kumar Gupta	839	16.3.1979	10.3.1979	02.2.2005
3	2	Dr.	1221	13.3.	01.1.	20.5.

		Irshad Ali		1973	1986	2005
4.	23	Dr. Govind Mohan Garg	1263	10.3.1979	01.1.1986	02.2.2005
5	1	Dr. Durga Shankar Shukla	1512	04.1.1982	10.05.1990	20.05.2005
6	22	Dr. Rajesh Kumar Mishra	1589	27.5.1982	10.5.1990	20.5.2005
7	3	Dr. Obaid Rehman	1956	27.5.1982	10.5.1990	20.5.2005
8	4	Dr. Subhash Chandra Gurudeo	2058	27.5.1982	10.5.1990	20.5.2005
9	6	Dr. Rajendra Kumar Srivastava	2191	27.5.1982	10.5.1990	20.5.2005
1	7	Dr. F.I. Zuberi	2250	27.5.1982	10.5.1990	20.5.2005
10	8	Dr. Bal Krishna Jaju	2398	09.12.1982	10.05.1990	20.05.2005
11	9	Dr. Ramesh Chandra Chadha	2503	09.12.1982	10.05.1990	20.05.2005
12	21	Dr. Vishesh Kum	2525	29.05.1985	27.04.1995	20.05.2005

		ar Virm ani				
13	12	Dr. Mirz a Mans sor Murt aza	2852	15.2. 1985	10.5. 1990	20.5. 2005
14	13	Dr. Veer endra Prata p Sing h	2961	15.2. 1985	10.5. 1990	20.5. 2005
15	14	Dr. Rata n Kum ar	2974	15.2. 1985	10.5. 1990	20.5. 2005
16	15	Dr. Mad huka r Nath Kapo or	3117	24.5. 1985	10.5. 1990	20.5. 2005
17	16	Dr. Veer endra Prata p Sing h	3125	24.5. 1985	10.5. 1990	20.5. 2005
18	5	Dr. Ram Kum ar Saxe na	3207	24.5. 1985	10.5. 1990	20.5. 2005
19	18	Dr. Vijay Pal Sing h	3243	29.5. 1985	27.4. 1995	20.05 .2005
21	19	Dr. Anil Kum ar	3282	24.5. 1985	10.9. 1990	20.05 .2005 read with 10.12 .2010

Chart 'B'

Petiti oner No.	S.N o. in Repr e sent	Nam e of Petiti oner	Senio rity No. in Senio	Date on whic h notio	Date on whic h Notio	Date of order granti ng

	atio n		ity List dated 05.06 .2003	nal prom otion grant ed in Senio r Grade	nal Prom otion is grant ed on the post of Joint Direc tor	prom otion
22	Sepa rate	Dr. Dr. P.K Bhat nagar	2366	09.12 .1982	10.05 .1990	: 20.05 .2005

Writ-A No.24592 of 2020

Sr. No .	Name of Petiti oners	Sourc e of Appoi nt - ment	Date of appoi nt- ment / Joinin g	Se nio rity No.	Date of Notional Promoti on on the post of Joint Director	Dat e of Ret ire me nt	Re ma rk
1.	Dr. Mahe sh Kuma r Gupta	DSC	31.07. 1971 / 30.08. 1971	11 78	01.01.19 86	30. 06. 20 06	Jun ior s we re pro mo ted upt o the pos t of Dir ect or Ge ner al wit h sel ecti on gra de of Rs. 45 00- 57 00
2.	Dr. Panch am Singh	DSC	14.08. 1972 / 22.08. 1972	13 81	01.01.19 86	31. 12. 20 03	DO

3.	Dr. Lakshman Jee Kesari	DSC	14.08.1972 / 18.08.1972	1386	10.05.1990	31.01.2006	Do
4.	Dr. Ram Pratap Singh Chauhan	DSC	28.10.1972 / 04.11.1972	1494	10.05.1990	31.10.2005	Do
5.	Dr. Sabhajeet Singh	DSC	28.10.1972 / 03.11.1972	1503	10.05.1990	31.01.2008	Do
6.	Dr. Kewala Nand Patani	DSC	07.09.1973 / 10.09.1973	1935	10.05.1990	31.07.2007	Junior's promoted upto the post of Director with selection on grade of Rs. 4500-5700
7.	Dr. Ram Shrinagar Dubey	DSC	18.07.1975 / 22.07.1975	2949	10.05.1990	31.01.2009	Junior's promoted upto the post of Adl. Director with selection on grade of Rs. 45

							00-5700

26. This Court having considered the two judgments passed by Division Benches in the case of Gulab Chandra and Dr. Ramji Pandey, the arguments as raised by learned counsel for the petitioners and on perusal of judgment of Single Bench of this Court in the case of **Dr. Jagannath Prasad Gupta Vs. State of U.P. and others; Service Bench No.2029 of 2015 order dated 01.07.2021**, found that the same reason for rejecting the case of the petitioners have been mentioned in the impugned order dated 05.08.2018, as have been mentioned in the counter affidavit filed by the respondents. The impugned order also considers the case of Dr. Sumati Sheel Sharma and mentions that Dr. Sumati Sheel Sharma was placed at the serial No.1099 of the seniority list and 21 other doctors, who were senior to her including those who had retired from service or died, had been given notional promotion as Additional Director w.e.f. 21.06.2009 and the notional promotion on the post of Director in the pay scale of Rs.5900-6300 w.e.f. the date that Dr. Sumati Sheel Sharma was given such promotion. This fact mentioned in the order dated 05.05.2015, as also the fact that petitioners were placed at serial numbers indicated in the chart narrated above of the seniority list, has convinced the Court that the impugned order is liable to be set aside.

27. Cases of the petitioners have been rejected only on the ground that Dr. Sumati Sheel Sharma had been given promotion on 21.06.1990 and 22.05.1996 on the basis of earlier seniority list and the petitioner were at that time junior to Dr. Sumati Sheel Sharma, therefore, they cannot claim the same benefit. Additionally, a reference has been made of pension, re-fixation having

30. Similar orders have been passed by Hon'ble the Supreme Court in Civil Appeal No.3041 of 2010 as have been mentioned above.

33. A direction is issued to the respondents to grant notional benefits of promotion to the petitioners as Additional Director and Director as and when it falls due in accordance with rules as notified on 11.08.2004 and the pay shall be refixed and payment of arrears of salary on such recalculation shall be made as expeditiously as possible, preferably within three months from today. The consequential benefits of pension, gratuity and other retiral dues shall also be available to the petitioners. In the event the payment is delayed beyond three months, the same shall carry 6% simple interest from the date of this judgment to the date of payment.

Km. Vishwa Mohini, Devashish Bhatt,
Rajesh Kumar

Counsel for the Respondents:
C.S.C.

A. Legal proceeding – Counter Affidavit to be filed on behalf of the St., as the contesting party – GO dated 25.09.2018, 14.03.2022 and 12.06.2023 – Officer, who can file it – Duty of Government Counsel explained – In matters, where the St. Government is a contesting party, then counter affidavit or any pleading should be got vetted by the Additional Chief Secretary / Principal Secretary and the counter affidavit should be prepared on the basis of the narrative vetted by the said Officer – Every Government Counsel, whether he be the Standing Counsel or A.G.A., or known by any other designation in the High Court, when he prepares a counter affidavit, objection or any pleading of any sort on behalf of the St. Government or where the St. Government is a party, then he shall first of all satisfy himself as to whether the aforesaid Government Orders have been complied or not? Only thereafter, such affidavit of pleading shall be finalized, so that unnecessary time of the Court is not wasted. (Para 5 and 6)

Writ petition kept pending. (E-1)

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

1. Heard Km. Vishwa Mohini, learned Counsel for the petitioner, Shri Shailendra Kumar Singh learned Chief Standing Counsel & Shri Prashant Singh Atal, learned C.S.C. - I, for the State.

2. After seeking instructions, this Court has been informed by the learned Chief Standing Counsel that in fact, the affidavit filed after the passing of the order dated 19.05.2023 was duly vetted by the Additional Chief Secretary of the department i.e. Rural Engineering Services.

However, in this very context we find, that in Public Interest Litigation No. 338 of 2022, in response to our order dated 30.08.2024, filed in the said petition as to who is authorized to file an affidavit on behalf of the Government, a Government Order dated 26.04.2001 was brought on record according to which, such responses on behalf of the State Government are to be filed by an officer not below the rank of Joint Secretary/Deputy Secretary, however, in exceptional circumstances, the same can also be filed by the Deputy Secretary or Section Officer concerned.

3. We had not expressed any opinion on this issue in the said matter. Today, we found that in the order dated 19.05.2023, there is a reference to four Government Orders on the subject which are dated 23.06.2010, 25.09.2018, 14.03.2022 and 08.07.2022. None of these Government orders were brought to our notice in P.I.L. No. 338 of 2022. Moreover, it is also informed that after 19.05.2023, another Government order dated 12.06.2023 was issued by the Chief Secretary for strict compliance of the Government Orders dated 23.06.2010, 25.09.2018, 14.03.2022 and 08.07.2022. There is no reference therein to the order dated 26.04.2001 which was placed before us in P.I.L. No. 338 of 2022.

4. We have gone through the aforesaid Government Orders and we find that in the Government Order dated 23.02.2010, it was provided that wherever the State Government is a party in any proceedings before the High Court, then the narrative should be got vetted by the Principal Secretary / Secretary and the counter affidavit should be prepared and filed based on the said vetted narrative. However, this Government Order was

further considered and another Government Order dated 23.06.2010 was issued, according to which in matters where the State Government was merely a proforma party / remote party, then the narrative pertaining to such matters for the purposes of filing counter affidavit should contain an endorsement by a Group A Officer of the administrative department concerned on the prescribed format of the Law Department that the counter affidavit in the matter is required to be filed by the Head of Department or Head of the Office i.e. not by the State Government. However, if in a particular matter, certain paragraphs of the writ petition pertain to the State Government, in that case, the narrative pertaining to the said paragraphs should be got vetted / approved by the Principal Secretary / Secretary / Special Secretary of the Government. The Principal Secretary can delegate his powers / obligations in this regard which would obviously mean a delegation to the Secretary / Special Secretary. Thereafter, another G.O. dated 25.09.2018 was issued reiterating what had been stated in the G.O. dated 23.06.2010, so far as, filing of affidavits on behalf of the State Government is concerned. Another G.O. was issued on 14.03.2022 dealing with various issues pertaining to legal proceedings before the High Court wherein the State is a party or not a party. However, so far as, the issue with which we are concerned i.e. the officer who is authorized and should file the affidavit on behalf of the State Government, the said G.O. also reiterated what was stated in the G.O. dated 25.09.2018. Paragraph 2 (?) (2) of the said G.O. dated 14.03.2022 reads as under:-

"उपर्युक्त वादों के संबंध में प्रतिशपथ पत्र तैयार कराते समय तथ्यों

की पुष्टि सहित तथ्यपरक प्रस्तरवार आख्या तैयार करने के उपरान्त, उसका सम्यंक परीक्षण विभागाध्यक्ष एवं कार्यालयाध्यक्ष के स्तर पर किया जाय तथा न्याय विभाग के उपर्युक्त संदर्भित शासनादेश दिनांक 25 सितम्बर 2018 के परिप्रेक्ष्य में यह स्पष्ट रूप से मत स्थिर किया जाय कि क्या प्रश्नगत बाद में शासन प्रोफार्मा पार्टी है अथवा कि शासन के किसी आदेश / नीति/नियम को चुनौती दी गयी है। यदि शासन के किसी आदेश/नीति/नियम को चुनौती दी गई है तो उसके संबंध में प्रत्तरवार आख्या तैयार कराकर व पुष्टि स्वरूप सक्षम प्राधिकारी के हस्ताक्षर सहित, अनुमोदन हेतु शासन को उपलब्ध कराया जाना सुनिश्चित किया जाय तथा यदि संबंधित बाद में शासन प्रोफार्मा पार्टी के रूप में पक्षकार है तो न्याय विभाग के उक्त शासनादेश में दिये गये निर्देशों व संक्षिप्त प्रतिशपथ पत्र के संलग्न मॉडल प्रारूप के अनुसार ही संक्षिप्त प्रतिशपथ पत्र तैयार कराकर उपलब्ध कराया जाय।"

5. There is another Government Order dated 08.07.2022 but it does not dwell on the issue with which we are concerned, at least, no provision could be pointed out by the Chief Standing Counsel in this regard. By the G.O. dated 12.06.2023 issued by the

9 All. Commissioner, Kendriya Vidyalaya Sangathan & Ors. Vs. Central Administrative Tribunal, 555 Allahabad & Anr.

Chief Secretary, strict compliance of the G.O.'s dated 23.06.2010, 25.09.2018, 14.03.2022 and 08.07.2022 was reiterated with reference to the orders passed in this petition on 19.05.2023. In the aforesaid G.O. dated 12.06.2023, in Paragraph 3 thereof, again, the Chief Secretary has reiterated that in matters where the State Government is a contesting party, meaning thereby, where it has an active role in the matter, then then counter affidavit or any pleading should be got vetted by the Additional Chief Secretary / Principal Secretary and the counter affidavit should be prepared on the basis of the narrative vetted by the said Officer.

6. In view of the above, we hereby provide that every Government Counsel, whether he be the Standing Counsel or A.G.A., or known by any other designation in the High Court, when he prepares a counter affidavit, objection or any pleading of any sort on behalf of the State Government or where the State Government is a party, then he shall first of all satisfy himself as to whether the aforesaid Government Orders have been complied or not ? Only thereafter, such affidavit of pleading shall be finalized, so that unnecessary time of the Court is not wasted when the pleadings have already been filed and this error or omission is pointed out to it. The Chief Standing Counsel and the Government Advocates shall take cognizance and ensure compliance thereof. In fact, if a narrative or the counter affidavit is required to be vetted by a senior officer of the Government in terms of the aforesaid Government Order, then a counter affidavit prepared in terms of the said narrative shall contain a specific paragraph that the said counter affidavit has been prepared on the basis of the narrative vetted by the concerned Officer, whose

name and designation should be mentioned, and also, that this has been prepared in compliance of the aforesaid Government order.

7. Shri Sanjay Verma, Additional L.R. is present from the office of Legal Remembrancer, U.P.. He expresses apology for non-production of the other Government Orders in the P.I.L. referred herein above.

8. Two weeks time is granted to the petitioner for filing rejoinder affidavit to the affidavit filed on behalf of the State.

9. List/put up this case **after two weeks.**

10. Let a copy of this order be sent to the Legal Remembrancer, U.P., the Chief Secretary, Government of U.P., Lucknow, as also, to the Chief Standing Counsel and Government Advocate of this Court at Lucknow & at Allahabad. A copy thereof be also sent to the learned Advocate General for his information.

(2024) 9 ILRA 555
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2024

BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ A No. 16078 of 2018

Commissioner, Kendriya Vidyalaya
Sangathan & Ors. ...Petitioners
Versus
Central Administrative Tribunal, Allahabad
& Anr. ...Respondents

Counsel for the Petitioners

Devendra Pratap Singh

Counsel for the Respondents:

Arvind Srivastava III

A. Civil Law - Service Matter - Probationer - Termination of Service - If the termination of services of a probationer is by an order simpliciter, based on the unsuitability of the employee for the post and/or unsatisfactory performance, the action would be tenable in law. However, if findings are arrived at in an inquiry regarding misconduct behind the officer's back or without a regular departmental inquiry, the simple order of termination is to be treated as being founded on allegations and would be bad in law. If, for determining the suitability of the probationer for the post in question, an inquiry is held, and it is on the basis of that inquiry that a decision is taken to terminate the probationer's service, the order will not be punitive in nature. Conversely, if there are allegations of misconduct, and an inquiry is held to ascertain the truth of such misconduct, and an order terminating the service is passed based on that inquiry, the order would be punitive in nature. In each case, the "motive" or "foundation" behind the termination order must be ascertained to decide whether the termination order is bad in law. (Para 38)

B. Civil Law - Service Matter - Probationer - Termination of Service Based on Unauthorized Absence- Allegation that the applicant remained unauthorizedly absent without any sanctioned leave from the competent authority. Court found that the termination order did not contain any recital indicating that it was based on misconduct. Instead, it was a simpliciter discharge order. As the applicant was a probationer, he did not have any legal right to challenge the issuance of a simpliciter discharge order. Held: Termination order upheld. (39, 43)

Allowed. (E-5)

List of Cases cited:

1. Dipti Prakash Banerjee Vs Satyendra Nath Bose National Centre For Basic Sciences, Calcutta, (1999) 3 SCC 60
2. Pavendra Narayan Verma Vs Sanjay Gandhi PGI of Medical Sciences, (2002) 1 SCC 520
3. Chandra Prakash Shahi Vs St. of U.P., (2000) 5 SCC 152
4. State of Punjab Vs Sukhwinder Singh, (2005) 5 SCC 569
5. Municipal Committee, Sirsa Vs Munshi Ram, (2005) 2 SCC 382
6. State of W.B. Vs Tapas Roy, (2006) 6 SCC 453
7. Muir Mills Unit of NTC (U.P.) Ltd. Vs Swayam Prakash Srivastava, (2007) 1 SCC 491
8. Chaitanya Prakash Vs H. Omkarappa, (2010) 2 SCC 623
9. Rajesh Kumar Srivastava Vs St. of Jharkhand, (2011) 4 SCC 447
10. Dr. Vijayakumaran C.P.V. Vs Central University of Kerala, (2020) 12 SCC 426
11. Punjab Vs Jaswant Singh, (2023) 9 SCC 150

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Impugned in the present proceedings at the instance of Commissioner, Kendriya Vidyalaya Sangathan, New Delhi (in short 'K.V.S.') is the order dated 24.04.2018 of Central Administrative Tribunal, Allahabad, bench Allahabad (in short 'Tribunal') in O.A. No.330/01233 of 2010 whereby the original application preferred by Sanjay Singh (in short 'original applicant') challenging the orders dated 19.08.2009 of the K.V.S. terminating the services of the original applicant as well as the order dated

10.11.2009 holding that the appeal preferred by the original applicant on 08.08.2009 in terms of Article 81-B read with sub-para 7 of the Education Code against the show cause memorandum dated 28.05.2009 does not lie, order dated 15/18.06.2010 whereby the revision preferred by the original applicant against the termination order dated 19.11.2008 needs no reconsideration and the order dated 02.07.2010 rejecting the representation of the original applicant for reconsideration of the order discharging him from service, has been allowed, all the orders impugned have been set aside and original applicant has been ordered to be reinstated back in service.

2. A joint statement has been made by learned counsel for the rival parties that the pleadings are complete and they do not intend to file any further affidavits and the writ petition be decided on the basis of the documents available on record. With the consent of the parties, the writ petition is being decided at the admission stage.

Facts

3. The case of the original applicant projected before the Tribunal was that pursuant to a recruitment exercise undertaken by the K.V.S., the original applicant after facing selection was offered appointment on the post of Work Experience Teacher in the pay scale of Rs. 5500-175-9000/- in Kendriya Vidyalaya, Dinjan, Assam on 19.11.2008. As per the offer of the appointment to the post of Work Experience Teacher, the original applicant was to report on duty by 05.12.2008. The original applicant claims to have reported for duty on 02.12.2008 and performed his duties with utmost sincerity till 12.12.2008. Since Dinjan

happened to be a very cold station and the original applicant was short of warm clothes so he took permission from the Principal of the K.V.S., Assam and got his leave sanctioned w.e.f. 13.12.2008 onwards.

4. According to the original applicant, the Vidyalaya in question was going to close for winter vacation from 21.12.2008 so there was no question of any loss to the students. It is also the case of the original applicant that on the reopening of the Vidyalaya on 01.01.2009, the original applicant got his reservations done by train, however, as the ill luck it may be, there happened to be a major train accident between Allahabad and Kanpur Station resulting to cancellation of several trains which constrained the original applicant to extend his leave. Somehow, the original applicant managed to reach Dinjan on 07.01.2009 and he reported for duty on 08.01.2009. The original applicant claims to have met the Principal of the Vidyalaya requesting him to accord permission to join the duties from 01.01.2009 but for the reasons best known to him, permission was not accorded to the original applicant to enter the Vidyalaya campus itself. Repeated request was extended by original applicant but the same was in vain. The original applicant again on 09.01.2009 and 10.01.2009 requested for joining the duties on 10.01.2009, the original applicant claims to have made telephonic conversation with the Assistant Commissioner of the K.V.S. and apprised him of the entire situation which was followed by a detailed representation dated 10.01.2009. Being frustrated with the odd situation and harassment meted to him, the original applicant claims to have lodged a first information report at Police Station-Dinjan. As joining was not accorded and

things had become bad to worse so the original applicant having no alternative left, returned back to Kanpur on 11.01.2009 and thereafter fell ill due to high fever, he could not join the Vidyalaya.

5. On 30.04.2009, a communication is stated to have been issued under the signatures of the Assistant Commissioner KVS, Regional Office, Silchar, Assam whereby it was recited that the original applicant is absent from duties w.e.f. 08.01.2009 and he was advised to report for duties immediately failing which disciplinary action would be taken against him as per K.V.S. Rules. The original applicant on the receipt of the said communication reported for duty on 19.05.2009 wherein the Principal of the K.V.S. apprised him that since the Vidyalaya is closed, thus, the original applicant cannot be accorded joining and he was instructed to join on 22.06.2009, the opening day of the Vidyalaya after summer vacation. On 28.05.2009, the Assistant Commissioner, K.V.S., Regional Office, Silchar, Assam proceeded to issue a notice purported to be under Article 81-D of the Education Code of the Kendriya Vidyalaya show causing as to why on account of unauthorized absence, he may not be deemed to have been removed from the service and for that purpose 10 days time for show causing was accorded to the original applicant. The original applicant on the receipt of the notice tendered his reply on 06.05.2009. A representation/request letter for according joining was also made by the original applicant on 15.06.2009 before the Assistant Commissioner, K.V.S., Silchar, Assam. It is alleged that the applicant consequent to the opening of the Vidyalaya post vacations appeared for joining on 22.06.2009 and thereafter the Principal of the Vidyalaya

permitted the original applicant to join duties on 22.06.2009 and he worked up till 25.06.2009. On 25.06.2009, the Principal of the Vidyalaya directed the original applicant to sign some blank papers and also obtained his receipt on certain orders and proceeded to cancel the entire joining of the original applicant from 22.06.2009 to 25.06.2009 (four days) on the premise that the original applicant was erroneously permitted to join, the original applicant on 25.06.2009 claims to have preferred an objection against the notice dated 28.05.2009 of the Assistant Commissioner, K.V.S., Silchar, Assam.

6. Thereafter, the Senior Administrative Officer of the K.V.S. (H.Q.), New Delhi proceeded to issue a communication dated 14.07.2009 requiring the original applicant to prefer appeal before the appellate authority against loss of the lien vide order dated 28.05.2009 of the Assistant Commissioner, K.V.S. Regional Office, Silchar. On 08.08.2009, the original applicant preferred an appeal before the appellate authority. On 19.08.2009, an order came to be passed by the Assistant Commissioner, K.V.S. Regional Office, Silchar, Assam whereby the services of the original applicant came to be terminated on completion of one month notice.

7. Being aggrieved against the termination order dated 19.08.2009 of the Assistant Commissioner, K.V.S., Regional Office, Silchar, Assam, the original applicant preferred an appeal on 09.09.2009 before the appellate authority. On 10.11.2009, the Joint Commissioner (Acad. and Admin.)/ appellate authority proceeded to pass an order holding that appeal preferred by the original applicant before the appellate authority was not

maintainable against the show cause memorandum dated 28.05.2009. The applicant thereafter preferred a detailed representation on 06.03.2010 in the form of Revision under Schedule-II read with Appendix-III of K.V.S. Code.

8. The original applicant being further aggrieved against the acts and omissions of the writ petitioners/ K.V.S. preferred O.A. No.683 of 2010 before the Tribunal, (Sanjay Singh v. State of U.P. and others) which came to be disposed of on 10.05.2010 with a direction to the original applicant to file reply to the show cause notice dated 28.05.2009 within a period of two weeks from the date of the receipt of the certified copy of the order and the competent authority was directed to pass a reasoned and speaking order within a period of two months. The original applicant submitted his response/ objection to the show cause notice on 12.05.2010. On 15/18.06.2010, the Education Officer of K.V.S., New Delhi proceeded to pass an order holding that there is no provision of reconsideration of the termination during probation in terms of the offer of the appointment. On 02.07.2010, another communication came to be issued negating the claim of the original applicant while holding that since the original applicant was not confirmed teacher, thus, the provisions of the Article 81-D of the Education Code will not apply and due to inadvertence, a show cause notice came to be issued on 28.05.2009 which stands withdrawn.

9. Questioning the orders dated 19.08.2009, 10.11.2009 15/18.06.2010 and 02.07.2010, the original applicant preferred O.A. No. 330/01233 of 2010 before the Tribunal seeking following reliefs:

“ A. To issue a writ order or direction in the nature of certiorari, quashing the order dt. 19.8.09, 10.11.09, 15/18.6.2010 & 2.7.2010 (Annexure no. 1, 2, 3 & 4 respectively) passed by the respondents.

B. To issue a further writ order or direction in the nature of mandamus commanding the respondents to reinstate the applicant as work experience teacher and permit him to work as such and grant him seniority, arrears of salary and other consequential benefits for which he is entitled for.

C. To pass any other suitable order or direction which this Hon'ble Tribunal may deem fit and proper under the circumstances of the case.

D. To award the cost of the present O.A. in favour of the applicant.”

10. On being noticed, the writ petitioners who were respondents before the Tribunal filed their response, to which a rejoinder affidavit was filed.

11. The original applicant came up for consideration before the Tribunal on 24.04.2018 wherein the same stood allowed, the orders impugned was set aside and the writ petitioners were directed to reinstate the original applicant in service as per his appointment order with all consequential benefits within a period of three months from the date of the production of the certified copy of the order.

12. Questioning the order of the Tribunal, the present writ petition has been preferred seeking following reliefs:

“1. issue a writ, order or direction in the nature of certiorari to call for record of the case and quash the

judgment and order dated 24.4.2018 passed by the Hon'ble Central Administrative Tribunal, respondent no.1 in O.A. No. 1233 of 2010 (Annexure No. 1 to the writ petition).

2. issue any other suitable writ petition, order or direction, and/or to pass such other and further order which this Hon'ble Court may deem fit and proper under the circumstances of the case.

3. award the cost to the petition in favour of the petitioner."

13. On 27.07.2018, the following orders were passed:

"Heard Sri D.P. Singh, learned counsel for the petitioner and Sri Islam Ahmad for the respondent no.2.

The petitioners in the writ petition are seeking quashing of the order dated 24.4.2018, passed by the Central Administrative Tribunal, Allahabad in O.A. No.330/01233/2010, whereby, the Tribunal has set aside the order of termination of respondent no.2 and directed his reinstatement in service with all consequential benefits.

The matter requires consideration.

Respondent may file counter affidavit within four weeks.

List thereafter.

Till the next date of listing, operation of order of the Tribunal dated 24.4.2018, shall remain stayed."

14. A response has been filed by the original applicant to which a rejoinder affidavit has been filed.

Arguments of Counsel for K.V.S.

15. Shri D.P. Singh, learned counsel for the writ petitioners/ K.V.S. has sought

to argue that the judgment and order of the Tribunal, impugned in the present proceedings cannot be sustained for a single moment inasmuch as the Tribunal while endorsing the claim of the original applicant has misconstrued the entire controversy and adopted an incorrect approach. Elaborating the said submission, it is being submitted that the reasoning assigned by the Tribunal while coming to the conclusion that it was a case of punitive discharge of services suffers from inherent fallacy, particularly, when neither any preliminary inquiry nor any departmental enquiry was initiated pursuant to issuance of any charge-sheet. However, only on the basis of overall assessment of the work of the original applicant, he was discharged from services. According to the writ petitioners, the original applicant was a probationer who was offered appointment on the post of Work Experience Teachers on a probation period with a clear stipulation during the probation period and thereafter, before he is confirmed, the services of the original applicant are terminable by one month notice or either side without any reasons being assigned.

16. Submissions is that the probationer does not possess any legal right to resist the discretion exercised by the appointing authority in discharging his services, as the original applicant is only a probationer subject to overall assessment by the employer. He further submits that though the writ petitioner pursuant to the offer of the appointment reported on duty on 02.12.2008 but without there being any sanctioned leave, he unauthorizedly remained absent from 13.12.2008 that too without due intimation and merely because, a notice purported to be under sub-clause (3) of Article 81-D of the Education Code was issued proposing to discharge his

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services on account of the voluntary abandonment of services, the same would not give any legal right to the original applicant, particularly, when no further action whatsoever was taken on the said notice and the same stood withdrawn.

17. Argument is that the position might have been different in case for any misconduct (unauthorized absence) any departmental enquiry was proceeded with thus the entire approach of the Tribunal itself, proceeds on misconception of facts and law and the order impugned in question is liable to be set aside.

18. Attention has also been invited towards the order dated 19.08.2009 dispensing with the services of the original applicant so as to contend that the order does not indicate in any manner whatsoever that the same is punitive as the position is otherwise as it is a simpliciter order of discharge. Reliance has been placed upon the decision in the cases of ***Municipal Committee, Sirsa v. Munshi Ram, (2005) 2 SCC 382, Punjab and Others v. Sukhwinder Singh, (2005) 5 SCC 569, Chaitanya Prakash and Another v. H. Omkarappa, (2010) 2 SCC 623 and Rajesh Kumar Srivastava v. State of Jharkhand and Others, (2011) 4 SCC 447*** so as to contend that the probationer has no legal right and it is always open for the employer to adjudge the suitability and once a simpliciter discharge order is passed then there is no requirement of adherence of the principle of natural justice. It is, thus, prayed that the order of the Tribunal be set aside and the writ petition be allowed in toto.

Arguments of Learned Counsel for Original Applicant

19. Countering the submission of the learned counsel for the K.V.S., Shri Arvind Srivastava-III who appears for the original applicant submits that the order of the Tribunal needs no interference in the present proceedings. It is submitted that the services of the original applicant has been dispensed with by resorting to punitive measure as the basic reason attributable to terminate the services of the original applicant was the allegation with respect to unauthorized absence.

20. Submission is that once the show cause notice dated 28.05.2009 came to be issued containing an allegation to the effect that the original applicant was unauthorizedly absent from duty then it is a open and shut case that the writ petitioners had resorted to punitive measures.

21. According to the original applicant, there were intervening circumstance beyond the control of the original applicant which created a situation whereby after taking permission, the original applicant proceeded on leave and left the station on 13.12.008 and thereafter when he reported for joining on 08.01.2009 but he was not allowed joining but subsequently, he was accorded joining on 22.06.2009 and he worked till 25.06.2009 and thereafter unilaterally the joining of the original applicant was cancelled. It is the submission of the original applicant that the entire action taken by the writ petitioners is just in order to get rid off the original applicant as though at one stage notice dated 28.05.2009 was sought to be issued but in order to hush up the entire episode, the notice stood withdrawn which itself shows that the entire action is nothing but a camouflage. While driving force from the judgment in ***Anoop Jaiswal v. Government of India and Another 1984 (2) SCC 369***. It

is contended that the order dispensing with the services with the original applicant is punitive and on account of misconduct that too in violation of principles of natural justice. Reliance has also been placed upon the judgment in **Jarnail Singh and Others v. State of Punjab and Others, 1986 (3) SCC 277** so as to further contend that once the services are to be terminated on the basis of the allegations of misconduct then, the same partakes the character of a punitive order. Therefore, it is prayed that the writ petition be dismissed and the judgment and the order of the tribunal be affirmed.

Analysis

22. We have given the thoughtful submission of the rival parties and perused the record.

23. Undisputedly, an offer of appointment came to be issued in favour of the original applicant on 19.11.2008 appointing the original applicant as a Work Experience Teacher in Kendriya Vidyalaya, Dinjan Assam in the pay scale of Rs.5500-175-9000/- whereby the original applicant was to report on duty by 05.12.2008.

24. The relevant terms and conditions of the offer of the appointment is quoted hereinunder:

“4. He/She will be on probation for a period of 02 years which may be extended. Upon successful completion of probation, he/she will be confirmed in his/her turn as per Kendriya Vidyalaya Sangathan rules.

5. During the probation and thereafter, until he/she is confirmed, the services of the appointee are terminable by one month notice on either side without any

reason being assigned, thereof. The appointing authority, however, reserves the right to terminate the services of the appointee before expiry of the stipulated period of notice by making payment of such equivalent to the pay & allowances for the period of notice of the unexpired portion thereof.”

25. It is also not in dispute that the original applicant reported for joining on 02.12.2008 and thereafter proceeded to leave the appointed place on 13.12.2008. Pleadings reveal that on one hand the original applicant claims that he was accorded permission and his leave was sanctioned w.e.f. 13.12.2008 but on the other hand the same is disputed by the K.V.S. as according to them, there is nothing on record to suggest that the leave was sanctioned. As per the original applicant, the Vidyalay went off for winter vacation from 21.12.2008 and was to reopen on 01.01.2009 but due to a major train accident between Allahabad-Kanpur station, the train was cancelled so he reached Dinjan on 07.01.2009 and reported for duty on 08.01.2009 but he was not accorded joining and he made request on 09.01.2009 and 10.01.2009 but the same was in vain so he made correspondences before the Assistant Commissioner, K.V.S. as well as the Principal. The original applicant returned back to Kanpur on 11.01.2009 wherein he claims to have received a letter dated 30.04.2009 of the Assistant Commissioner, K.V.S. requiring him to join the duties as he was unauthorizedly absent, so he again approached the Vidyalay and he was accorded joining on 22.06.2009 and he discharged the duties till 25.06.2009 (four days), whereafter a notice came to be issued on 28.05.2009 of the Assistant Commissioner, Kendriya Vidyalaya

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Sangathan Regional Office, Silchar, Assam show causing the original applicant that as to why he shall not be deemed to have been abandoned the service owing to loss of lein for not joining the duties. On 19.08.2009, an order came to be passed by the Assistant Commissioner, Kendriya Vidyalaya Sangathan Regional Office, Silchar, Assam whereby the original applicant services stood terminated on completion of one month.

26. The bone of contention between the parties is whether the order of terminating the services of the original applicant on the face of allegation of unauthorized absence can be said to be an exercise of termination simpliciter or punitive. To answer the said question, it would be apposite to retrace the law on the said subject.

27. The Hon'ble Supreme Court in **Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre For Basic Sciences, Calcutta and Others, (1999) 3 SCC 60**, in para 21 had observed as under:

"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."

28. In **Pavendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Another, (2002) 1 SCC 520**, in para 29, the following was held:

"Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."

29. In **Chandra Prakash Shahi v. State of U.P. and Others, (2000) 5 SCC 152**, following was observed:

"28. The important principles which are deducible on the concept of 'motive' and 'foundation', concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account

of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

30. In **State of Punjab and Others v. Sukhwinder Singh**, (2005) 5 SCC 569, the

Hon'ble Supreme Court was confronted with the situation wherein a probationer remained continuously absent for 22 days and he was discharged without holding a formal or a departmental enquiry or a preliminary or fact finding inquiry, it was held as under:

"20. In the present case neither any formal departmental inquiry nor any preliminary fact-finding inquiry had been held and a simple order of discharge had been passed. The High Court has built an edifice on the basis of a statement made in the written statement that the respondent was a habitual absentee during his short period of service and has concluded therefrom that it was his absence from duty that weighed in the mind of the Senior Superintendent of Police as absence from duty is a misconduct. The High Court has further gone on to hold that there is direct nexus between the order of discharge of the respondent from service and his absence from duty and, therefore, the order discharging him from service will be viewed as punitive in nature calling for a regular inquiry under Rule 16.24 of the Rules. We are of the opinion that the High Court has gone completely wrong in drawing the inference that the order of discharge dated 16-3-1990 was, in fact, based upon misconduct and was, therefore, punitive in nature, which should have been preceded by a regular departmental inquiry. There cannot be any doubt that the respondent was on probation having been appointed about eight months back. As observed in *Ajit Singh v. State of Punjab* the period of probation gives time and opportunity to the employer to watch the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserves a right to dispense with his service

without anything more during or at the end of the prescribed period, which is styled as period of probation. The mere holding of preliminary inquiry where explanation is called from an employee would not make an otherwise innocuous order of discharge or termination of service punitive in nature. Therefore, the High Court was clearly in error in holding that the respondent's absence from duty was the foundation of the order, which necessitated an inquiry as envisaged under Rule 16.24(ix) of the Rules."

31. In **Municipal Committee, Sirsa v. Munshi Ram**, (2005) 2 SCC 382, the issue involved and which engaged attention was with respect to termination of a probationer and in para 10, it was observed as under:

"It is clear from the above that if the order of termination indicates that it is a termination simpliciter and does not cast any stigma on the employee by the said order of termination the mere fact that there was an inquiry into his conduct earlier would not by itself render the termination invalid. Applying the said principle, we see that the order of termination in the present case is an order of discharge simpliciter. But in the course of the inquiry, the Labour Court noticed that on an earlier day there was some incident where the administrative officer found some lacunae in the working of the respondent but based on that no charge-sheet was served nor inquiry was conducted. However, the appellant came to the conclusion that it is not in its interest to continue the respondent's services, hence, discharged him. In the background, the mere fact that there was a misconduct on the part of the respondent which was not enquired into ipso facto does not lead to the conclusion that the order of termination

is colourable and in fact is a punitive order."

32. The Hon'ble Supreme Court in **State of W.B. and Others v. Tapas Roy**, (2006) 6 SCC 453 was dealing with a discharge order mentioning several instances of unauthorized absence of a probationer and while following the judgments on the said subject, it was observed as under:

"8. The High Court was of the view that Rule 10 of the Rules did not apply to orders which were stigmatic. As has already been held by this Court in Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences that in order to constitute a stigmatic order necessitating a formal inquiry, it would have to be seen whether prior to the passing of the order, there was an inquiry into the allegations involving moral turpitude or misconduct so that the order of discharge was really a finding of guilt. If any of these three factors are absent, the order would not be punitive. We have also held that stigma in the wider sense of the word is implicit in every order of termination during probation. It is only when there is something more than imputing unsuitability for the post in question, that the order may be considered to be stigmatic. In our view, the language, quoted earlier in the discharge order, cannot be said to be stigmatic as it neither alleges any moral turpitude or misconduct on the part of the respondent nor was there an inquiry as such preceding the order of discharge. The order has been passed strictly in terms of Rule 10 of the Rules. We are, accordingly, of the view that the appeal must be allowed. It is, accordingly, allowed and the impugned order is set aside."

33. In **Muir Mills Unit of NTC (U.P.) Ltd. v. Swayam Prakash Srivastava and Another**, (2007) 1 SCC 491, the Hon'ble Apex Court held as under:

“44 Also in *Registrar, High Court of Gujarat v. C.G. Sharma* it was observed that an employee who is on probation can be terminated from services due to unsatisfactory work.

45. This Court's decision in *P.N. Verma v. Sanjay Gandhi PGI of Medical Sciences*¹ can be referred to in this context, where it was held by this Court that the services of a probationer can be terminated at anytime before confirmation, provided that such termination is not stigmatic. This Court in *State of M.P. v. Virendera Kumar Chourasiya* also has held that in the event of a non-stigmatic termination of the services of a probationer, principles of *audi alteram partem* are not applicable.”

34. While dealing with the case of a probationer whose services stood terminated on account of the unsatisfactory service, in the case of **Chaitanya Prakash and Another v. H. Omkarappa**, (2010) 2 SCC 623, the following was observed:

“18. It is no longer *res integra* that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the Supreme Court in *Abhijit Gupta v. S.N.B. National Centre, Basic Sciences*¹, wherein also a similar letter was issued to the employee concerned intimating him that his performance was unsatisfactory and, therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic

facts of the said case are almost similar to the one in hand. There also, letters were issued to the employee concerned to improve his performance in the areas of his duties and that despite such communications the service was found to be unsatisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation, and, therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged misconduct. The Supreme Court negated the said contention and upheld the order of termination.”

35. With regard to termination of a probationer on the premise of non-suitability for the job, the Hon'ble Supreme Court in **Rajesh Kumar Srivastava v. State of Jharkhand and Others**, (2011) 4 SCC 447 observing held as follows:

“The order of termination passed in the present case is a fallout of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such decision cannot be said to be stigmatic or punitive. This is a case of termination of service simpliciter and not a case of stigmatic termination and, therefore, there is no infirmity in the impugned judgment and order passed by the High Court.”

36. The Hon'ble Supreme Court in **Dr. Vijayakumaran C.P.V. v. Central University of Kerala and Others**, (2020) 12 SCC 426 held as under:

“It is well-established position 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". Such reference may inevitably affect the future prospects of the incumbent and if so, the order must be construed as ex facie stigmatic order of termination. A three-Judge Bench of this Court in Indra Pal Gupta v. Model Inter College had occasion to deal with somewhat similar situation. In that case, the order of termination referred to the decision of the Managing Committee and subsequent approval by the competent authority as the basis for termination. The resolution of the Managing Committee in turn referred to a report of the Manager which indicated serious issues and that was made the basis for the decision by the Committee to terminate probation of the employee concerned."

37. Recently in the case of ***State of Punjab and Others v. Jaswant Singh, (2023) 9 SCC 150***, the issue which fell for consideration before the Hon'ble Supreme Court was with regard to unauthorized absence without any intimation by the probationer and the Hon'ble Supreme Court observed as under:

"23. Similarly, in Amar Kumar, wherein the Court found that the appellant therein had instigated to do commotion/agitation/protest and also raised slogans by spreading false rumours in connection with the death of one of the trainees, which was the foundation to pass the order for termination. Thus, in the said case, the Court was of the opinion that the order of termination cannot be simpliciter. In both the cases as referred to above, the allegation of serious misconduct is common, unlike in the instant case, wherein, the foundation of discharge is not

on any serious allegation or act of misconduct. The discharge order was passed on the recommendation of the supervisory authority concerned of the Training Centre due to prolonged absence from training without any intimation. The authority found that the probationer constable has no interest in training, and no sense of responsibility, hence, he cannot prove himself a good, efficient police officer. In view of above discussion, both the referred cases are distinguishable on facts."

38. An irresistible conclusions stand drawn from the proposition of law culled out from the above noted decision is that with respect to termination of services of a probationer if it is by an order simpliciter and on the ground of unsuitability of the employee from the post and/ or unsatisfactory performance, the action would be tenable in law since the stimulus or motive is the unsatisfactory service, however, if findings were arrived in an inquiry, as to the misconduct behind the back of an officer or without a regular departmental inquiry, the simple order of termination is to be treated to be founded on the allegations and would be bad in law. Therefore, there is no strict jacket formula and each case, 'motive' or 'foundation' behind the termination order will have to be ascertained to decide whether the termination order is bad in law.

39. Reverting to the facts of the case, pleadings reveal that there is an allegation against the original applicant that he remained unauthorizedly absent without there being any sanctioned leave from the competent authority of the K.V.S. from 13.12.2008. However, we find that the termination order dated 19.08.2009 does not contain any recital that the same is on

the basis of any misconduct as rather to the contrary, the same is a simpliciter discharge order.

40. Interestingly, the termination/discharge order also does not contain any reference to any correspondence either by way of any advisory or reference to the show cause notice but only refers to the terms and conditions of the offer of the appointment.

41. The termination order dated 19.08.2009, for the ready reference is reproduced hereinunder:

“No.f.29064/2009/KVS(SR)

Dated 19.8.2009

Speed Post

OFFICE ORDER

Shri Sanjay Singh, WET is hereby informed that his services stand terminated on completion of one month hereof in terms of offer of appointment vide Memorandum No.F.29053(Misc)/2008/KVS(SR)/ 18872-74 dated 19.11.2008.

To

Shri Sanjay Singh

C/O. Shri Lal Bahadur Singh,

H.No. 151 ME Single Story,

Illegible

Hemant Vihar, Barra-2

(K.J.Subba)

Kanpur, (U.P) Pin-208027

Assistant Commissioner

Distribution:

1 The Principal, KV, Dinjan- for information.

2. The Deputy Commissioner(Admn), KVS(HQ), New Delhi

3. The AAO, KVS, RO, Silchar.”

42. Bearing in mind, the aforesaid factual situation, mere issuance of the show cause notice dated 29.05.2009 and subsequent withdrawal would not be of any relevance, particularly, when though at one stage, the K.V.S. intended to proceed with some sort of inquiry by way of a show cause notice but once the same stood withdrawn and no action whatsoever was taken then by no stretch of imagination it can be said that the order of discharge was punitive in nature. Thus, it can be safely said that the action taken by the K.V.S. was actuated with motive and not foundation.

43. Nonetheless, once the status of the original applicant was of a probationer and probation did not transform into a regular/confirmed employee then, in law, the original applicant does not have any legal right to resist the action of the K.V.S. in proceedings to issue a simpliciter order of discharge.

44. As regards, the reliance placed upon the decision in the case of **Anoop Jaiswal (supra)** is concerned, the same is not applicable in the facts of the case, particularly, when in the said case though the simple order of discharge of a probationer was passed but the same was on the ground of unsuitability that too based upon a report/ recommendation of the concerned authority indicating of commission of misconduct by the probationer and while applying of Article 311(2) of the Constitution of India, it was treated to be punitive in nature. So far as the judgment in the case of **Jarnail Singh (supra)** is concerned, in the said case, the allegations were of misconduct and adverse entries, which became the basis for the departmental selection committee for considering the employee as unfit for regularization resulting in termination.

Both the judgments relied upon by the Tribunal are distinguishable as here in the present case, there is neither an enquiry with relation to any misconduct nor there is any legal protection is available under the statutory rules. Pertinently, the Kendriya Vidyalaya Sangathan (Appointment, Permissions, Seniority Etc.) Rules, 1971 also does not confer any legal protection to a probationer so as to make him akin to avail the benefits of a regular officer/employee.

45. Viewing the case from all the angles, we are of the firm opinion that the Tribunal has committed a serious error in allowing the original application preferred by the original applicant while making him admissible to the benefits akin to a regular employee despite the fact that the original applicant was only a probationer and no inquiry whatsoever was initiated against him with respect to any misconduct.

46. Accordingly, the writ petition is **allowed**. The judgment and order dated 24.04.2018 of the Tribunal in Original Application No.330/01233 of 2010 is hereby set aside.

47. Original application No.330/01233 of 2010 stands dismissed.

(2024) 9 ILRA 569

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 04.09.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 17005 of 2018

Raj Kumar

Versus

...Petitioner

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

Counsel for the Petitioner:

Sri Anil Kumar Srivastava

Counsel for the Respondents:

C.S.C., Sri Mukesh Kumar Kushwaha, Sri Pranjali Mehrotra

A. Service Law – Promotion - One must have requisite academic qualification of the concerned trade to make him eligible for post on which promotion has to be made and if a candidate possesses requisite qualification as in the present case petitioner possesses the requisite academic qualification being diploma in engineering for promotion on the post of Junior Engineer (Mechanical), such a candidate definitely deserves to be promoted. The experience is only counted qua service rendered by an employee in a feeding cadre. If a clerk, who falls in group 'C' category can be promoted considering his clerical experience as sufficient, then any other employee including a storekeeper, who falls in Group 'C' cadre would be entitled to promotion unless of course, working experience in a particular trade is required, but this is not the case of respondent that experience of a particular trade was required under the rules. (Para 12)

A candidate if is already having requisite qualification to his credit prior to entering into the service and, he is equally entitled to be considered for promotion on the post of Junior Engineer within 5% quota provided under the relevant rules. (Para 11)

B. Based on the principle of Article 14 of the Constitution and on sound principle of service jurisprudence governing the healthy employer and employee relationship, it is a must that employees falling in same or similar cadre are given further same opportunity to advance their career in service.

If a clerk can be promoted as Junior Engineer for having diploma in concerned trade, the

denial of this opportunity to Storekeeper, just for he being not clerk is highly discriminatory.

C. Rules of promotion are to be construed liberally as promotional avenues are meant to avoid stagnation of employees and regular promotion not only boosts up the moral of work force at lower level but otherwise also improves the total environment qua work culture in any establishment. In industries it seen as a tool to ensure that no industrial unrest takes place amongst the workers.

In present case, petitioner was appointed against the substantive vacancy and was also having diploma in concerned trade and also requisite period of service in group 'C' cadre and so definitely he deserved to be considered for promotion on the post of Junior Engineer (Mechanical). Thus, the order passed by the authority rejecting the claim of the petitioner dated 27th April, 2017 cannot be sustained in law. (Para 14, 15)

Writ petition allowed. (E-5)

Precedent followed:

Madhavendra Singh Vs St. of U.P. & ors., 2016 (2) ADJ 259 (DB) (Para 4)

Present petition assails the order dated 27.04.2017, passed by the Managing Director, U.P. State Bridge Corporation Limited, Lucknow.

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

1. Supplementary counter affidavit filed today is taken on record.

2. Heard Sri Anil Kumar Srivastava, learned counsel for the petitioner, Sri Pranjal Mehrotra, learned counsel for the respondent Nos. 2 to 4 and learned Standing Counsel for the State respondent.

3. Petitioner, who is working as Storekeeper Grade-1 with the respondent

establishment, is aggrieved by the order dated 27th April, 2017 passed by the respondent No.- 2, whereby his claim for promotion on the post of Junior Engineer (Mechanical) has been rejected on the ground that in respect of the post falling in the category of Junior Engineer 5% posts meant for the purpose of promotion from amongst employees falling in the category of Draftsmen/ Dresser/ Clerks/ Laboratory Assistant, who required diploma certificate in Engineering and who have completed five years of his regular service, whereas petitioner had already diploma certificate to his credit prior to entering into the service and secondly he would not come in the category of employees mentioned under the rules.

4. The submission advanced by learned counsel for the petitioner is two fold: Firstly, the controversy that a candidate should have acquired the requisite qualification whether during service period or had the requisite qualification prior to entering into the service is no more *res integra* in the light of the Division Bench judgment of this Court in the case of **Madhavendra Singh v. State of U.P. and others, 2016 (2) ADJ 259 (DB)**; and *secondly*, the argument advanced by learned counsel for the petitioner is that post of Storekeeper falls within the category of Group - C employee and since the posts of Draftsmen/ Dresser/ Clerks/ Laboratory Assistant also fall in group 'C' category the post of Storekeeper shall also be taken to be in group 'C' category.

5. Earlier when the Court had heard this matter on 21st August, 2024 upon these very above arguments already

advanced by learned counsel for the petitioner the Court had issued following direction:

“1. The submission advanced by learned counsel for the petitioner is that the controversy regarding petitioner having diploma certificate prior to any Government service is no more res integra in view of the judgment of Division Bench of this Court in the case of Manvendra Singh vs. State of U.P. and others (Misc. Bench No.5874 of 2020). However, the respondents have refused to accord promotion to the petitioner on the post of Junior Engineer only on the ground that the petitioner was not a Group C employee belonging to the clerical cadre. He submits that post of Storekeeper is Group C post and therefore falls in clerical cadre.

2. Another argument advanced by learned counsel for the petitioner is that the basic requirement for promotion is that a candidate should fall in Group C category and should have a diploma certificate in Engineering and so the basic post is however of no relevance. According to him person falling in Group C category should be given promotion if he has diploma certificate.

3. Meeting the argument above, Sri Mehrotra, learned counsel for the respondent has taken the Court to the relevant paragraph nos.9 and 10 of the supplementary counter affidavit in support of his argument that the petitioner was having a lesser pay scale as presentee Storekeeper whereas for the purpose of direct recruitment on the same post the pay scale is Rs.5200-20,000/-. Sri Mehrotra has sought to urge that the petitioner was not falling in the category of the post in the requisite pay scale to have received promotion.

4. In order to appreciate the argument of Sri Mehrotra, learned counsel for the respondent, it is necessary to go through the pay scale of Draftsmen/Dresser/Clerks/Laboratory Assistant in the establishment.

5. Upon a pointed query Sri Mehrotra, learned counsel for the respondent seeks time to have instruction in the matter.

6. Let the affidavit be filed on behalf of the Corporation giving in the details of payscale of Draftsmen/Dresser/Clerks/Laboratory Assistant of the establishment in question. The affidavit shall also disclose as to whether the post of Storekeeper and Assistant Store Keeper fall in Group C category or not, on the next date fixed.

7. List this case immediately after fresh on 04.09.2024.”

6. A supplementary counter affidavit has been filed today in which vide paragraph 5 it has been clearly stated that the pay-scale of Draftsmen is Rs.4000-100-6300, the pay-scale of Clerk is Rs.3285-85-5700, the pay-scale of Storekeeper is Rs.3050-75-3950-8-4590 and the pay-scale of Laboratory Assistant is Rs.- 3050-75-4590. Paragraph 5 of the supplementary counter affidavit is reproduced hereunder:

“5. That the Government Order No. 1409/23-1-2007-12 Setu/07 dated 27.08.2007 provides the full list of posts falling under the regular establishment of the Uttar Pradesh State Bridge Corporation Limited. As per the said list, at serial no. 17 the post Draftsmen (Cartographer) is on the pay scale of Rs. 4000-100- 6300; at serial no. 39 the post of Clerk (Office Assistant Grade - 2) is on the pay scale of Rs. 3285-85-5700; at serial no. 41 the post of Storekeeper is on the pay

scale of Rs. 3050-75-3950-80- 4590; and at serial no. 43 the post of Laboratory Assistant is on the pay scale of Rs. 3050-75-4590.

Copy of the Government Order No. 1409/23-1-2007-12 Setu/ 07 dated 27.08.2007, is being filed herewith and marked as Annexure No.2 to this affidavit."

7. Further vide paragraph 7 of the supplementary counter affidavit post of Storekeeper is taken to be falling in the category of group 'C' employees. Paragraph 7 of the supplementary counter affidavit is reproduced hereunder:

"7. That it is further submitted that the post of Storekeeper falls within Group – C, with the basic pay of Rs. 3050-4590, which is fixed from time to time as per the recommendations of the Pay Commission."

8. In view of this above admitted position, it can be safely concluded that post of Storekeeper falls in group 'C' category and so the posts of Storekeeper like that of Lab Assistant, Draftsmen, can be considered for promotion as Junior Engineer within 5% of quota as provided for under the relevant service rules.

9. One of the arguments advanced by learned counsel for the respondents is that petitioner was appointed on temporary basis in the year 2002 on the post of Storekeeper grade - II. Admittedly petitioner has been promoted in the year 2018 on the post of Storekeeper Grade - I. A person in any establishment is promoted only when he acquires a permanent status on the lower post. The order of appointment which has been relied upon in support of his argument, is of the year 2002 and subsequently petitioner's service are

claimed to have been confirmed on 19th February, 2007, which shows that appointment has been made against a substantive vacancy. The appointment order was on the temporary basis being on probation and not a stop gap arrangement or ad hoc appointment. It is admitted to the learned counsel for the respondent that petitioner was promoted in the year 2018 on a substantive vacancy.

10. In such above view of the matter only point is to be considered as to whether petitioner would be entitled to be promoted in the event he had qualification prior to his entering into service. As I have already observed in the earlier part of this judgement that controversy is no more res integra in view of the Division Bench of this Court in the case of Madhavendra Singh (*supra*) I see no justification for denial of promotion to the petitioner. It is relevant to quote paragraphs 5, 6, 7 & 8 of the said judgment:

"5. In pursuance of an order passed by this Court on 18 November 2015, a counter affidavit has been filed by the Principal Secretary in the PWD in which, it has been stated as follows:

"That the petitioner has not obtained diploma in civil engineering with the prior permission of the department hence in accordance with Rule 5(2) of the Rules, 2014 is not eligible for promotion. Rule 5 (2) of the U.P. Public Works Department Junior Engineer (Civil) (Group-C) Service Rules, 2014 specifically provides that in order to be eligible for promotion under 5% quota, a candidate must have completed 10 years of service on group C post and have completed diploma in civil engineering after the prior approval/permission of the department. Petitioner had obtained diploma in civil

engineering prior to his appointment in group C post and without approval/permission of the department, hence is not in accordance with Rules, 2014 and is not entitled for promotion as per the policy of the government."

Now Rule 5 of the Rules insofar as is material provides as follows:

“भाग – तीन भर्ती

भर्ती का 5 सेवा में अवर अभियन्ता (सिविल) के पदों पर भर्ती निम्नलिखित स्रोत स्रोतों से की जायेगी:-

(एक) पञ्चानने प्रतिशत आयोग के माध्यम से सीधी भर्ती द्वारा।

(दो) पांच प्रतिशत विभाग में मौलिक रूप से नियुक्त समूह "ग" के कर्मचारियों में से, जिन्होंने विभाग से अनुज्ञा प्राप्त करने के पश्चात नियम 8 में विहित अर्हताएं अर्जित की हों और भर्ती के वर्ष के प्रथम दिवस को दस वर्ष की मौलिक सेवा पूर्ण कर ली हो, पदोन्नति द्वारा आयोग के माध्यम से।"

6. Rule 5 provides for 95% of the posts being filled up by direct recruitment. The remaining 5% of the posts are to be filled up by promotion from in service candidates who were substantively appointed as Group-C employees. The condition is that such candidates must fulfil the required educational qualifications as prescribed in Rule 8 after obtaining the permission of the department and should have completed 10 years of substantive service on the first day of the year of recruitment.

7. In our view, the requirement that a candidate should have fulfilled the required educational qualifications as prescribed by Rule 8 after obtaining the permission of the department covers those in service candidates who have acquired the qualifications during their employment with the State Government. This is intended to ensure that a candidate who is duly employed with the State obtains the educational qualifications only after seeking and obtaining the permission of the prescribed authority. Obviously, the object and purpose is not to exclude from

consideration in service candidates who have already obtained educational qualifications prescribed prior to their date of entry in service. In other words, Rule 5 (2) is not intended to act as an exclusion of in service candidates who otherwise fulfil the requirement of holding the prescribed qualifications, where the qualifications had already been acquired prior to entry in service. If the Rule is construed in the manner it has been interpreted by the State Government, it would become manifestly arbitrary since it would operate to exclude in service candidates who fulfil all the required norms including the prescribed qualifications, only on the ground that the qualifications had been obtained prior to the date of entry in service. This is evidently not the object and purpose which is sought to be achieved by the Rule.

8. Hence, as we have interpreted the Rule, it would not exclude the petitioner from being considered for promotion merely on the ground that he had not obtained the educational qualifications prescribed with the permission of the department. There was no occasion for the petitioner to obtain the permission of the department for the simple reason that he had acquired a three year diploma in 1988, much prior to his appointment in the clerical cadre of the PWD in 1999. We, consequently, hold that the petitioner shall not be excluded from the eligibility list for the reasons which had weighed with the authorities. We clarify that it would be open to the authorities to duly verify that the petitioner does fulfil the prescribed qualifications. Subject to this verification and the petitioner meeting the required norms as prescribed in Rule 5 (2), the name of the petitioner shall be included in the eligibility/select list in accordance with law. This exercise shall be completed within a period of one month from the date of receipt of a certified copy of this order.

In the view which we have taken in interpreting Rule 5 (2), it has not been necessary for the Court to strike down the provisions contained in the Rule."

11. Thus upon a bare reading of the aforesaid paragraphs it is clear that a candidate if is already having requisite qualification to his credit prior to entering into the service and, he is equally entitled to be considered for promotion on the post of Junior Engineer within 5% quota provided under the relevant rules.

12. Even otherwise the legal principle to be evolved in the case would be, one must have requisite academic qualification of the concerned trade to make him eligible for post on which promotion has to be made and if a candidate possesses requisite qualification as in the present case petitioner possesses the requisite academic qualification being diploma in engineering for promotion on the post of Junior Engineer (Mechanical), such a candidate definitely deserves to be promoted. The experience is only counted qua service rendered by an employee in a feeding cadre. If a clerk, who falls in group 'C' category can be promoted considering his clerical experience as sufficient, then any other employee including a storekeeper, who falls in Group 'C' cadre would be entitled to promotion unless of course, working experience in a particular trade is required, but this is not the case of respondent that experience of a particular trade was required under the rules.

13. Still further I do not find substance in the argument of Sri Mehrotra that post of Storekeeper being not mentioned under the rules, Storekeeper cannot claim promotion. This has nothing to do with the object sought to be achieved and has no rationale. If a clerk

can be promoted as Junior Engineer for having diploma in concerned trade, the denial of this opportunity to Storekeeper, just for he being not clerk is highly discriminatory. Rules of promotion are to be construed liberally as promotional avenues are meant to avoid stagnation of employees and regular promotion not only boosts up the moral of work force at lower level but otherwise also improves the total environment qua work culture in any establishment. In industries it seen as a tool to ensure that no industrial unrest takes place amongst the workers. So based on the principle of Article 14 of the Constitution and on sound principle of service jurisprudence governing the healthy employer and employee relationship, it is a must that employees falling in same or similar cadre are given further same opportunity to advance their career in service.

14. Applying the above principles to the case in hand I find that petitioner was appointed against the substantive vacancy and was also having diploma in concerned trade and also requisite period of service in group 'C' cadre and so definitely he deserved to be considered for promotion on the post of Junior Engineer (Mechanical).

15. In view of the above, the order passed by the authority rejecting the claim of the petitioner dated 27th April, 2017 (Annexure -1 to the writ petition) cannot be sustained in law.

16. Thus writ petition succeeds and is accordingly, allowed. The order passed by the authority dated 27th April, 2017 is hereby quashed.

17. Respondents are directed to pass appropriate order regarding promotion of the petitioner within 5% quota for promotion on the post of Junior Engineer

(Mechanical) and give notional benefits including seniority in the event any of his juniors was promoted, with effect from the date of promotion of such junior person.

18. Appropriate order shall be passed within a period of one month from the date of production of certified copy of this order.

(2024) 9 ILRA 575

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.09.2024

BEFORE

**THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE VIKAS BUDHWAR, J.**

Writ A No. 19109 of 2023

Union of India & Ors. ...Petitioners
Versus
Namo Narain Prasad ...Respondent

Counsel for the Petitioners:
Sri Krishna Agarawal

Counsel for the Respondent:
Sri Tanuj Shahi

A. Service Law – Enhancing punishment - CCS CCA Rules, 1965 - Rule 23, 29 - The bone of contention is whether it was permissible for the revisable authority to have invoked the provisions contained under Rule 29 (1)(vi) of the Rules, 1965 or not for enhancing the punishment. (Para 29)

The judgment in the case of *Vikrambhai Maganbhai Chaudhary (infra)* holds that **notification dated 29.5.2001 is unsustainable in the eyes of law as there is no period stipulated for exercising the revisable powers u/Rule 29(1)(vi) of the Rules, 1965. (Para 34)**

In the present case, it is evident that the notice dated 30.06.2022 issued by the Revisable Authority, Chief Postmaster General, U.P. Circle Lucknow is in exercise of the powers u/Rule 29(1)(vi) of the Rules, 1965 after a period of approximately five years from the date of the order of the Disciplinary Authority dated 31.10.2017 and approximately after four years from the date of the order of the Appellate Authority dated 12.4.2018 on a revision preferred by the original applicant on 23.5.2018. (Para 35)

A Division Bench of this Court in the case of *M.M. Srivastava (infra)* had the occasion to consider the provision of Clause (v) Sub-Rule (1) of Rule 29 of the Rules, 1965 and went on to hold that **the orders are to be passed within the statutory period that too within the reasonable time.** In so far as the judgment in the case of *K. Raghvan (infra)* is concerned, the same also speaks about exercising of the proceedings within the reasonable period. (Para 37)

Notably the Disciplinary Authority imposed punishment on 31.10.2017 currency whereof was for a period of five years from 1.11.2017 to 31.10.2022 however, prior to one month of lapsing of the currency of the punishment on 30.9.2022, the order enhancing the punishment to compulsory retirement has been passed, while exercising the powers u/Rule 29(1)(vi) of the Rules, 1965 was thoroughly uncalled for and not justified in the eyes of law. (Para 39)

B. Violation of principles of natural justice
- As regards the issue of violation of principles of natural justice on account of the fact that the allegation of forged vouchers was not part and parcel of the charge memorandum. (Para 40)

The vouchers came to be submitted by the original applicant on 21.8.2014 which is before the the date of issuance of the charge sheet, as the same came to be issued on 15.9.2014. Thus, once the said vouchers were in possession of the Disciplinary Authority then it was required of that the said allegations were to be made the part and the parcel of the charge sheet if to be inquired into. Moreover, the original applicant was aware about the said allegation as the same stood noticed in the

inquiry report as well as in the order of the Disciplinary Authority confirmed upto appellate authority. The said findings have not been questioned by the original applicant. (Para 43)

C. This Court in exercise of jurisdiction u/Article 226 of the Constitution of India may not interfere with the quantum of the punishment sought to be imposed upon the delinquent as what is to be seen is the decision making process and not the ultimate decision until and unless the same is disproportionate to the gravity of the charge and shocks the conscience - There is no quarrel to the said proposition since the facts and circumstances of the present case, are on different footing and in the opinion of the Court the Revisional Authority could not have exercised powers u/Rule 29(1)(vi) of the Rules, 1965. (Para 44)

Writ petition dismissed. (E-4)

Precedent followed:

1. U.O.I. Vs Vikrambhai Maganbhai Chaudhari, (2011) 7 SCC 321 (Para 20)
2. M.M. Srivastava Vs U.O.I., 1985 LAB. I.C. 1757 (Para 20)
3. U.O.I. & ors.Vs K. Raghavan, 2012 SCC Kerala 31795 (Para 20)

Present petition assails the order dated 01.08.2023 of the Central Administrative Tribunal Lucknow Bench, Lucknow, upholding the order dated 25.3.2018 of the Appellate Authority confirming the punishment imposed by the Disciplinary Authority on 31.10.2017 reverting the original applicant (respondent here) for the post of Senior Postmaster to Dak Assistant for a period of five years while fixing the pay at the minimum of the scale of Dak Assistant for a period of five years with cumulative effect on future increments for the reversion period, recovery of an amount of Rs. 3,88,060/- and the said period shall not be treated as *dies non* but only be for computation of retiral benefits.

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Impugned in the present proceedings at the instance of Union of India through Director General Post, Department of Posts, New Delhi (In short 'Postal Department') is an order dated 1.8.2023 of the Central Administrative Tribunal Lucknow Bench, Lucknow (In short Tribunal) passed in O.A. No.541 of 2022, (Namo Narain Prasad vs. Union of India & others) whereby the original application preferred by Namo Narain Prasad (In short 'original applicant') came to be disposed of while setting aside the order dated 30.9.2022 of the Revisional Authority and upholding the order dated 25.3.2018 of the Appellate Authority confirming the punishment imposed by the Disciplinary Authority on 31.10.2017 reverting the original applicant for the post of Senior Postmaster to Dak Assistant for a period of five years while fixing the pay at the minimum of the scale of Dak Assistant for a period of five years with cumulative effect on future increments for the reversion period, recovery of an amount of Rs.3,88,060/- and the said period shall not be treated as *dies non* but only be for computation of retiral benefits.

2. A joint statement has been made by the learned counsel for the rival parties that they do not propose to file any further affidavits and the writ petition be decided at the admission stage on the basis of the documents available on record. With the consent of the parties, the writ petition is being decided at the admission stage.

Facts

3. The case of the original applicant before the Tribunal was that while he was discharging the duties on the post of Sub

Post Master, Sikanderpur, Bus Stand from 7.8.2012 to 26.6.2012 alleging irregularities, was placed under suspension vide order dated 26.6.2014. A major penalty charge memorandum was issued on 15.9.2014 containing as many as two articles of charges. An Inquiry Officer came to be appointed to conduct inquiry against the original applicant. The Inquiry Officer tendered its inquiry report dated 31.8.2017 holding the two article of charges stood proved against the original applicant. A show cause notice is also stated to have been issued to which the original applicant submitted his reply and thereafter on 31.10.2017, the Superintendent Post Office, Ballia Division, Ballia proceeded to pass an order imposing as many as four punishments: (a) reversion from the post of Sub Post Master to Dak Assistant from the pay scale of Rs.37,500/- to Rs.25,500/- w.e.f. 1.11.2017 for a period of five years (b) fixation of the pay at the minimum of scale of Dak Assistant for a period of five years with cumulative effect on future increment (c) no increment was made admissible for the period of reversion (d) an amount of Rs.3,88,060/- to be deposited by the original applicant to be adjusted.

4. Being aggrieved against the punishment order dated 31.10.2017 of the Disciplinary Authority, the original applicant preferred an appeal on 12.12.2017 under Rule 23 of the CCS CCA Rules, 1965 (In short Rules, 1965) before the Director Postal Services, Office of P.M.G., Varanasi, writ petitioner no.4. The said appeal came to be rejected on 13.4.2018 confirming the punishment imposed by the Disciplinary Authority.

5. Against the appellate order dated 13.4.2018 confirming the punishment order

dated 31.10.2017 of the Disciplinary Authority, the original applicant claims to have preferred revision before the writ petitioner no.3, Chief Postmaster General, U.P. Circle, Lucknow on 23.5.2018.

6. According to the original applicant, the revision preferred by him remained pending and during the interregnum period the punishment order dated 31.10.2017 came to be implemented. As per the original applicant the Revisional Authority, Chief Postmaster General U.P. Circle Lucknow proceeded to issue a notice dated 30.6.2022 while exercising powers under Rule 29(1)(vi) of the Rules, 1965 intending to revise/ enhance the punishment inflicted vide order dated 31.10.2017 of the Disciplinary Authority.

7. The original applicant on the receipt of the same tendered its objection/reply on 20.7.2022 and thereafter on 30.9.2022 the Chief Postmaster General, U.P. Circle Lucknow exercising its revisional jurisdiction proceeded to pass an order for compulsory retirement.

8. Assailing the order dated 30.9.2022 of the Revisional Authority, order dated 13.4.2018 of the Appellate Authority and order dated 31.10.2017 of the Disciplinary Authority, the original applicant preferred O.A. No.332/00541 of 2022 seeking following reliefs:

“(i) Issue order or direction to respondents to quash the Revision order dated 30.9.2022, appellant order dated 13.4.2018, and punishment order dated 31.10.2017 contained in Annexure No.1,2 and 3 respectively to the Original Application in the interest of justice.

(ii) Issue order or direction to declare that Rule 29(1)(vi) of the

CCS(CCA)1965 cannot be invoked to issue show cause notice and thereafter enhance punishment order after six months of the date of punishment order sought to be enhanced.

(iii) Issue order or direction to respondents to reinstate the applicant on the post of Sub Post Master (SPM) and to take work by withdrawing Respondent letter dated 6.10.2022 and pay salary month to month, treating the punishment order contained in Annexure No 1,2 and 3 to the Original Application as nonest in the eyes of law and consequently grant all consequential benefits of arrears of salary, seniority and other service benefits with 12% interest.

Issue order or direction to respondents to consider and pass order regularising the suspension period from 25.6.2014 to 19.10.2014 and to pay salary for the aforesaid period.

Grant any other relief which this Hon'ble Tribunal deems fit in facts and circumstances of the case. Cost of this Original Application may please be awarded."

9. On being noticed, a reply was filed by the writ petitioners herein to which a rejoinder affidavit was also filed.

10. The original application came up for consideration before the Tribunal on 1.8.2023 wherein the original application preferred by the original applicant came to be disposed of

"In view of above, OA is disposed of in the following terms: (a) Impugned order dated 30.09.2022 passed by the Revising Authority whereby applicant has been compulsorily retired is quashed.

(b) The punishment order dated 31.10.2017 passed by Disciplinary

Authority is confirmed and Respondents/competent authority are directed to execute the same.

(c) Consequently, the applicant is entitled to reinstatement in service. The respondents are directed to issue appropriate office order in this regard immediately but not later than 06 (six) weeks from the date of receipt of a certified copy of this order.

(d) We, however, direct that the applicant will not be entitled to back wages on the principle of "no work no pay" although a period of his absence from the date of passing the order by Revising Authority shall not be treated as dies non, and the same will be counted for retiral benefits.

(e) There shall be no order as to costs."

11. Questioning the said order, Postal department/writ petitioners have filed the present writ petition.

12. This Court on 16.11.2023 entertained the writ petition while issuing notice to the original applicant and passed an interim order providing that the reinstatement of the original applicant shall subject to the final outcome of the writ petition.

Arguments of the counsel for the Writ Petitioners/Postal Department

13. Sri Krishna Agarwal, learned counsel for the Postal department/writ petitioners has sought to argue that the judgement and the order of the Tribunal impugned in the present writ petition cannot be sustained for the single moment inasmuch as the Tribunal has misconstrued the entire controversy and adopted an incorrect approach. Elaborating the said

submission, it has been submitted that the original applicant while posted as Sub Post Master, Sikanderpur, Bus Stand for the period from 7.8.2012 to 26.6.2014 has committed serious irregularities resulting to the fact that on 26.6.2014, he was placed under suspension and thereafter on 15.9.2014 a major penalty charge memorandum containing two articles of charges was served upon him. In the light of the provisions of the Rules, 1965, the inquiry proceedings stood initiated while appointing an Inquiry Officer, who conducted the inquiry in accordance with law after giving full opportunity to the delinquent employee/original applicant, and the charges stood proved against him. A show cause notice was also issued to the original applicant accompanied with the inquiry report to which the original applicant submitted his reply and after considering the same on 31.10.2017 the punishment order was passed against which an appeal was preferred which came to be rejected on 13.4.2018 confirming the order of the Disciplinary Authority. Against the order of the Disciplinary Authority and the Appellate Authority, the original applicant preferred revision under Rule 29 of the Rules, 1965 before the Revisional Authority, the writ petitioner no.3, who in terms of the provisions contained under Rule 29 (1)(vi) of the Rules, 1965 proceeded to issue notice dated 30.6.2022 intending to revise/enhance the punishment imposed by the Disciplinary Authority as confirmed by the Appellate Authority. The original applicant submitted his reply on 20.7.2022 and after considering the same, the order dated 30.9.2022 has been passed enhancing the punishment to compulsory retirement.

14. Submission is that once the charges which were obviously grave and

serious in nature stood proved against the original applicant in the inquiry proceedings and the same stood accepted by the Disciplinary Authority and remained intact throughout till the appellate stage then while exercising of the powers conferred under Rule 29 (1)(vi) of the Rules, 1965, it is always open for the Revisional Authority to enhance the punishment in that regard.

15. It is the submission of the writ petitioners that there has been no procedural infirmity in the entire decision making process as at all stages and levels, the original applicant was given full opportunity of hearing.

16. While assailing the findings returned in the order impugned of the Tribunal, it is contended that a totally perverse and incorrect finding has been recorded to the extent that the charge of submission of forged vouchers was not the part and the parcel of the charge memorandum inasmuch as during the course of the inquiry proceedings, when the original applicant submitted its reply to the charge memorandum then certain vouchers were submitted which on enquiry were found to be forged thus, there was no question of the said allegation to be the part of the articles of the charge/charge memorandum.

17. To put it otherwise the contention is that the allegation of submission of forged vouchers is in furtherance of the articles of charges which have been mentioned in the charge sheet and the same are interwoven and intermingled with it and is an offshoot itself. It is also argued that inquiry officer is under legal obligation to deal with all the contentions raised by the respective parties during the inquiry

proceedings in order to determine as to whether the delinquent is guilty or not and the in the present case based upon the submission of the vouchers by the delinquent when inquiry was held then it revealed that the same was forged thus, by no stretch of imagination it can be said that inquiry was conducted with respect to a charge which was not mentioned in the charge sheet.

18. Additionally, it has been argued that once the finding of submission of forged vouchers remains intact and unquestionable then the natural consequences will follow as the Courts of law would not interfere with the ultimate decision but would invoke writ jurisdiction in case there is any procedural infirmity in decision making process.

19. Lastly, it has been argued that once the Rule 29(1)(vi) of the Rules, 1965 provides for enhancement of punishment and the same has been enhanced after according satisfaction then merely because sufficient time had lapsed from the date of the imposition of the punishment by Disciplinary Authority term whereof was five years would not be a relevant factor as even before the lapsing of the period of punishment imposed by the Disciplinary Authority on 31.10.2022, prior to it on 30.6.2022 a notice came to be issued for enhancement of the punishment and ultimate order came to be passed on 30.9.2022. It is is thus, prayed that the order of the Tribunal be set aside and the writ petition be allowed in toto.

Arguments of the counsel for the original applicant

20. Countering the submission of the learned counsel for the writ petitioners, Sri

Tanuj Shahi, who appears for the original applicant has submitted that the order of the Tribunal needs no interference in the present proceedings. It is submitted that the exercise of power under Rule 29(1)(vi) of the Rules, 1965 was thoroughly impermissible particularly in view of the fact that the order of the Disciplinary Authority dated 31.10.2017 was implemented and the currency of the punishment was from 1.11.2017 to 30.10.2022 however, on 30.6.2022 a notice has been issued under Rule 29(1)(vi) of the Rules, 1965 and thereafter on 30.9.2022 now an order enhancing the punishment to compulsory retirement has been passed. According to him the exercise of the powers under Rule 29(1)(vi) of the Rules, 1965 is to be within the reasonable period and not after a period of approximately five years from the date of the passing of the order of the Disciplinary Authority, 31.10.2017 that too on a revision preferred by the original applicant against the order of the Disciplinary Authority and Appellate Authority with a prayer for setting aside the same. He seeks to rely upon the judgement in the case of **Union of India v. Vikrambhai Maganbhai Chaudhari (2011) 7 SCC 321, M.M. Srivastava v. Union of India 1985 LAB. I.C. 1757 and Union of India & others v. K. Raghavan, 2012 SCC Kerala 31795.**

21. It is also the submission of the learned counsel for the original applicant that might be the issue relatable to forged vouchers came to be noticed in the inquiry report but the same would not suffice and would not be in conformity with the Rules inasmuch under the statutory Rules a specific charge is to be reproduced in the memorandum of charges supported by documentary evidence and witnesses in order to bring home the charges and in case

according to the writ petitioners/Postal department the same was to be inquired into then a supplementary charge sheet containing the said charge ought to have been issued. He further submits that the entire procedure adopted by the postal department/writ petitioners is foreign to the service jurisprudence and thus the writ petition is liable to be dismissed.

22. Before embarking the inquiry upon the tenability of the argument of the rival parties, it would be apposite to reproduce the statutory rules, government orders/circulars and the documents which have material therein in the controversy in question.

**STATUTORY RULES,
NOTIFICATIONS & DOCUMENTS**

CCS (CCA) Rules 1965 :-

29. [Revision]

(1) Notwithstanding anything contained in these rules—

(i) the President; or

(ii) the Comptroller and Auditor-General, in the case of a Government servant serving in the Indian Audit and Accounts Department; or

2[(iii) the Member (Personnel) Postal Services Board in the case of a Government servant serving in or under the Postal Services Board and [Adviser (Human Resources Development), Department of Telecommunications] in the case of a Government servant serving in or under the Telecommunications Board]; or

(iv) the Head of a Department directly under the Central Government, in the case of a Government servant serving in a department or office (not being the Secretariat or the Posts and Telegraphs Board), under the control of such Head of a Department; or

(v) the Appellate Authority, within six months of the date of the order proposed to be [revised]; or

(vi) any other authority specified in this behalf by the President by a general or special order, and within such time as may be prescribed in such general or special order;

at any time, either on his or its own motion or otherwise call for the records of any inquiry and 2 revise] any order made under these rules or under the rules repealed by Rule 34 from which an appeal is allowed, but which no appeal has been preferred or from which no appeal is allowed, consultation with the Commission where such consultation is necessary, and may—may from after

(a) confirm, modify or set aside the order; or

(b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or

(c) remit the case to the authority which made the order to or any other authority directing such authority to make such further enquiry as it may consider proper in the circumstances of the case; or

(d) pass such other orders as it may deem fit:

3[Provided that no order imposing or enhancing any penalty shall be made by any revising authority unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it is proposed to impose any of the penalties specified in Clauses (v) to (ix) of Rule 11 or to enhance the penalty imposed by the order sought to be revised to any of the penalties specified in those clauses, and if an inquiry under Rule 14 has not already been held in the case, no such penalty shall be imposed

except after an inquiry in the manner laid down in Rule 14 subject to the provisions of Rule 19, and except after consultation with the Commission where such consultation is necessary [and the Government servant has been given an opportunity of representing against the advice of the Commission]:

Provided further that no power of 2[revision] shall be exercised by the Comptroller and Auditor-General, 3[Member (Personnel), Postal Services Board, Adviser (Human Resources Department), Department of Telecommunications] or the Head of Department, as the case may be, unless—

(i) the authority which made the order in appeal, or

(ii) the authority to which an appeal would lie, where no appeal has been preferred, is subordinate to him.

(2) No proceeding for 2[revision] shall be commenced until after— (i) the expiry of the period of limitation for an appeal, or (ii) the disposal of the appeal, where any such appeal has been preferred.

(3) An application for 2[revision] shall be dealt with in the same manner as if it were an appeal under these rules.

23. Notification dated 29.5.2001:-

"MINISTRY OF COMMUNICATIONS
(DEPARTMENT OF POSTS)

New Delhi, 29-5-2001
NOTIFICATION

No. S.O... In exercise of the powers conferred by Clause (vi) of sub-rule (1) of Rule 29 of the Central Civil Services (Classification, Control & Appeal) Rules, 1965, the President hereby specifies that in the case of a government servant serving in the Department of Posts, for whom the appellate authority is

subordinate to the authority designated as the Principal Chief Postmaster General or the Chief Postmaster General (other than the Chief Postmaster General of Senior Administrative Grade) of a Circle, the said Principal Chief Postmaster General or the said Chief Postmaster General, as the case may be, shall be the revising authority for the purpose of exercising the powers under the said Rule 29.

(No. C-11011/1/2001-VP)

sd/-
(B.P. Sharma)
Director (VP)"

24. Charge memorandum/Article to charges dated 15.9.2014 :-

अनुच्छेद-1

यह कि उक्त श्री नगोनारायण प्रसाद उपडाकपाल सिकन्दरपुर बस स्टैण्ड ने दिनांक 07.08.2012 से 26.06.2014 तक उक्त पद पर कार्य करते हुए इस कार्यालय के स्वीकृति/आदेश के बिना विभिन्न मदों में कथित रूप से खर्च रूपया 388060/- (रु० तीन लाख अठासी हजार साठ) पार्ट आफ कैश दिखाया है इस प्रकार उनके द्वारा मात्र रूपया 388060/- (रु० तीन लाख अठासी हजार साठ) का दुर्विनियोजन किया गया है।

अतः एतद् द्वारा आरोपित है कि उक्त श्री नमोनारायण प्रसाद ने अपने उक्त कृत्य से P & T FHB Volume-I के नियम 103 एवं 334 का उल्लंघन किया तथा वांछित कर्तव्य निष्ठा एवं सत्यनिष्ठा बनाये रखने में असफल रहकर केन्द्रीय सिविल सेवा (आचरण) नियमावली 1964 के नियम 3(I)(i) एवं (ii) का भी उल्लंघन किया।

अनुच्छेद-II

यह कि उक्त श्री नमोनारायण प्रसाद उपडाकपाल सिकन्दरपुर बस स्टैण्ड ने दिनांक 07.08.2012 से 26.06.2014 तक उक्त पद पर कार्य करते हुए डाकघर से संबंधित तथा कथित विभिन्न मदों में किए गए खर्च का विवरण एवं बाऊचर से संबंधित कोई भी रजिस्टर या अभिलेख संधारित नहीं किये। इससे रूपया 388060/- (रु० तीन लाख अठासी हजार साठ) का विवरण स्पष्ट नहीं हो सका।

अतः एतद् द्वारा आरोपित है कि उक्त श्री नमोनारायण प्रसाद के उक्त कृत्य से P & T FHB Volume-I के नियम

354 एवं 357 का उल्लंघन किया तथा वांछित कर्तव्य निष्ठा एवं सत्यनिष्ठा बनाये रखने में असफल रहकर केन्द्रीय सिविल सेवा(आचरण) नियमावली 1964 के नियम 3(I)(i) एवं (ii) का भी उल्लंघन किया।

25. Order of the disciplinary authority dated 31.10.2017-

अधोहस्ताक्षरी द्वारा समस्त दस्तावेजों बयानों प्रदर्शों का गहराई से अध्ययन किया और पाया कि आरोपित कर्मचारी द्वारा शिकायत से पूर्व दिनांक 22.07.2013 तक के डीजल/पेट्रोल वाउचर मंडलीय कार्यालय प्रस्तुत किए। पेट्रोल से संबंधित नित्य प्रति किए जाने वाले खर्चों को नियम अनुसार हिसाब में नहीं लिया और ना ही उसे स्वीकृत करने के लिए नियम अनुसार सक्षम अधिकारी को प्रेषित किया। खर्चों से एवं जनरेटर प्रयोग से संबंधित रजिस्टर भी नित्य प्रति उप डाकघर में आरोपित कर्मचारी द्वारा संधारित नहीं किया गया जिसे आरोपित कर्मचारी द्वारा मनमानी तरीके से निलंबन अवधि में जांच कार्यवाही प्रस्तावित होने के उपरान्त तैयार किया जो कि पूरी तरीके से काल्पनिक व आधारहीन है। आरोपित कर्मचारी द्वारा स्वयं स्वीकार किया गया है कि वह कार्य के अधिकता के कारण खर्च से संबंधित अभिलेख नित्य प्रति नहीं बनाता था तथा खर्चा के बाउचर्स भी समय से स्वीकृति हेतु सक्षम अधिकारी को नहीं भेज सका। खर्चों से संबंधित 15 बण्डल वाउचर द्वारा कुल खर्च रु० 396952(तीन लाख छियान्नवे हजार नौ सो बावन मात्र) के आरोपित कर्मचारी द्वारा अपने पत्र दिनांक 22.08.2014 के द्वारा निलंबन अवधि में मण्डलीय कार्यालय बलिया को भेजना दर्शाया गया है जो यह सिद्ध करता है कि खर्चों से संबंधित बाउचर्स समय से स्वीकृत हेतु मंडलीय कार्यालय नहीं भेजे जाते थे और ना ही दस्तावेज विधिवत समय से बनाया जा रहा था. अतः आरोपित कर्मचारी पर लगाया गया आरोप कि वह खर्चों से संबंधित अभिलेख नियमानुसार नहीं बना रहे हैं सिद्ध होते हैं।

जांच कार्रवाई के दौरान साक्षी श्री उज्जवल अग्रवाल सहायक श्री जहीर अहमद अंसारी कार्यालय सहायक श्री अभय शंकर वर्मा उप डाकपाल सिकन्दरपुर बस स्टैण्ड के बयानों से इस आरोप की पुष्टि होती है कि वाउचर समय से स्वीकृत हेतु सक्षम अधिकारी को नहीं भेजे गए सबसे अहम व गंभीर विषय कि जो बाउचर्स खर्चों के रूप में दर्शाए गए वह सभी आरोपित कर्मचारी द्वारा तैयार किए गए हैं इस बात की पुष्टि जांच अधिकारी द्वारा जांच में की गई इस संबंध में प्रबंधक किसान सेवा केन्द्र शंकरपुर बलिया श्री संदीप कुमार उपाध्याय का बयान व जांच में उसकी पुष्टि यह स्पष्ट करती है कि आरोपित कर्मचारी द्वारा खर्चों से संबंधित सभी बाउचर्स फर्जी तरीके से तैयार किए गए। आरोपित कर्मचारी का यह कहना है कि श्री संदीप कुमार उपाध्याय किसान सेवा केन्द्र शंकरपुर बलिया के प्रबंधक नहीं है गलत है अगर वह कहते हैं कि श्री संदीप

कुमार उपाध्याय किसान सेवा केन्द्र के प्रबंधक नहीं है तो उन्हें जांच करवाई में असली प्रबंधक किसान सेवा केन्द्र शंकरपुर बलिया के बयान व जांच करवाई में पुष्टि से स्वतः सिद्ध होता है कि श्री नमो नारायण प्रसाद द्वारा प्रस्तुत समस्त पेट्रोल खर्च बाउचर्स फर्जी हैं। पेट्रोल खर्च बाउचर्स के फर्जी होने की पुष्टि श्री चन्द्रिका राम मेल ओवरसीयर व श्री बलबीर सिंह तत्कालीन निरीक्षक डाकघर केन्द्रीय बलिया द्वारा भी की गयी। इसके अतिरिक्त ए०सी०जी० 17 पर खर्च की पुष्टि/ गवाही स्वरूप भी जीउत राम जी०डी०एस० पैकर सिकन्दरपुर बलिया के जो हस्ताक्षर किए गए वह भी फर्जी पाए गए जिन्हें भी श्री नमो नारायण प्रसाद द्वारा पेट्रोल खरीदने के लिए प्रतिदिन लगभग 80 कि०मी० की दूरी तय की जबकि सिकन्दरपुर में डाकघर से कुछ ही दूरी पर पेट्रोल पंप है वहां से पेट्रोल नहीं खरीदा गया बल्कि 80 किलोमीटर दूर से खरीदा गया। जो सिद्ध करता है कि पेट्रोल रसीद फर्जी तैयार की गई है। श्री नमो नारायण प्रसाद अपने वाउचरों की पुष्टि के लिए श्री संजय प्रसाद बचाव गवाह प्रस्तुत किया वह पूरी तरह से प्रायोजित है क्योंकि आरोपित कर्मचारी उसकी वैधानिकता की पुष्टि नहीं कर सके। श्री नमो नारायण प्रसाद आरोपित कर्मचारी द्वारा अन्य खर्चा के रूप में डाकघर के बाहर रबिश डलवाने आदि पर किया गया खर्च भी जांच में फर्जी पाया गया क्योंकि डाकघर में कार्यरत सहकर्मी द्वारा जांच में बताया गया कि रबिश आदि आरोपित कर्मचारी द्वारा नहीं डलवाई गई।

जांच करवाई के दौरान आरोपित कर्मचारी कोई ऐसा साक्ष्य/दस्तावेज प्रस्तुत नहीं कर सके जो उन पर लगे आरोपों से उन्हें मुक्ति प्रदान करता हो। आरोपित कर्मचारी द्वारा स्वयं भी फर्जी वाउचर प्रस्तुत करने की नैतिक जिम्मेदारी मानकर ही कुल गबनित राशि रु० 388060/- डाकघर के अवर्गीकृत मद में जमा की।

जांच कार्रवाई के उपरान्त प्रस्तुत जांच सार व उसके साथ प्रस्तुत सम्यक दस्तावेजों राज्य साक्षियों द्वारा दिए गए बयान व अन्य परिस्थित जन साक्ष्य के आधार पर इस निष्कर्ष पर पहुंचा हूं कि आरोपित कर्मचारी पर लगे आरोप पूर्णतया सही हैं तथा वह कठोर दंड का पात्र है।

अतः मैं डॉ० अरूण यादव अधीक्षक डाकघर बलिया श्री नमो नारायण प्रसाद आरोपित कर्मचारी के वर्तमान मूल वेतन रु० 37500/- डाक सहायक संवर्ग के न्यूनतम वेतन रु० 25500 पर दिनांक 01.11.2017 से कम करने का आदेश पारित करता हूं साथ ही यह दण्ड अगले पांच वर्ष (दिनांक 31.10.2022) तक संचाई प्रभाव के साथ लागू रहेगा। श्री नमो नारायण प्रसाद दंड अवधि के दौरान कोई भी इन्कीमेंट अर्जित नहीं करेंगे तथा भविष्य में मिलने वाले इन्कीमेंट को भी संचाई प्रभाव से प्रभावित करेगा। इसके अलावा नमोनारायण प्रसाद आरोपित कर्मचारी द्वारा यू०सी०आर० में जमा धनराशि रु० 388060/- को गबनित धनराशि के सापेक्ष समायोजित किया जाता है।

Notice dated 30.6.2022:-

DEPARTMENT OF POSTS, INDIA
OFFICE OF THE CHIEF POSTMASTER
GENERAL, U.P. CIRCLE, LUCKNOW-01

Memo No. Vig/P-38/2018/5 Dated at
Lucknow the 30-06-2022

NOTICE

Whereas Shri Namo, Narayan Prasad, PA, Ballia was proceeded against under Rule-14 CCS (CCA) Rules 1965 by SPOs Ballia vide memo no. F/Genral/DP/Namo Narayan Prasad/14-15 dated 15.09.2014 and penalty of "Reduction of his pay from Rs. 37,500/- to Rs. 25,500/- w.e.f. 01.11.2017 for a period of five years. It is further ordered that during the period of reduction of the pay, the charged official will not earn increments of pay and this will have the effect of future increments of his pay with cumulative effect was awarded vide SPOs Ballia memo no. F/Genral/DP/Namo Narayan Prasad/14-15 dated 31.10.2017. Against the aforesaid punishment order, he preferred an appeal dated 12.12.2017 to DPS Varanasi, which was decided as "Rejected" by DPS Varanasi vide memo RPV/Vig/Appeal/5-2/2018 dated 13.04.2018. Now, instant petition dated 23.05.2018 has been preferred by the petitioner against the said punishment order. .

2- And whereas the undersigned in exercise of powers conferred vide Rule-29 (1) (vi) CCS (CCA) Rules 1965, intends to revise the said punishment order F/Genral/DP/Namo Narayan Prasad/14-15 dated 31.10.2017 due to following reasons:-

a) Allegations leveled against the petitioner were related to misappropriation government money which was established during the course of oral inquiry. Petitioner has misappropriated Rs. 3,88,050/- as cash was found short in his office was responsible.

b) Petitioner on the one hand has misappropriated Rs. 3,88,060/- and on hand created bogus vouchers for justifying the liability in the office, whereas testimony of SW-8, Shri Sandeep Kumar Upadhyay clearly established that vouchers forwarded by the petitioner were bogus and fake.

c) Petitioner has forwarded fake and bogus vouchers of a petrol pump situated 80 Km. away from Sikandarpur, which is not justified on any ground.

All the above irregularities are very serious and grave in nature and committed by the petitioner.

3- Now, therefore, the undersigned while deciding the petition of the petitioner, perused the relevant records of the case and found that the penalty of "Reduction of his pay from Rs. 37,500/- to Rs. 25,500/- w.e.f. 01.11.2017 for a period of five years. It is further ordered that during the period of reduction of the pay, the charged official will not earn increments of pay and this will have the effect of future increments of his pay with cumulative effect" imposed vide SPOs Ballia memo no. F/Genral/DP/Namo Narayan Prasad/14-15 dated 31.10.2017 is not commensurate with the gravity of offence committed by him. As the petitioner misappropriated Rs. 3,88,060/- and to justify his claim presented fake and bogus vouchers. These are very serious and grave irregularities and such an official is undesirable in government service.

4- Therefore, the undersigned proposes to enhance the penalty upheld by appellate authority vide memo no. RPV/Vig/Appeal/5-2/2018 dated 13.04.2018 and imposed by disciplinary authority vide memo no. F/Genral/DP/Namo Narayan Prasad/14-15 dated 31.10.2017 "Reduction of his pay

from Rs. 37,500/- to Rs. 25,500/- w.e.f. 01.11.2017 for a period of five years. It is further ordered that during the period of reduction of the pay, the charged official will not earn increments of pay and this will have the effect of future increments of his pay with cumulative effect" to "Dismissal from Service." , if any,

5- Narayan Shri Namo Narayan Prasad, PA, Ballia is called upon to submit his representation against the proposed revised penalty within 10 (Ten) days of receipt of this memo, failing which it shall be presumed that he has nothing to say and revised penalty will be imposed.

(Kaushlendra Kumar Sinha)

Chief Postmaster General,

U.P. Circle, Lucknow-226001

Shri Namo Narayan Prasad,

Postal Assistant,

Ballia.

(Through PMG Varanasi Region, Varanasi)

ANALYSIS

26. We have given thoughtful consideration to the arguments advanced by the rival parties and perused the record.

27. The facts are not in issue. It is not in dispute that the original applicant while posted as Sub Postmaster, Sikandarpur, Bus Stand from 7.8.2012 to 26.6.2014 owing to certain irregularities was placed under suspension on 26.6.2014. On 15.9.2014 a major penalty charge sheet containing two articles of charges was served upon the original applicant with the allegation, (a) the applicant without there being any approval/order of the competent authority made expenditures of an amount of Rs.3,88,060/- and misappropriated the same; (b) despite being asked to submit the vouchers, registers and the documents

showing the the expenditure of an amount of Rs.3,88,060/- the same was not furnished.

28. One Sri P.S.P. Srivastava was appointed as an Inquiry Officer, who conducted the inquiry proceedings and tendered inquiry report on 31.8.2017 before the Disciplinary Authority, a show cause notice was issued to the original applicant and thereafter on 31.10.2017, the punishment order came to be passed whereby (a) reversion from the post of Senior Postmaster to Dak Assistant for a period of five years in the pay scale of Rs.37,500/- (b) fixation of the pay at the minimum of the scale of Dak Assistant of five years with cumulative effect on future increment (c) non admissibility of the increments during the reversion period and (d) deposit of amount of Rs.3,88,060/- to be adjusted. Against the same an appeal came to be filed by the original applicant which came to be rejected on 13.4.2018 confirming the order of the Disciplinary Authority and thereafter the original applicant preferred a revision on 23.5.2018 which came to be rejected on 30.9.2022.

29. The bone of contention between the rival parties is whether it was permissible for the revisable authority to have invoked the provisions contained under Rule 29 (1)(vi) of the Rules, 1965 or not for enhancing the punishment.

30. To begin with, we are required to have a quick survey of the Rule 29 of the Rules, 1965 which deals with revision. Rule 29(1) of the Rules, 1965 postulates six categories of Revisional Authority. So far as the present controversy is concerned the same is relatable to the exercise of the powers by the Revisional Authority under Rule 29(1)(vi) of the Rules, 1965. Perusal

of the said Rule would go to show that there is no period provided in Sub-Clauses (i) to (iv) & (vi), Sub-Clause (v) refers to a period of six months from the date of the order proposed to be revised by the appellate authority.

31. On 29.5.2021 the Ministry of Communication (Department of Post) in exercise of the powers conferred by Clause (vi) of Sub Rule (1) of Rule 29 of the Rules, 1965 issued a notification specifying the authorities who were to exercise revisional powers against the order of the Appellate Authority. In the case in hand, the matter relates to Postal department of Ministry of Communication. Interestingly, in the notification dated 29.5.2001 there is no time line provided for exercising the powers of the Revisional Authority under Clause (vi) of Sub Rule (1) of Rule 29 of the Rules, 1965. The said notification came up for consideration before the Hon. Supreme Court in the case of **Vikrambhai Maganbhai Chaudhary (Supra)** wherein the following was observed”-

10. As rightly observed by the Tribunal, the above sub-rule (1) of Rule 29 indicates 6 categories of revisional authorities. If we go further it shows that while no period is mentioned in sub-clauses (i) to (iv), sub-clause (v) refers to a period of six months from the date of the order proposed to be revised. Since the order was passed by exercising power under sub-clause (vi), we have to see whether in the notification specifying an authority a time-limit has been mentioned or even in the absence of the same, the outer limit can be availed by exercising power under sub-clause (v). According to the learned ASG, there is no need to specify the period in the notification authorising the authority concerned to call for the record for any

enquiry and revise any order made under the Rules. We are unable to accept the said claim for the following reasons.

11. It is to be noted that in cases where the appellate authority seeks to review the order of the disciplinary authority, the period fixed for the purpose is six months from the date of the order proposed to be revised. This is clear from sub-clause (v) of sub-rule (1) of Rule 29. On the other hand, Clause (vi) confers similar powers on such other authorities which may be specified in that behalf by the President by a general or special order and the said authority has to commence the proceedings within the time prescribed therein. Even though Rule 29(1)(vi) provides that such order shall also specify the time within which the power should be exercised, the fact remains that no time-limit has been prescribed in the notification.

12. We have already pointed out that no period has been mentioned in the notification. The argument that even in the absence of a specific period in the notification in view of Clause (v), the other authority can also exercise such power, cannot be accepted. To put it clear, sub-clause (v) applies to the appellate authority and Clause (vi) to any other authority specified by the President by a general or special order for exercising power by the said authority under sub-clause (vi). There must be a specified period and the power can be exercised only within the period so prescribed.

13. Inasmuch as the Notification dated 29-5-2001 has not specified any time-limit within which the power under Rule 29(1)(vi) is exercisable by the authority specified, we are of the view that such notification is not in terms with Rule 29 and the Tribunal is fully justified in quashing the same. The High Court has

also rightly confirmed the said conclusion by dismissing the special application of the appellants and quashing the notification on the ground that it did not specify the time-limit. Consequently, the appeal fails and the same is dismissed. No order as to costs.

32. The Swamy's Compilation of Central Civil Services, Classification Control and (Incorporating Orders received up to February 2015) of Muthuswamy and Brinda baring the notification dated 29.5.2001 on the said subject does not contain any other notification. The pleadings either before the Tribunal or before us also does not indicate that there is any other notification on the said subject.

33. Though against the order of the Disciplinary Authority dated 31.10.2017 and the Appellate Authority dated 13.4.2018 a revision came to be preferred by the original applicant on 23.5.2018 before the Revisable Authority but the same remained pending however, on 30.6.2022 a notice came to be issued while exercising powers under Rule 29(1)(vi) of the Rules, 1965 for revising/enhancing the punishment. The source of power invoking the proceedings for enhancement of the punishment by the revisable authority is under Rule 29(1)(vi) of the Rules, 1965.

34. The judgment in the case of **Vikrambhai Maganbhai Chaudhary (Supra)** holds that notification dated 29.5.2001 is unsustainable in the eyes of law as there is no period stipulated for exercising the revisable powers under Rule 29(1)(vi) of the Rules, 1965.

35. Applying the said judgement in the facts of the case, it is evident that the notice dated 30.6.2022 issued by the Revisable Authority, Chief Postmaster

General, U.P. Circle Lucknow is in exercise of the powers under Rule 29(1)(vi) of the Rules, 1965 after a period of approximately five years from the date of the order of the Disciplinary Authority dated 31.10.2017 and approximately after four years from the date of the order of the Appellate Authority dated 12.4.2018 on a revision preferred by the original applicant on 23.5.2018.

36. The revision preferred by the original applicant was for the limited purpose for setting aside the order passed against him by the Disciplinary Authority affirmed by the Appellate Authority, however, in the revisional proceedings, the Revisional Authority had intended to enhance the punishment. The Sub-Rule (1) of Rule 29 of the Rules, 1965 though provides that the Authorities enumerated in Clause (i) to (vi) may at any time either on his or in its own motion or otherwise call for the records of the inquiry and pass an order to confirm, modify or set aside the punishment order however, as mandated by the Hon. Supreme Court in the case of **Vikrambhai Maganbhai Chaudhary (Supra)** the said exercise is to be undertaken within a reasonable period. Moreover, the said aspect assumes significance particularly in view of the fact that party seeking revision would not obviously intend that the punishment be enhanced thus, by all eventualities the exercise of the power by the Revisional Authority is to be within the reasonable period.

37. Further a Division Bench of this Court in the case of **M.M. Srivastava (Supra)** had the occasion to consider the provision of Clause (v) Sub-Rule (1) of Rule 29 of the Rules, 1965 and went on to hold that the orders are to be passed within

the statutory period that too within the reasonable time. In so far as the judgment in the case of **K. Raghvan (Supra)** is concerned, the same also speaks about exercising of the proceedings within the reasonable period.

38. Consequently, we are unable to subscribe to the view taken by the Tribunal in para-14 of the judgement of the Tribunal under challenge that there is no time line prescribed in Rule 29(1)(vi) of the Rules 1965 for invoking revisable jurisdiction as the said issue is now more res integra in view of the judgement of the Hon'ble Apex Court in the case of **Vikrambhai Maganbhai Chaudhary (Supra)**.

39. Notably the Disciplinary Authority imposed punishment on 31.10.2017 currency whereof was for a period of five years from 1.11.2017 to 31.10.2022 however, we find that prior to one month of lapsing of the currency of the punishment on 30.9.2022, the order enhancing the punishment to compulsory retirement has been passed which in the background of the intervening facts as discussed above, while exercising the powers under Rule 29(1)(vi) of the Rules, 1965 was thoroughly uncalled for and not justified in the eyes of law.

40. As regards the issue of violation of principles of natural justice on account of the fact that the allegation of forged vouchers was not part and parcel of the charge memorandum is concerned, though we are not required to go in to the said issue in the wake of the fact that the proceedings under Rule 29(1)(vi) of the Rules, 1965 exercised by the Revisional Authority was unjustified but since argument has been raised by the parties so we proceed to examine the same.

41. As noticed, there were two charges levelled against the original applicant in the charge memorandum dated 15.9.2014, (a) misappropriation of the government money while showing it towards the expenditure to the tune of Rs.3,88,060/- without any approval orders of the competent authority under various heads; and (b) non submission of vouchers record and documents to substantiate the expenditures. The inquiry report as well as the order of the Disciplinary Authority recites that the delinquent/original applicant did not submit the documents at the appropriate/relevant time however, it was submitted subsequently after his suspension and during the inquiry proceedings and when it came to be enquired it was found that the vouchers were forged.

42. A counter reply has been filed by the writ petitioners before the Tribunal by the Superintendent Post Office, Ballia in which in paragraph no. 3, it was asserted as under:-

"3. That it may be stated here that the applicant Namu Narayan Prasad (compulsorily retired) had worked as Sub Postmaster (Postal Assistant cadre, not norm based LSG) of Sikanderpur Bas Stand Office from 7.8.2012 to 26.4.2014. He made expenditures of Rs. 3,88,060/- in various heads without the order/sanction of the competent authority (Supdt. of Post Offices, Ballia Division) during the above mentioned period and he was showing these amounts in the 'Part of Cash' head. It is submitted that Deputy Post Master, Ballia, HQ vide his letter dated 11.3.2014, a copy of which is being annexed herewith and marked as Annexure no. CR-1, informed SPOs, Ballia about this irregularity. The whole matter was got

inquired into by the Inspector of Posts, Central Sub Division (SDI, Central) Ballia. The report, a copy of which is being annexed herewith and marked as Annexure no. CR-2 alongwith a statement of applicant, a copy of which is being annexed herewith and marked as Annexure no. CR-3 was submitted by the SDI, Central letter dated 25.6.2014. As per the report, it was clear that the Government money was being misappropriated by the applicant. After this, applicant was suspended vide SPOs Ballia Memo dated 25.6.2014, a copy of which is being annexed herewith and marked as Annexure no. CR-4. After a detailed inquiry into the matter, it was found that the applicant had misappropriated the Government money amounting to Rs. 288060/- in different heads. The 15 bundle vouchers sent by the applicant through Ballia HO Speed Post No. EQ2723156621N dated 21.8.2014 during the suspension period against this amount were found bogus and fake during the inquiry, a copy of which is being annexed herewith and marked as Annexure no. CR-5. After that, in this regard the applicant submitted an application to SDI Central on 13.9.2014 and deposited Rs. 3,00,000/- on 13.9.2014 under UCR (Unclassified receipts) no. D-2 in Ballia HO and Rs. 88060/- on 16.9.2014 under UCR (Unclassified receipts) no. B-1174 in Ballia HO, a copy of which are being annexed herewith and marked as Annexure nos. CR-6 & 7 respectively. An FIR no. 0574 of 2016 was lodged in this matter against the applicant in Sikanderpur P.S. on 27.10.2016, a copy of which is being annexed herewith and marked as Annexure no. CR-8.

43. Perusal of the counter affidavit filed by the writ petitioners before the Tribunal would reveal that 15 bundle vouchers came

to be submitted by the original applicant through Ballia, H.O. Post Office No.EQ2723156621N on 21.8.2014 during the suspension period against the said amount which was found bogus and fake during the inquiry. The said assertion in the counter reply of the writ petitioners explicitly reveals that the vouchers came to be submitted by the original applicant on 21.8.2014 which is before the the date of issuance of the charge sheet, as the same came to be issued on 15.9.2014. Thus, once the said vouchers were in possession of the Disciplinary Authority then it was required of that the said allegations were to be made the part and the parcel of the charge sheet if to be inquired into. Moreover, the original applicant was aware about the said allegation as the same stood noticed in the inquiry report as well as in the order of the Disciplinary Authority confirmed upto appellate authority. The said findings have not been questioned by the original applicant.

44. As regards the submission of the learned counsel for the writ petitioners that this Court in exercise of jurisdiction under Article 226 of the Constitution of India may not interfere with the quantum of the punishment sought to be imposed upon the delinquent as what is to be seen is the decision making process and not the ultimate decision until and unless the same is disproportionate to the gravity of the charge and shocks the conscience, is concerned, there is no quarrel to the said proposition since the facts and circumstances of the present case, are on different footing and in the opinion of the Court the Revisional Authority could not have exercised powers under Rule 29(1)(vi) of the Rules, 1965.

45. Accordingly, we are of the firm opinion that the writ petitioners have miserably failed to show any illegality

committed by the Tribunal in passing the order impugned so as to warrant interference in the present proceedings.

46. Resultantly, the writ petition is **dismissed**.

47. Interim order if any stands vacated.

(2024) 9 ILRA 590
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2024

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 1983 of 2023

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

Counsel for the Petitioner:
 Sri Neeraj Srivastava

Counsel for the Respondents:
 Sri Alkesh Singh, C.S.C.

A. Limitation Law – Condonation of delay – U.P. Consolidation of Holdings Act, 1950 - Section 9A(2) & 48(1) - Whenever technicality is pitted against the substantial justice, it is substantial justice which prevails. Law of limitation is based upon public policy intending to discourage unnecessary litigation between the parties, therefore, while exercising discretionary power to condone the delay, the Court should act sparingly.

In normal course, delay cannot be condoned unless sufficient reason is assigned.

Delay cannot be condoned in a cavalier manner unless the sufficient cause is shown by the parties. Normally, despite the

prescribed period of limitation is expired, the phrase "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence, inaction or for want of bonafide is imputable to the adversary party. Meaning thereby, if sufficient cause for delay is shown by the parties concerned, discretion is entrusted upon the court/authority concerned to condone the delay so that substantial justice be done. (Para 6)

In present case, it is evident that Deputy Director of Consolidation while quashing the order passed by the Settlement Officer of Consolidation has not properly discussed the genuineness of the Vakalatnama and service of notice upon the Kanhaiya Lal as pointed out by the petitioner in the writ petition. Both the parties are at variance on the point of knowledge qua order dated 30.7.1970 passed by the Consolidation Officer. The petitioner has denied the knowledge of proceeding u/s 9A(2) of UPCH Act before the Consolidation Officer, however, conversely, the contesting-respondents have laid emphasis upon the knowledge to Kanhaiya Lal who was served with notice, and appeared through "Vakeel", namely, Sri Ramesh Chandra Kulshreshtha.

There is no discussion, appraising the copy of notice which is said to have been served upon Kanhaiya Lal and memo of appearance filed by "Vakeel" Sri Ramesh Chandra Kulshreshtha. In case, it is proved that despite the knowledge Kanhaiya Lal had chosen not to assail the order dated 30.07.1970, then right of the appellant (descendants from Kanhaiya Lal) to assail the order passed by the Consolidation Officer will be affected. However, on the flip side, in case, knowledge to Kanhaiya Lal is not proved, then certainly, to serve the substantial justice, the petitioner should be accorded an opportunity to contest the appeal on merits. (Para 7)

B. The date of knowledge and source of knowledge of any particular event to explain the "sufficient cause" is paramount consideration at the time of considering the point of delay in filing any

application or appeal etc. Therefore, liberal approach in condoning the delay cannot be made absolute and same is subject to the bonafide and conscious action of the person, who is beseeching for the condonation of the delay. (Para 7)

The Deputy Director of Consolidation has miserably failed to accord conscious discussion in the light of available documentary evidence on the record, (w.r.t. which both the parties are at variance) to prove the presence of Kanhaiya Lal and his knowledge qua order dated 30.7.1970. Kanhaiya Lal has allegedly restrained himself from assailing the said order during his life time. Thus, instant writ petition succeeds and is partly allowed. The order dated 27.03.2023 passed by the Deputy Director of Consolidation is quashed. The revision filed on behalf of Subhash Kumar and others is restored to its original number and parties are relegated before the Deputy Director of Consolidation to get the revision decided de novo in the light of the observation as made in the order of the date. (Para 8)

Words and Phrases – “Sufficient cause” -

The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, where or not "sufficient cause" has been furnished, can be decided on the facts of the particular case and no strait-jacket formula is possible. (Para 6)

Writ petition partly allowed. (E-4)

Precedent followed:

1. Ram Nath Sao Vs Govardhan Sao, AIR 2002 SC 1201 (Para 6)

2. Majji Sannemma @ Sanyasirao Vs Reddy Srivedi & ors., AIR 2022 SC 332 (Para 6)

Present petition assails order dated 27.3.2023, passed by the Deputy Director of Consolidation, reversing the order dated 28.9.2002 passed by the Settlement Officer of Consolidation, whereby delay caused in filing the appeal has been condoned on the cost of Rs. 100/- and

date is fixed for hearing the appeal on merits.

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the parties and perused the record on board.

2. Aggrieved with the order dated 27.3.2023 passed by the Deputy Director of Consolidation in Revision No. 2015530149000043 under section 48(1) of UP Consolidation of Holdings Act, 1950 (in brevity 'UPCH Act'), reversing the order dated 28.9.2002 passed by the Settlement Officer of Consolidation in appeal No. 438 under section 11(1) of UPCH Act whereby delay caused in filing the appeal has been condoned on the cost of Rs. 100/- and date is fixed for hearing the appeal on merits, petitioner has filed the present writ petition.

3. Having considered the rival submissions advanced by the learned counsel for the parties and perusal of record, it is manifested that instant writ petition has arisen from delay condonation in filing the appeal before the Settlement Officer of Consolidation. In basic consolidation record, names of Kanhaiya Lal and Shiv Prasad (predecessor-in-interest of the petitioners) were recorded. One Angad Rai (father of respondent No. 4) has filed an objection under Section 9A(2) of UPCH Act claiming his right and title over the property in question on the basis of sale deed said to have been executed by Kanhaiya Lal. The Consolidation Officer, vide order dated 30.7.1970, has allowed the objection under Section 9A(2) of UPCH Act and passed an order to record the name of Aangad Rai & others in place of recorded tenure holders. At belated stage, after the death of

Kanhaiya Lal, an appeal dated 21.07.1982 has been preferred on behalf of his son, namely, Sanjay Kumar (minor) under the guardianship of his mother Smt. Prema Devi wife of Kanhaiya Lal. The Settlement Officer of Consolidation, vide order dated 15.11.1989, has condoned the delay in filing the appeal and, simultaneously, allowed the appeal on merits whereby the parties were relegated before the Consolidation Officer to get the matter decided afresh. The Deputy Director of Consolidation, on revision being filed on behalf of the Angad Rai, has reversed the order passed by the Settlement Officer of Consolidation and relegated the parties, at the appellate stage to decide the point of delay first caused in filing the appeal, before deciding its merits. In pursuance of the remand order dated 5.6.1999 passed by the Deputy Director of Consolidation, the matter has been scrutinized on the point of delay, as such, the Settlement Officer of Consolidation, vide order dated 28.9.2002, has condoned the delay in filing the appeal on the cost of Rs. 100/-. Having been aggrieved with the order dated 28.9.2002 passed by the Settlement Officer of Consolidation, Subhash Kumar (respondent No. 4) and others have preferred revision. The Deputy Director of Consolation, vide order dated 27.3.2003, has allowed the revision and quashed the delay condonation order passed by the Settlement Officer of Consolidation, which gives rise a cause of action for filing the instant writ petition.

4. Solitary point involved in the instant writ petition relates to the condonation of delay caused in filing the appeal dated 21.7.1982 assailing the order dated 30.7.1970 passed by the Consolidation Officer in proceeding under Section 9A(2) of UPCH Act. As per the ground taken by the petitioner in appeal

dated 21.7.2022 (annexure No. 5), he/she came to know for the first time through rumour in the village on 19.7.1982 qua order passed by the consolidation court, therefore, inspected the record on 20.7.1982. Petitioner came with a specific case that before that neither the appellant (petitioner No. 1 herein) nor his father had ever come to know about the order passed by the Consolidation Officer. It is apposite to mention that father of the petitioner No. 1 had died on 25.4.1982 and, after his death, the appeal was filed on 21.7.1982. The petitioner has denied any service of notice upon Kanhaiya Lal and also denied the filing of Vakalatnama on his behalf. Learned counsel for the petitioner has attempted to bring out a case of fraud by distinguishing between the signatures made on the Vakalatnama (annexure No. 2) and the notice (annexure No. 3). Learned counsel for the contesting-respondents has denied the plea as raised on behalf of the petitioner and came with the contention that one Mr. Ramesh Chandra Kulshrestha had appeared and filed his Vakalatnama on 8.6.1970 on behalf of Kanhaiya Lal. Notice was properly served upon Kanhaiya Lal and the delay in filing the objection under Section 9A(2) of UPCH Act was condoned in his presence, vide order dated 18.6.1970, on the cost of Rs. 10/-. He has placed reliance on the order sheets dated 7.7.1970 and 16.7.1970 whereby time was granted to the defendant for filing written statement and, thereafter, the case was ordered to be proceeded ex-parte in absence of the defendant, respectively. Copy of the order sheets from dated 27.5.1970 to dated 16.7.1970 are collectively filed as annexure No. CA-1 to the counter affidavit. Qua the survival of another co-tenant Shiv Prasad, it has been contended that he has executed a registered sale deed on 2.9.2002, however, he himself has never made any endeavour

to challenge the order dated 30.7.1970 passed by the Consolidation Officer.

5. In nutshell, there is an intricate question qua knowledge of order dated 30.7.1970 passed by the Consolidation Officer in proceeding under Section 9A(2) of UPOCH Act whereby names of Kanhaiya Lal and Shiv Prashad (predecessors-in-interest of the petitioners) have been ordered to be deleted from the consolidation record and in its place name of predecessors-in-interest of the contesting-respondent No. 4 and others have been ordered to be recorded. Admittedly, Kanhaiya Lal died on 25.4.1982, however, his minor son (Sanjay Kumar) through his mother being a guardian has filed an appeal on 21.7.1982. The appellant has blatantly denied the knowledge about the order dated 30.07.1970, to him, and his father Kanhaiya Lal either. However, the contesting-respondents are vehemently relied upon the memo of appearance filed by counsel Sri Ramesh Chandra Kulshreshtha, who was a designated "Vakeel". The Settlement Officer of Consolidation while condoning the delay in filing the appeal was of the opinion that the liberal view should be taken in condoning the delay so that opportunity may be accorded to the appellant to defend his case. However, he has not returned any finding qua sufficiency of cause for delay in filing the appeal. The Deputy Director of Consolidation, in turn, has laid emphasis upon the service of notice on Kanhaiya Lal, who had chosen not to contest the case and, ultimately, the same is resulted into final culmination of proceeding under section 9A(2) of UPOCH Act by the order dated 23.7.1970 passed against him. The Deputy Director of Consolidation has emphasised the reluctance at the part of Kanhaiya Lal,

who had not assailed the order dated 30.7.1970. Thus, he has concluded that both the parties were litigated before the Consolidation Officer, therefore, filing an appeal at the belated stage, after twelve years, is not liable to be condoned.

6. It is no more *res integra* that whenever technicality is pitted against the substantial justice, it is substantial justice which prevails. Law of limitation is based upon public policy intending to discourage unnecessary litigation between the parties, therefore, while exercising discretionary power to condone the delay, the Court should act sparingly. Delay cannot be condoned in a cavalier manner unless the sufficient cause is shown by the parties. Normally, despite the prescribed period of limitation is expired, the phrase "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence, inaction or for want of bonafide is imputable to the adversary party. Meaning thereby, if sufficient cause for delay is shown by the parties concerned, discretion entrusted upon the court/authority concerned to condone the delay so that substantial justice be done. In the case of **Ram Nath Sao v. Govardhan Sao**, AIR 2002 SC 1201, the Hon'ble Supreme Court has expounded that the expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, where or not "sufficient cause" has been furnished, can be decided on the facts of the particular case and no strait-jacket formula is possible. Dealing with the phrase "sufficiency cause", Hon'ble Supreme Court in the matter of **Majji Sannemma @ Sanyasirao vs. Reddy Srivedi & Others** reported in AIR 2022

SC 332, has expounded that, in normal course, delay cannot be condoned unless sufficient reason is assigned. For ready reference, Paragraph Nos. 7.1 to 7.5 are quoted hereinbelow:-

"7.1 In the case of **Ramlal, Motilal and Chhotelal** (supra), it is observed and held as under:-

In construing s. 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chattappan*, (1890) J.L.R. 13 Mad. 269, "s. 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant."

7.2 In the case of **P.K. Ramachandran** (supra), while refusing to condone the delay of 565 days, it is observed that in the absence of reasonable, satisfactory or even appropriate explanation for seeking condonation of delay, the same is not to be condoned lightly. It is further observed that the law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds. It is further observed that while exercising discretion for condoning the delay, the court has to exercise discretion judiciously.

7.3 In the case of **Pundlik Jalam Patil** (supra), it is observed as under :-

The laws of limitation are founded on public policy. Statutes of limitation are sometimes described as "statutes of peace". An unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. The principle is based on the maxim "interest reipublicae ut sit finis litium", that is, the interest of the State requires that there should be end to litigation but at the same time laws of limitation are a means to ensure private justice suppressing fraud and perjury, quickening diligence and preventing oppression. The object for fixing time-limit for litigation is based on public policy fixing a lifespan for legal remedy for the purpose of general welfare. They are meant to see that the parties do not resort to dilatory tactics but avail their legal remedies promptly. Salmond in his Jurisprudence states that the laws come to the assistance of the vigilant and not of the sleepy."

7.4 In the case of **Basawaraj** (supra), it is observed and held by this Court that the discretion to condone the

delay has to be exercised judiciously based on facts and circumstances of each case. It is further observed that the expression "sufficient cause" cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party. It is further observed that even though limitation may harshly affect rights of a party but it has to be applied with all its rigour when prescribed by statute. It is further observed that in case a party has acted with negligence, lack of bona fides or there is inaction then there cannot be any justified ground for condoning the delay even by imposing conditions. It is observed that each application for condonation of delay has to be decided within the framework laid down by this Court. It is further observed that if courts start condoning delay where no sufficient cause is made out by imposing conditions then that would amount to violation of statutory principles and showing utter disregard to legislature.

*7.5 In the case of **Pundlik Jalam Patil** (supra), it is observed by this Court that the court cannot enquire into belated and stale claims on the ground of equity. Delay defeats equity. The Courts help those who are vigilant and "do not slumber over their rights."*

7. Applying the ratio decided by Hon'ble Supreme Court, as discussed above, in the given circumstances of the present case, it is evident that Deputy Director of Consolidation while quashing the order passed by the Settlement Officer of Consolidation has not properly discussed the genuineness of the Vakalatnama and service of notice upon the Kanhaiya Lal as pointed out by the petitioner in the writ petition. Both the parties are at variance on the point of knowledge qua order dated 30.7.1970 passed by the Consolidation Officer. I have already

discussed the facts relating to delay in previous paragraphs, wherein petitioner has denied the knowledge of proceeding under section 9A(2) of U.P. Act before the Consolidation Officer, however, conversely, the contesting-respondents have laid emphasis upon the knowledge to Kanhaiya Lal who was served with notice, and appeared through "Vakeel", namely, Sri Ramesh Chandra Kulshreshtha. While returning its finding qua service of notice upon Kanhaiya Lal and his appearance through "Vakeel", the Deputy Director of Consolidation has failed to appraise the evidence on record. There is no discussion, appraising the copy of notice which is said to have been served upon Kanhaiya Lal and memo of appearance filed by "Vakeel" Sri Ramesh Chandra Kulshreshtha on behalf of Kanhaiya Lal. In case, it is proved that despite the knowledge Kanhaiya Lal had chosen not to assail the order dated 30.7.1970 passed by the Consolidation Officer then right of the appellant (descendants from Kanhaiya Lal) to assail the order passed by the Consolidation Officer will be affected. However, on the flip side, in case, knowledge to Kanhaiya Lal is not proved, then certainly, to serve the substantial justice, the petitioner should be accorded an opportunity to contest the appeal on merits. Needless to say that date of knowledge and source of knowledge of any particular event to explain the "sufficient cause" is paramount consideration at the time of considering the point of delay in filing any application or appeal etc. Therefore, liberal approach in condoning the delay cannot be made absolute and same is subject to the bonafide and conscious action of the person, who is beseeching for the condonation of the delay.

8. In this conspectus, as above, in my considered opinion, the Deputy Director of Consolidation has decided the revision in a

9. It is expected that the Deputy Director of Consolidation shall accord conscious appraisal to the documents on record and pass a speaking and reasoned order in accordance with law after giving opportunity of hearing to the parties concerned without granting unnecessary adjournment to either of the parties expeditiously, preferably, within a period of three months from the date of appearance of the parties along with certified copy of the order of the date, who are hereby directed to appear before the Deputy Director of Consolidation on 24.9.2024.

[illegible]

(Delivered by Hon'ble Irshad Ali, J.)

IA No.8 of 2024

1. Heard.

2. In view of order passed on 22.8.2024, the present application for impleadment has been filed for impleadment of District Magistrate, Balrampur as District Gonda has been bifurcated and new district Balrampur has been created.

3. In view of facts narrated above, the application is allowed.

4. Learned counsel for the petitioners is permitted to carry out necessary incorporation during course of the day.

Order on Writ Petition

1. Heard Sri Anuj Kudesia, learned counsel for the petitioners and Sri Rajiv Srivastava, learned Additional Chief Standing Counsel for the State-respondent.

2. In the year 1979, notice under Sub Section (2) of Section 10 of the Act, 1960 has been issued during pendency of case a fire had taken place in Tahsil Balrampur and entire record was destroyed. In the year 1981, again, notice under Sub Section (2) of Section 10 of the Act, 1960 was issued in the name of Late Surya Narain Singh even though he already died on 8.12.1977. Again, separate notices were issued under Sub Section (1) of Section 10 of the Act, 1960.

3. Notices were issued for the land as follows :-

(a) Plot No.352 area 7.06 acres and Plot No.370 area 9.98 acres situated at Village Bhadua Shanker Nagar, Pargana and Tahsil Tulsipur District Gonda.

(b) Plot No.283 area 11.67 acres and Plot No.415 area 5.00 acres situated at Village Charan Gahiya, Pargana and Tahsil Tulsipur District Gonda.

(c) At village Kapia Khalsa Tappa Aikhin, Pargana and Tahsil Naugarh District Basti which were in the name of Smt. Jayanti Kunwar.

4. The petitioners filed separate objections, Annexure-1 (dated 7.4.1983) and Annexure-2 (dated 6.7.1983), which are as under :-

(a) Plot No.352 area 7.06 acres and Plot No.370 area 8.98 acres situated at Village Bhadua Shanker Nagar, Pargana and Tahsil Tulsipur District Gonda the entire land was *bhumidhari land* of Smt. Jayanti Kunwar and was already transferred in year 1959 by executing sale deed in favour of Ram Chandra and Paras Nath for valuable consideration and the mutation order was passed on 06.09.1974 by Consolidation Officer and the *amaldaramad* of this mutation order was not made due to mistake on the part of consolidation staff.

(b) Plot No.283 area 11.67 acres and Plot No.415 area 5.00 acres situated at Village Charan Gahiya Pargana and Tahsil Tulsipur District Gonda were wrongly shown as irrigated, while this land was unirrigated and this land was also not situated in effective command area of any lift irrigation canal or a private irrigation work and due to which, only one crop was yielded from such land.

(c) at village Kapia Khalsa Tappa Aikhin, Pargana and Tahsil Naugarh District Basti, which were in the name of Smt. Jayanti Kunwar who was owner of the land having inherited the same from her maternal grandfather and which she transferred entire land in favour of different

persons by way of registered sale deed after obtaining valuable sale consideration from the transferees (sale deeds were executed on 07.04.1971, 08.06.1971 and 26.06.1971).

5. In response to objections, the State of Uttar Pradesh filed its written statement. Registered sale deed in respect of Plot No.352 and Plot No.370 situated at Village Bhadua Shanker Nagar, Pargana and Tahsil Tulsipur District Gonda were executed in year 1959 in favour of Ram Chandra and Paras Nath.

6. Impugned order dated 31.12.1991 passed by the respondent No.3 Chief Revenue officer, Faizabad (Annexure-8 to the writ petition), whereby the authority framed the following issues :-

(i) Whether the entries of C.L.H. form 3A, 3B and 3C issued to the tenure holders are correctly entered ?

(ii) Whether the sale deed in the respect of plot No.352 and Plot No.370 situated at Village Bhadua Shanker Nagar, Pargana and Tahsil Tulsipur District Gonda were executed in favour of Ram Chandra and Paras Nath were admissible in law, and if so, its effect ?

(iii) Whether the entire land of Charan Gahiya was unirrigated ?

(iv) Whether the sale deeds executed by Smt. Jayanti Kunwar (petitioner No.2) widow of original ceiling tenure holder Late Surya Narain Singh in respect of the land of Village Kapia Khalsa on 07.04.1971, 08.06.1971 and 26.06.1971 were legally admissible, if so, its effect ?

6. The issue Nos.1 and 3 were interconnected and they were decided together. The prescribed authority has decided two issues in favour of the petitioners and no

evidence was adduced on behalf of the state of Uttar Pradesh to establish the fact that the land of village Charan Gahiya was within the command area of canal of Bhawanpur Bandh and the statement of Lekhpal also recorded and no document was produced by him.

7. With regard to issue No.2, the plot No.352 and Plot No.370 situated at Village Bhadua Shanker Nagar, Pargana and Tahsil Tulsipur District Gonda were executed in favour of Ram Chandra and Paras Nath during the year 1959 for valuable consideration and these persons were neither family members of the tenure holder nor they were otherwise related to them and the finding recorded the name of transferees was not entered over the land but the authority did not consider that the mutation order was passed on 06.09.1974 by Consolidation Officer and the *amaldaramad* of this mutation order was not made due to mistake on the part of consolidation staff.

8. It is submitted by learned counsel for the petitioners that the issue No.4 was decided very casually and non-speaking and ignored the sale deeds were executed on 07.04.1971, 08.06.1971 and 26.06.1971 in respect of the land of Village Kapia Khalsa Tappa Aikhin Pargana and Tahsil Naugarh District Basti merely on the ground that they were executed after the appointed date of 24.1.1971 and prescribed authority did not correctly apply its mind that they were executed for adequate consideration and in good faith for the immediate benefit of the tenure holder and also the provisions of sub section (6) of Section 5 of the Act of 1961.

9. After the prescribed authority rejected petitioners' objections and

determined their ceiling area by treating and clubbing the entire land covered by the aforesaid sale deeds situated in village Bhadua Shanker Nagar as well as situated in village Kapia Khalsa with the land of the tenure holder and thereby declared an area of 28.13-7 acres of land as surplus area.

10. Against the order of the prescribed authority, appeal was filed before the Additional Commissioner, Faizabad.

11. While deciding the issue Nos.1 and 3 to the effect that entire land of Village Charan Gahiya was unirrigated said by prescribed authority and no appeal was preferred by the State against aforesaid finding, but appellate court, while deciding the appeal, had no jurisdiction to hold that the land of Village Charan Gahiya was irrigated land and the finding of appellate court is manifestly perverse and contrary to law.

12. About issue No.2, Gata Nos.352 and 370 Village Bhadua Shankar Nagar, Gonda and in the year 1959 sale deeds were executed in favour of Ram Chandra and Paras Nath and statement was also given by them before prescribed authority and the mutation order was passed on 06.09.1974 which was not made due to mistake on the part of consolidation staff.

13. About issue No.4, Village Kapia Khalsa land, sale deed executed by the Petitioner No.2 for adequate consideration and in good faith for immediate benefit of the tenure holder and the purpose for agriculture the land was far from her house that's why petitioner No.2 sold her land and the name of purchaser of the land was also recorded in the consolidation record. Reference may be made on paragraph-63 of

the writ petition, as stated by the petitioners' counsel.

14. In evidences of Ram Chandra and Phoolmati W/o Paras Nath, they have stated that they purchased the land after paying a valuable consideration and they have possession over it.

15. The instant supplementary affidavit bringing on record the form CH-41, CH-23, CH-11, CH-45 Khatauni of Aadhar year, 1359 Fasli and 1356 Fasli, whose certified copies have been obtained by the petitioners from the revenue record of the office of District Collector, Balrampur on 18.07.2024, whereby it is evident that Gata No.352 and Gata No.370 situated at village Bhadua Shankar Nagar, Pargana and Tehsil- Tulsipur, District- Gonda, have been renumbered during consolidation proceedings which have been sold in year 1959, whose old numbers were 2258, 2259, 2260, 2261, 2267 and 2268, meaning thereby, the properties are the same as per Form- 23.

16. In respect of Gata No. 283 and Gata No. 415 situated at village Charan Gahiya, Pargana and Tehsil - Tulsipur, District- Gonda, is unirrigated land as per Form CH- 41 and 45 in the revenue record but the revenue authorities have treated the same as irrigated land.

17. Learned counsel for the petitioners placed reliance upon the following judgments :-

(i) **Ramadhhar Singh Vs. Prescribed Authority & others [1994 Supp (3) Supreme Court Cases 702].** Relevant paragraph-2 is being quoted below :-

"2. "It has to be seen under what provision of the Act can the validity of the

sale executed prior to January 24, 1971, the appointed day, be gone into? Sub-section (6) of Section 5 of the said Act says that in January, 1971, which but for the transfer would have been declared as surplus land under the Act shall be ignored and not taken into account. The proviso (b) thereto, inter alia, provides that a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and an irrevocable instrument, not being of benami transaction or for immediate or deferred benefit for the tenureholder or other members of the family, is outside the scope of the aforesaid sub-section. Thereafter explanation II provides that the burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit. Apparently, it is under this provision of law that the validity of the sale deed dated April 22, 1969 was put to test. The authorities under the Act took the view that the sale deed was not genuine because no consideration appears to have passed before the Sub-Registrar and that it was a transfer between father and son raising a dust of suspicion. Otherwise it was not disputed on fact that the sale had been effected by means of a registered deed in which the passing of consideration was mentioned as a recital. The existence of the sale deed being not disputed and it having taken place, as said before, on February 24, 1969, prior to the appointed day that is January 24, 1971, the inquiry regarding the validity of the sale deed under sub-section (6) of Section 5 was totally misplaced. Thereunder, as it appears to us, the appropriate authority had no jurisdiction to be put the validity of the sale deed to test since his jurisdiction arose only when the deed of transfer had been effected on or after the appointed day. Not only the first and the appellate authority under the

Act persisted in that view, but the High Court too proceeded on that basis. The effort of the appellant to have it declared that the authorities had no jurisdiction to invalidate the sale under sub-section (6) of Section 5 when read with Explanation II to sub-section (1) of Section 5 also was a futile attempt because the High Court followed the path, as did the authorities under the Act, and rejected the writ petition. We are of the view that this was a wholly erroneous approach. Sub-section (6) of Section 5 did not confer jurisdiction on the authorities to determine the validity of the sale and if that is so any finding of theirs as to the contents of the sale is of no assistance. In the result the appeal must succeed. Accordingly, allowing the same we set aside all the orders of the authorities below as also that of the High Court. No costs."

(ii) Ram Chandra Vs. State of U.P. & others [2020 (4) ADJ 535 (LB)].

Relevant paragraphs-31 to 41 are being quoted below :-

"31. In the instant case the petitioner got the right to possession by virtue of succession to the six plots of land in village Magrapur on death of his father in September 1979 only. However, in the extract of Khatauni considered by the Prescribed Authority of the year is 1407 to 1412 Fasli, the term of cultivatory possession was mentioned as since before 1373 Fasli.

32. Moreover, the Appellate Authority rightly interpreted section 29 of the Act and came to a conclusion that determination of ceiling area is to be done with reference to the date the petitioner was recorded as tenure holder i.e. with effect from September 1979 and not with reference to 08.06.1973, the date of the enforcement of the Amendment Act.

33. The language of Section 5 (1) "on and from the date of commencement" of the amendment act i.e. 08.06.1973, ceiling area has to be determined taking into account all the lands held by such a person throughout the State, in any capacity, whatsoever. The date of 08.06.1973 is relevant date only for the purpose of defining "ceiling area", it is not relevant for the purpose of determining the area of the holding of a tenure holder. If the petitioner's argument is to be believed it would mean that only if a person has land in excess of "ceiling area" on 08.06.1973 then alone he shall come under the clutches of the Act. This would do violence to the very language of the Act, and the purpose for which it was enacted. The language of Section 5 (1) of the Act starts with the phrase "on and from" Commencement of the Act.

34. The date of commencement of the Amendment Act is 8th June 1973, hence, the computation of a holding of a tenure holder would depend on either the date of commencement of the Act, or from the commencement of the Act to any other point of time in the future. The operation of the Act is a continuing process. It does not stop merely on the date of 8th June 1973, when the Amendment Act came into operation but from the date of such commencement the determination of surplus land will be done as and when a tenure holder comes into possession and holds land the aggregate of which is more than the ceiling area permissible under the Act.

35. It is clear from the Long Title and Preamble of the Act that the object of the act is to impose ceiling on land holdings in Uttar Pradesh. The Act does not take away any rights of the tenure holder but only restricts the area he can hold to allow for a more equitable

distribution of a scarce resource among the States' entire population in the interest of the community, to ensure increased agricultural production and to provide land for landless agricultural labourers and for other public purposes as best to subserve the common good. The argument of the learned counsel for the petitioner that since he did not hold surplus land on the date of commencement of the Amendment Act, any land which came into his possession by succession thereafter should be ignored, is rejected as misconceived.

36. The next contention of the learned counsel for the petitioner is that under section Under section 3 (7) the definition of family has been given and in relation to a tenure holder it means himself or herself and the spouse, other than a judicially separated spouse, minor son and minor daughters, other than married daughters. Under Sub-section (3) of Section 5 for Computation of Ceiling Area in case of a tenure holder the number of family members has to be done taking into account. In case the family members are not more than five, only 7.30 hectares of irrigated land is permissible. However, if the family members are more than five, then 2 additional hectares of land is admissible subject to a maximum of 6 hectares of such additional land.

37. For each adult son the tenure holder is entitled to 2 hectares of additional land, subject to a maximum of 4 hectares of additional land. Provided that such adult sons are not independent tenure holders in their own right having more than 2 hectares of irrigated land in their possession.

38. A careful perusal of the aforesaid provision clearly shows that if the member in the family exceeds five, the tenure holder is entitled for additional land provided that none of such member is a

tenure holder in his/her own right. Similarly, it also provides that even if there are no adult sons, but if the strength of the members of the family is more than five, then the tenure holder is entitled to additional land of 2 hectares for each member of the family subject to a maximum of 6 hectares of additional land. It is not in dispute in the present case that the strength of family members of the petitioner was Eight at the time when notice was issued to him on 02.11.2000. The petitioner brought on record the High School pass Certificates of his three daughters and three sons. However, the Prescribed Authority and the Appellate Authority refused to grant benefit of additional land for each member of the family in addition to the five members as the petitioner did not produce relevant extract of the Family Register and on 08.06.1973 none of the petitioner's children was born. The logic applied by the Prescribed Authority and the Appellate Authority is incomprehensible. According to the respondents, the date of determination of family members has been taken as 8th June 1973, but the date of determination of ceiling area has been taken as the date when the Prescribed Authority was deciding the case.

39. In my considered opinion even though the petitioner's family consisted of only two members i.e. himself and his wife on 8th June 1973, at the time of issuance of notice under Section 9, on 02.11.2000, all of his six children had been born. Three of his daughters were married but there were at least three sons who were living with him. None of them has been shown to be an independent tenure holder having more than 2 hectares of land by the State respondents, in their Counter affidavit. For the purpose of determination of ceiling area the petitioner was entitled to

2 additional hectares for at least one of his sons namely Shyam Srivastava who was major at the time.

40. Though this Court is not convinced with the argument of the learned counsel for the petitioner regarding the applicability of the cut-off date of 08.06.1973 for determining ceiling area on the basis of Section 29 of the Act and holds that the petitioner was independent tenure holder of eight plots of land ad-measuring 8.546 hectares in villages Magrapur and Baddupur in Tehsil Shahbad District Hardoi which in irrigated terms came out to be 7.968 hectares; the failure of the learned Court below to take into account the number of members of the petitioner's family while determining the permissible limit of land to be left with the petitioner cannot be countenanced.

41. The Writ Petition is allowed. The orders of the Respondent nos.2 & 3 are set aside as they failed to take into account the petitioner right to additional land under Section 5(3) b of the Act. The petitioner shall be entitled to all of his land in the eight plots mentioned in CLH 3 in the two villages concerned."

18. On the other hand, Sri Rajiv Srivastava, learned Additional Chief Standing Counsel placed reliance upon Section-5 of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960, which is being quoted as under :-

"5. Imposition of Ceiling.- (1) On and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, no tenure holder shall be entitled to hold in the aggregate through-out Uttar Pradesh, any land in excess of the ceiling area applicable to him."

19. In respect of Section 5, learned Additional Chief Standing Counsel submitted that minor sons, daughters and wife is admissible in the definition of 'family'. This submission is in respect of issue No.4 of the issues framed by the prescribed authority with regard to imposition of ceiling.

20. In rebuttal, learned counsel for the petitioners submitted that after the amendment on 8.6.1973, the land sold prior to 1973 shall not be added in the ceiling proceedings.

21. After having heard the rival submission of learned counsel for the parties, I perused the material on record as well as law report cited by learned counsel for the petitioners.

22. On overall consideration, it is evident that the respondents have treated the land of Village Bhadua Shanker Nagar, Pargana and Tehsil Tulsipur, District Gonda covered by the registered sale deeds executed during the year 1959 in favour of Ram Chandra and Paras Nath, much prior to the appointed date of 24.1.1971 to continue to belong to Smt. Jayanti Kunwar in spite of the fact that the aforesaid registered sale deeds were implemented and in pursuance of which, the names of the transferees were ordered to be mutated during consolidation operations under the orders of the Consolidation Officer, amaldaramad of which was not made in the revenue records and by doing this, the respondents have committed an error, which is not sustainable in the eyes of law.

23. On perusal of certified copies of CH-23, CH-41, CH-11 and CH-45, it is evident that Gata No.352 and 370 situated at Village Bhadua Shanker Nagar, Pargana

and Tehsil Tulsipur, District Gonda, which have been sold in the year 1959, whose old numbers were 2258, 2259, 2260, 2261, 2267 and 2268, meaning thereby, the properties are the same as per form-23 of U.P. Consolidation of Holdings Act, 1953. During the consolidation proceedings, the old Gata Nos.2258, 2259, 2260, 2261, 2267 and 2268 have been renumbered as Gata No.352 and 370, which also finds mention in sale deeds contained in Annexures-6 and 7. On perusal of the documents referred hereinabove, it is transpired that the land in question is unirrigated land. The prescribed authority as well as the Additional Commissioner have not considered the same and held that these are different numbers and land is irrigated, in fact, the land is unirrigated, which clearly demonstrates the findings of the prescribed authority as well as Additional Commissioner to be erroneous in nature.

The finding recorded by the respondents to the effect that the entire land of Village Charan Gahiya, Pargana and Tehsil Tulsipur, District Gonda is irrigated, is erroneous in law and the same has not been recorded in accordance with the statutory determination of irrigated land provided under Section 4-A of the Act of 1961 read with Rule 3 of the U.P. Imposition of Ceiling on Land Holdings Act, 1961. In fact, the non-irrigated land does not come under the ambit of ceiling.

24. The argument advanced by learned counsel for the petitioners is also supported by the judgments relied upon by him as they are totally applicable in the present case.

25. In view of the foregoing discussion and the judgments relied upon, the Court is of the opinion that the

impugned orders are not sustainable in law, thus, the impugned orders dated 21.4.1997 and 31.12.1991, passed by respondent Nos.2 and 3 are hereby set aside. The writ petition succeeds and is **allowed**.

26. However, the matter is remanded back to the Additional Commissioner to decide the issue afresh in accordance with law.

(2024) 9 ILRA 604
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ Tax No. 978 of 2024

M/s R.D. Enterprises **...Petitioner**
Versus
Union of India & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Srijan Pandey, Sri Swetashwa Agarwal

Counsel for the Respondents:
 A.S.G.I., Sri Krishna Agarawal, Sri Parv Agarwal

(A) Tax Law - Central Goods and Services Tax Act, 2017 - Section 83 - Provisional attachment to protect revenue in certain cases - Power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled - Formation of an opinion by the Commissioner under Section 83(1) must be based on tangible material bearing on the necessity of ordering a provisional attachment for the purpose of protecting the interest of the government revenue.(Para -6)

Provisional attachment of bank account by Department without fresh reasons - following expiry of the prior attachment - Previous attachment dated February 16, 2023, expired after one year - Petitioner successfully challenged it - leading to its removal by order dated May 6, 2024 - new attachment was imposed on May 16, 2024, without any new reasons. (Paras - 2, 3, 4)

HELD: - Provisional attachment order dated May 16, 2024 quashed and set aside. Reattachment without fresh reasons violates Section 83 of the Act and is arbitrary. Concerned bank directed to remove the attachment and allow petitioner access to the account. (Para - 9,10)

Petition allowed. (E-7)

List of Cases cited:

1. Radha Krishan Industries Vs St. of H.P. & ors., (2021) 6 SCC 771

2. Amazonite Steels Pvt. Ltd. Vs U.O.I., 2020 (36) G.S.T.L. 184 (Cal.)

(Delivered by Hon'ble Shekhar B. Saraf, J.
 &
 Hon'ble Manjive Shukla, J.)

1. Heard Sri Swetashwa Agarwal, learned counsel appearing on behalf of the petitioner and Sri Parv Agarwal, learned counsel appearing on behalf of the respondents.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner is aggrieved by the provisional attachment order dated May 16, 2024 passed by the respondent authorities under Section 83 of the Central Goods and Service Tax Act, 2017 (hereinafter referred to as "the Act").

3. It is to be noted that the same bank account had been attached vide order dated February 16, 2023. After expiry of the

period of one year, the writ petitioner had filed a writ petition seeking removal of the said attachment. Subsequent to the filing of the said writ petition, it appears that the attachment was removed and the same has been recorded in the order passed by the coordinate Bench of this Court dated May 6, 2024 in Writ Tax No.699 of 2024.

4. Surprisingly, ten days after passing the order by the coordinate Bench of this Court, a verbatim notice has been issued on May 16, 2024 without providing for any fresh reason for provisional attachment of the account for the second time. This notice even does not mention the fact that this attachment is being done for the second time. Furthermore, no specific reasons have been provided for requirement of the Department for fresh provisional attachment of the bank account.

5. In our view, this kind of arbitrary action without providing any fresh reasons to the petitioner for provisional attachment is draconian in nature and cannot be sustained in the eyes of law. Section 83 of the Act is provided below :-

"Section 83. Provisional attachment to protect revenue in certain cases

(1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the

expiry of a period of one year from the date of the order made under sub-section (1)."

6. In **Radha Krishan Industries vs. State of Himanchal Pradesh and Others** reported in **(2021) 6 SCC 771** the Supreme Court has held in relation to Section 83 of the Act that a second attachment of the bank account may be made under Section 83 of the Act, but the Department has to provide fresh reasons for the same. Relevant paragraphs thereof are extracted below :-

"75. Moreover, an order of provisional attachment was issued by the Joint Commissioner which was withdrawn on 30-1-2019, after considering the representations made by the petitioner. On the very ground, without any material change in circumstances, another order of provisional attachment came to be issued by another Joint Commissioner. Therefore, it was the contention of the petitioner before the High Court that the subsequent order of provisional attachment is in substance and effect an order reviewing the earlier order withdrawing the order of provisional attachment which was not permissible and therefore the subsequent order of provisional attachment is without jurisdiction. The High Court has not considered this aspect. Both the earlier and the subsequent orders of provisional attachment are on the same grounds. Therefore, unless there was a change in the circumstances, it was not open for the Joint Commissioner to pass another order of provisional attachment, after the earlier order of provisional attachment was withdrawn after considering the representations made by the petitioner. This is an additional ground to set aside the subsequent order of provisional attachment.

E. Summary of findings

76. For the above reasons, we hold and conclude that:

76.1. The Joint Commissioner while ordering a provisional attachment under Section 83 was acting as a delegate of the Commissioner in pursuance of the delegation effected under Section 5(3) and an appeal against the order of provisional attachment was not available under Section 107(1).

76.2. The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable.

76.3. The High Court has erred in dismissing the writ petition on the ground that it was not maintainable.

76.4. The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled.

76.5. The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. Before ordering a provisional attachment the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the interest of the government revenue.

76.6. The expression "necessary so to do for protecting the government revenue" implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment.

76.7. The formation of an opinion by the Commissioner under Section 83(1) must be based on tangible material bearing on the necessity of ordering a provisional

attachment for the purpose of protecting the interest of the government revenue.

76.8. In the facts of the present case, there was a clear non-application of mind by the Joint Commissioner to the provisions of Section 83, rendering the provisional attachment illegal.

76.9. Under the provisions of Rule 159(5), the person whose property is attached is entitled to dual procedural safeguards:

(a) An entitlement to submit objections on the ground that the property was or is not liable to attachment; and

(b) An opportunity of being heard.

There has been a breach of the mandatory requirement of Rule 159(5) and the Commissioner was clearly misconceived in law in coming into conclusion that he had a discretion on whether or not to grant an opportunity of being heard.

76.10. The Commissioner is duty-bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached.

76.11. A final order having been passed under Section 74(9), the proceedings under Section 74 are no longer pending as a result of which the provisional attachment must come to an end.

76.12. The appellant having filed an appeal against the order under Section 74(9), the provisions of sub-sections (6) and (7) of Section 107 will come into operation in regard to the payment of the tax and stay on the recovery of the balance as stipulated in those provisions, pending the disposal of the appeal.

77. For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High

Court dated 1-1-2021 [Radha Krishan Industries v. State of H.P., 2021 SCC OnLine HP 4566] ."
(Emphasis added)

6. Upon perusal of Sub-section 2 of Section 83 of the Act, it appears that such provisional attachment shall cease to have effect after the expiry of a period of one year. The department cannot be allowed simpliciter to issue a second notice, and thereafter, third and fourth and continue with the provisional attachment for four to five years without giving any fresh reason for the said provisional attachment. If the same was allowed, Sub-section 2 of Section 83 of the Act would become otiose and have no relevance whatsoever.

7. One may look into the judgment passed by the Calcutta High Court in the case of **Amazonite Steels Pvt. Ltd. vs. Union of India** reported in **2020 (36) G.S.T.L. 184 (Cal.)**, wherein the Court has held as follows:-

"Epilogue:

"A tax collector should collect taxes from a taxpayer just like a bee collects honey from a flower in an expert manner without disturbing its petals" - Kautilya in Arthashastra.

38. The new regime under the GST Act, 2017 is a new legislative creation by which the Union Government along with all the State Governments have streamlined various statutes under which tax was earlier collected to enhance the ease of doing business by preventing multi-point taxation that was extremely cumbersome and time consuming for the citizens of India. The raison d'etre of the GST Act, 2017 is to reduce the burden of tax and also to simplify the procedures. This,

however, is coupled with certain far reaching and drastic measures that would be applicable on persons who evade the payment of such taxes. One need not stress the importance of the responsibility that comes upon the Government officials who take such drastic measures upon the citizens of this country. Nonetheless, these drastic provisions come with a purpose, and that is to ensure collection of taxes so that the inequities in society may be reduced by the Government. Provisions such as provisional attachment are necessary to ensure that persons who intend to evade taxes and/or are a part of a mechanism to defraud the Government are nipped in the bud and appropriate taxes can be collected from such persons."

8. We are of the view that the legislature never intended this provision to be read in a casual manner, as the provision for provisional attachment is a drastic measure that the Department takes even before assessing the liability of the petitioner. This provision is in the nature of preventive detention in criminal cases where one detains a person without any offence having been committed.

9. In light of the above, it becomes extremely necessary for the Department to justify the reasons for such a provisional attachment and without such justification being provided by the Department, by way of specific reasons, such provisional attachment would be illegal, arbitrary and non est in law. In the present facts and circumstances of the case, we do not find recording of any such reasons.

10. Accordingly, the provisional attachment order dated May 16, 2024 is quashed and set aside. The bank concerned is directed to remove the attachment and

immediately allow the petitioner to have access to the said bank account. Needless to mention, the Department shall be at liberty to proceed in accordance with law.

11. The writ petition is allowed.

(2024) 9 ILRA 608

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.09.2024

BEFORE

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

Second Appeal No. 379 of 2010

**U.P. Avas Evam Vikas Parishad, Lucknow
& Ors.**

...Appellants

Versus

Virendra Kumar & Ors. ...Respondents

Counsel for the Appellant:

Madan Mohan, Chandra Shekhar Singh,
M.D. Singh Shekhar, Madan Mohan
Chaurasisa, Rajan Upadhyay, Senior
Advocate

Counsel for the Respondent:

A.K. Mishra, Ajay Kumar Singh, Ashish
Kumar Singh, Gautam, O.V. Bajpai, Pushkar
Mehrotra, Swetashwa Agarwal, Varchaswa
Bajpai, Senior Advocate

**Civil Law - Civil Procedure Code, 1908 -
Section – 100 - Order VII - Rule 11 - U.P.
Avas Evam Vikas Parishad Adhiniyam,
1965 - Sections 17, 32, 73, 82, 83, 84, 88
& 88(2) - - U.P. Town Improvement Act,
1919 - Section 36 - Specific Relief
Act, 1963 - Sections 38 & 41 - Land
Acquisition Act, 1894- Section 17 - Second
Appeal - filed by defendants - original suit - for
a permanent prohibitory injunction - filed by
plaintiffs, against the defendant-appellants, who
claim ownership and tenancy of a disputed
property - The trial court dismissed the suit -
but, the appeal filed by plaintiffs was allowed,
leading to a decree in their favour - The**

defendants then appealed in instant Second
Appeal - raised substantial questions of law
regarding the ownership and identity of the
disputed land - court finds that, in the entire
gamut of the otherwise very detailed findings
recorded by the lower appellate court to answer
for the plaintiffs, the ignorance of this principle
in dispute about location of the suit property
being in one plot number or numbers or the
other, would vitiate the conclusions - held, the
findings of the lower appellate court cannot be
U.P.held unless a survey of the contiguous
Khasra numbers is duly carried out according to
the fixed point method - hence, the impugned
decree passed by lower appellate court is set
aside - matter is remanded back to the court for
further investigation to accurately determine the
location of the suit property using a survey
commission or the total station method - lower
appellate court will then rehear and decide the
appeal afresh - directions issued, accordingly -
Appeal is allowed in part.(Para - 43, 45, 46, 47)

Second Appeal Partly allowed. (E-11)

List of Cases cited:

1. Shreepat Vs Rajendra Prasad & ors., 2000 (40)
ALR 534: JT 2000 (7) SC 379,
2. Delhi Development Authority Vs Mohd. Sher Nabi
Chaman & ors., 2015 SCC OnLine Del 7832.

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

1. This is a defendants' second appeal
arising out of a suit for permanent
prohibitory injunction.

2. Original Suit No.1187 of 1991 was
instituted by the four plaintiffs, Virendra
Kumar, Sheo Singh, Rampal Singh
Chauhan and Km. Pushpa with a case that
plaintiff-respondents Nos.1 to 3 are tenants
in the premises detailed at the foot of the
plaint since the year 1970 on a monthly
rent of Rs.300/-. Defendant-respondent
No.5, Sirajuddin son of Fariduddin, arrayed
as defendant No.3 to the suit, was the
owner of the said premises and the land

comprising it. He agreed to transfer the premises aforesaid in the plaintiff-respondents' favour, and for the purpose, executed a registered agreement to sell dated 05.04.1990. The agreement to sell last mentioned (for short, 'the suit agreement') covenants to transfer an area of 5000 square yards, situate in *Khasra* No.5751M of *Khewat* Nos.1 and 15, Qasba Meerut (for short, 'the suit property'). The further case of the plaintiff-respondents is that they are residing in the premises under reference as tenants and now by virtue of the suit agreement have contracted a right to purchase the suit property for a total sale consideration of Rs.5,00,000/-. Out of the settled sale consideration, the plaintiff-respondents have paid an earnest in the sum of Rs.4,70,000/- to defendant-respondent No.5. The plaintiff-respondents say that they were paying rent to defendant-respondent No.5 regularly up to the date of execution of the said agreement, but not later on, as was covenanted between the plaintiff-respondents and defendant-respondent No.5 at the time of execution and registration of the last mentioned agreement that no further rent shall be payable by the plaintiff-respondents to defendant-respondent No.5 for reason that a substantial part of the sale consideration had been paid at the time of registration of the suit agreement.

3. It is also the plaintiff-respondents' case that in part performance of the suit agreement, possession of the suit property has been given to the plaintiff-respondents (described in the plaint as 'remained with the plaintiffs'). The plaintiff-respondents are residing in the suit property and tethering their cattle there. The defendant-appellants have no concern with the suit property. It has never been acquired by the defendant-appellants and no proceedings

for acquisition of the suit property have been taken. The defendant-appellants never sent any notice to the plaintiff-respondents or defendant-respondent No.5 with regard to the suit property, or so to speak, regarding its acquisition or taking possession. The constructions standing in the suit property are old and neither the plaintiff-respondents nor defendant-respondent No.5 have raised any new construction. The plaintiff-respondents do not own any other house, except the one located in the suit property in the city of Meerut.

4. In the first week of September, 1991, the employees of the defendant-appellants attempted to take possession of the suit property and also attempted demolition of the constructions standing thereon. The plaintiff-respondents, therefore, sent a notice under Section 88 of the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 (for short, 'the Act of 1965') to the defendant-appellants on 10.09.1991, which was received by the said defendant-appellants, but not answered. The employees of the defendant-appellants, a day before institution of the suit, attempted to demolish the plaintiff-respondents' construction and take forcible possession of the suit property. They are also said to have demanded money of the plaintiff-respondents. It was on this cause of action that the plaintiff-respondents prayed that a decree of permanent injunction be granted against the defendant-appellants, restraining them from interfering in the rights and possession of the plaintiff-respondents or user by the plaintiffs of the suit property (described as working of the plaintiffs on the premises) and from demolishing any construction of theirs on the said property, a full description of which is given at the foot of

the plaint. It must be mentioned here that in the plaint, the suit property was originally described as follows:

“Open land with four rooms situated at Victoria Park, Dhobighat, Jail Chungi, Meerut bounded as follows:

East : Plot of Rajvir Singh & others.

West : Victoria Park, Sports Colony,

North : Nala, government road and Dhobighat colony.

South : Rana Pratap Enclave.”

5. The suit was instituted on 20.11.1991 with the aforesaid description of the suit property, but much later on 27.03.2009, an amendment application was made, seeking to amend the boundaries. The amendment application was allowed by the Court vide order dated 28.04.2009. The amended description of the suit property is detailed below:

“Open land with four rooms situated at Victoria Park, Dhobighat, Jail Chungi, Meerut bounded as follows:

South : earlier Plot of Rajvir Singh & others. Now colony of Avas Vikas Parishad.

North : Dhobi Ghat Colony and Victoria Park Sports Colony and thereafter road.

East : Government road thereafter Nala.

West : Now construction of Avas Vikas Parishad thereafter Rana Pratap Enclave. Thereafter Abu Nala.

And shown in map Annexure 1 of the Plaint by the letters ABCD .”

6. Along with the amended plaint, a plaint map is annexed, where the suit

property is denoted by the letters ABCD, an area of 5000 square yards.

7. A written statement was filed on behalf of the two defendants to the suit, who are the defendant-appellants here. They are, for all practical purposes and intents, the U.P. Avas Evam Vikas Parishad, queerly impleaded twice, first through the Housing Commissioner and then as defendant No.2 through the Assistant Housing Commissioner, Meerut. In the written statement, they have denied the ownership of defendant-respondent No.5 and say that, not being the owner, he had no right to execute the suit agreement, on the foot of which, no rights can accrue in the plaintiff-respondents' favour. The suit property was acquired by the Government and delivered unto the defendant-appellants, who are in possession of the same. It is the defendant-appellants' case that the suit property is a small piece of land, which was acquired by the Government for the Improvement Trust, Meerut. A scheme for Housing in Meerut, known as 'Housing Accommodation and Street Scheme No.1', was launched in an area lying between the Abu Nala Meerut, Garh Road and Kanker Road, now known as the University Road. The boundaries of the acquired land have been pleaded by the defendants in paragraph No.16 of the written statement, thus:

“North : Khasra Plot No.5717, 5719, 5732, 5733 and 5751 part of Qasba Meerut.

South : Meerut-Garh Mukteshwar Road.

West : Abu Nala.

East : Kanker Road which joins Abdullahpur Chungi to Meerut Garhmukteshwar Road.”

The defendant-appellants say that later on, the name of the Avas Evam Vikas Parishad, the defendant-appellants was entered in the Malikan Register on Page No.79. This entry was made in the Tehsil records on 16th of August, 1977.

8. A notification for acquisition of the land under reference was issued under Section 36 of the Town Improvement Act, 1919 and published in the Gazette of U.P. dated 22nd, 29th October, 1966 and 5th November, 1966 for information to the general public, inviting objections. It is the defendant-appellants' case that after due process of disposal of objections, the land proposed to be acquired through the earlier notifications under the Town Improvement Act was notified on 29.11.1969 under Section 32 of the Act of 1965. It is also pleaded by the defendant-appellants that upon enforcement of the Act of 1965, the Improvement Trust, constituted for the area, stood dissolved and all its assets, rights and liabilities transferred to the Avas Evam Vikas Parishad, the defendant-appellants (for short, 'the defendants'). After publication of the notification in the Gazette on 29.11.1969, the entire land detailed in the written statement stood vested in the defendants and possession of the land acquired was delivered on 13.01.1972 to the defendants by the Government. The defendants say that the plaintiff-respondents and defendant-respondent No.5 are not at all entitled to raise any constructions on any part of the suit property, located in part of *Khasra* No.5751, without the sanction of a plan for the purpose by the Avas Evam Vikas Parishad. To do otherwise, would be a contravention of Section 83 of the Act of 1965. It seems to be the alternate case of the defendants that if any constructions have been raised by the plaintiff-respondents, though not admitted, in the suit property, comprising a part of *Khasra* No.5751, in contravention of provisions of the

Act of 1965, the plaintiff-respondents are liable to be penalized under Section 73 of the last mentioned Act. The defendants are vested by statute with the right to demolish the said constructions, if any, standing on the suit property under Sections 82 and 83 of the Act of 1965. They have a right to enter in the said land under Section 84 of the last mentioned statute.

9. On the 8/9th of August, 1992, the defendants lodged a First Information Report with the jurisdictional police station against unknown anti-social elements, who were attempting to encroach the suit property, which belonged to the Avas Evam Vikas Parishad. Acting on the FIR, the Police demolished the unauthorized and illegal constructions found on the spot. The defendants say that the plaintiff-respondents (for short, 'the plaintiffs') are not residing in the suit property, but live in separate residences of their own in the city, a fact mentioned in the cause title of the plaint. Defendant-respondent No.5 was never the owner of the suit property and, therefore, the suit agreement, described by the defendants as 'so called', is a nullity in the eye of law and void. In the absence of any right, title or interest and lawful possession, the plaintiffs have no cause of action to maintain the suit. The description of the suit property given in the plaint is castigated as vague and incorrect. The boundaries of *Khasra* No.5751, part of which was delivered into the possession of the defendants by the Government (by virtue of the acquisition), have been given in paragraph No.27 of the written statement, thus:

“North: Pakki Nali and thereafter Dhobi Ghat and Abadi of others.

South: Part of Khasra No.5749 and part of Khasra No.5750.

East: Nala and Khasra No.5733.
West: Abu Nala."

10. It is also the defendants' case that though possession of the plaintiff is not admitted, but if they be found in possession, they are no more than trespassers in the suit property. Their suit, therefore, is not maintainable. The suit is barred by estoppel and acquiescence, besides the want of notice under Section 88 of the Act of 1965.

11. On the pleadings of parties, the Trial Court framed the following issues (translated into English from Hindi):

"1. Whether defendant No.3 was owner of the suit property? If yes, its effect?

2. Whether plaintiff Nos.1 to 3 were tenants in the suit property from the year 1970 at the rate of Rs.300/- per month? If yes, its effect?

3. Whether defendant No.3 has executed a registered agreement dated 05.04.1990 to transfer the suit property in the plaintiffs' favour for a total sale consideration of Rs.5,00,000/-, out of which the plaintiffs have paid defendant No.3 a sum of Rs.4,70,000/- in advance?

4. Whether possession of the suit property has been delivered to the plaintiffs in part performance? If yes, its effect?

5. Whether the suit property has been acquired by the Government and its possession delivered to defendant Nos.1 and 2 as averred in paragraph Nos.7 and 16 to 20 of the written statement?

6. Whether the plaintiffs are liable to be punished under Section 73 of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965, as averred in paragraph No.21 of the written statement?

7. Whether the suit agreement is void and has any evidentiary value? If yes, its effect?

8. Whether in view of the averments in paragraph No.26 of the written statement, the plaint is liable to be rejected?

9. Whether the suit is barred by the principle of estoppel and acquiescence?

10. Whether the plaintiffs' suit is barred by Section 88 of the U.P. Avas Evam Vikas Parishad Adhiniyam for want of notice?

11. To what relief is the plaintiffs entitled?"

12. The plaintiffs in support of their case filed documentary evidence, a summary of which is recorded in the judgment of the Trial Court. Apart from the documentary evidence, the plaintiffs examined PW-1 Virendra Kumar, PW-2 Rampal Singh, PW-3 Raj Kumar Sharma and PW-4 Jaipal Sharma. The defendants too filed documentary evidence, a summary whereof figures in the judgment of the Trial Court. Two witnesses were examined on behalf of the defendants, to wit, DW-1 Umesh Mohan Sharma and DW-2 Jeet Singh.

13. The Trial Court determined Issues Nos.1, 2, 3, 4 and 7 together. The Trial Court after considering the case and evidence of parties on the aforesaid issues remarked that the evidence shows that so far as the plaintiffs are concerned, they had in their favour the suit agreement, but no sale deed had been executed. It is remarked by the Trial Court that in *Khasra* No.5751, names of a number of other persons are also recorded. The plaintiffs never applied for a survey to be done in order to determine in which *Khasra* number the suit property was located. It is opined that on

the basis of the suit agreement alone, the plaintiffs would not become owners. The Trial Court has also frowned much upon the fact that in the suit agreement, the suit property has not been properly described with reference to its location. It is described as 5000 square yards of land with its boundaries given. The agreement is of the year 1990, but no sale deed was attempted to be secured by the plaintiffs. This, in the opinion of the Trial Court, shows that the suit agreement is sham. It is more than once emphasized by the learned Trial Judge in his findings on these issues that in the absence of a survey being done, it is difficult to determine in which plot number, the suit property is located. More or less on this reasoning, the Trial Court decided Issues Nos.1, 2, 3, 4 and 7 against the plaintiffs and in the defendants' favour.

14. Issue No.5 was decided against the plaintiffs and in the defendants' favour, holding that the suit property had been acquired by the Government for the defendants, who have been given possession thereof. The defendants are owners in possession of the suit property. Issues Nos.8 and 11 were determined together. Here again, the Trial Court has emphasized the fact that the plaintiffs did not take steps to get the suit property surveyed nor did they secure execution of a sale deed in their favour from defendant-respondent No.5, Sirajuddin. The Trial Court on these findings dismissed the suit with costs vide judgment and decree dated 16.08.2005.

15. Aggrieved, the plaintiffs appealed the decree to the District Judge of Meerut, where their appeal was numbered as Civil Appeal No.181 of 2005. It was assigned to the learned Additional District Judge, Court No.7, Meerut, before whom it came up for

hearing. The learned Additional District Judge by his judgment and decree dated 07.01.2010 allowed the plaintiffs' appeal with costs, set aside the judgment and decree passed by the Trial Court, reversed the same and decreed the suit with costs. The defendants were restrained from interfering with the plaintiffs' possession in the suit property, denoted by letters ABCD.

16. Disillusioned by the decree passed by the learned Additional District Judge, the defendants have appealed to this Court under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code').

17. The appeal was admitted to hearing on 07.04.2010, when the following substantial questions of law were formulated:

1. *Whether the plaintiff-respondents can claim or maintain any rights or title over the land in question only on the basis of agreement of sale executed by Sirajuddin?*

2. *Whether the plaintiff-respondents who claim tenancy rights also over the land in question could contest the claim of U.P. Awas Vikas Parishad, Lucknow to acquisition of land in question on grounds other than those to which a tenant is entitled in law?*

18. On 07.08.2019, another substantial question of law was framed, which reads:

Whether the lower appellate court was justified in allowing the appeal and decreeing the suit of the plaintiff-respondent without the boundaries mentioned in the amended plaint being duly proved?

19. After the hearing had proceeded substantially on 28.02.2024, 29.02.2024,

01.03.2024, 04.03.2024, 05.03.2024, 07.03.2024 and 11.03.2024, on 12th of March, 2024, this Court thought it imperative to frame a further substantial question of law, to which the parties agreed. Accordingly, following substantial question of law, marked as '(iv)' was formulated. It reads:

Whether the issue being if part of *Khasra* No. 5751 i.e. the suit property is located in *Khewat* Nos. 1 and 15 or *Khewat* No. 445, it was imperative for the Court to issue a Survey Commission or adopt the Total Station Method in order to locate the suit property?

20. This appeal was heard on 28.02.2024, and, thereafter, across a number of dates until 14.03.2024, when judgment was reserved.

21. The learned Counsel for the parties addressed the Court on Substantial Question of Law No.1, the third that was formulated on 07.08.2019, without being numbered, which shall be referred to as Substantial Question of Law No.3, and for the most part on the question that was formulated last, that is to say, Question No. (iv). Upon considering the submissions of parties on Substantial Question of Law No. (iv), the way these were addressed, this Court thought that the question was formulated on slightly different terms than those involved, which required clarification and perhaps re-formulation, on which the parties had to be heard again. Accordingly, the appeal was posted for further hearing on 06.09.2024. On the said day, learned Counsel for the parties were apprised about the terms of Substantial Question of Law No. (iv) formulated on 12.03.2024, seeking clarification about their submissions advanced earlier. The learned Counsel

appearing for both parties agreed that given their submissions on the substantial question under reference, it was required to be re-formulated. Accordingly, Substantial Question of Law No.(iv), framed on 12.03.2024, was reformulated on 06.09.2024 in the following terms:

(iv) Whether the issue being if the suit property is located in Khasra Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11 and 5751/12 or a part of these plots (unacquired) or Khasra No.5751/5 (acquired), all part of Khewat Nos. 1 and 15, it was imperative for the Court to issue a Survey Commission or adopt the Total Station Method?

22. Before proceeding further and answering the questions involved in this appeal, it must be recorded here that in the Lower Appellate Court, extensive documentary evidence was admitted to record, a copious description of which in a summary finds record in the judgment of that Court. There are three registered agreements, apparently executed by defendant-respondent No.5, either directly or through his attorney, in favour of the plaintiffs dated 07.10.2005, 29.09.2008 and 16.09.2009, extending the life of the original registered agreement to sell dated 05.04.1990. Apart from it, there are many documents relating to acquisition by the defendants brought on record, some of which have been secured under the Right to Information Act. PW-1, Virendra Kumar, who is the first plaintiff in the suit, has testified before the Lower Appellate Court in the witness-box.

23. Heard Mr. Ramesh Upadhyaya, learned Senior Advocate assisted by Mr. Rajan Upadhyay, learned Counsel for the

defendants in support of this appeal, Mr. Ashish Kumar Singh, learned Counsel appearing on behalf of defendant-respondent No.5 and Mr. Pushkar Mehrotra, learned Counsel appearing for plaintiffs Nos.1, 2, 3 and 4.

24. As regards the first substantial question of law, the Lower Appellate Court has extensively referred to the recorded chain of title relating to *Khasra* No.5751, regarding the part falling in *Khewat* No.1. It has been noticed that *Khewat* No.15 relating to *Khasra* No.5751, paper No.144-Ga shows the name of Sirajuddin son of Fariduddin, defendant-respondent No.5 recorded along with the other co-owners. The Lower Appellate Court has opined that a perusal of paper No.145-Ga/3 supports the fact that Shafiuddin son of Rafiuddin was recorded in *Khasra* No.5751M to the extent of 0.9360 hectare. Likewise, paper No.145-Ga/4 shows that in *Khewat* No.15, Shafiuddin son of Rafiuddin's name is recorded in *Khasra* No.5751M to the extent of 1.3160 hectares. Others too are recorded in the plot with their possession shown by way of abadi. It is then remarked that *Khasra* No.5751 also finds record in paper No.147-Ga for the Fasli Year 1410. It is also remarked by the Lower Appellate Court that paper No.142-Ga is a sale deed executed by Khan Bahadur Sheikh Wahiuddin in favour Bhuria, which is now Allah Mehar's land. This fact shows that in the opinion of the Judge in the Lower Appellate Court, Wahiuddin sold land to Allah Mehar, leaving back the remainder of his land lying towards south of that sold in *Khasra* No.5751M. The inference drawn by the learned Judge in the Lower Appellate Court is that the suit property, denoted by letters ABCD (in the plaint map) lies to the south of the Dhobi Ghat and belongs to the heirs of Khan Bahadur Wahiuddin, where

in the *Khewat*, Shafiuddin son of Rafiuddin is recorded along with others. It is also remarked that in the same *Khewat*, defendant-respondent No.5, Sirajuddin is also recorded as a owner. A copy of the plaint, bearing paper No.117-Ga, giving rise O.S. No.21 of 1993, Jamaluddin v. Mughisuddin and another, from the Court of the 5th Additional Civil Judge, Meerut has been noticed by the Lower Appellate Court to show that Shafiuddin son of Rafiuddin was defendant No.20 to the said suit, who had died and in his place, his heirs had been substituted as defendant Nos.20/1, Kutubuddin, 20/2, Sirajuddin and 20/3, Abdul Qadir, all sons of Sheikh Fariduddin. This has led the Lower Appellate Court to further infer that Shafiuddin, who was recorded in *Khasra* No.5751, *Khewat* No.15 to the extent of 1.3160 hectares and *Khewat* No.1 to the extent of 0.9360 hectare, had died, leaving behind defendant-respondent No.5, Sirajuddin, inheriting a one-third share that he owned in the *Khewat*. It is also noticed that Sirajuddin was already recorded in *Khewat* Nos.1 and 15 as one of the owners (Malikan). From these facts, the Lower Appellate Court has inferred that defendant-respondent No.5, Sirajuddin was owner in possession of land, comprising his share in *Khasra* No.5751 of *Khewat* Nos.1 and 15. It is then remarked by the learned Judge that defendant-respondent No.5 has not traversed the plaintiffs' claim and the suit against him had proceeded ex parte. He had executed the suit agreement, the execution of which was proved by Virendra Kumar, PW-1 and Jaipal Sharma, PW-2, who were witnesses of the agreement. A further agreement to sell and extending the term of the suit agreement, paper No.173-Ga (photostat copy of which is paper No.174-Ga) has been executed on 16.09.2009. The suit agreement has,

therefore, been found to be still an enforceable contract. The suit agreement was opined by the Lower Appellate Court to be one showing the boundaries of the suit property, comprising 5000 square yards of land, contracted to be purchased for the worth of Rs.5,00,000/-, out of which a sum of Rs.4,70,000/- was paid in earnest.

25. In the opinion of the learned Judge in the Lower Appellate Court, the suit agreement shows that the plaintiffs were in possession of the suit property, earlier as tenants. It is remarked that the issue, whether the plaintiffs had paid the requisite sale consideration to defendant-respondent No.5 is a matter inter se the two parties, where the defendants have no locus standi to object. From the testimony of PW-1 Virendra Kumar, PW-2 Rampal Singh, PW-3 Raj Kumar Sharma and PW-4 Jaipal Sharma, in the witness-box, it has been concluded by the Lower Appellate Court for a fact that it is the plaintiffs, who are in possession of the suit property. The suit agreement affirms the fact that at the time of entering into it, the plaintiffs were in occupation of the suit property on a monthly rent of Rs.300/- since the year 1970. It has also been remarked that rent receipts have been produced and proved.

26. The question, therefore, if the plaintiffs can claim or maintain any rights or title over the suit property on the basis of an agreement to sell alone, executed by Sirajuddin, is to be answered in the affirmative. The reason is that inter se Sirajuddin, defendant-respondent No.5, who has been found by the Lower Appellate Court on a plausible view of the evidence on record to be the owner of the suit property and the plaintiffs, there is no dispute that the plaintiffs are in possession of the suit property. Their possession

commenced as tenants way back in the year 1970 and the character and nature of their rights altered to that of a vendee, holding under a contract, whose existing possession had been converted to one referable to the agreement to sell or the suit agreement here. It really means that the former tenants, to wit, the plaintiffs, are now in possession of the suit property in part performance of the suit agreement. Assuming that the plaintiffs are not in possession of the suit property in part performance of the suit agreement, but as tenants, properly so called, or holding over, or at sufferance, there is no quarrel about the fact that howsoever inchoate the plaintiffs' title, it is a case for the plaintiffs, holding permissive possession of the suit property at the instance of the owner thereof, to wit, defendant-respondent No.5, Sirajuddin.

27. Now, the other issues to what extent Sirajuddin is the owner of the suit property, vis-à-vis his co-sharers and what is the extent of his rights in the suit property, area-wise, is a matter inter se Sirajuddin and his co-sharers, and may be the plaintiffs. The fact if the plaintiffs are still tenants of some kind or in possession of the suit property in part performance, as already remarked, is also a matter between the plaintiffs on one hand, and defendant-respondent No.5, Sirajuddin on the other. It has nothing to do with the defendants unless the defendants show or establish that they have acquired title to the suit property, or so to speak, the said property through the Government under the law of acquisition. Whether they have acquired the suit property or not, is not the subject matter of this question. Elsewhere, it has been held and that alone is relevant to this question that the defendants are not the owners of the suit property. If they are not, the

plaintiffs, whether in possession of the suit property by permission or licence of defendant-respondent No.5, or in their right as his tenants, or by virtue of possession traceable to part performance of the suit agreement, executed by defendant-respondent No.5, are entitled to maintain the suit for an injunction against the defendants; if not on the basis of pristine title, on the basis of a well established and sound possessory title.

28. In view of the answer to Substantial Question of Law No.1, Substantial Question of Law No.2 does not arise for consideration, as rightly objected to by the plaintiffs.

29. Now, this takes us to the third question, if the Lower Appellate Court was justified in decreeing the suit without the boundaries mentioned in the amended plaint being duly proved. The Lower Appellate Court has answered the issue if the boundaries originally given in the plaint and those amended and clarified with the aid of a plaint map effect a change in the identity of the suit property. The learned Judge has remarked that the boundaries given in the plaint, originally pleaded, showed the suit property to be one abutting the Dhobi Ghat and the Government Road. The boundaries, that were earlier given in the plaint and those presently given, on all four sides are the same. The suit property on side AB to the north showed Dhobi Ghat and Sports Colony; to the south, it earlier showed the plot of Rajveer, which land has now been given into the possession of the defendants, the Avas Evam Vikas Parishad. The suit property on the side AD shows the defendants and thereafter the Maharana Enclave. It is then remarked that upon a perusal of the map attached to the plaint, it is clear that the

north-south directions relative to the suit property are diagonally placed and for the said reason, in giving the boundaries of the suit property, some confusion had arisen. A perusal of the plaint map, annexed after the amendment, clarifies the situation of the suit property and indicates no change in its location.

30. It is remarked by the Lower Appellate Court that the submission of the learned Counsel for the defendants here that there is a change brought about to the suit property has no force. The said property, as shown in the plaint map annexed, has no confusion about its identity. Now, these are findings of fact recorded by the Lower Appellate Court upon doing a comparison of the boundaries originally pleaded in the plaint, with those amended, together with the plaint map brought in through the amendment to clarify matters. It may be noticed that the suit was instituted way back in the year 1991 and the plaint giving rise to it is a document dated 20.11.1991. The boundaries were amended pursuant to an order of the Court dated 28.04.2009, made on an amendment application dated 27.03.2009. The change in boundaries, that the plaintiffs have brought in through the amendment, is distanced in time by 18 years. This Court must observe that every amendment to the boundaries in the plaint need not be proved, provided the change brought in through the amendment on a realistic appraisal of evidence, does not bring about a change to the location and the identity of the suit property. If the change, that is brought in through the amendment, is merely clarificatory of the boundaries originally pleaded, or is necessitated by the fast-changing landscape in contemporary time, where the surroundings of a given property suffer quick change due to the fast

pace of development, no proof of boundaries, the change whereof is necessitated by the changed surroundings of the property overtime may be required. In this connection, reference may be made to **Naresh Kumar and others v. Smt. Chawli and others**, 2020 (5) ADJ 33, where I held:

“41. The findings of the lower Appellate Court, based on appreciation of documentary and oral evidence to conclude the precise manner in which *Khasra* No. 113 has been subdivided to leave a residue on the eastern side of the brick-worked road, laid with permission of the plaintiff, is a flawless finding of fact. It is not for this Court to interfere with that part of the finding. This Court, however, has, within the limited scope of its scrutiny clearly indicated that on a true interpretation of the title deeds, dated 3.6.1896, 4.6.1896 and 26.3.1920, there is no interpretation to be done about identity of the suit property, where conclusions have been drawn by the lower Appellate Court from evidence based on subsequent changes to physical features, that are not contemporaneous to the sale-deeds. It is held for a principle that though boundaries given in the deeds of title are the most reliable evidence about the identity of adjoining properties, but the rule may have slender or no application to a situation where physical features about the property suffer change in course of time. In this case that change happened in 1956.”

(emphasis by Court)

31. The question is, therefore, answered in the **negative** with the remark that given the clarificatory nature of the boundaries of the suit property brought in by amendment and depiction of changes due to development, the Lower Appellate Court committed no error in decreeing the

suit without the boundaries in the amended plaint being proved.

32. Now arises for consideration the last and the most fundamental question, that is to say, the fourth substantial question of law. The question is, if it was imperative for the Court to issue a survey commission or resort to the total station method in order to locate the suit property. The dispute about the location of the suit property has arisen precisely on the issue if it is located in *Khasra* Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11 and 5751/12 or a part of these plots (unacquired), or *Khasra* No.5751/5 (acquired), all part of *Khewat* Nos. 1 and 15. The question about the location of the suit property has been dealt with by the Lower Appellate Court in answering Issue No.5; Issues Nos.1, 2, 3, 4 and 7 together, and, lastly, Issue No.11. In answering the substantial question of law under consideration, it is not the findings of fact recorded by the Lower Appellate Court about the location of the suit property, vis-à-vis the *Khasra* plot number, that we are required to re-determine, but to see if the conclusion about location of the suit property in one or the other *Khasra* plot number, could be reached without the aid of a survey commission. There is no quarrel on facts between parties that a survey commission following the three-fixed point method was not issued at all in this case. Neither the parties made that application, either during trial or in appeal; nor did the Court consider it appropriate to issue a survey commission. This issue was raised before the Trial Court and noticed in its judgment, but no commission was indeed issued. It is required to be seen if on the state of evidence the issue of a survey commission or adoption of the total station method to locate the suit property in one

Khasra plot number or the other with reference to its *Khewat* or otherwise was necessary. The Lower Appellate Court has noticed that the suit property is a 5000 square yards land, denoted in the plaint map by letters ABCD. According to the plaintiffs, it is a part of *Khasra* No.5751, which is included in *Khewat* Nos.1 and 15. It is also noticed that the plaintiffs' case is that the suit property has not been acquired by the Government. Rather, what has been acquired out of the said plot is the land comprising the Dhobi Ghat, belonging to Allah Mehar, which comprises an area of two bigha.

33. The plaintiffs' case further noticed is that two bigha of land belonging to Allah Mehar has constructions all over it and for the said reason, possession of this acquired land could not be taken. The defendants, therefore, are attempting to take possession of land to the south of Allah Mehar's, that is part of *Khasra* No.5751M, included in *Khewat* Nos.1 and 15, but not acquired in order to make good the total area of 14 bigha 16 biswa and 6 biswansi of acquired land in *Khasra* No.5751.

34. The learned Judge in the Lower Appellate Court while answering Issue No.5 has remarked that the conclusions of the Trial Court on the issue were not based on evidence led by parties. The evidence led by parties on this issue has not been appreciated in its context and conclusions drawn. The learned Judge has referred to paper No.48-Ga/1, which is a possession memo. A photostat copy of the said memo has been noticed to be marked as paper No.188-Ga/2. Now, about this document, it is remarked by the Lower Appellate Court that pursuant to the notification dated 12.10.1972 under Section 17 of the Land Acquisition Act, a total area of 66 bigha 6

biswansi was taken possession of by the defendants. The possession memo indicates the *Khasra* numbers of the plot and the relative area. It is remarked that *Khasra* No.5751, which is a big plot, has had an area of 12 bigha 5 biswa belonging to Bhabhuti and another agriculturist, taken possession of, besides an area of 2 bigha, also in the same *Khasra* No.5751M, belonging to Allah Mehar. Also taken possession of in *Khasra* No.5751M is an area of 11 biswa 6 biswansi, recorded in the name of Municipal Board. The total area of land acquired out of *Khasra* No.5751M works out to a figure of 14 bigha 16 biswa 6 biswansi.

35. It is remarked by the learned Judge that in the written statement in paragraph No.16, it is averred that a part of *Khasra* No.5751 alone has been acquired and that to the north of the acquired part of *Khasra* No.5751 lies the balance of unacquired land. The Judge in the Lower Appellate Court has taken particular note of the contents of the award passed in the compensation matter. This document was secured under the Right to Information Act and its veracity is not in doubt. The award has been noticed at page Nos.9 and 10 thereof to say that out of *Khasra* No.5751, 12-5-0 of land stood in the name of Bhabhuti and Bulaki, whereas these men hold no title to it. This land is nazul. It then figures at page No.10 of the award that *Khasra* No.5751/13, comprising 0-10-0 has not been acquired. Likewise, the award shows at page No.11 that land comprising *Khasra* Nos. 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/12, admeasuring 4 bigha 14 biswa has not been acquired. On the same page, the finding recorded by the Land Acquisition Officer in the award is that 3-19-0 land in *Khasra* No.5751/1, and 1-5-0 in *Khasra*

No.5751/2, is not found included in the defendants' Housing Scheme, and a fortiori, not acquired. At page No.12 of the award, it is remarked that Sheikh Shafiuddin had said that *Khasra* No.5751, part of *Khewat* No.15, the land admeasured 5-4-0, whereas the part of *Khasra* No.5751 that lay in *Khewat* No.1, the area of land was 3-14-0. He further said that he was the tenure holder of the said land and that his father died in October, 1968. He had possession recorded in revenue records relating to the said land. Shafiuddin also credited with the statement that *Khasra* No.5751 is recorded as a joint holding and land acquired for Scheme No.1 includes part of land from this *Khasra*. Out of the said *Khasra* number, two bigha of land was sold by his grandfather, Wahiuddin to Mst. Bhuria vide registered sale deed dated 04.09.1949 and upon Bhuria's demise, came to be recorded in her son Allah Mehar's name in the revenue records of 1370 Fasli. Shafiuddin has further said that Allah Mehar sold the most part of his land for construction of houses. It was also said by Shafiuddin that Allah Mehar's land abuts the pucca road and Nala No.5743, and stretches across on the other side to the Dhobi Ghat constructed by him. The southern part of *Khasra* No.5751, by no means, is Allah Mehar's land. The southern part, admeasuring 2.30 bigha, which is being acquired, belongs to him (Shafiuddin) and he is entitled to claim compensation for it. He has also said that the remainder of land lies to the west. Now, all this testimony credited to Rafiuddin was recorded during proceedings of adjudication leading to the award by the Special Land Acquisition Officer.

36. The learned Judge has inferred from these facts that Wahiuddin was Shafiuddin's grandfather, who sold land to

Mst. Bhuria vide registered sale deed dated 04.09.1949. After Bhuria's demise, her son, Allah Mehar came to be recorded in the said land by succession. The said land houses the Dhobi Ghat as well. To the south of Allah Mehar's land, admeasuring 2 bigha, is the remainder of land belonging to Shafiuddin. The learned Judge has particularly remarked that the award holds that the inference is that Shafiuddin's demand for compensation regarding *Khasra* Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11 and 5751/12 is not tenable because the land aforesaid is not under acquisition. Possession of the aforesaid *Khasra* numbers has never been taken by the defendants. It is remarked by the Lower Appellate Court that, according to the award, the defendants took possession of *Khasra* No.5751, part of *Khewat* No.445, *Khata* Nos.398 and 411, admeasuring 12-16-6, comprising nazul and *Khasra* No.5751/5, admeasuring 2-0-0 for the purpose of the Scheme. The learned Judge has remarked that from a perusal of the award, it is pellucid that *Khasra* No.5751, 12-16-6 land is nazul, whereas 2 bigha comprised in *Khasra* No.5751/5 is Allah Mehar's land. The land situate to the south of Allah Mehar's, held by Sheikh Shafiuddin, is not included in the acquired land. The award has been relied upon by the learned Judge to infer that land to the south of the part of *Khasra* No.5751, upon which the Dhobi Ghat is constructed, is not acquired land at all. The possession memo, paper No.188-Ga has been noticed by the learned Judge to say that 12-5-0 land recorded in the name of Bhabhuti and another, besides *Khasra* No.5751M, admeasuring 0-11-6 recorded in the Municipal Board's name, totals to an area 12-16-6, which is nazul in the award. The learned Judge has also remarked that

Khasra No.5751/5, admeasuring 2 bigha is Allah Mehar's land. Thus, the total land comprising 14-16-6 is acquired land, but land to the south of Allah Mehar's, is not acquired. The learned Judge has then quoted from the award thus:

"अल्लामेहर ने खसरा सं. 5751 की 2-0-0 बीघा भूमि जो जमींदारी विनाश क्षेत्र में पड़ती है, के सम्बन्ध में मुवावजा हेतु मांगपत्र प्रस्तुत किया है इन्होंने अधिकांश भूमि प्लाट बनाकर बेच दी है। इनकी भूमि अर्जन में न होते हुए भी यह प्रतिकर पाने की कोशिश कर रहे हैं।"

37. It is then recorded by the Lower Appellate Court that in view of the said finding by the Land Acquisition Officer, Allah Mehar was not paid any compensation for the 2 bigha of his land. It is further remarked that though the land of *Khasra* No.5751/5 admeasuring 2 bigha is under acquisition and Allah Mehar's name is recorded over it, but in consequence of Allah Mehar selling the said land to third parties, possession of the same could not be taken. Referring to the award extensively, the learned Judge has inferred that out of the total area of land acquired in *Khasra* No.5751M, to wit, 14-16-6, 2-0-0, belonging to Allah Mehar, could not be taken possession of. The physical possession taken, according to the award, was noticed to be 11-19-12 i.e. short by 2-16-14. The learned Judge has opined that the defendants' case that they have taken possession of the entire area of acquired land, admeasuring 14-16-6 physically, which does not include Allah Mehar's land, that is to say, 2 bigha of the Dhobi Ghat, which was not acquired, but lay to the south of Dhobi Ghat, is incorrect. There are very detailed comparison with areas of the

acquired land, old records and guesswork done on some probabilities, whether the suit property could indeed be part of the acquired land or away from it. The conclusion drawn is that the suit property, that lay to the south of Allah Mehar's land, was not included in the acquired land and that part of *Khasra* No.5751M was unacquired. To the same effect are the findings on Issue No.11.

38. Now, on the undisputed facts, what may not be denied are that the only land acquired, comprising *Khasra* No.5751M, part of *Khewat* Nos.1 and 15 was the one sold away by the ancestors of defendant-respondent No.5 to Mst. Bhuria vide sale deed dated 04.09.1949. In former times, *Khasra* No.5751 was a very large number, spread across a number of *Khewat*. It is also not disputed that the land of *Khasra* No.5751, belonging to defendant-respondent No.5 and rented out to the plaintiffs, and subsequently contracted to be sold, is located in that part of *Khasra* No.5751, which lies in *Khewat* Nos.1 and 15. The only part of *Khasra* No.5751 lying in *Khewat* Nos.1 and 15, that was acquired, is an area of 2 bigha sold to Bhuria, and, subsequently, inherited by Allah Mehar. It is also not in dispute that the suit property lies in the southern part of *Khasra* No.5751, part of *Khewat* Nos.1 and 15, owned by defendant-respondent No.5 and let out to the plaintiffs, and subsequently contracted to be sold to them.

39. The Lower Appellate Court seems to have attempted to determined the matter with reference to the findings in the award passed by the Special Land Acquisition Officer, the records, the relative location of different parts of *Khasra* No.5751, the way they are placed direction-wise to one another, because what is not in dispute is

that most of the acquired part of *Khasra* No.5751 lie in other *Khewat* numbers; not 1 and 15. At the same time, there is no quarrel, as already said, that the suit property is definitely located in that part of *Khasra* No.5751, which is included in *Khewat* Nos.1 and 15. The last fact that has led the Lower Appellate Court to decide finally and without undertaking a survey of the suit property with reference to its plot number, in which it is located, is the fact that Allah Mehar's part of *Khasra* No.5751, lying in *Khewat* Nos.1 and 15, alone has admittedly been acquired, which measures 2-0-0 with evidence there to the effect that Allah Mehar sold away his 2 bigha to third parties, of which possession could not be taken due to encroachment and constructions over it. The Lower Appellate Court moved to a quick finding that for the balance of the total area of acquired land in *Khasra* No.5751, to wit, 14-16-6, part of *Khewat* Nos.1 and 15, the defendants have attempted to encroach into the suit property, claiming it as theirs in lieu of the short area of Allah Mehar's, of which they could not take possession.

40. This Court must remark that *Khasra* No.5751, the part lying in *Khewat* Nos.1 and 15, has since come to be subdivided into *Khasra* Nos.5751/1, 5751/2, 5751/3, 5751/4, 5751/5, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12. It is no longer an undivided or minjumla number, but has definitive subdivisions, all bearing different survey plot numbers/ *Khasra* numbers. It is also not in dispute that the survey plot number or *Khasra* number of land owned by Allah Mehar is 5751/5. Abutting it to the south, are different subdivisions of *Khasra* Nos.5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12, in some of which the

suit property is located. There is every possibility that the suit property might include some part or area of *Khasra* No.5751/5. Therefore, it is of the first importance to determine in which plot numbers precisely the suit property lies. By now, it has come to be settled for a principle that in the face of any doubt or dispute, if the suit property is located in one survey plot number or *Khasra* number or the other, has to be determined through a survey commission following the three fixed points method. If fixed points are no longer available, the precise location of the suit property with reference to the survey plot number or *Khasra* number can be done through resort to the total station method. The principle that in case of a dispute about the location of the property in one survey plot number or the other, it is necessary to issue a survey commission, has come to be well settled.

41. The principle that in case of a dispute about the location of the property in one survey plot number or the other, it is necessary to issue a survey commission, which would identify the suit property following the fixed point method, is laid down by the Supreme Court in **Shreepat v. Rajendra Prasad and others, 2000 (40) ALR 534: JT 2000 (7) SC 379**. It has been held in **Shreepat** (*supra*):

“1. Respondent No. 1 - Rajendra Prasad had instituted a suit for declaration and possession over land bearing *Khasra* No. 257/3 against the Appellant on the ground that he had purchased this land from its previous owner - Premnarayan - by a registered sale-deed. It was further pleaded that the Appellant had forcibly taken possession and was trying to construct his house. The suit was resisted by the Appellant on the grounds, inter alia,

that the land in dispute was not part of Kteasra Plot No. 257/3, but was part of *Khasra* Plot No. 257/1 which was the Government land and over which the Appellant was in possession since long, it having been leased out to him. It was also pleaded that he had constructed the house over that land.

2. On a consideration of the evidence on record, the trial court decreed the suit. The decree was affirmed by the lower appellate court and upheld by the High Court in Second Appeal.

3. The principal contention raised by learned Counsel for the Appellant is that though there was a serious dispute with regard to the identity of the land in dispute, whether the land in dispute formed part of *Khasra* No. 257/3 or *Khasra* No. 257/1 (sic) courts below did not get the identity established and decreed the suit of the Respondent only on the basis of oral evidence which was not sufficient for the purpose of establishing the identity of the land in dispute at the spot.

4. In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity, the courts below, before decreeing the suit should have got the identity established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of *Khasra* No. 257/3 or *Khasra* No 257/1. This having not been done has resulted 'in serious miscarriage of justice. We consequently allow the appeal, set aside' the order passed by the courts below as affirmed by the High Court and remand the case to the trial court to dispose of the suit afresh in the light of the observations made above and in accordance with law."

42. In the fast changing landscape of the present day, fixed points sometimes

disappear and are no longer available. If that be the position, to determine the *Khasra* number, where the suit property is located and demarcate it with reference to its plot number, an alternate method of more recent origin is the total station method. That this method can be utilized to demarcate lands/ property with regard to their location in one survey number or the other was held by the Delhi High Court in **Delhi Development Authority v. Mohd. Sher Nabi Chaman and others, 2015 SCC OnLine Del 7832**, where it is observed:

"13. At this stage, I may also deal with and dispose of an argument urged on behalf of the respondent no. 1/plaintiff/ applicant/ review petitioner that the right to file objections if taken away would seriously affect the rights of the respondent no. 1/plaintiff/ applicant/ review petitioner, however, this argument conveniently ignores the fact that both the parties agreed to be bound by the fresh demarcation report to be carried out in terms of the Total Station Method. Since both the parties agreed, more so because there was a very narrow scope of the respondent no. 1/plaintiff/applicant/review petitioner existing whether in *khasra* nos. 22/3, 22/4, 22/8, 22/9 and 25/20/2 of village Mandoli as claimed by him or in *khasra* nos. 976 min., 977 min., 978 min. and 979 min. of village Mandoli which was the land of the petitioner/DDA, therefore, there is no prejudice to the respondent no. 1/ plaintiff/ applicant/ review petitioner and hence these arguments urged on behalf of the respondent no. 1/ plaintiff/applicant/review petitioner are rejected.

14. The next argument which was urged on behalf of the respondent no. 1/ plaintiff/ applicant/ review petitioner was that the revenue law does not entitle the

demarcation by the Total Station Method, however, in my opinion, this is an argument of desperation because there is no bar under the revenue law not to carry out demarcation by the Total Station Method. Merely because a particular method is provided in the revenue laws which was passed many decades back, does not mean that the modern methods with respect to demarcation cannot be adopted by the revenue authorities, more so when such a method is now the only available proper method, because the traditional methods were with respect to areas and lands which were unconstructed and wherein demarcation could be done by traditional methods, but when the entire city is built up, demarcation will have to be done by the laser method i.e the Total Station Method inasmuch as which is done with respect to the fixed and specific points in terms of the revenue law. This argument urged on behalf of the respondent no. 1/ plaintiff/ applicant/ review petitioner is also therefore rejected.”

43. In the entire gamut of the otherwise very detailed findings recorded by the Lower appellate Court to answer for the plaintiffs, the ignorance of this principle in a dispute about location of the suit property being in one plot number or numbers, or the other or others specified, would vitiate the conclusions. In this case, the principle applies with greater force, because the controversy has, as already remarked, narrowed down to the issue if the suit property is located in *Khasra* No.5751/5, which is the only plot number of the subdivided plots of *Khasra* No.5751, located in *Khewat* Nos.1 and 15, that has admittedly been acquired. Other parts of *Khasra* No.5751 or its later subdivided plots fall in other *Khewats*; not *Khewat* No.1 or 15. The suit property, which the

plaintiffs claim comprising *Khasra* No.5751, and now, its subdivided numbers is located in *Khewat* Nos.1 and 15; not the other *Khewat*. These issues have already been dwelt upon by the Lower Appellate Court in punctilious detail, which need not detain us. Nevertheless, the findings of the Lower Appellate Court cannot be upheld unless a survey of the contiguous *Khasra* Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12 on one hand and *Khasra* No.5751/5 on the other, is carried out according to the fixed points method. If survey is not possible, the location of the suit property in the precise *Khasra* numbers has to be determined through the total station method.

44. In view of the aforesaid conclusions, Substantial Question of Law No. (iv) is answered in the **affirmative**.

45. In view of the answer to Substantial Question of Law No.(iv), the judgment of the Lower Appellate Court would have to be set aside with a remit of the matter to that Court with a direction to hear and decide the appeal afresh, after causing a fixed point survey of the suit property with regard to its location in one set of plot numbers or the other. Or, failing a fixed point survey of the suit property, the location thereof with reference to its plot number/ numbers has to be undertaken, adopting the total station method.

46. The result would be that the decree passed by the Lower Appellate Court would have to be set aside with a remit of the matter to that Court with the direction that the location of the suit property in one plot number or the other, and, particularly, if it is located in *Khasra* No.5751/5 or in the contiguous *Khasra* Nos. 5751/1,

5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12, would have to be determined through the agency of a survey commission, who would undertake it following the three fixed points method. If the survey commission fails for the non-availability of three fixed points, a fresh commission shall be issued to a trained agency to determine the location of the suit property as aforesaid, following the total station method. Upon the submission of a report by the Survey Commissioner following the fixed point method, or the total station method, as the case may be, the parties would have a right to object and lead necessary evidence. The Lower Appellate Court will then re-hear and decide the appeal afresh, all to be done within a period of six months from the date of receipt of a copy of this judgment and order.

47. In the result, this appeal succeeds and is **allowed in part**. The impugned decree passed by the Lower Appellate Court is set aside with an order of remand in above terms.

48. The costs of this appeal shall abide by the event in the appeal before the Lower Appellate Court.

49. Let the lower court's records be sent down at once.

(2024) 9 ILRA 625

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.09.2024

BEFORE

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

Second Appeal No. 946 of 2010

U.P. Avas Evam Vikas Parishad, Lucknow & Anr.

...Appellants

Versus

Sirajuddin & Ors.

...Respondents

Counsel for the Appellants:

A.P. Srivastava, Chandra Shekhar Singh

Counsel for the Respondents:

A.K. Sharma, Anil Sharma, D.S. Bohra

Civil Law - Civil Procedure Code, 1908 - Section 100 - Order VII - Rule 11 - U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 - Sections 17, 32 & 88(2) - U.P. Town Improvement Act, 1919 - Section - 36 - Specific Relief Act, 1963 - Sections 38 & 41 - Second Appeal - filed by defendants - original suit - for a permanent prohibitory injunction - filed by five plaintiffs, against the defendant-appellants, who claim ownership and tenancy of a disputed property - The trial court dismissed the suit - but, the appeal filed by plaintiffs was allowed, leading to a decree in their favour - The defendants then appealed in instant Second Appeal - raised substantial questions of law regarding the ownership and identity of the disputed land - court finds that, in the entire gamut of the otherwise very detailed findings recorded by the lower appellant court to answer for the plaintiffs, the ignorance of this principle in dispute about location of the suit property being in one plot number or numbers or the other, would vitiate the conclusions - held, the findings of the lower appellate court cannot be U.P.held unless a survey of the contiguous *Khasra* numbers is duly carried out according to the fixed point method - hence, the impugned decree passed by lower appellate court is set aside - matter is remanded back to the court for further investigation to accurately determine the location of the suit property using a survey commission or the total station method - lower appellate court will then rehear and decide the appeal afresh - directions issued, accordingly - Appeal is allowed in part.(Para - 38, 40, 41, 42)

Second Appeal Partly allowed. (E-11)

List of Cases cited:

1. Shreepat Vs Rajendra Prasad & ors., 2000 (40) ALR 534: JT 2000 (7) SC 379,

2. Delhi Development Authority Vs Mohd. Sher Nabi Chaman & ors., 2015 SCC OnLine Del 7832.

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

1. This is a defendants' second appeal arising out of a suit for permanent prohibitory injunction.

2. Original Suit No.866 of 2005 was instituted in the Court of the City Munsif, Meerut by the five plaintiff-respondents to this appeal, praying that a decree of permanent injunction be passed against the defendants, to wit, the U.P. Avas Evam Vikas Parishad, Lucknow and the Assistant Housing Commissioner of the Parishad aforesaid to the effect that the defendants be restrained from interfering in the rights and possession of the plaintiffs, demolishing their standing constructions or interfering with the construction work carried on by the plaintiffs on the land in dispute, the full particulars whereof are given at the foot of the plaint. The property, subject matter of the said suit, was shown to be 5000 square yards of land of *Khasra* No.5751, part of *Khewat* Nos.1 and 15, situate at Victoria Park, Dhobi Ghat, Meerut City (for short, 'the suit property'), with boundaries detailed. Plaintiff-respondent No.1, Sirajuddin son of Sheikh Fariduddin, claimed himself to be the owner and landlord of the suit property. Plaintiff-respondent Nos.2 to 5, to wit, Maharaj Singh, Ashok Kumar, Shripal Singh and Ashok Kumar Sharma, claimed possession over the suit property as tenants of plaintiff No.1, Sirajuddin. Plaintiff-respondent Nos.2 to 5 pleaded that they were carrying the business of a dairy in the suit property and there was no dispute between Sirajuddin, the owner and landlord

on one hand and plaintiff-respondent Nos.2 to 5, tenants on the other. The plaintiff-respondents shall together be referred to as 'the plaintiffs' hereinafter. In the event of reference to some of them, the reference would be by their number in the array or other individual reference.

3. Plaintiff Nos.2 to 5 say that they are in possession since the year 1972 and have earned goodwill for their business. Plaintiff No.1, therefore, agreed to transfer the suit property in favour of plaintiff Nos.2 to 5, executing a registered agreement to sell dated 11.04.1990 in their favour for a total sale consideration of Rs.5,00,000/-. Plaintiff Nos.2 to 5 paid the first plaintiff in earnest a sum of Rs.4,70,000/-. It is averred that plaintiff Nos.2 to 5, being in possession of the suit property prior to execution of the agreement to sell, plaintiff No.1, in part performance of the contract, delivered possession to plaintiff Nos.2 to 5. The defendants have no interest whatsoever in the suit property. On the other hand, plaintiff Nos.2 to 5 are tethering their cows and buffaloes and carrying on business. The defendants have never acquired or purchased the suit property. It was also pleaded by the plaintiffs that the total area of *Khasra* No.5751 was 29 *bigha* 13 *biswa* (pucca), of which in *Khewat* Nos.1 and 15 *Mahal* 3+7 - 1/2 and 13+2 - 1/2, 13 *bigha* 8 *biswa* was part of the *Khewat* of the zamindars. Two *biswa* land of *Khasra* No.5751 was part of other *Khewat*, belonging to other zamindars and 16 *bigha* 5 *biswa* was *mafi davam mahal*.

4. A sale deed was executed on 04.07.1949 by Wahiuddin in favour of Smt. Bhuria, conveying 2 *bigha* land out of *Khasra* No.5751, located towards the northern side of the said plot. The land, which was purchased by Smt. Bhuria on

northern side of the *Khasra* was located near the road. After Bhuria's demise, her son Allah Mehar inherited the said land. This land came to be known as Dhobi Ghat and is part of the land acquired out of *Khasra* No.5751, the total acquisition out of the said plot, being an area of 12 bigha 5 biswa.

5. It is also the plaintiffs' case that though acquired, possession of land purchased by Smt. Bhuria, known as Dhobi Ghat, was not taken by the defendants. Instead, they are asserting claim to 2 bigha land towards south of the part of *Khasra* No.5751, belonging to Smt. Bhuria and after her, her son, Allah Mehar. The suit property is situate to the south of the part of *Khasra* No.5751, that has not been acquired. The further case of the plaintiffs is that they were not issued any notice by the defendants to take possession. The plaintiffs say that they have not encroached any land of the defendants. The defendants do not own the suit property, but their employees threatened to take forcible possession and forcibly demolished the plaintiffs' construction. It is also pleaded that in the month of February, 1990, the defendants held out threats again, compelling the plaintiffs to serve a notice under Section 88(2) of the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 (for short, 'the Act of 1965') upon the defendants on 23.02.1990. The defendants received the notice, but did not answer.

6. The defendants filed a written statement, contesting the plaintiffs' case. They say that plaintiff No.1 is neither owner in possession of the suit property nor plaintiff Nos.2 to 5 tenants in possession. The plaintiffs, thus, have neither title nor possession. The suit property is there on papers, but not on the spot. The description

is vague and elusive. The suit property is not identifiable. The boundaries given in the plaint are fictitious. The suit property does not exist in the vicinity of the acquired land of *Khasra* No.5751. The defendants say that some land of *Khasra* No.5751 was acquired by the State Government under Section 36 of the U.P. Town Improvement Act, 1919 and by subsequent notifications under Section 32 of the Act of 1965. A notification was in the last issued under Section 17 of the Act of 1965 in October, 1972. Possession and ownership of the land acquired out of *Khasra* No.5751 was taken by the defendants on 13.11.1972. Since then, they are in possession of the suit property as its absolute owner. The total area acquired out of *Khasra* No.5751 is 14 bigha 16 bishwa and 6 biswansi. The boundaries of the acquired part of *Khasra* No.5751 have been pleaded by the defendants to rebut the plaintiffs' case. The defendants say that part of the land, belonging to Allah Mehar, was acquired, but possession of the acquired land in its entirety was not delivered to the defendants at the time of acquisition, including the part belonging to Allah Mehar as it houses abadi. The acquired part of *Khasra* No.5751 has encroachers, against whom cases are pending in various Courts. In paragraph No.19 of the written statement, it is admitted that a total area of 11 bigha 19 bishwa 12 biswansi alone out of *Khasra* No.5751 was taken possession of by the defendants. It is pleaded in paragraph No.20 of the written statement, amongst others, that construction work is going on over an area 11-19-12 of land aforesaid for Scheme No.1, Mangal Pandey Nagar, but according to the layout plan, no area out of land comprised in Khewat Nos.1 and 15 is included. It is said, therefore, that the plaintiffs would have no cause of action, because the suit property is part of *Khasra*

No.5751, located in Khewat Nos.1 and 15. There were other pleas raised regarding bar of the suit under the law.

7. The Trial Court, on the pleadings of parties, framed the following issues (translated into English from Hindi):

“1. Whether plaintiff No.1 is the sole owner of the property in dispute, comprising Khewat Nos.1 and 15, *Khasra* No.5751, the details of which are given at the foot of the plaint?

2. Whether plaintiff Nos.2 to 5 are in possession of the property in dispute with the consent of plaintiff No.1 since the year 1972 and their possession is protected by Section 53A of the Transfer of Property Act?

3. Whether the suit is barred by *res judicata*, as pleaded in paragraph No.24 of the written statement?

4. Whether the land in dispute is part of the acquired land, as pleaded in the written statement?

5. Whether the suit is barred by Section 88(2) of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965?

6. Whether the plaint is fit to be rejected under Order VII Rule 11 CPC, as pleaded in paragraph No.29 of the written statement?

7. Whether the suit is barred by Section 38/41 of the Specific Relief Act?

8. Whether the suit is bad for non-joinder of necessary parties?

9. Whether the defendants are entitled to the award of special cost?

10. Relief?

11. Whether the description of the property in dispute is incomplete, misleading and ambiguous, and the land is not identifiable on the spot? If yes, its effect?”

8. The plaintiffs filed substantial documentary evidence and examined two

witnesses, PW-1 Maharaj Singh and PW-2 Daya Shankar Pandey, whereas the defendants also led documentary evidence and examined a solitary witness, DW-1 Umesh Mohan Sharma. The details of the evidence, that was there before the Trial Court, is listed in the learned Trial Judge’s judgment.

9. Issues Nos.1 and 2 were answered against the plaintiffs and in favour of the defendants. Issue No.3 was answered for the plaintiffs. Issue No.4 was also answered for the plaintiffs. Issue No.5, likewise, was answered for the plaintiffs. Issue No.11 was decided against the plaintiffs and in favour of the defendants. Issue No.6 for the defendants, holding that since Issues Nos.1 and 2 had been decided against the plaintiffs, the plaint was fit to be rejected. Issue Nos.7 and 8 were not pressed by the defendants. Issue No.9 was answered for the plaintiffs as the defendants did not press much for special costs. Issue No.10 was answered against the plaintiffs, holding that no injunction can be issued against the true owner and that the suit was not filed by the true owner. The Trial Court, accordingly, dismissed the suit with costs *vide* judgment and decree dated 01.10.2009.

10. The plaintiffs, aggrieved by the Trial Court’s decree, appealed to the learned District Judge, Meerut. The plaintiffs’ appeal was numbered as Appeal No.130 of 2009 and assigned to the Special Judge (E.C. Act)/ Additional District Judge, Meerut. The learned Additional District Judge, before whom the appeal came up for determination, *vide* judgment and decree dated 02.06.2010 allowed the same, reversed the Trial Court and decreed the suit perpetually restraining the defendants from interfering with the plaintiffs’ possession in the suit property.

11. Aggrieved, this appeal has been preferred by the defendants under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code').

12. The appeal was admitted on the following substantial question of law:

Whether the finding of the courts below that the land in dispute has not been acquired by the U.P. Avas Evam Vikas Parishad in exercise of power under Section 28 read with section 32 of the U.P. Avas Evam Vikas Adhiniyam is perverse?

The aforesaid question was not numbered.

13. Later on, on 07.08.2019, two other substantial questions of law were formulated and numbered. These read:

(1) Whether, in absence of any categorical finding with regard to ownership of the plaintiffs over the suit property and with regard to identity of the land in dispute, the lower appellate court was justified in decreeing the suit?

(2) Whether, the lower appellate court was justified in placing the onus on the defendants-appellant of proving their right over the property in dispute?

14. After the hearing had proceeded substantially on 28.02.2024, 29.02.2024, 01.03.2024, 04.03.2024, 05.03.2024, 07.03.2024 and 11.03.2024, on 12th of March, 2024, this Court thought it imperative to frame a further substantial question of law, to which the parties agreed. Accordingly, following substantial question of law, marked as '(iii)' was formulated. It reads:

Whether the issue being if part of Khasra No. 5751 i.e. the suit property is

located in Khewat Nos. 1 and 15 or Khewat No. 445, it was imperative for the Court to issue a Survey Commission or adopt the Total Station Method in order to locate the suit property?

15. This appeal was heard on 28.02.2024, and, thereafter, across a number of dates until 14.03.2024, when judgment was reserved.

16. The learned Counsel for the parties mostly addressed the Court on Substantial Question of Law Nos.1, 2 and (iii). Upon considering the submissions of parties on Substantial Question of Law No. (iii), the way these were addressed, this Court thought that the question was formulated on slightly different terms than those involved, which required clarification and perhaps re-formulation, on which the parties had to be heard again. Accordingly, the appeal was posted for further hearing on 06.09.2024. On the said day, learned Counsel for the parties were apprised about the terms of Substantial Question of Law No. (iii) formulated on 12.03.2024 and seeking clarification about their submissions advanced earlier. The learned Counsel appearing for both parties agreed that given their submissions on the substantial question under reference, it was required to be re-formulated. Accordingly, Substantial Question of Law No.(iii), framed on 12.03.2024, was reformulated on 06.09.2024 in the following terms:

(iii) Whether the issue being if the suit property is located in Khasra Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11 and 5751/12 or a part of these plots (unacquired) or Khasra No.5751/5 (acquired), all part of Khewat Nos. 1 and 15, it was imperative for the Court to issue

a Survey Commission or adopt the Total Station Method?

17. Heard Mr. Ramesh Upadhyaya, learned Senior Advocate assisted by Mr. Rajan Upadhyay, learned Counsel for the defendants in support of this appeal, Mr. R.C. Singh, learned Senior Advocate assisted by Mr. Dheeraj Singh Bohra, learned Counsel appearing for the plaintiffs.

18. It was urged on behalf of the defendants on the substantial question of law formulated on 10.07.2019 that the finding by the Lower Appellate Court in reversal of the Trial Court to the effect that the suit property had not been acquired by the defendants is perverse. On the other hand, it is urged for the plaintiffs that the finding about non-acquisition of the suit property recorded by the Lower Appellate Court is based on a thorough appreciation of the documentary and oral evidence on record. It is a very plausible finding and one of fact, which ought not be disturbed. This question would be dealt with later in this judgment.

19. Substantial Question of Law No.1 may first be answered. This question has two parts to it. The first is if in the absence of any categorical finding with regard to the plaintiffs' ownership of the suit property, the suit could be decreed and the other is if it could be decreed, without a categorical finding with regard to identity of the land in dispute. A perusal of the findings recorded by the Lower Appellate Court shows that it is not all the plaintiffs, who claim ownership of the suit property. Ownership is claimed by plaintiff No.1, Sirajuddin alone, whereas plaintiff Nos.2 to 5 claimed to be his tenants and doing business in the suit property i.e. part of

Khasra No.5751 on the southern side of this large minjumla number, part of Khewat Nos.1 and 15. Khasra No.5751M has been noticed to be a very large plot, spread across different Khewat, including Khewat Nos.1 and 15. On the question of ownership, the Lower Appellate Court has recorded a finding in favour of plaintiff No.1 by relying upon the award, where it is mentioned that Sheikh Shafiuddin has claimed to be the tenure-holder of land of Khewat No.15, Mahal 13+2 - 1/2 to the extent of 5-4-0 and Khewat No.1, Mahal 3+7 - 1/2, admeasuring 3-14-0, which is in his possession.

20. It is also noticed by the Lower Appellate Court from the award that Shafiuddin's father was Sheikh Rafiuddin, who died in the year 1968. The award also mentions the fact that 2-0-0 of land had been sold to Allah Mehar. In fact, it had been sold to Allah Mehar's mother, Smt. Bhuria by an ancestor of Shafiuddin, one Wahiuddin. The further finding recorded based on the award by the learned Additional District Judge is that the land of Khasra No.5751, in the southern part of it, does not belong to Allah Mehar, as would be evident from a perusal of the sale deed executed in favour of Smt. Bhuria (Allah Mehar's mother). The remainder of land in Khasra Nos.5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12 has not been acquired.

21. It has also been held by the learned District Judge, on the basis of the findings in the Special Land Acquisition Officer's award, that land of Khewat No.445, part of Khata Nos.398 and 411, but comprising Khasra No.5751, admeasuring 12-16-6 is nazul and land of Khasra No.5751/5, 2-0-0 has been acquired for the Scheme. The

further finding is that apart from 2-0-0 of land, comprised in this Khasra, part of Khewat Nos.1 and 15, no other part has been acquired. The learned Lower Appellate Court has, therefore, recorded a finding that leaving aside nazul land in Khasra No.5751 and the area of 2-0-0, the rest of the land would be owned according to the record of ownership in the Khewat.

22. This Court must remark that in determining the question of ownership on the state of pleadings of parties, the question is always to be determined inter partes, relative to their pleaded case and the evidence produced. The case of plaintiff No.1 is one based on inheritance, pitted against that of the defendants, who claim on the basis of acquisition. No doubt, the Lower Appellate Court has not investigated the entire derivation of title by plaintiff No.1 from the last recorded and admitted owner or zamindar Sheikh Wahiuddin down to plaintiff No.1, precisely determining his share according to the pedigree, but that would not be the requirement of the law in a suit for injunction of the present kind. The findings in the award, on which the Lower Appellate Court has relied, clearly point to the fact that the Special Land Acquisition Officer has held that in Khasra No.5751, part of Khewat Nos.1 and 15, all that has been acquired is an area of 2-0-0, the land transferred by Sheikh Wahiuddin to Mst. Bhuria, and, subsequently, inherited by Allah Mehar, her son. The Lower Appellate Court has, therefore, held that the other land in Khasra No.5751 would belong to the owners as recorded in the Khewat. Amongst them, it is not disputed that plaintiff No.1 is there. In this suit for injunction against a defendant, who does not himself claim title to a particular plot of land beyond a certain area of it, which the

plaintiff does not claim, the Lower Appellate Court has recorded a finding as to ownership of plaintiff No.1, sufficient to support the decree for injunction. It has also been opined by the Lower Appellate Court, on the basis of consideration of relevant evidence, that plaintiff Nos.2 to 5 are in possession of the suit property with permission of plaintiff No.1, and further, that their possession is protected by Section 53-A of the Transfer of Property Act.

23. As to the other part of the question regarding decreeing the suit without the Court recording a categorical finding as to identity of the suit property, this Court notices that the Lower Appellate Court has determined the identity of the suit property by looking into the award, where the case of parties is categorical that except for an area admeasuring 2-0-0 of land, comprising Khasra No.5751/5, transferred to Mst. Bhuria through a sale deed by Wahiuddin (later on inherited by Allah Mehar), no other part of Khasra No.5751, lying in Khewat Nos.1 and 15, was acquired by the defendants. Now, to determine the identity of the suit property, the Lower Appellate Court has looked into two maps, produced in evidence by the defendants, one bearing paper No.20-Ga and the other bearing paper No.21-Ga. The Court has found material discrepancies between these two maps and analyzed it well. The Lower Appellate Court has remarked that the two maps are contrary to the acquisition proceedings. A lay out plan, bearing paper No.93-Ga has also been considered by the Lower Appellate Court, which shows the total area of acquired land in Khasra No.5751M to be 3.9550 hectares that works out to 16-0-0. Out of this, an area of 1740 square meters, which is shown as abadi, reducing the acquired area to 15-0-0, has been noticed. The lay out plan of the

acquired land has been meticulously analyzed with reference to the other maps produced by the defendants to reach a conclusion that the land of the Dhobi Ghat, which is admittedly acquired, is not shown in the lay out plan and the area thereof, admeasuring 2-0-0, is admitted to be made good from land in Khasra No.5751 to the south, which is unacquired land. It is also observed that admittedly, according to the defendants, they are in possession of an area 12-0-0 of land, apparently out of Khasra No.5751, but in the lay out plan, they have surprisingly shown an area of 15-0-0 in the said Khasra number. There is then a stinging comment by the Lower Appellate Court that the defendants with a dishonest intention have drawn up the lay out in order to claim unacquired land from the southern part of the Khasra, which they have lost to the extent of 2-0-0, despite acquisition, comprising the Dhobi Ghat, of which they could not take possession.

24. In the face of these findings, apart from the question whether the suit property is accurately identified or something more was required to be done to identify it with greater precision, it cannot be said that the Lower Appellate Court has decreed the suit without recording a finding regarding the identity of the suit property.

25. Substantial Question of Law No.1 is, therefore, answered in the terms that it cannot be said that there is absence of findings with regarding to ownership of the plaintiffs over the suit property or as to identity of the same, though the identity is required to be established with greater precision.

26. We may now turn to answer the substantial question of law last formulated, that is to say, Question No. (iii) as re-

formulated. In support of the appeal, it is urged on behalf of the defendants that looking to the findings recorded by the Lower Appellate Court, all that can be said is that Khasra No.5751 is a very large plot, spread across different Khewat. The land of Khasra No.5751, that is part of Khewat Nos.1 and 15, has not been acquired except some area, but parts of the said Khasra number, that lie in other Khewat numbers, have been substantially acquired. The defendants would submit that the suit property's location has not been identified with reference to the Khasra number, where it is situate. This militates against the principle that if there is a doubt with reference to the plot number, where the suit property is situate, it is imperative for the Court to issue a survey commission and determine the precise location.

27. The plaintiffs rely on the very elaborate findings of the Lower Appellate Court to hold that the suit property is not at all a part of the acquired land, particularly those findings that tend to show the first plaintiff's land, part of Khasra No.5751, lying in Khewat Nos.1 and 15 was never acquired. This Court finds that the Lower Appellate Court has remarked that after the issue of notification under Section 6 of the Land Acquisition Act, which here would mean the notification issued under Section 32 of the Act of 1965 read with Section 6 of the Land Acquisition Act and before possession is taken, the Collector under Section 8 of the last mentioned Act has to demarcate the land acquired and get the same measured. If a map of the acquired land has not already been drawn up, the Collector has to get that map done. The Lower Appellate Court has said and very pertinently that despite the map or plan, as it is called under Section 8 of the Land Acquisition Act, being demanded by the

Court, it was not produced. Obviously, the Court must have asked the defendants to produce the map, because they are the acquiring body, who are in touch with the Collector and the Land Acquisition Officer. The absence of the map or a plan of the land acquired, at the stage of Section 8 proceedings, has left matters about the precise identity of the acquired land and a fortiori the location of the suit property, within or without the said land in the realm of doubt.

28. The Lower Appellate Court has recorded facts, relying extensively on the award made by the Land Acquisition Officer, to the effect that the proposal to acquire the land for the defendants involved a total of 71-14-6, of which 55-16-0 was ZA land and the balance 14-16-6 was non-ZA area. The award has been extensively scrutinized by the Lower Appellate Court to remark that so far as Khasra No.5751 is concerned, there was a demand for compensation, as regards 2-0-0 area of land acquired, put forward by Allah Mehar. It is noticed that out of the acquired land in Khasra No.5751, 0-11-6 has been noticed to be banjar belonging to Class 14(3). An area of 12-5-0 in Khasra No.5751, was claimed by Bhabhuti and Bulakidas on the basis of their possession, with the entries of a well and a pucca construction. The award found it to be nazul, entrusted to the Management of the City Board, Meerut. Bhabhuti and Bulakidas were recorded in Class 10 as non-occupancy tenants. The land was utter nazul. There is then a finding with reference to the various subdivisions of Khasra No.5751, commencing 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12, belonging to different landholders and the fact that these landholders came up

with objections claiming compensation, but the Land Acquisition Officer held that all these plots of land were not acquired.

29. There is a specific finding by the Lower Appellate Court, on the basis of the findings of the Land Acquisition Officer, that the Avas Vikas Parishad had acquired land of Khasra No.5751, that was part of Khewat No.445, Khata Nos.398 and 411, admeasuring 12-16-6 and Khasra No.5751/5, admeasuring 2-0-0. It is also remarked that the land, admeasuring 2-0-0 belongs to Allah Mehar. The further finding is that a perusal of the award shows that the fact is admitted that in Khewat Nos.1 and 15, the only land acquired is an area of 2-0-0 and no other land from this Khewat has been acquired.

30. Now, before this Court also, it is not seriously in issue at the instance of the defendants that any other part of Khasra No.5751, Khewat Nos.1 and 15 was acquired for the defendants. In their submission, the defendants had said that they had not acquired any land in Khewat Nos.1 and 15, part of Khasra No.5751. They had acquired other parts of the last mentioned plot located in different Khewat and Mahal. The Lower Appellate Court has considered a map produced by the defendants relating to their acquired land, bearing paper No.20-Ga and remarked that the total area of Khasra No.5751 shown in this map is 6.4584 hectares, where the acquired land in possession of the defendants, indicated in green colour, is 14-16-6. Beyond it, an area of 3.0278 hectare is shown and the area of the Dhobi Ghat indicated is 0.5152 hectare, in yellow colour. Maharana Pratap Enclave's area shown is 0.9770 hectare, Jasrampur Village an area of 0.1729 hectare and the Sports Colony is shown with an area of 1.7660

hectares. In the map aforesaid, relating to Scheme-01 of the defendants, the boundaries show Maharana Pratap Enclave and Jasrampur Village not acquired, but the rest is shown acquired. The total area of acquired land in this map, according to the Lower Appellate Court, turns out to be 20-22 bigha pucca.

31. Another map was produced by the defendants, bearing paper No.21-Ga, where the total area of Khasra No.5751 is shown to be 6.6500 hectares, denoted by bold dotted line in black. In the said map, it is noticed that the south-western part of Khasra No.5751 is shown comprising 1466 square meters of encroached land, which includes Village Jasrampur, Dhobi Ghat, Sports Colony, Maharana Pratap Enclave to the extent of 1683 square meters, 4350 square meters, 1757 square meters and 1228 square square meters, respectively. This map, presented by the defendants, has been remarked by the Lower Appellate Court to be discrepant from the earlier map, bearing paper No.20-Ga. It is also said about the latter map, bearing paper No.21-Ga, that the acquired land shown, does not include the area of Dhobi Ghat nor of the Sports Colony, which show that both the maps are contrary to the acquisition proceedings, including the lay out plan, bearing paper No.93-Ga. In the lay out plan, the total area shown is 16-0-0, out of which 1740 square meters is recorded to be abadi, leaving a net area of 3.7180 hectares, which works out to 15-0-0. In the said plan, the Sports Colony is shown to the north of the acquired land, stretching up to the road and to the east, abutting public drain. This plan does not show the land of the Dhobi Ghat, which was acquired land. It is also said by the Lower Appellate Court that in order to make up for the shortage of area between the acquired land and that

available on the spot, which is short by 2-0-0 of land of the Dhobi Ghat, included in the acquisition, but left out in the acquisition map/ plan, the defendants have moved southwards, that is in Khasra No.5751, including in the plan the unacquired land with a dishonest motive. The lay out plan, which has included the unacquired land in the Khasra to the south to make up for the lost area of Dhobi Ghat's acquired land, has been drawn up with a dishonest motive because the defendants have admitted that they have taken possession of 12-0-0 land, whereas the plan shows the area of the acquired land possessed as 15-0-0.

32. There is also a remark that the Trial Court has wrongly regarded Allah Mehar's land as one belonging to plaintiff No.1, Sirajuddin, also concluding in error that the plaintiffs have no possession over the same. This Court must observe that on these facts, the Lower Appellate Court has concluded that the only part of Khasra No.5751, that is included in Khewat Nos.1 and 15 which has been acquired, is Khasra No.5751/5, admeasuring 2-0-0, belonging to Allah Mehar, sparing all land in the said Khasra, belonging to plaintiff No.1 from acquisition. This is a finding that proceeds on relevant evidence, but ignores principle. The principle here, that seems to be violated by the Lower Appellate Court, is that while upon a consideration of the different maps produced by the defendants and other evidence relating to the acquired land and the unacquired part of Khasra No.5751, a very careful mensuration of the acquired land and the unacquired part of the Khasra has been done, the location of the suit property, vis-à-vis the precise plot number(s), has not been ensured. This becomes very relevant because what was a very large Khasra No.5751, located in different Khewat, has overtime been

subdivided and assigned different plot numbers, marked as subdivisions of Khasra No.5751.

33. The Lower Appellate Court is right in depending much upon the award passed by the Land Acquisition Officer, because possibly the defendants cannot deny what has been held there. Khasra Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12, regarding which Sheikh Shafiuddin, an ancestor of plaintiff No.1, laid claim for compensation before the Land Acquisition Officer, led to a refusal on ground that those subdivisions of Khasra No.5751 were not acquired. There is a remark in the award that a part of Khasra No.5751 was sold by Shafiuddin's ancestor Wahiuddin to Mst. Bhuria, from whom Allah Mehar inherited it, but he sold much of this land and now claims compensation. About this land of Allah Mehar, which has been acquired, the Land Acquisition Officer says, stretches up to the pucca road and drain No.5743 and to the Dhobi Ghat constructed by him. He is entitled to compensation of that land. It is also held by the Land Acquisition Officer that the southern part of Khasra no.5751 cannot be Allah Mehar's land.

34. There is also a remark in the award that the defendants have taken possession of Khewat No.445, Khata Nos.398 and 411, comprised of part of Khasra No.5751, admeasuring 12-16-6 of nazul land and Khasra No.5751/5, admeasuring 2-0-0, of which possession has been taken. Now, to infer from this remark of the Land Acquisition Officer, as done by the learned Judge in the Lower Appellate Court that Khasra No.5751/5, admeasuring 2-0-0, is Allah Mehar's land, of which possession has been taken and, therefore, the

defendants attempt to move southwards to the other subdivisions of Khasra No.5751 upon 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12, not 5751/5 to make up for the lost area of Allah Mehar's acquired Khasra No.5751/5, is rather conjectural and as already said, ignores principle. The principle is if there is doubt about the location of the suit property in a particular plot number, it is the duty of the Court to issue a survey commission, who would ascertain the precise location of the suit property in one plot number or the other. Here, going by the award, there is no dispute now, since Khasra No.5751 has been subdivided, that the only part of Khasra No.5751 included in Khewat Nos.1 and 15, that has been acquired, is 5751/5. It has been held by the Lower Appellate Court that this plot belongs to Allah Mehar and is encroached. The Land Acquisition Officer has not said that Khasra No.5751/5 belongs to Allah Mehar, but does say that Allah Mehar's land has been illegally sold and, therefore, encroached. Therefore, what is to be determined is whether the suit property, in respect of which the plaintiffs claim relief, is part of Khasra No.5751/5 or a part of it, or is it included in Khasra Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12, all of which have admittedly not been acquired, except Khasra No.5751/5.

35. It is particularly to be remarked that now these various subdivided plots of Khasra No.5751, including the acquired part, comprising Khasra No.5751/5, are contiguous plots and location of the suit property with reference to the precise plot number would be of the first importance. There is no dispute about the fact that other parts of Khasra No.5751, that lie in different Khewat, is not in issue, because

plaintiff No.1 is the owner of Khasra No.5751 that falls in Khewat Nos.1 and 15. The controversy, therefore, almost narrows down to determining if the suit property is located in Khasra No.5751/5 or away from it in the other plot numbers of 5751 that are unacquired. This would most certainly require determination of the precise location, vis-à-vis the plot number of the suit property through a survey commission following the three fixed points method. It would also be possible, in the alternative, to employ the total station method, if fixed points are no longer available in the vicinity.

36. The principle that in case of a dispute about the location of the property in one survey plot number or the other, it is necessary to issue a survey commission, which would identify the suit property, is laid down by the Supreme Court in **Shreepat v. Rajendra Prasad and others**, 2000 (40) ALR 534: JT 2000 (7) SC 379. It has been held in **Shreepat** (*supra*):

“1. Respondent No. 1 - Rajendra Prasad had instituted a suit for declaration and possession over land bearing Khasra No. 257/3 against the Appellant on the ground that he had purchased this land from its previous owner - Premnarayan - by a registered sale-deed. It was further pleaded that the Appellant had forcibly taken possession and was trying to construct his house. The suit was resisted by the Appellant on the grounds, inter alia, that the land in dispute was not part of Kteasra Plot No. 257/3, but was part of Khasra Plot No. 257/1 which was the Government land and over which the Appellant was in possession since long, it having been leased out to him. It was also pleaded that he had constructed the house over that land.

2. On a consideration of the evidence on record, the trial court decreed the suit. The decree was affirmed by the lower appellate court and upheld by the High Court in Second Appeal.

3. The principal contention raised by learned Counsel for the Appellant is that though there was a serious dispute with regard to the identity of the land in dispute, whether the land in dispute formed part of Khasra No. 257/3 or Khasra No. 257/1 (sic) courts below did not get the identity established and decreed the suit of the Respondent only on the basis of oral evidence which was not sufficient for the purpose of establishing the identity of the land in dispute at the spot.

4. In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity, the courts below, before decreeing the suit should have got the identity established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of Khasra No. 257/3 or Khasra No 257/1. This having not been done has resulted 'in serious miscarriage of justice. We consequently allow the appeal, set aside the order passed by the courts below as affirmed by the High Court and remand the case to the trial court to dispose of the suit afresh in the light of the observations made above and in accordance with law.’”

37. In the fast changing landscape of the present day, fixed points sometimes disappear and are no longer available. If that be the position to determine the Khasra number, where the suit property is located and demarcate it with reference to its plot number, an alternate method of more recent origin is the total station method. That this method can be utilized to demarcate lands/

property with regard to their location in one survey number or the other, was held by the Delhi High Court in **Delhi Development Authority v. Mohd. Sher Nabi Chaman and others**, 2015 SCC OnLine Del 7832, where it is observed:

“13. At this stage, I may also deal with and dispose of an argument urged on behalf of the respondent no. 1/plaintiff/applicant/ review petitioner that the right to file objections if taken away would seriously affect the rights of the respondent no. 1/plaintiff/ applicant/ review petitioner, however, this argument conveniently ignores the fact that both the parties agreed to be bound by the fresh demarcation report to be carried out in terms of the Total Station Method. Since both the parties agreed, more so because there was a very narrow scope of the respondent no. 1/plaintiff/applicant/review petitioner existing whether in khasra nos. 22/3, 22/4, 22/8, 22/9 and 25/20/2 of village Mandoli as claimed by him or in khasra nos. 976 min., 977 min., 978 min. and 979 min. of village Mandoli which was the land of the petitioner/DDA, therefore, there is no prejudice to the respondent no. 1/ plaintiff/applicant/ review petitioner and hence these arguments urged on behalf of the respondent no. 1/ plaintiff/applicant/review petitioner are rejected.

14. The next argument which was urged on behalf of the respondent no. 1/ plaintiff/ applicant/ review petitioner was that the revenue law does not entitle the demarcation by the Total Station Method, however, in my opinion, this is an argument of desperation because there is no bar under the revenue law not to carry out demarcation by the Total Station Method. Merely because a particular method is provided in the revenue laws which was passed many decades back, does not mean

that the modern methods with respect to demarcation cannot be adopted by the revenue authorities, more so when such a method is now the only available proper method, because the traditional methods were with respect to areas and lands which were unconstructed and wherein demarcation could be done by traditional methods, but when the entire city is built up, demarcation will have to be done by the laser method i.e the Total Station Method inasmuch as which is done with respect to the fixed and specific points in terms of the revenue law. This argument urged on behalf of the respondent no. 1/ plaintiff/applicant/ review petitioner is also therefore rejected.”

38. In the entire gamut of the otherwise very detailed findings recorded by the Lower appellate Court to answer for the plaintiffs, the ignorance of this principle in a dispute about location of the suit property being in one plot number or numbers, or the other, would vitiate the conclusions. In this case, the principle applies with greater force, because the controversy has, as already remarked, narrowed down to the issue if the suit property is located in Khasra No.5751/5, which is the only acquired plot number of the subdivided plots of Khasra No.5751, located in Khewat Nos.1 and 15, that has admittedly been acquired. Other parts of Khasra No.5751, or its other subdivided plots, fall in other Khewat; not Khewat No.1 or 15. The suit property, which the plaintiffs claim, comprising Khasra No.5751 and now its subdivided number, is located in Khewat Nos.1 and 15, not the other Khewat. These issues have already been dwelt upon by the Lower Appellate Court in punctilious detail, which need not detain us. Nevertheless, the findings of the Lower Appellate Court cannot be upheld

unless a survey of the contiguous Khasra Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12 on one hand, and Khasra No.5751/5 on the other, is duly carried out according to the fixed point method. If that survey is not possible, the location of the suit property in the precise Khasra numbers has to be determined through the total station method.

39. In this view of the aforesaid conclusions, Substantial Question of Law No. (iii) is answered in the **affirmative**.

40. In view of the answer to Substantial Question of Law No. (iii), the unnumbered one framed at the time of admission of the appeal as well as Substantial Question of Law No.2, need not be answered as the judgment of the Lower Appellate Court would have to be set aside with a remit of the matter to that Court with a direction to hear and decide the appeal afresh, after causing a fixed points survey of the suit property with regard to its location in one set of plot numbers or the other, or failing a fixed point survey taking resort to the total station method.

41. The result would be that the decree passed by the Lower Appellate Court would have to be set aside with a remit of the matter to that Court with the direction that the location of the suit property in one Khasra number or the other, and, particularly, if it is located in Khasra No.5751/5 or in the contiguous Khasra Nos. 5751/1, 5751/2, 5751/3, 5751/4, 5751/6, 5751/7, 5751/8, 5751/9, 5751/10, 5751/11, 5751/12, shall be determined through the agency of a Survey Commission, who would undertake it following the three fixed points method. If the Survey Commission fails for the non-

availability of three fixed points, a fresh commission shall be issued to a trained agency to determine the location of the suit property as aforesaid following the total station method. Upon submission of a report by the Survey Commissioner, following the fixed point method, or the total station method, as the case may be, the parties would have a right to object and lead necessary evidence. The Lower Appellate Court will then re-hear and decide the appeal afresh, all to be done within a period of **six months** from the date of receipt of a copy of this judgment and order.

42. In the result, this appeal succeeds and is **allowed in part**. The impugned decree passed by the Lower Appellate Court is set aside with an order of remand in above terms.

43. The costs of this appeal shall abide by the event in the appeal before the Lower Appellate Court.

44. Let the lower court's records be sent down at once.

(2024) 9 ILRA 638

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 24.09.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 244 of 2022

Jamuna Prasad @ Yamuna Prasad

...Appellant

Versus

Harilal

...Respondent

Counsel for the Appellant:

Sri Rajesh Kumar

Counsel for the Respondent:

Sri Kaushal Tiwari

A. Civil Law - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 9 - Code of Civil Procedure, 1908 - Rules 23, 23A, 24 & 25 - Appeal was filed on ground that trial court has passed judgment and decree without considering pleadings, evidence, material on record, commission report etc - Admittedly all the material for deciding suit was before trial court and no evidence was required to be placed on record for passing judgment and decree in suit. (Para 11)

B. Regarding first and second point of determination, first appellate court concluded that trial court should have passed order but trial court has not done so and passed order in a cursory manner - The view expressed by trial court does not seem in accordance with law - In such situation, first appellate court found that case was liable to be remanded to trial court for passing fresh order in view of observations made by first appellate court. (Para 18)

C. While considering third point of determination, first appellate court found that appellant succeeded in proving that land in dispute was his sehan land, of which he was owner and in possession since time of his ancestors - His trees and tap are situated on said land - Thus, appellant was entitled to permanent injunction. (Para 19)

Held, appellate court has not found that evidence on record was not sufficient to dispose of case finally, not recorded any finding that any issue has not been framed, which was required to be framed and evidence on same was required to be adduced by parties - In such circumstances, appellate court itself should have determined suit finally instead of remanding matter to trial court - Impugned order set aside, directions accordingly. (Para 20)

Appeal allowed. (E-13)**List of Cases cited:**

1. Shivakumar & ors. Vs Sharanbasappa & ors.; 2020 AIR(SC) 3102/2020 LawSuit(SC) 345, (Para 25)

2. J. Balaji Singh Vs Diwakar Cole & ors.; (2017) 14 SCC 207, (Para 13, 14, 18, 19)

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

1. Heard Shri Rajesh Kumar, learned counsel for the defendant/appellant and Shri Kaushal Tiwari, learned counsel for the plaintiff/respondent.

2. This first appeal from order has been preferred under Order XLI Rule 1(u) of Civil Procedure Code, 1908 (hereinafter referred to as "C.P.C.") against the judgment and order dated 10.02.2022 passed in Civil Appeal No. 11 of 2021; Harilal vs. Jamuna Prasad by District Judge, Ambedkar Nagar, by means of which the appeal filed by the plaintiff/respondent has been allowed and judgment and order dated 05.12.2019 passed in Regular Suit No. 476 of 1997; Harilal vs. Jamuna Prasad by Civil Judge, Junior Division, Ambedkar Nagar has been set aside and the case has been remanded to the trial court to decide afresh in accordance with law and the observations made in the same.

3. Learned counsel for the appellant submits that the first appellate court has wrongly and illegally allowed and remanded the matter for deciding afresh, whereas all the pleadings, evidence and material on record were before the first appellate court and the first appellate court has recorded findings on the basis of material on record and remanded the matter

only on the ground that the evidence has properly not been appreciated, while the first appellate court has to decide the appeal considering the pleadings, evidence and material on record as trial court and it could have decided the case finally instead of reminding the matter. Thus, Learned counsel for the appellant submits that the impugned judgment and order is not sustainable in the eyes of law and is liable to be set aside and the matter may be remanded to the first appellate court to decide the appeal on merit in accordance with law. He relies on **Shivakumar and others vs. Sharanbasappa and others; 2020 AIR(SC) 3102/2020 LawSuit(SC) 345.**

4. Per contra, learned counsel for the respondent submits that learned first appellate court has rightly remanded the case in accordance with law to decide the suit afresh because the learned trial court has failed to properly appreciate the pleadings, evidence and material on record and the law laid down by the Hon'ble Apex Court and this Court. He further submits that the learned trial court has also failed to consider the report of the commissioner and the site plan prepared, which were on record, therefore, there is no error or illegality in the impugned judgment and order. However, he could not dispute that all the pleadings, evidence and commission report etc. were on record and the first appellate court could have passed the final order after considering the same.

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

6. The plaintiff/respondent filed suit for permanent injunction on the ground that the land in dispute shown in the site

plan annexed with the plaint is old abadi and sehan land and his house is adjacent to the land in dispute on the western side. The sehan darwaja opens in the land in dispute, which is being used by his family members for sitting, sukhvan and for other agricultural and household purposes since prior to abolition of zamindari. There are two thala Kothi Bans, one tree of Gular, hand pipe, haudi and khoota in the land in dispute, as such, he is owner of the land in dispute under Section 9 of U.P. Zamindari Abolition and Land Reforms Act. The defendant/appellant has no concern with the land in dispute. The defendant/appellant is a muscle man and on the basis of his muscle power, he is threatening to open door in the land in dispute on the instigation of local police and administration since the last week of June, 1997. The sehan of the defendant/appellant is on the east side of his house. The defendant/appellant, after hearing about the suit, with the help of the local police and some enemies of the plaintiff/respondent has constructed a wall of bricks forcefully before commission, which has been shown in the site plan. Thus, the suit for permanent injunction and for demolition of wall constructed by the defendant/appellant and handing over possession back to the plaintiff/respondent.

7. The defendant/appellant contested the suit by filing written statements denying the averments made in the plaint and alleging that the wrong site plan has been filed alongwith the suit. It has further been stated that the wall existing on the western hata of his house on the western side, which was of mud had shortened, therefore, he had planned to construct a wall of bricks, which was opposed by the plaintiff/respondent, therefore, he gave an application to the

Pargana Adhikari, Jalalpur for protection from the plaintiff/respondent for reconstruction of the wall. It was further alleged that after inquiry in the complaint made by the defendant/appellant and with the intervention of the previous and the present Gram Pradhan, it was decided, on the basis of compromise, that a wall will be constructed leaving four hand land. Accordingly, the wall of 22 Radda was constructed. It was further alleged that in the east side of the boundary, his two thatches and the trees of *Mango, Badhal, Goolar, Lahchaura and Kothi* bans planted by his father are existing. The plaintiff/respondent has wrongly shown his pipe in the land in dispute, whereas the same is existing beyond his boundary wall at a distance on the western side and on the southern side of the house of the plaintiff/respondent and the main sehan of the plaintiff/ respondent is also situated on the eastern side, accordingly, his sariya is also adjacent to his house. The house of the plaintiff/respondent had never been on the eastern side of the A.C. Line and he has no right to use the said land. The possession of the plaintiff/respondent had never been on the land in dispute, therefore, the suit may be dismissed. An additional written statement was also filed, before the trial court, denying the averments made in the plaint.

8. On the basis of the pleadings of the parties, six issues were framed by the trial court. Thereafter, evidence of P.W. 1-Harilal, P.W. 2-Ambeylal and P.W. 3-Haridarshan was recorded, but no documentary evidence was filed on behalf of the plaintiff/respondent. On behalf of the defendant/appellant, the evidence of D.W. 1-Jamuna, D.W. 2-Ram Deen and D.W. 3-Hari Prasad was recorded. On his behalf, copy of the Nakal Report Chalani, Police

Station Malipur dated 22.07.2010 and case State vs. Jamuna Prasad under Section 18/116 IPC, court of Up Zila Magistrate, Jalalpur and Nakal Report Chalani, Police Station Malipur dated 10.07.2010, case State vs. Jamuna Prasad etc. Case No. 1490 of 2010, under Section 18/116 IPC court of Up Zila Magistrate Jalalpur were filed as Paper Nos. 41ga and 42ga alongwith the list 40ga in documentary evidence. The learned trial court, after considering the pleadings of the parties, evidence and material on record and hearing, dismissed the suit. Being aggrieved, the Civil Appeal was filed by the plaintiff/respondent before the court below.

9. The court below recorded that the main objection against the judgment and decree passed by the trial court is that the learned trial court has passed the impugned order without perusing appropriately pleadings of both the parties, facts and evidence available on record and circumstances of the case. The learned trial court has also ignored the guidelines determined by Hon'ble Supreme Court and this High Court while passing the impugned order. The learned trial court has also not considered the commission report and site plan, therefore, the impugned order is not sustainable, therefore, the appropriate order may be passed setting aside the impugned order. The relevant Paragraph 9 of the impugned order is extracted hereinbelow:-

"9. अपीलार्थी/वादी द्वारा विद्वान अवर न्यायालय द्वारा पारित आक्षेपित निर्णय एवं आदेश के विरुद्ध मुख्य रूप से यह आपत्ति की गयी है कि विद्वान अवर न्यायालय ने उभय पक्ष के अभिकथनों तथा पत्रावली पर उपलब्ध तथ्य साक्ष्य एवं परिस्थितियों का सम्यक् ढंग से परिशीलन किये बिना आक्षेपित आदेश पारित किया है। विद्वान अवर न्यायालय ने माननीय उच्च न्यायालय व माननीय उच्चतम न्यायालय द्वारा निर्धारित गाइड लाइन की अनदेखी करके आक्षेपित आदेश पारित किया है। विद्वान अवर न्यायालय ने

अमीन आयुक्त द्वारा प्रस्तुत आख्या व मानचित्र को नजरन्दाज करते हुए आक्षेपित आदेश पारित किया है, जो अस्तित्व में रहने योग्य नहीं है। अतः उसे अपास्त करते हुए यथोचित आदेश पारित किया जाय।"

10. The defendant/appellant opposed the submissions of learned counsel for the plaintiff/respondent and stated that the learned trial court has passed the judgment and decree after considering the facts and evidence available on record and circumstances of the case, in which there is no error, therefore, the appeal is liable to be dismissed. The relevant paragraph 10 of the impugned order is extracted hereinbelow:-

"प्रत्यर्थी / प्रतिवादी के विद्वान अधिवक्ता द्वारा अपीलार्थी के उपरोक्त तर्कों व तथ्यों का खण्डन किया गया और यह कथन किया गया कि विद्वान अवर न्यायालय ने पत्रावली पर उपलब्ध तथ्य, साक्ष्य एवं परिस्थितियों को दृष्टिगत रखते हुए आक्षेपित आदेश पारित किया है, जिसमें कोई त्रुटि नहीं है। अतः अपीलार्थी की अपील निरस्त किये जाने योग्य है।"

11. In view of above, it is apparent that the appeal was filed only on the ground that the trial court has passed the judgment and decree without considering pleadings, evidence, material on record, commission report and the facts and circumstances of the case, therefore, admittedly all the material for deciding the suit was before the trial court and no evidence or material was required to be placed on record for passing the judgment and decree in the suit.

12. The provision of remand has been made in Rule 23, 23A and 25 of Order XLI C.P.C. Rule 24 of Order XLI C.P.C. provides that where the evidence upon the record is sufficient to enable the appellate court to pronounce judgment, the appellate court may, after resettling the issues, if necessary, may determine the suit finally, which is extracted herein-below"-

"24. Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which Appellate Court proceeds."

13. In view of Rule 24, quoted above, the appellate court is to pronounce the judgment and determine the suit finally, where the evidence upon the record is sufficient to enable it to pronounce the judgment, which may be pronounced after resettling the issues, if necessary, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate court proceeds, therefore, even if the appellate court is of the view that the trial court has passed an erroneous and illegal order taking a view, which is not sustainable on the basis of material before the trial court, it can pass order taking a different view after considering the pleadings, evidence and material on record. Thus, if no issue arises, which is required to be framed or which is required to be considered on the basis of pleadings of the parties and if required to be framed but no additional evidence is required, the first appellate court may decide the appeal as a trial court after resettling issues and it cannot invoke provisions of Rule 23, 23-A or 25 of Order XLI C.P.C. for remanding the matter. Consequence thereof is that the first appellate court has to finally determine the suit after considering the pleadings, evidence and material on record as a trial court considers the same.

14. The aforesaid view taken by this court is covered by the judgment of Hon'ble Supreme Court, in the case of Shivakumar and others vs. Sharanbasappa and others (Supra). The Hon'ble Supreme Court, in the said case, considered the procedure relating to appeals from original decrees provided under Order XLI C.P.C. and noted in para 25 (25.1 to 25.6). The Hon'ble Supreme Court held in para 25.3 and 25.4 that a comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23A of Order XLI is not complete without reference to the provision contained in Rule 24 of Order XLI. It has further held that a conjoint reading of the Rule 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of the remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order XLI C.P.C. and to determine the suit finally and it is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary, the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. The para 25 (25.1 to 25.6) is extracted herein below:-

"[25] Taking up the other point for determination the submission of learned counsel for the appellants that the High Court ought to have considered remanding the case by taking recourse to the provision contained in Order XLI Rule 23A CPC, in our view, remains totally bereft of substance this submission has only been noted to be rejected.

25.1. The procedure relating to appeals from original decrees (usually referred to as 'regular first appeal') is provided in Order XLI of the Code of Civil Procedure, 1908 and therein, various provisions relating to hearing of an appeal, remand of case, remitting of issues for trial, production of additional evidence in Appellate Court etc. are contained in Rules 16 to 29 under the sub-heading Procedure on hearing. For their relevance, we may take note of the provisions contained in Rules 23, 23A, 24 and 25 of Order XLI CPC as follows:-

"23. Remand of case by Appellate Court.- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit, and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases. Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

24. Where evidence on record sufficient. Appellate Court may determine

case finally.- Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred. and in such case shall direct such Court to take the additional evidence required:

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time."

25.2. Rule 23A came to be inserted in Order XLI CPC by way of the Code of Civil Procedure (Amendment) Act. 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but the Appellate Court has the inherent power of remanding a case where it was considered necessary to do so in the

interest of justice. Some of the High Courts had made similar provisions by way of their respective amendments. Insertion of Rule 23A in Order XLI by the Amending Act of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the Appellate Court shall have the power of remand, if a re-trial is considered necessary.

25.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23A of Order XLI is not complete without reference to the provision contained in Rule 24 of Order XLI that enables the Appellate Court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the Appellate Court proceeds on a ground entirely different from that on which the Trial Court had proceeded.

25.4. A conjoint reading of Rules 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner be the litigation unwarranted order of remand merely elongates the life of the litigation without serving the cause of Justice. order of remand only on the ground that the points touching An appreciation of

evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

25.4.1. The decision cited by the learned Counsel for the appellants in the case of Mohan Kumar (supra) is an apt illustration as to when the Appellate Court ought to exercise the power of remand. In the said case, the appellant and his mother had filed the civil suit against the Government and local body seeking declaration of title, perpetual injunction and for recovery of possession in respect of the land in question. The Trial Court partly decreed the suit while holding that the plaintiffs were the owners of the land in dispute on which trespass was committed by the respondents and they were entitled to get the encroachment removed: and it was also held that the Government should acquire the land and pay the market value of the land to the appellant. Such part of the decree of the Trial Court was not challenged by the defendants but as against the part of the decision of the Trial Court which resulted in rejection of the claim of the appellant for allotment of an alternative land, the appellant preferred an appeal before the High Court. The High Court not only dismissed the appeal so filed by the appellant but proceeded to dismiss the entire suit with the finding that the plaintiff-appellant had failed to prove his ownership over the suit land inasmuch as he did not examine the vendor of his sale deed. In the given circumstances, this Court observed

that when the High Court held that the appellant was not able to prove his title to the suit land due to non-examination of his vendor, the proper course for the High Court was to remand the case to the Trial Court by affording an opportunity to the appellant to prove his title by adducing proper evidence in addition to what had already been adduced. Obviously, this Court found that for the conclusion reached by the High Court, a case for re-trial was made out particularly when the Trial Court had otherwise held that the appellant was owner of the land in dispute and was entitled to get the encroachment removed as also to get the market value of the land. Such cases where re-trial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fillup the lacuna in its case.

25.5. It gets perforce reiterated that the occasion for remand would arise only when the factual findings of Trial Court are reversed and a re-trial is considered necessary by the Appellate Court.

25.6. The present case had clearly been the one where the parties had adduced all their evidence, whatever they wished to; and it had not been the case of the plaintiff-appellants that they were denied any opportunity to produce any particular evidence or if the trial was vitiated because of any alike reason. As

noticed, there had been several suspicious circumstances surrounding the Will in question, some of which were noticed by the Trial Court but were brushed aside by it on untenable reasons. The High Court has meticulously examined the same evidence and the same circumstances and has come to a different conclusion that appears to be sound and plausible, and does not appear suffering from any infirmity. There was no reason or occasion for the High Court to consider remanding the case to the Trial Court. The contention in this regard is required to be, and is, rejected.

15. The Hon'ble Supreme Court had also considered the aforesaid issue in the case of **J. Balaji Singh vs. Diwakar Cole and others; (2017) 14 SCC 207** and under what circumstances, remand could have been made and the power of this Court under Order 43 Rule 1(u) C.P.C on being challenged in an order of remand. The relevant paragraphs 13, 14, 18 and 19 are extracted hereinbelow:-

"13) The main question, which fell for consideration before the High Court, was whether the first Appellate Court was right in remanding the case to the Trial Court for fresh trial on merits?

14) There are three provisions in the Code which deal with the power of the Appellate Court to remand the case to the Trial Court. These provisions are Order 41 Rules 23, 23-A, and 25.

14.1) So far as Order 41 Rule 23 is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that the Trial Court has disposed of the suit upon a preliminary point. The Appellate Court in such cases is empowered to direct

the Trial Court to decide all the issues on evidence on record.

14.2) So far as Rule 23-A is concerned, it enables the Appellate Court to remand the case to the Trial Court when it finds that though the Trial Court has disposed of the suit on all the issues but on reversal of the decree in appeal, a re-trial is considered necessary by the Appellate Court.

14.3) So far as Rule 25 is concerned, it enables the Appellate Court to frame or try the issue if it finds that it is essential to the right decision of the suit and was not framed by the Trial Court. The Appellate Court in such case may, accordingly, frame the issues and refer the same to the Trial Court to take the evidence and record the findings on such issues and return to the Appellate Court for deciding the appeal. In such cases, the Appellate Court retains the appeal to itself.

18) The High Court failed to see that when the first Appellate Court itself did not decide the appeal on merits and considered it proper to remand the case to the Trial Court, a fortiori, the High Court had no jurisdiction to decide the appeal on merits. Moreover, Order 43 Rule 1(u) confers limited power on the High Court to examine only the legality and correctness of the remand order of the first Appellate Court but not beyond that. In other words, the High Court should have seen that Order 43 Rule 1(u) gives a limited power to examine the issue relating to legality of remand order, as is clear from Order 43 Rule 1(u) which reads thus:-

"1(u) an order under rule 23 or rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court"

19) It is well settled law that the jurisdiction to decide the appeal on merits can be exercised by the Appellate Court only when the appeal is filed under Section 96 or 100 of the Code against the decree. Such was not the case here.”

16. In view of above, this Court in an appeal under Order 43 Rule 1(u) has to confine itself on such facts, conclusions and decisions, which have a bearing on the order of remand and the aforesaid rule confers limited power on the High Court to examine only the legality and correctness of the remand order of the first appellate court and not beyond that.

17. Adverting to the facts of the present case, the first appellate court framed three points for determination on the basis of pleadings of the parties and the grounds of challenge, which are extracted hereinbelow:

“1. क्या अपीलार्थी/वादी प्रश्नगत भूमि का स्वामी है और स्वामी स्वरूप उस पर अध्यासित है?

2. क्या प्रतिवादी द्वारा दौरान वाद विवादित स्थल पर निर्माण किया गया है, यदि हाँ तो प्रभाव?

3. क्या अपीलार्थी/वादी याचित अनुतोष को प्राप्त करने का हकदार है?”

18. The first and second point of determination have been considered and decided together. After considering the pleadings of the parties, evidence and material on record, the first appellate court came to the conclusion that the learned trial court should have passed the required order after considering deeply the points discussed by the first appellate court but the learned trial court has not done so and passed impugned order in a cursory

manner. Thus, the view expressed by the learned trial court on the said points does not seem, prima facie, in accordance with law. In such situation, the first appellate court came to the conclusion that the case is liable to be remanded to the learned trial court for passing fresh legal order in view of observations made by the first appellate court after hearing.

19. While considering the third point of determination, the first appellate court came to the conclusion that the appellant/plaintiff has succeeded in proving from his all facts and evidence that the land in dispute is his sehan land of which he is the owner and in possession since the time of his ancestors and since prior to the abolition of zamindari. His trees and tap are situated on the said land. In such situation, the appellant/plaintiff is entitled for the relief of permanent injunction.

20. In view of above, the first appellate court on the basis of pleadings, evidence and material on record has recorded findings in regard to the first, second and third point of determination. The first appellate court has not found that evidence on record is not sufficient to dispose of the case finally. The first appellate court has also not recorded any finding that any issue has not been framed, which is required to be framed and evidence on the same is required to be adduced by the parties. In such circumstances, the appellate court itself should have determined the suit finally instead of remanding the matter as it could have been done in such circumstances.

21. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that the first appellate court has

passed the impugned judgment and order and remanded the case to the learned trial court for deciding afresh in violation of law as discussed above because the appeal could have been decided finally by the appellate court, therefore, it is not sustainable in the eyes of law and liable to be set aside by this Court with a direction to the first appellate court to decide the appeal in accordance with law.

22. The appeal is, accordingly, **allowed**. The judgment and order dated 10.02.2022 passed in Civil Appeal No. 11 of 2021; Harilal vs. Jamuna Prasad by District Judge, Ambedkar Nagar is hereby set aside. The matter is remitted back to the first appellate court with a direction to the first appellate court to reconsider and pass a fresh order, after affording opportunity of hearing to the parties, in accordance with law and observations made hereinabove in this order expeditiously and preferably within a period of three months, from the date of production of certified copy of this order, without granting unnecessary adjournment to either of the parties as the proceedings are pending since filing of the regular suit in the year 1997. No order as to costs.

(2024) 9 ILRA 648

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 24.09.2024

BEFORE

**THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.**

Writ-A No. 3089 of 2024

Arun Prakash Gupta ...Petitioner
Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:

Utsav Mishra, Gaurav Mehrotra

Counsel for the Respondents:

A.S.G.I., Anurag Srivastava, Raj Kumar Singh

A. Administrative Law – Judicial review – Scope of the proceedings before the Tribunal - Administrative Tribunals Act, 1985: Section 22 - The Tribunal while adjudicating a service dispute is empowered to enter into questions of fact, and decide factual issues based on evidence, as is done by the Civil Court, even though not bound by the provisions of Code of Civil Procedure, 1908. In fact, the Tribunal is a substitute for the Civil Court. Prior to constitution of the Central Administrative Tribunal (CAT) under the Act, 1985, the remedy was before the Civil Court, and therefore, an alternative forum has been provided u/Article 323-A of the Constitution of India. It can take evidence, evaluate it and record findings of fact.

B. The proceedings of the High Court u/Article 226 are summary proceedings, whereas the proceedings of the Tribunal, even though they are required to be completed expeditiously, are not the same as the High Court in this sense. The Tribunal has been vested with powers to examine questions of fact, to take evidence and decide factual issues based thereon, whereas, the powers of the High Court u/Article 226 of the Constitution, do not permit such an exercise. **The Tribunal acts as the only courts of first instance in respect of the areas of law for which they have been constituted. It will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.** (Para 7)

In the present case, the Tribunal has declined to enter into the factual issues on a misconception, as if it was exercising powers of judicial review as are exercised by the High Courts u/Article

226 of the Constitution, by way of summary proceedings, wholly oblivious of the legal position as aforesaid. This does not take away the initial role of the Tribunal to act as a Court/Tribunal of first instance. There are various issues which should have been seen by the Tribunal. (Para 8)

The impugned judgment is liable to be set aside. The Transfer Application No. 33200001/2017 shall now stand restored before the CAT at Lucknow and the same shall be heard and decided afresh. In doing so, it shall be open for it to exercise the powers and jurisdiction vested in it u/s 22 of the Act, 1985, rather it would be obliged to do so, if the situation so requires. (Para 10)

Initially a writ petition was filed before the High Court in the year 2000 which was transferred to the Tribunal in 2017 and thereafter, it came to be dismissed on 17.01.2024, the Tribunal is requested to grant priority to the hearing of this petition, and it is expected that the Tribunal shall hear and decide the same within a period of five months, from the date a copy of this order is served before it. The parties are permitted herein to bring on record, the pleadings filed in this petition, before the Tribunal within a period of four weeks from today, for its convenience, which shall also be taken into consideration accordingly. (Para 11)

Writ petition disposed of. (E-4)

Precedent followed:

1. U.O.I. Vs Subrat Nath in Civil Appeal No. 7939 – 7940 of 2022 arising out of Special Leave to Appeal (Civil) No. 3524 of 2022 (Para 3)

2. L. Chandra Kumar Vs U.O.I., (1997) 3 SCC 261 (Para 7)

Present petition assails the judgment and order dated 17.01.2024, passed by the Central Administrative Tribunal, Lucknow.

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

(1) This is a writ petition filed by the petitioner challenging the judgment and order dated 17.01.2024 passed by the Central Administrative Tribunal, Lucknow in a Transfer Application bearing No. 01 of 2017 (Arun Kumar Gupta Vs. Union of India & Ors.).

2) The judgment and order dated 26.04.2024 reads as under:-

"1. Heard Shri Gaurav Mehrotra along with Shri Utsav Mishra, learned counsel for the petitioner and Shri Anurag Srivastava along with Raj Kumar Singh, learned counsel for the opposite parties no. 2 to 4.

2. Let Shri Anurag Srivastava, learned counsel for the opposite parties no. 2 to 4 satisfy the Court firstly as to there being any evidence to establish even on the basis of preponderance of probabilities that the petitioner herein conducted 17 tests misusing his official position illegally.

3. Secondly, that he did not conduct any test in respect of other samples and issued a certificate in favour of M/s Satyadeep Polypipes, Jalpaigudi and that for the aforesaid illegal acts he accepted money from the proprietor of the Firm.

4. Thirdly, whether the proceedings were initiated on the basis of the oral complaint of Shri S. Goenka, Proprietor of the said Firm or some other material. If so, what was it.

5. Fourthly, whether there is any evidence or any witness who may have seen the petitioner preparing the certificate in question and signing it.

6. Fifthly, whether the hand writing expert, who has opined that the

signature on the certificate in question is that of the petitioner, was produced during inquiry proceedings. If not, what is the consequence of it upon the validity of such proceedings.

7. Sixthly, whether there is any evidence that PVC Pipes were brought to the premises of CIPET on a four wheeler as considering their size it would not have been possible to carry them on a two wheeler but the number of the vehicle which has come in evidence was ultimately found to be that of a two wheeler, therefore, what is the evidence about 17 tests being carried out on three samples of resist PVC Pipes after bringing those pipes found in the premises.

8. Seventhly, whether Shri S. Goenka, who is alleged to have been made the oral complaint, appeared before the Inquiry Officer and was examined.

9. If any fax message was received from him or his Firm supporting the charges against the petitioner what exercise was conducted by the Inquiry Officer to verify the veracity of the said Fax Message that it had been sent by Shri S. Goenka or his Firm and what was the evidence in this regard.

10. Learned counsel for the parties shall also address the Court upon the scope of power and jurisdiction of the Central Administrative Tribunal while considering and deciding an Original Application under the Administrative Tribunals Act, 1985; whether its power are akin to the powers of judicial review available to the High Court under Article 226 of the Constitution of India or they are akin to a Court or a Tribunal of first instance, such as, the Civil Court and

whether the Tribunal has misdirected itself by proceeding to decide the OA, as if, it was exercising the powers of judicial review for which it was guided by a decision of Hon'ble the Supreme Court rendered in the case of *Union of India Vs. Subrata Nath*; Civil Appeal Nos. 7939-7940 of 2022 arising out of Special Leave to Appeal (Civil) NO. 3524 of 2022.

11. List/ put up no 29.04.2024 as fresh."

3) Although, we had put certain queries to the opposite parties Counsel vide our order dated 26.04.2024, which are contained in Paragraph 2 to 9, but in Paragraph 10 of our order, we had also proposed to consider the scope of power and jurisdiction of the Central Administrative Tribunal while considering and deciding an original application, under the Administrative Tribunals Act, 1985 (hereinafter referred to as, the Act, 1985); whether its powers are akin to the powers of judicial review, available to the High Court under Article 226 in the Constitution of India, or they are akin to a Court or a Tribunal of first instance, such as, the Civil Court; and whether the Tribunal has misdirected itself, by proceeding to decide the O.A., as if, it was exercising the powers of judicial review, for which it was guided by a decision of Hon'ble the Supreme Court, rendered in the case of ***Union of India vs. Subrat Nath in Civil Appeal No. 7939-7940 of 2022 arising out of Special Leave to Appeal (Civil) No. 3524 of 2022.***

4) After hearing the matter, we are of the opinion that the queries raised by us in Paragraph 2 to 9, can be considered by the Tribunal itself, as it may involve an inquiry into questions of fact and the evidence which was adduced in the disciplinary

proceedings against the petitioner. As regards, the scope and power of jurisdiction of the Tribunal in this regard, the Act, 1985 was promulgated with a reference to Article 323-A of the Constitution of India. The very purpose of constitution of Tribunals under the said Act and Article 323-A of the Constitution is to ensure a forum for speedy and effective adjudication of disputes pertaining to terms and conditions of service of officers and employees, whether they be of the Central Government or the State Government, as the case may be.

5) No doubt, the Tribunals constituted under the Act, 1985 have certain powers analogous to the High Court, such as to decide the vires of an enactment, except the Act, 1985 under which they have been constituted, but at the same time, they are also supposed to act as Courts or Tribunals of first instance so as to thrash out findings of fact also. It is a misconception, that Tribunals while exercising the powers under the Act, 1985 in fact exercise powers of judicial review, *stricto sensu*, as the High Court does under Article 226 of the Constitution of India. It is not so. This would be evident from the provisions of the Act, 1985 itself. We may in this regard refer to Section 4 of the Act, 1985, which provides for establishment of an Administrative Tribunal to exercise the jurisdiction, powers and authority conferred on such Tribunal, by or under the Act, 1985. The Tribunal consists of judicial and administrative members, both. The jurisdiction, powers and authority of the Tribunals have been dealt with in Chapter III of the Act, 1985. Section 14 deals with Central Administrative Tribunal, whereas Section 15 deals with State Administrative Tribunals, constituted under the Act, 1985. Section 22 deals with powers and

procedure of Tribunals and it reads as under:-

"22. Procedure and Powers of Tribunals – (1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 [5 of 1908], but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private.

(2) A Tribunal shall decide every application made to it as expeditiously as possible and ordinarily every application shall be decided on a perusal of documents and written representations and after hearing oral arguments, if any, allowed by the Tribunal in the circumstances of the case

(3) A Tribunal shall have, for the purposes of holding any inquiry, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 [5 of 1908], while trying a suit, in respect of the following matters, namely, --

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872 [1 of 1872],

requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing a representation for default or deciding it ex parte;

(h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(i) any other matter which may be prescribed by the Central Government."

6) Although, the Tribunal is not bound by the procedure laid down in the Code of Civil Procedure, 1908, but it is to be guided by the principles of natural justice and the provisions of the Act, 1985. Sub-section 3 of the Section 22 clearly provides that the Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of matters already quoted hereinabove.

7) The very vesting of such powers of summoning and enforcing attendance of any person and examining him on oath; requiring discovery and production of documents; receiving evidence on affidavits; requisitioning any public record or document, or copy of such record or document from any office subject to the provisions mentioned therein; issuing commissions for examination of witnesses or documents, as are exercised by a Civil Court while trying a suit, which is a court

of first instance, it is evident, that the Tribunal while adjudicating a service dispute is empowered to enter into questions of fact, and decide factual issues based on evidence, as is done by the Civil Court, even though not bound by the provisions of Code of Civil Procedure, 1908. In fact, the Tribunal is a substitute for the Civil Court. Prior to constitution of the Central Administrative Tribunal under the Act, 1985, the remedy was before the Civil Court, and therefore, an alternative forum has been provided under Article 323-A of the Constitution of India. It can take evidence, evaluate it and record findings of fact. The powers of the High Court under Article 226 of the Constitution of India on the other hand, do not permit such an exercise. The proceedings of the High Court under Article 226 are summary proceedings, whereas the proceedings of the Tribunal, even though they are required to be completed expeditiously, are not the same as the High Court in this sense. The Tribunal has been vested with powers to examine questions of fact, to take evidence and decide factual issues based thereon. This aspect has also been considered by a Seven Judges Bench decision of the Supreme Court of India in ***L. Chandra Kumar Vs. Union of India, (1997) 3 SCC 261***, wherein it has been observed in Paragraph 93 – ***"We may add that the Tribunal will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted."*** However, for the benefit of the Tribunal, the entire Paragraph 93 is quoted hereinbelow:-

"93. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires

of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

8) When we peruse the impugned judgment in the light of what we have discussed hereinabove with regard to the scope of the proceedings before the Tribunal

and the powers & jurisdiction vested in it under the Act, 1985, we find that the Tribunal has declined to enter into the factual issues on a misconception, as if it was exercising powers of judicial review as are exercised by the High Courts under Article 226 of the Constitution of India, by way of summary proceedings, wholly oblivious of the legal position as aforesaid. The similarity of the jurisdiction of the Tribunal vis-à-vis the High Court has been clearly discussed and explained by the Supreme Court in Paragraph 93 of its judgment in L. Chandra Kumar (Supra). This does not take away the initial role of the Tribunal to act as a Court / Tribunal of first instance. There are various issues which should have been seen by the Tribunal, especially, the points which we have noticed in our order dated 26.04.2024, quoted hereinabove, but have not been discussed.

9) On being confronted, learned Counsel for the opposite parties could not dispute the factual and legal position, so far as, the scope of the proceedings of the Tribunal constituted under the Act, 1985, and the jurisdiction of the Tribunal under the said Act.

10) We are therefore, of the opinion, for the reasons aforesaid, the impugned judgment is liable to be set aside and accordingly, the same is set aside. The Transfer Application No. 33200001/2017 shall now stand restored before the Central Administrative Tribunal at Lucknow and the same shall be heard and decided afresh, keeping in mind the observations made hereinabove, especially the points raised in our order dated 26.04.2024. In doing so, it shall be open for it to exercise the powers and jurisdiction vested in it under Section 22 of the Act, 1985, rather it would be obliged to do so, if the situation so requires.

1. Sushil Kumar Singhal Vs Pramukh Sachiv Irrigation Department & ors., Civil Appeal No. 5262 of 2008 (Para 7)

2. Jagdish Prasad Singh Vs St. of Bihar & ors., 2024 SCC OnLine 1909 (Para 9)

3. St. of U.P. & ors. Vs Suresh Kumar Tripathi, Writ-A No. 3194 of 2022 (Para 10)

4. St. of Punj. & ors. Vs Rafiq Masih (White Washer) & ors., (2015) 4 SCC 334 (Para 10)

5. High Court of Punjab & Haryana & ors. Vs Jagdev Singh, (2016) 14 SCC 267 (Para 10)

Present petition assails order dated 14.03.2024, passed by opposite party No.4.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ravi Pratap Singh, learned counsel for the petitioner and Sri Sandeep Sharma, learned Standing Counsel.

2. By means of this petition, the petitioner has prayed following main relief(s):-

"(i) issue, a writ order or direction in the nature of Certiorari quashing the impugned letter/order dated 14.3.2024 issued by the opposite party No.4, contained in Annexure No.1 to this writ petition.

(ii) issue, a writ order or direction in the nature of Mandamus commanding the respondents to pay entire remaining post retiral dues as well as service dues to petitioner like gratuity, G.P.F. L.I.C. etc. alongwith interest who has retired from the post of Junior Engineer i.e. on 31.12.2023."

3. The precise contention of learned counsel for the petitioner is that the petitioner retired on 31.12.2023 and after retirement, impugned notice dated 14.03.2024 has been issued against the petitioner indicating therein that the petitioner has been paid excess amount while providing him the benefit of pay scale, with effect from 2001, therefore, the excess amount to the tune of Rs.8,96,965/- is directed to be recovered from the petitioner.

4. Learned counsel for the petitioner has submitted that the petitioner retired from the post of Junior Engineer which comes within the purview of Class-III post and no opportunity of hearing has been provided to the petitioner before issuing the aforesaid impugned order dated 14.03.2024. Learned counsel has also stated that at the time of excess payment no undertaking was received from the petitioner to the effect that if any excess amount is paid to the petitioner the same may be recovered.

5. Learned Standing Counsel has tried to defend the impugned order, but he has submitted that there is no recital in impugned order that as to whether any opportunity of hearing has been afforded to petitioner or not or as to whether any undertaking has been received from the petitioner at the time of making excess payment.

6. Learned counsel for the petitioner has also submitted that in terms of Government Order dated 16.01.2007, which has been annexed as Annexure no.7 to the petition, wherein it has been categorically indicated that at the time of retirement or after the retirement, record of the employee of last 34 months may be

examined, not beyond that, but in the present case, record of the petitioner is being examined from the year 2008, which is much beyond the period of 34 months.

7. Attention has also been drawn towards the judgment and order dated 17.04.2014 passed by the Apex Court in **Sushil Kumar Singhal Vs. Pramukh Sachiv Irrigation Department & Others, Civil appeal No.5262 of 2008**, referring to paragraphs 7, 10 and 11, which reads as under:-

"7. Upon perusal of the aforesaid G.O. and the submission made by the learned counsel appearing for the appellant, it is not in dispute that the appellant had retired on 31st December, 2003 and at the time of his retirement his salary was Rs.11,625/- and on the basis of the said salary his pension had been fixed as Rs.9000/-. Admittedly, if any mistake had been committed in pay fixation, the mistake had been committed in 1986, i.e. much prior to the retirement of the appellant and therefore, by virtue of the aforesaid G.O. dated 16th January, 2007, neither any salary paid by mistake to the appellant could have been recovered nor pension of the appellant could have been reduced.

10. For the aforesaid reasons, we quash the impugned judgment delivered by the High Court and direct the respondents not to recover any amount of salary which had been paid to the appellant in pursuance of some mistake committed in pay fixation in 1986. The amount of pension shall also not be reduced and the appellant shall be paid pension as fixed earlier at the time of his retirement. It is pertinent to note that the Government had framed such a policy under its G.O. dated

16th January, 2007 and therefore, the respondent authorities could not have taken a different view in the matter of re-fixing pension of the appellant.

11. The submission made on behalf of the learned counsel appearing for the respondent that the appellant would be getting more amount than what he was entitled to cannot be accepted in view of the policy laid down by the Government in G.O. dated 16th January, 2007. If the Government feels that mistakes are committed very often, it would be open to the Government to change its policy but as far as the G.O. dated 16th January, 2007 is in force, the respondent-employer could not have passed any order for recovery of the excess salary paid to the appellant or for reducing pension of the appellant."

8. The Apex Court has interpreted the purport and intent of Government Order dated 16.01.2007 and has observed that the respondent-employer could not have passed any order for recovery of excess salary paid to the appellant or for reducing the pension of the appellant beyond such period.

9. Learned counsel for the petitioner has also drawn attention towards judgment passed by the Apex Court in **Jagdish Prasad Singh vs. State of Bihar and Others 2024 SCC OnLine 1909** referring to paragraphs 21,22,23 and 24, which reads as under:-

21. We firmly believe that any decision taken by the State Government to reduce an employee's pay scale and recover the excess amount cannot be applied retrospectively and that too after a long time gap. In the case of Syed Abdul Qadir v. State of Bihar(2009) 3 SCC 475, this Court held that when the excess

unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. The relevant paras of the Syed Abdul Qadir (supra) are extracted hereinbelow : -

“57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess.

59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge

that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made.”

(emphasis supplied)

22. Similarly, this Court in ITC Limited v. State of Uttar Pradesh(2011) 7 SCC 493, held as under : -

“108. We may give an example from service jurisprudence, where a principle of equity is frequently invoked to give relief to an employee in somewhat similar circumstances. Where the pay or other emoluments due to an employee is determined and paid by the employer, and subsequently the employer finds, (usually on audit verification) that on account of wrong understanding of the applicable rules by the officers implementing the rules, excess payment is made, courts have recognised the need to give limited relief in regard to recovery of past excess payments,

to reduce hardship to the innocent employees, who benefited from such wrong interpretation.”

(emphasis supplied)

23. In the case of *State of Punjab v. Rafiq Masih (White Washer)* (2015) 4 SCC 334, this Court held as under : -

“18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

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

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

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

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

(v.) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would

be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

(emphasis supplied)

24. Recently, this Court in *Thomas Daniel v. State of Kerala* 2022 SCC OnLine SC 536, held that the State cannot recover excess amount paid to the ex-employee after the delay of 10 years.

10. Learned counsel for the petitioner has also drawn attention of this Court towards the judgment and order dated 16.07.2024 passed by the Division Bench of this Court in Writ-A No.3194 of 2022, **State of U.P. and Others Vs. Suresh Kumar Tripathi**, whereby the judgment of the Apex Court in re; **Sushil Kumar Singhal (supra)** has been followed dismissing the writ petition filed by the State holding that if any recovery has been proposed or executed against the employee after his retirement or at the time of his retirement in derogation of the dictum of the Apex Court in re; **Sushil Kumar Singhal (supra)** and **State of Punjab and others v. Rafiq Masih (White Washer) and others, (2015) 4 SCC 334**, such recovery may not be permissible. Besides, the judgment of **Rafiq Masih (supra)** has been clarified by the Apex Court in re; **High Court of Punjab and Haryana and others v. Jagdev Singh, (2016) 14 SCC 267**, wherein it has been held by the Apex Court that if at the time of making excess payment, if any, any specific and categorical undertaking is received from the employee, such amount may be recovered but in absence of such undertaking at the time of making excess payment, the benefit of the judgment in re; **Rafiq Masih (supra)** would be provided to the employee concerned.

11. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that the impugned recovery is in violation of Government Order dated 16.01.2007 (supra), which has been interpreted and affirmed by the Apex Court in re; **Sushil Kumar Singhal (supra)**. Further, such recovery has been executed in absence of any specific undertaking of the present petitioner at the time of making payment of such amount, if any, therefore, the petitioner would be entitled for the benefit of the dictum of the Apex Court in re; **Rafiq Masih (supra)**, **Jagdev Singh (supra)** and **Jagdish Prasad Singh (supra)**.

12. Accordingly, the writ petition is allowed

13. The impugned order dated 14.03.2024 passed by opposite parties no.3 are hereby set aside/ quashed.

14. The opposite parties are directed to repay/refund the amount which has been deducted from the petitioner forthwith, preferably within a period of six weeks from the date of receipt of certified copy of this order, failing which the petitioner would be entitled for the interest on the delayed payment at the rate of 8% p.a.

[Before parting with, I appreciate the efforts and research made by Shri Piyush Tripathi, Research Associate attached with me, in finding out the relevant case laws applicable in the present case.]

(2024) 9 ILRA 659
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 4566 of 2019

Rajesh Kumar**Petitioner**
Versus
State of U.P. & Ors.**Respondents**

Counsel for the Petitioner:

Abhishek Gupta, Alok Shukla, Prabhakar Awasthi

Counsel for the Respondents:

C.S.C., Devesh Kumar Shukla, Dharmesh Kumar Shukla, Pankaj Agarwal, Sharad Saran Srivastava, Shekhar Gangal

A. Service Law – Removal - U.P. Nagar Palika Parishad Employees (Enquiry, Punishment and Removal) Rules, 1960 - U.P. Government Servant Discipline and Appeal Rules, 1999 - There is a well laid rule i.e. Rule 7, providing for a detailed procedure as per the U.P. Government Servant Discipline and Appeal Rules, 1999 to be followed for inviting a penalty which is major in nature.

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

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

3. Where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be

given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence...

No such procedure was followed by the respondent before passing the order dated 20.02.2015 as neither it mentions any charge-sheet containing article of charges are issued to petitioner, nor it contains any reference to any letter asking petitioner to submit his explanation. All that is stated is that petitioner was required to tender apology by the board in its emergent meeting held on 13.01.2015. In the entire counter affidavit except for taking a plea in paragraphs-20 and 23 that petitioner was duty bound to follow the discipline and discharged duties as per the terms of appointment and that the concerned authority had rightly dismissed the petitioner. **Nothing has been stated as to what procedure has been followed, nor any document has been annexed therewith from where it can be inferred that any such procedure contemplated u/Rule 7 of the 1999 Rules was followed.** (Para 10)

Hence, the order dated 20.02.2015 removing the petitioner from employment is held to be void *ab initio*. The appellate authority having affirmed the order which was void *ab initio* has also manifestly erred in law.

Writ petition allowed. (E-4)

Present petition assails order/notice dated 20.02.2015, whereby he has been removed from employment of the respondent's establishment with three months' notice in advance and order passed by the appellate authority rejecting his appeal and affirming the order passed by the disciplinary authority.

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

1. Heard Shri Saurabh Tripathi, learned Advocate holding brief of Shri Alok Shukla, learned counsel for petitioner,

Shri Shekher Bandal, learned Advocate appearing for respondents No. 4 and 5 and learned Standing Counsel.

2. Petitioner before this Court is aggrieved by the order/ notice dated 20.02.2015 whereby he has been removed from employment of the respondent's establishment with three months' notice in advance. Petitioner is also aggrieved by the order passed by the appellate authority rejecting his appeal and affirming the order passed by the disciplinary authority.

3. Briefly stated facts of this case are that petitioner was initially appointed on 12.12.2007 on the post of Jamadar-cum-sweeper in pay-scale as admissible to such employees of a local body establishment, however later on his services came to be confirmed vide order dated 01.02.2009. It appears that thereafter taking into consideration the conduct of the petitioner relating to the discipline at his end and creating scenes in the establishment by disobeying the commands of the higher authorities and misbehaviour with the colleagues, he was issued with some notice dated 12.01.2015 and the board adopted a resolution in the emergent meeting convened on 13.01.2015 asking the petitioner to tender his apologies fixing 19.02.2015. Since the petitioner, it appears, failed to appear to tender his apology, the board adopted a resolution to remove him from employment with three months' salary in advance and so a consequential order was passed on 20.02.2015.

4. Aggrieved by the said order, petitioner questioned the decision taken by the Chairman which got referred to the District Level Scrutiny Committee and then also filed an appeal before the appellate

authority, namely, the Divisional Commissioner, Aligarh on 30.12.2017 raising several issues including the legal aspect that the order impugned was a mere notice and so cannot be taken to be an order of removal from service to be justified within the legal framework of the U.P. Nagar Palika Parishad Employees (Enquiry, Punishment and Removal) Rules, 1960, (Rules, 1960), however the appellate authority affirmed the order passed by the respondent local bodies under its order dated 13.06.2018.

5. Assailing the orders Mr. Tripathi, has raised the issued of legal propriety as to the conduct of the disciplinary proceedings at the end of the Municipal Board on the ground that no such procedure as has been conceived in law was followed, insofar as the penalty in the nature of major action like termination/ removal from service is concerned. Mr. Tripathi, has further argued that even going by Rules, 1960, the respondents were to follow the procedure as prescribed under the U.P. Government Servant Discipline and Appeal Rules, 1999 for the purposes of imposition a major penalty upon the delinquent employee. Mr. Tripathi, has also argued that looking to the order impugned passed under the joint signatures of Chairman and Chief Executive Officer, it clearly transpires that Board had only asked the petitioner to tender his apologies on a particular date and since the petitioner did not appear, they proceeded to fire him. It is argued that in the absence of any charge being levelled and reduced into article of charge inviting explanation from petitioner, this action of the respondents is per se bad.

6. *Per contra*, Mr. Gangal appearing for the local body concerned submits that from the order impugned it clearly

transpires that the petitioner had misbehaved and it was taken to be a serious misconduct at the end of petitioner and, therefore, the respondent proceeded to remove him from employment. Mr. Gangal also submitted that the authority has passed the order in the light of the relevant provisions as contained under Rules 1960 thus, he defends the order for the reason assigned therein.

7. Having heard learned counsel for respective parties and having perused the records, I find this much to be very clear that relating to some misbehaviour and disobedience shown at the end of petitioner in office he was asked by the board to appear and submit his apologies on or before 19.02.2015 which the petitioner did not as he failed to appear and resultantly the respondent found it to be a case of gross misconduct inviting penalty in the nature of removal from service as per the Rules 11 and 12 of the 1960 Rules.

8. I have perused the 1960 Rules and I find that except in case of temporary employees of the establishment of a local body no permanent/ confirmed employee can be removed from service only on the basis of a notice with three months salary in advance. The Rule 12-A of Rules, 1960 itself contemplates that U.P. Government Servant Discipline and Appeal Rules, 1999 as applicable. There is also a procedure prescribed for placing the petitioner under suspension during pending the disciplinary proceedings. Relevant provisions as contained in Rule 11 and 12 of 1996 Rules are reproduced hereunder:

"11. (1) नियम 9 के उपबन्धों के अधीन रहते हुए, अस्थायी सेवक की सेवायें, या तो सेवक द्वारा सक्षम प्राधिकारी को अथवा

सक्षम प्राधिकारी द्वारा सेवक को लिखित रूप में किसी भी समय नोटिस देकर समाप्त किये जाने योग्य होंगी।

(2) या तो सक्षम प्राधिकारी द्वारा सेवक को या सेवक द्वारा सक्षम प्राधिकारी को ऐसी नोटिस दिये जाने की अवधि एक माह होगी, परन्तु सेवक को सक्षम प्राधिकारी द्वारा नोटिस की दशा में पश्चातवर्ती नोटिस की पूर्ण अथवा आंशिक अवधि को उसके बदले में वेतन से प्रतिस्थापित कर सकेगी, परन्तु अग्रेतर कि सक्षम प्राधिकारी किसी सेवक को बिना नोटिस के अथवा न्यून अवधि की नोटिस पर, सेवक से नोटिस के बदले किसी शास्ति का भुगतान करने की अपेक्षा किये बिना, सेवा से मुक्त करने हेतु स्वतन्त्र होगा।

(3) इस नियमावली में "अस्थायी सेवा" से नगर पालिका परिषद् में किसी अस्थायी पद पर स्थानापन्न और मौलिक सेवा और किसी स्थायी पद पर स्थानापन्न सेवा अभिप्रेत है।

(4) इस नियमावली की कोई भी बात निम्नलिखित पर लागू नहीं होती-

(क) संविदा पर नियोजित सेवक,

(ख) किसी नगर पालिका परिषद् के नियोजन में पूर्णकालिक नियोजन में न रहने वाले सेवक,

(ग) समाश्रित कोष से भुगतान किये जाने वाले सेवक, तथा

(घ) कार्य-प्रभार संस्थापन में नियोजित व्यक्ति।

12. (क) नगर पालिका परिषद् की सेवा में कोई सरकारी सेवक एतपश्चात

उपबन्धित प्रक्रिया के अनुसरण के बिना न तो दण्डित किया जायेगा न उसकी सेवायें समाप्त की जायेंगी।

(ख) जब कोई नगर पालिका परिषद् प्रस्ताव पारित करे कि उसके नियोजन के अन्तर्गत किसी सरकारी सेवक के विरुद्ध कोई अनुशासनिक कार्यवाही प्रारम्भ की जानी चाहिए, तो परिषद् का अध्यक्ष प्रस्ताव की एक प्रतिलिपि, मामले की सुसंगत सामग्री और अभिलेख के साथ, सेवक सरकारी कर्मचारी को दण्डित करने हेतु सक्षम प्राधिकारी को अग्रसारित करेगा तथा ऐसा प्राधिकारी तत्पश्चात् शासकीय सेवक (वर्गीकरण, नियन्त्रण और अपील) नियमावली अथवा अधीनस्थ सेवा दण्ड और अपील नियमावली, यथास्थिति में अन्तर्विष्ट उपबन्धों के अनुसार आवश्यक कार्यवाही करेगा।"

(emphasis added)

9. Upon bare reading of the aforesaid provisions, I find it to be a well laid rule providing for a detailed procedure as per the U.P. Government Servant Discipline and Appeal Rules, 1999 to be followed for inviting a penalty which is major in nature. It has now, therefore, become relevant to reproduce the Rules 7 of the 1999 Rules which runs as under:

"7. Procedure for imposing major penalties:-

Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner:

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

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

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

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

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

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

sheet shall be served by publication in a daily newspaper having wide circulation :
Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

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

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

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

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.

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

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of

the proceeding inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

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

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

Provided that this rule shall not apply in following cases :

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

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

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

(emphasis added)

10. Applying the above Rules to the facts of the case, I find that no such procedure was followed by the respondent

before passing the order dated 20.02.2015 as neither it mentions any charge-sheet containing article of charges are issued to petitioner, nor it contains any reference to any letter asking petitioner to submit his explanation. All that is stated is that petitioner was required to tender apology by the board in its emergent meeting held on 13.01.2015. In the entire counter affidavit except for taking a plea in paragraphs-20 and 23 that petitioner was duty bound to follow the discipline and discharged duties as per the terms of appointment and that the concerned authority had rightly dismissed the petitioner. Nothing has been stated as to what procedure has been followed, nor any document has been annexed therewith from where it can be inferred that any such procedure contemplated under Rule 7 of the 1999 Rules was followed.

11. In view of the above, therefore, the Court comes to the conclusion that the entire procedure to remove the petitioner from employment by order dated 20.02.2015 was de hors the 1960 Rules and hence, the order dated 20.02.2015 removing the petitioner from employment is held to be void *ab initio*. The appellate authority having affirmed the order which was void *ab initio* has also manifestly erred in law.

12. In view of the above, the writ petition succeeds and is allowed.

13. The order dated 20.02.2015 passed by disciplinary authority as well as the order dated 13.06.2018 passed by appellate authority and the order dated 16.11.2018 affirming the order of the appellate authority are hereby quashed.

14. Petitioner shall be reinstated in service with effect from the date he had

been removed and shall be paid his entire arrears of salary and the current salary, however, it will be remain open for the respondent to initiate disciplinary proceedings as may be advised but, this time strictly in accordance with law.

(2024) 9 ILRA 665

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.09.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-A No. 11437 of 2024

The C/M, Jubilee Sanskrit College Ballia & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:

Sri Nityodit Tripathi, Sri Shivendu Ojha, Sri R.K. Ojha (Sr. Adv.)

Counsel for the Respondents:

C.S.C., Sri Laxman Tripathi, Sri Shesh Kumar Srivastava, Sri Anil Tiwari (Sr. Adv.)

A. Education Law – Maintainability - U.P. State Universities Act, 1973 - Section 68 -

A preliminary objection has been raised as to the maintainability of the writ petition u/Article 226 of Constitution of India against the order impugned dated 23.06.2024 passed by Vice Chancellor as remedy lies u/s 68 of U.P. State Universities Act, 1973 (hereinafter called as 'Act of 1973') before the Chancellor.

Alternate remedy is not an absolute bar.

There is self-contained restriction upon the Courts to entertain writ petitions in case there is an statutory remedy available. Right from the year 1958 till date, Hon'ble Apex Court had held that writ petitions are maintainable u/Article 226, and the **jurisdiction cannot be ousted merely on the ground of alternative remedy.** (Para 10)

B. Three guiding principles where a writ petition can be entertained and alternative remedy will not operate as a bar are for the enforcement of Fundamental Rights or where there has been violation of principles of natural justice or where the order or proceedings are wholly without jurisdiction or vires of Act is under challenge. (Para 26)

C. Difference between "entertainability" and "maintainability" of writ petition - Objection as to the "maintainability" goes to the root of the matter and if such objections were found to be of substance, the courts would be rendered incapable of even receiving the *lis* for adjudication. On the contrary, the question of "entertainability" is entirely within the realm of discretion of the High Court, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a Court for many reasons or relief and could be refused to the petitioner, despite setting up a sound legal point. Dismissal of a writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper. (Para 27)

In the present case, it would be unjust to relegate the matter to Chancellor u/s 68 of the Act of 1973 as on four earlier occasions either the fourth respondent or the petitioner has assailed the orders passed by Vice Chancellor and in the earlier round of litigation, similar stands was taken by fourth respondent which was repelled by the Court and the Vice Chancellor proceeded to adjudicate the matter. (Para 28)

Taking the same ground would be injustice and unnecessarily dragging the matter. The dispute raised is only as to the genuineness of experience certificate and competence of issuing authority/Principal is before this Court as well as it was before the Vice Chancellor. (Para 29)

On the two occasions, the Vice Chancellor has failed to address the real issue as to whether the Principal was competent enough to issue

such experience certificate being not an appointing authority. He was required to adjudicate whether an experience certificate could be issued by a Principal of an Institution or by the appointing authority. (Para 30)

The present writ petition cannot be thrown away on the ground of alternative remedy as has already been held by Apex Court that it is not an absolute bar and is maintainable under the guidelines laid down by Apex Court. (Para 32)

Writ petition held to be maintainable. (E-5)

Precedent followed:

1. St. of U.P. Vs Mohammad Nooh, AIR 1958 SC 86 (Para 3)
2. A.V. Venkateshwaran Vs Ramchand Sobhraj Wadhvani, AIR 1961 SC 1506 (Para 4)
3. Calcutta Discount Co. Ltd. Vs ITO, Companies District I Calcutta & anr., AIR 1961 SC 372 (Para 5)
4. Whirlpool Corpo. Vs Registrar of Trade Marks, Mumbai & ors., (1998) 8 SCC 1 (Para 6)
5. Harbanslal Sahnia Vs Indian Oil Corp. Ltd. , (2003) 2 SCC 107 (Para 7)
6. Assistant Commissioner of State Tax & ors. Vs M/s Commercial Steel Ltd., (2022) 16 SCC 447 (Para 8)
7. Godrej Sara Lee Ltd. Vs Excise & Taxation Officer-cum-Accessing Authority, 2023 SCC OnLine SC 95 (Para 9)

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. A preliminary objection has been raised as to the maintainability of the writ petition under Article 226 of Constitution of India against the order impugned dated 23.06.2024 passed by Vice Chancellor as remedy lies under Section 68 of U.P. State Universities Act, 1973

(hereinafter called as 'Act of 1973') before the Chancellor.

2. The question as to whether an alternative remedy is an absolute bar to the maintainability of the writ petition under Article 226 has been under constant legal vigil of not only the Apex Court but also of this Court. From time to time the Hon'ble Apex Court had dealt with the issue in extenso and in categorical terms held that alternative remedy is not an absolute bar as to the maintainability of a writ petition under Article 226 of Constitution.

3. The matter as to exhaustion of statutory remedy came up for consideration before Hon'ble Apex Court in case of **State of U.P. vs. Mohammad Nooh, AIR 1958 SC 86** and the Hon'ble Apex Court observed as under:-

"... It must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy,

convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.”

4. The Constitution Bench of Apex Court in case of **A.V. Venkateswaran vs. Ramchand Sobhraj Wadhvani, AIR 1961 SC 1506** considered the above view and held as under:-

“10. The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor-General formulated to the normal Rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible Rules which should be applied with rigidity in every case which comes up before the Court.”

5. Another Constitution Bench of Hon'ble Apex Court in **Calcutta Discount Co. Ltd. vs. ITO, Companies District I Calcutta and another, AIR 1961 SC 372** again had the occasion to consider the issue in regard to alternative remedy in a matter

relating to income tax and the Court held as under:-

“26. Mr Sastri next pointed out that at the stage when the Income Tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.”

6. In **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1**, Hon'ble Apex Court again had the occasion to consider the matter of exhaustion of remedies and whether the writ under Article 226 was maintainable in case there was any alternative remedy. The Court held that power to issue prerogative writs under Article 226 is plenary in nature and is not limited by any other provision of Constitution. However, the Court laid down that alternative remedy would not operate as a bar in at least three contingencies, namely, where the writ petition has been filed for enforcement of any of the Fundamental Rights or where there has been a violation of principle of natural justice, or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Relevant paragraphs are extracted hereunder:-

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

7. Relying upon the decision in Whirlpool Corporation (supra), the Hon’ble Apex Court in Harbanslal Sahnia vs. Indian Oil Corpn. Ltd., (2003) 2 SCC 107 reiterated the above provisions and held as under:-

“7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners’ dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.”

8. In Assistant Commissioner of State Tax and others vs. M/s Commercial Steel Limited, (2022) 16 SCC 447, the Apex Court while dealing with provisions of Section 107 of Central Goods and Service Tax Act, 2017 found that where an appeal lies against an order of deduction and notice issued under Section 20 but a writ petition was filed. The Apex Court held as under:-

“10. The respondent had a statutory remedy under Section 107.

Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternative remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:

- (i) a breach of fundamental rights;
- (ii) a violation of the principles of natural justice;
- (iii) an excess of jurisdiction; or
- (iv) a challenge to the vires of the statute or delegated legislation."

9. Similarly, in **Godrej Sara Lee Ltd. v. Excise & Taxation Officer-cum-Accessing Authority, 2023 SCC OnLine SC 95**, the Apex Court discussed the concept of "entertainability" and "maintainability" of a writ petition and held that they are distinct concepts and held as under:-

"4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by article 226 of the Constitution having come across certain orders passed by the High Courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard

may be made to article 329 and ordinances of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the High Court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the High Courts (bearing in mind the facts of each particular case)

have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under article 226 that has evolved through judicial precedents is that the High Courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition "not maintainable". In a long line of decisions, this court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are

distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the High Courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a High Court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper."

10. Thus, from the decisions of Hon'ble Apex Court cited above, it is clear that alternate remedy is not an absolute bar. There is self contained restriction upon the Courts to entertain writ petitions in case there is an statutory remedy available. Right from the year 1958 till date, Hon'ble Apex Court had held that writ petitions are maintainable under Article 226, and the jurisdiction cannot be ousted merely on the ground of alternative remedy. The Constitution Bench of 1961 had carved out the exceptions under which the writ petitions are maintainable.

11. Much water has flown since then and in Whirlpool Corporation (supra), the Hon'ble Apex Court had clearly laid down the three contingencies under which alternative remedy would not operate as a

bar. They are – (i) where the writ petition has been filed for the enforcement of any of the Fundamental Rights (ii) where there has been a violation of the principle of natural justice or (iii) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. The said principles as laid down had been followed in the subsequent decisions of Apex Court which till date is being followed.

12 . Now, advertng to the facts of the instant case which are necessary for the better understanding of the case as to whether the writ petition filed before this Court is maintainable or not under Article 226 of Constitution of India.

13. There is a Sanskrit Degree College in the name of Jubilee Sanskrit College, Ballia. It is affiliated with Sampurnanand Sanskrit Vishwavidyalaya, Varanasi and provisions of first Statute are applicable. The Institution is under grant in aid list of State Government and Payment of Salary Act, 1971 is applicable by virtue of Section 2(b) of the Act. Being a degree college, it is governed by the Act of 1973.

14. After retirement of one Baij Nath Pandey, who was the Principal of the College, in the year 2015, the post of Principal fell vacant. An advertisement was published in two newspapers on 16.07.2015. The fourth respondent applied and filled his application form on 23.07.2015. Along with the application documents including experience certificate issued by Principal of one Sri Ramanand Peeth Sanskrit Mahavidyalaya Karnghanta, Varanasi dated 12.01.2015 was also annexed which reflects his appointment since July, 2004. The interview was held on 03.04.2016. The fourth respondent

submitted another experience certificate issued by Principal, Sri Ramanand Peeth Sanskrit Mahavidyalaya Karnghanta, Varanasi dated 23.07.2015 which reflects that he was appointed in month of July, 2010 by the Committee of Management and was teaching up till date on the post of Sahayak Vyakaran Pravakta. He joined the Institution on 15.06.2016. His probation period was from 15.06.2016 to 15.06.2017.

15. The Committee of Management of the Institution through correspondence dated 01.06.2017 sought verification of the experience certificate dated 23.07.2015. The Manager of Sri Ramanand Peeth Sanskrit Mahavidyalaya Karnghanta, Varanasi on 03.07.2017 apprised that fourth respondent was never appointed in his College and experience certificate dated 23.07.2015 appears to be forged and fabricated. The Committee of Management sought clarification from fourth respondent on 13.05.2017. A reply was submitted on 11.07.2017 along with an affidavit stating that all the documents were submitted at the time of appointment and there was no criminal case pending against the fourth respondent except a criminal case registered under Section 107/116 of I.P.C. The period of probation was extended for another six months by Committee of Management on 16.07.2017. Thereafter, he submitted his certificates of educational qualifications along with experience certificate dated 23.07.2015 through letter dated 18.07.2017. It appears that a complaint was made in respect of the experience certificate of fourth respondent, pursuant to which the Committee of Management decided to conduct an inquiry. Notices were issued to fourth respondent seeking his reply in the matter. The inquiry report was submitted by Chairman on 04.02.2018 to Manager of the

Institution. The Committee of Management proceeded to suspend the fourth respondent on 18.02.2018 and directed to hand over the charge to senior most teacher Mr. Siddharth Shanker Ojha. The Manager, thereafter, passed a consequential order on 19.02.2018 putting the fourth respondent under suspension. Thereafter, charge-sheet was served and the matter was placed before Vice Chancellor through letter dated 20.02.2018. An objection was filed to the said charge-sheet on 03.03.2018. On 11.05.2018, last opportunity opportunity was given to fourth respondent for submitting his explanation. On 07.06.2018, the appointment of fourth respondent as Principal was cancelled. The matter was placed before Vice Chancellor on 19.06.2018.

16. The order cancelling appointment was challenged by fourth respondent before this Court through Writ Petition No. 3813 of 2022. The writ Court on 27.04.2022 directed the Vice Chancellor of the University to take decision regarding termination of service of fourth respondent. The Vice Chancellor on 14.11.2022 approved the suspension as well as termination order of fourth respondent. Again, the same was challenged by fourth respondent through Writ-A No. 20283 of 2022. The writ Court on 13.12.2022 while disposing of the writ petition set aside the order passed by Vice Chancellor and remanded back the same to be decided again.

17. Post remand, the Vice Chancellor by order dated 16.04.2023 again approved the suspension and termination order. The fourth respondent again challenged the same through Writ Petition No. 9080 of 2023. The order was again quashed and remanded back to Vice

Chancellor on 23.05.2023 for deciding afresh. Post remand, the Registrar of the University issued a letter on 25.07.2023 requiring all the parties to appear on the date of hearing which was fixed for 11.08.2023. The Committee of Management filed its reply on 11.08.2023.

18. The Vice Chancellor on 17.08.2023 passed an order reinstating fourth respondent. This order was challenged by the present petitioner through Writ-A No. 15912 of 2023. In the said writ petition, the fourth respondent took specific ground that writ petition was not maintainable in view of alternative remedy available under Section 68 of the Act of 1973. The writ Court dealt with the same and found the writ petition to be maintainable looking to the factual background of the case and allowed the writ petition on 01.12.2023 and set aside the order passed by Vice Chancellor on 17.08.2023 and remanded back the matter for consideration afresh.

19. The Vice Chancellor constituted a Three Member Committee on 29.02.2024. The Vice Chancellor on the report of inquiry committee passed the order impugned on 23.06.2024 for reinstating the fourth respondent and providing all the consequential benefits.

20. The present writ petition has been filed mainly on the ground that order of Vice Chancellor dated 23.06.2024 does not address the basic issue as to why a person who lacks qualification of a Principal can be appointed in an Institution. The certificate submitted by him is forged as it has not been issued by appointing authority. Reliance has been placed by fourth respondent on certificates dated 12.01.2015 and 23.07.2015 which have not

been issued by appointing authority which is Committee of Management and they have been issued by Principal, and there is denial by Committee of Management of Sri Ramanand Peeth Sanskrit Mahavidyalaya Karnghanta, Varanasi as to appointment of the fourth respondent in the Institution. Moreover, no finding has been recorded by Vice Chancellor despite direction by writ Court on 01.12.2023 whether the Principal of Sri Ramanand Peeth Sanskrit Mahavidyalaya Karnghanta, Varanasi was competent to issue such experience certificate.

21. Sri Anil Tiwari, learned Senior Counsel appearing for fourth respondent has heavily relied upon the decision of Apex Court rendered in case of **Commercial Steel Limited (supra)** wherein the Apex Court had held that a writ petition can be entertained in exceptional circumstances where there is a breach of Fundamental Rights, or violation of principles of natural justice, or excess of jurisdiction or a challenge to the vires of the statute or delegated legislation.

22. Rebutting the argument, Sri R.K. Ojha, learned Senior Counsel appearing for the petitioner had submitted that Apex Court had constantly laid guidelines as to the entertainability of a writ petition under Article 226 and the instant case is covered under the principles so laid down by Hon'ble Apex Court. According to him, this is the fifth round of litigation between the parties, and each time the order is passed by Vice Chancellor. It is subjected to the jurisdiction of the writ Court. On earlier four occasions, the matter has been remanded back to Vice Chancellor to decide the issue as to the certificate issued by Sri Ramanand Peeth Sanskrit

Mahavidyalaya Karnghanta, Varanasi. Till date, the adjudication to the moot question as to whether Principal of an Institution is competent to issue such a experience certificate has not been decided. The order impugned also lacks adjudication by Vice Chancellor despite repeated directions of this Court. According to him, the petitioner cannot be ousted on the ground of alternate remedy as the Vice Chancellor has failed to perform his duty and not complied the directions of this Court issued in specific terms. The proceedings are without jurisdiction and thus the order is amenable to the jurisdiction of this Court under Article 226.

23. I have heard respective counsel for the parties and perused the material on record.

24. The question as regards the maintainability of writ petition under Article 226 of Constitution of India and alternate remedy being not an absolute bar had been under active consideration of Hon'ble Apex Court since long.

25. The Constitution Bench in case of **A.V. Venkateswaran (supra)** found that there cannot be an absolute bar to a writ petition under Article 226 in view of statutory provision. With passage of time much water has flown and the Hon'ble Apex Court had laid down the principles for the entertainment of the writ petition

26. What culls out from the decision of **Whirlpool Corporation (supra)** that three guiding principles where a writ petition can be entertained and alternative remedy will not operate as a bar are for the enforcement of Fundamental Rights or where there has been violation of principles of natural justice or where the order or

proceedings are wholly without jurisdiction or vires of Act is under challenge.

27. The Hon'ble Apex Court in **Godrej Sara Lee Ltd. (supra)** went a step further and distinguished between the concept of "entertainability" and "maintainability" of writ petition. A fine distinction has been made by Their Lordships at the Apex Court and held that real distinction between the two ought not to be lost sight of. The Hon'ble Apex Court held that objection as to the maintainability goes to the root of the matter and if such objections were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the contrary, the question of "entertainability" is entirely within the realm of discretion of the High Court, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a Court for many reasons or relief and could be refused to the petitioner, despite setting up a sound legal point. The Court further held that dismissal of a writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

28. Thus, considering the above dictum in the light of the present case, it would be unjust to relegate the matter to Chancellor under Section 68 of the Act of 1973 as on four earlier occasions either the fourth respondent or the petitioner has assailed the orders passed by Vice Chancellor and in the earlier round of litigation, similar stands was taken by fourth respondent which was repelled by the Court and the Vice Chancellor proceeded to adjudicate the matter.

29. Taking the same ground would be injustice and unnecessarily dragging the

matter. The dispute raised is only as to the genuineness of experience certificate and competence of issuing authority/Principal is before this Court as well as it was before the Vice Chancellor.

30. On the two occasions, the Vice Chancellor has failed to address the real issue as to whether the Principal was competent enough to issue such experience certificate being not an appointing authority. He was required to adjudicate whether an experience certificate could be issued by a Principal of an Institution or by the appointing authority.

31. The issue raised by Sri Ojha goes to the root of the matter which the Vice Chancellor has failed to address despite the repeated remand orders passed by this Court. The present writ petition cannot be thrown away on the ground of alternative remedy as has already been held by Apex Court that it is not an absolute bar and is maintainable under the guidelines laid down by Apex Court.

32. Reliance placed upon **Commercial Steel Limited (supra)** by respondent counsel also only fortifies the principle laid down by Hon'ble Apex Court in case of **Whirlpool Corporation (supra)** which has been followed in subsequent decisions.

33. Considering the facts and circumstances of the case, I find that the preliminary objection raised by counsel for fourth respondent has no legs to stand and the same stands overruled. The present writ petition is maintainable under Article 226 of Constitution of India.

34. Put up this matter, as fresh, on 19th September, 2024 for further hearing.

35. Looking to the facts and circumstances of the case and order passed by Vice Chancellor/ respondent no. 2, the order impugned dated 23.06.2024 shall remain stayed till the next date of listing.

(2024) 9 ILRA 674

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 02.09.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 1892 of 2023

Prakash Kumar

...Petitioner

Versus

D.G., Directorate of Medical Education and Training & Ors.

...Respondents

Counsel for the Petitioner:

Digvijay Singh Yadav

Counsel for the Respondents:

Kshitij Mishra, Ramendra Kumar Yadav

Civil Law - Indian Contract Act, 1872 - Section 171 - "educational certificates" as lien - retention of original educational certificates to secure bond amount - Validity - "educational certificates" can not be held as lien. Educational Certificates not being a marketable commodity, is not subject to exercise of any lien under Section 171 of the Indian Contract Act, 1872 . Retention of original educational certificates by the Medical Institution to secure bond amount which a candidate may be liable to pay, at the time of withdrawal from the PG Diploma course, cannot be sustained. Medical College is bound to return the educational certificates to the candidate after verification of educational certificates is complete and they are not required for the said purpose. College Administration cannot retain the educational certificates of the students.(Para 15, 16)

Allowed. (E-5)**List of Cases cited:**

Association of Medical Superspeciality Aspirants & Residents & ors. U.O.I. & ors., (2019) 8 SCC 607

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

1. Heard Sri Digvijay Singh Yadav, learned counsel for the petitioner as well as Kshitij Mishra, learned counsel for respondent nos. 1 and 3.

2. It has been submitted by learned counsel for the petitioner that petitioner had appeared in NEET PG Examination, 2022 for taking admission in PG Course and secured 189.04 in All India 50% quota rank. On the basis of NEET PG Examination, 2022 result, provisional letter of allotment was issued to the petitioner allotting Sarojani Naidu Medical College, Agra - respondent no. 3 in the programme of Diploma Course in Dermatology.

3. It is next submitted by learned counsel for the petitioner that allotment of Diploma Course in Dermatology was purely provisional and seat of candidate is liable to be cancelled in case the candidate does not fulfill the eligibility criteria on verification of original documents at the time of reporting or any time thereafter. The petitioner participated in the counseling and also completed all the formalities of verification and also fill up two years compulsory service bond as per rules. In order to obtain admission, the petitioner has to deposit entire certificates/documents at the time of counseling. It is also submitted that at the relevant point of time the petitioner was employed in ESIC, Delhi and was under duty to apply for study leave before he could have taken admission in the said

course. The petitioner could not obtain no objection certificate from his employer and therefore could not submit the same before respondent no. 3 and therefore, could not pursue the PG Diploma Course in Dermatology in the said Institution. It is also case of the petitioner that he had also signed a 'bond' with his employer i.e. ESIC, Delhi where there is condition that after the petitioner is given no objection certificate, he has to undergo compulsory service after completion of PG Diploma course.

4. It is in the aforesaid circumstances, the petitioner was unable to pursue the said course and accordingly he requested respondent no. 3 to return his original educational certificates deposited by him at the time of admission to the PG Course. Respondent no. 3 rejected the application of petitioner by means of order dated 23.11.2023, stating that petitioner has obtained admission in PG Diploma course and in case he wishes to resign from the aforesaid course, he has to deposit Rs.5,00,000/- as well as salary he would have received during the said period and only on deposit of aforesaid amount can the original certificates be returned. It is against order dated 23.11.2023 that present writ petition has been filed.

5. It is submitted by learned counsel for the respondents that according to the counter affidavit filed by the respondents the petitioner is bound by the terms and conditions of the bond which were executed by him at the time of seeking admission and which bond conditions were known to him at the time of admission exercise and during counseling. Alongwith the bond, the petitioner also filed an affidavit to the effect that he, if resigns from the allotted seat, then penalty of Rs.5,00,000/- will be imposed upon him.

6. It is further stated that the petitioner was allotted reserve category seat of two years PG Diploma Course under the All India Quota Seat and the petitioner had completed all the formalities of admission while depositing his original certificates and signing the bond and only subsequent to that he was issued admission letter where the petitioner had agreed to all the terms and conditions.

7. Perusal of the counter affidavit would indicate that the respondent Medical College is demanding bond amount of Rs.5,00,000/- before releasing the original educational certificates, on account of not pursuing entire length of course of PG Diploma in Dermatology. Accordingly, the issue before this Court is as to whether original educational certificates of a candidate are kept by the Institution as security for payment of bond amount in case the candidate wishes to withdraw from the said course.

8. This Court has perused the judgment of Hon'ble Supreme Court in the case of **Association of Medical Superspeciality Aspirants and Residents and Others Vs. Union of India and Others, (2019) 8 SCC 607**, wherein the Apex Court has dealt in detail with the validity and enforceability of the 'bond' at the time of seeking admission in a medical course.

9. Undoubtedly there is no dispute that in case a candidate wishes to leave the course, penalty of Rs.5,00,000/- can be imposed upon him. In case a candidate wishes to withdraw from the course he has to pay bond amount and in case of failure in making payment of bond amount, same can be recovered by the Medical College.

10. Question before this Court is as to whether original educational certificates can be kept as security to secure payment of bond amount by the Medical College?

11. In this regard, this Court has perused the 'bond' conditions as well as the affidavit filed by the candidate seeking admission in the PG Diploma Course. This Court does not find any provision by which lien is created on the original educational certificates of a candidate seeking admission in a PG Diploma Course, who has undertaken to make payment of bond amount in case he wishes to withdraw from the said course.

12. Undoubtedly, in case a candidate violates the terms and conditions of the affidavit or bond, he will be under mandate to pay the bond amount as provided therein and the respondent Medical College would be at liberty to recover the said amount in accordance with law. But, on the other hand this Court does not find any lien created in favour of the Medical Institution to retain original educational certificates in order to enforce the bond conditions as provided in the bond and affidavit filed by the a candidate at the time of admission.

13. In absence of criteria of lien, the Medical College could not retain original educational certificates of any student. The purpose of submission of original educational record of a candidate at the time of his admission is only to verify his educational qualification and do not serve the purpose of securing bond amount which a candidate may be liable to pay at the time of his withdrawal from the aforesaid course.

14. In case it was intention of the University or National Medical

Commission then a specific provision in this regard would have been provided for and only when a lien is created only then the Medical College would have right to retain the original educational certificates of the candidate.

15. It is no more res integra that "educational certificates" can not be held as lien. Educational Certificates not being a marketable commodity, is not subject to exercise of any lien under Section 171 of the Indian Contract Act, 1872. Hon'ble the Apex Court and various High Courts have categorically held in a catena of judgments that College Administration cannot retain the educational certificates of the students.

16. Accordingly, this Court is of the view that retention of original educational certificates by the Medical Institution to secure bond amount which a candidate may be liable to pay, at the time of withdrawal from the PG Diploma course, cannot be sustained. Accordingly, on the request made by a candidate, in case verification of educational certificates is complete and they are not required for the said purpose, the Medical College is bound to return the same to the candidate concerned.

17. At this stage it is made clear that aforesaid action would not come in the way of the Medical College in exercising its right to realise the bond amount from the petitioner, in accordance with law, in case he violates the terms of admission and withdraws from the said course without completing the same.

18. All the provisions of law can be taken aid of by the Medical College while seeking realisation of bond amount from the student.

19. In the light of above, impugned order dated 23.11.2023 is hereby quashed. The writ petition is **allowed**.

20. Respondent no. 3 is directed to return the original educational certificates/records of the petitioner forthwith in accordance with law.

(2024) 9 ILRA 677

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 19.09.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 2671 of 2022

Ram Devi **...Petitioner**

Versus

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

Counsel for the Petitioner:

Savita Jain

Counsel for the Respondents:

C.S.C., Dilip Kumar Pandey, Praveen Kumar Sharma

Civil Law - Constitution of India, 1950 - Article 14 - Fair Price Shop Licence Cancellation - Personal hearing before Cancellation - Prescribed Authority passed the impugned order canceling the licence, ignoring the petitioner's request for a personal hearing. That request was also not considered by the appellate authority. In the counter affidavit filed by the State, there was no specific denial of this fact. Held: Sub-Divisional Magistrate, by not granting the petitioner an opportunity for a hearing, has rendered the impugned order illegal, arbitrary, and violative of Article 14 of the Constitution of India. It was incumbent upon the Sub-Divisional Magistrate to afford the petitioner personal hearing before proceeding with

the order of cancellation. Impugned order quashed. (Para 9)**Allowed.** (E-5)**List of Cases cited:**

S.B.I. & ors. Vs Rajesh Agarwal & ors., reported in (2023) 6 SCC 1

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

1. Heard Ms. Savita Jain, learned counsel for petitioner, learned Standing Counsel for the State/respondent no. 1 to 3 and perused the material available on record.

2. By means of the present writ petition, the petitioner has assailed the validity of the order dated 28.03.2018 passed by the Sub Divisional Magistrate, Mishrikh, District Sitapur whereby he has cancelled the fair price shop licence of the petitioner. The petitioner has also assailed the order dated 21.01.2022 passed by the Joint Commissioner (Food), Lucknow Division, Lucknow wherein the appeal preferred by the petitioner against the order of the Sub Divisional Magistrate has been dismissed.

3. It is the case of the petitioner that the petitioner was appointed fair price shop licensee for Village Panchayat Kanduwapur, Tehsil Mishrikh, District Sitapur. It has also been stated that there was no complaint against the petitioner. The petitioner is running fair price shop for several years. Subsequently certain complaints were made against the petitioner levelling allegations regarding not giving the quantity of food-grains to which the villagers were entitled and also charging more than was due to be paid as consideration for the said goods.

4. On receipt of the complaints against the petitioner, a preliminary inquiry was conducted by the Supply Inspector, Mishrikh, Sitapur. On the basis of the report submitted in this regard, the fair price shop licence of the petitioner was suspended by means of order dated 07.04.2017. In the said suspension order, a copy of the allegations/charge sheet was also given to the petitioner. During the said inquiry, number of card holders had given the statements in support of the allegations levelled against the petitioner. The petitioner had duly responded to the charge sheet. By means of the reply submitted on 20.04.2017, and on receipt of the response, the Sub Divisional Magistrate, Mishrikh, District Sitapur, duly considered the reply of the petitioner and relied upon the allegations levelled against the petitioner, and also considered that in the allegations levelled against the petitioner it was found that instead of 5 kg per unit only 4.5 kg of food-grains were being disbursed and even the sugar was sold for Rs.30/- and only 800 gm was disbursed and similarly he found that the allegations levelled with regard to the kerosene oil was found proved against the petitioner.

5. The reply of the petitioner was not found satisfactory and the Sub Divisional Magistrate, Mishrikh proceeded to cancel the fair price shop licence. The petitioner being aggrieved by the order of cancellation dated 28.03.2018 preferred an appeal before Joint Commissioner (Food), Lucknow Division, Lucknow. The appellate authority also considered the grounds raised by the petitioner and found that there were serious allegations levelled against the petitioner, which were found proved during the said inquiry and considering that the allegations levelled was serious, had rejected the said appeal.

6. Learned counsel for petitioner has submitted that the petitioner has not been given any opportunity of hearing prior to cancellation of said fair price shop licence and also submitted that the evidence was in-fact adduced by her which were not adequately considered by the Sub Divisional Magistrate, Mishrikh and accordingly, prayed for interference by this Court in the present writ petition.

7. The writ petition has been opposed by the learned Standing Counsel. He submits that full opportunity of hearing was provided to the petitioner and it is only after receiving the reply of the petitioner the impugned order of cancellation was passed. □ He further submits that all aspects of the matter has been duly considered by both the authorities and there is no infirmity in the same and the petition deserves to be dismissed.

8. Learned counsel for petitioner while assailing both the impugned orders has submitted that in the reply submitted by the petitioner on 20.04.2017 before the Prescribed Authority it was specifically pleaded in paragraph no. 9 that an opportunity of personal hearing may be given to the petitioner before any decision is taken. The Prescribed Authority has passed the impugned order ignoring the request of the petitioner for personal hearing. The said fact has also been mentioned by the petitioner in paragraph no. 15 of the present writ petition. The said request has neither been considered by the Sub Divisional Magistrate, Mishrikh, Sitapur nor by the appellate authority and even in the counter affidavit filed by the State, there is no specific denial of the said fact.

9. This Court is of the considered view that while filing the reply in case the

licensee has specifically taken a plea that an opportunity of personal hearing may be granted to her before any passing order is passed. Accordingly, it was incumbent upon the Sub Divisional Magistrate, Mishrikh Sitapur to have afforded an opportunity of personal hearing to the petitioner before proceeding to pass the order of cancellation. It is on this score, this Court is of the considered view that the Sub Divisional Magistrate by not granting any opportunity of hearing to the petitioner has rendered the impugned order illegal, arbitrary and violative the Article 14 of the Constitution of India and accordingly, the writ petition deserves to be allowed on this ground alone.

10. Hon'ble the Supreme Court of India in the case of **State Bank of India and others Vs. Rajesh Agarwal and others** reported in (2023) 6 SCC 1, has discussed the facets and importance of the Rule of Opportunity of being heard:

"80. Audi alteram partem has several facets, including the service of a notice to any person against whom a prejudicial order may be passed and providing an opportunity to explain the evidence collected. In Union of India v. Tulsiram Patel, (1985) 3 SCC 398, this Court explained the wide amplitude of audi alteram partem :

"96. The rule of natural justice with which we are concerned in these appeals and writ petitions, namely, the audi alteram partem rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by

which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence. The process of a fair hearing need not, however, conform to the judicial process in a court of law, because judicial adjudication of causes involves a number of technical rules of procedure and evidence which are unnecessary and not required for the purpose of a fair hearing within the meaning of audi alteram partem rule in a quasi-judicial or administrative inquiry."

81. Audi alteram partem, therefore, entails that an entity against whom evidence is collected must :

(i) be provided an opportunity to explain the evidence against it;

(ii) be informed of the proposed action, and

(iii) be allowed to represent why the proposed action should not be taken."

10. In light of the above, the writ petition is allowed. The impugned orders dated 28.03.2018 passed by the Sub Divisional Magistrate, Mishrikh, District Sitapur and order dated 21.01.2022 passed by the Joint Commissioner (Food), Lucknow Division, Lucknow are set aside.

11. The matter is remitted to the Sub Divisional Magistrate, Mishrikh, District Sitapur for proceeding afresh in the matter from the stage of filing of reply of the petitioner.

12. It is noticed that reply of the petitioner is already on record and only opportunity of personal hearing is to be

granted by the Sub Divisional Magistrate, Mishrikha, District Sitapur.

13. In the aforesaid circumstances, the Sub Divisional Magistrate, Mishrikh, District Sitapur is directed to fix a date within two weeks from the date a certified copy of this order is produced before him for personal hearing to the petitioner. On the other hand, the petitioner undertakes to appear before the Sub Divisional Magistrate before the date fixed or any other date fixed within one week thereafter for personal hearing before the Sub Divisional Magistrate, Mishrikh, District Sitapur. After conclusion of the opportunity of personal hearing granted by this Court, he shall proceed to pass orders in the said matter within four weeks thereafter in accordance with law.

14. With the aforesaid observations/directions, the petition stands allowed.

(2024) 9 ILRA 680

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 04.09.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 3319 of 2024

Smt. Poonam Maurya

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Dharendra Kumar Singh Rathore, Sri Madhur Prakash

Counsel for the Respondents:

C.S.C., Sri Harish Chandra Dwivedi, Sri Navneet Singh, Sri D.K. Dwivedi

A. Civil Law - U.P. Panchayat Raj Act, 1947 - Section 12C - Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994 - Rule 3 - Representation of the People Act, 1951 - Section 81(1) - Election Petition - Presentation of Election Petition - Election petition under Sections 12-C (1) & (3) has to be necessarily and mandatorily presented by the candidate himself/herself personally if it is in his/her name. However, if it is presented by an advocate or his clerk *in the presence of the candidate* before the Prescribed Authority, it would be sufficient compliance with Section 12-C(3) of the Act. If the election petition is not presented as aforesaid, then it would be a fatal and incurable defect which has to result in dismissal of the petition by the Prescribed Authority, with liberty to the candidate to file a fresh petition if the limitation is still available before it expires, in accordance with the provisions of Section 12-C(3) of the Act, personally or by his advocate or clerk in his presence. (Para 15)

A. Civil Law - U.P. Panchayat Raj Act, 1947 - Section 12C - Representation of the People Act, 1951 - Section 81(1) - Objection as to Presentation of Election Petition - Any objection regarding non-presentation of the election petition by a candidate *should be raised at the earliest when the trial is pending before the Prescribed Authority* and not after disposal of the election petition, such as, at the revisional stage or before the High Court. In the instant case, objection regarding presentation of the election petition was not raised during the trial before the Prescribed Authority; accordingly, the issue was not framed before the Prescribed Authority. Objection regarding presentation of the election petition was taken for the first time in revision after conclusion of the trial by the Prescribed Authority. Court found no illegality in the order passed by the Prescribed Authority/Sub-Divisional Magistrate. (Para 16)

Dismissed. (E-5)

List of Cases cited:

1. Sumitra Devi Vs Special Judge/Addl. District & Sessions Judge, E.C. Act, Hardoi & ors., 2020 (6) ADJ 134
2. G.V. Sreerama Reddy & anr. Vs Returning Officer & ors., 2009(0) Supreme (SC) 1438

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Dharendra Kumar Singh Rathor / Mr. Madhur Prakash, learned counsel for the petitioner, learned standing counsel for the state-respondents, Mr. Harish Chandra Dwivedi and Mr. Navneet Singh, holding the brief of Mr. D.K. Dwivedi, learned counsel for respondent no.7.

2. Brief facts of the case are that petitioner was elected as Gram Pradhan of the Gram Panchayat Dhanauri, Block & Tehsil Swar, District Rampur in pursuant to the election held on 15.4.2021. In respect to the aforementioned election, an election petition under Section 12-C of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as the "Act") has been filed by respondent no.7/Smt. Shobha Rani before the Sub Divisional Magistrate/Prescribed Authority, on the ground that the petitioner was not eligible for contesting the election of Gram Pradhan. The Prescribed Authority framed 11 issues in the election petition. An application was filed to decide the issue nos. 1, 3 & 5 as preliminary issues. The petitioner filed reply to the election petition, denying the allegation made in the election petition, stating that petitioner was not holding the post of Shiksha Mitra at the time of filing her nomination. The petitioner also filed her objection to the application filed by the election petitioner to decide the issue nos. 1, 3 & 5 as

preliminary issues. The Prescribed Authority/S.D.M. vide order dated 28.7.2023 allowed the election petition and declared the election of the petitioner for the post of Gram Pradhan as void. The Prescribed Authority has also declared the post of Gram Pradhan vacant in respect to gram panchayat Dhanauri, Block and Tehsil Swar, District Rampur. The petitioner challenged the order of the Prescribed Authority dated 28.7.2023 by way of revision under Section 12-C(6) of the Act before the District Judge which was registered as Revision No.24 of 2023, wherein specific ground was taken that election petition was not presented by election petitioner herself, as such, the election petition cannot be entertained. Respondent no.7/Smt. Shobha Rani also filed a revision which was registered as Revision No.26 of 2023 with the prayer that after declaring the election of the petitioner as void, respondent no.7 should be declared elected as Gram Pradhan as respondent no.7 was on 2nd position in the election held on 15.4.2021. The revisional court/District Judge vide order dated 9.1.2024 dismissed both the revisions, hence, this writ petition has been filed for the following reliefs:-

i) issue a writ, order or direction in the nature of certiorari quashing the impugned judgement and order dated 28.07.2023 (Annexure No. 1) passed by the respondent no.3, Prescribed Authority/Court of Sub-Divisional Magistrate, Tehsil Swar, District Rampur of Moradabad Division, in Case No. 2194/ Computerized Case No. T2021135902194 of 2021 (Smt. Sobha Rani Vs. Smt. Poonam Maurya and others) and judgement and order dated 09.01.2024 (Annexure No.2) passed by respondent no.2 / Revising Authority /

District Judge, Rampur in Civil Revision No. 24 of 2023 (CNR No. UPRPO10059852023 (Smt. Sobha Rani w/o Sanjai Kumar and others) respectively and calling for records of the case.

ii) Issue a writ, order or direction in the nature of mandamus commanding the respondents to treat the petitioner not being in service in any manner from the date of tendering her resignation dated 23.03.2021 (Annexure No. 8 to the writ petition).

3. This Court vide order dated 4.3.2024 entertained the matter, issued notice to respondent nos. 8 to 15 as respondent no.7 was represented by the counsel. All the respondents were directed to file counter affidavit in the matter. In pursuance of the order dated 4.3.2024, respondent no.7 has filed her counter affidavit as well as learned standing counsel has also filed his counter affidavit. Petitioner has filed his rejoinder affidavit in the matter.

4. Learned counsel for the petitioner submitted that election petition under Section 12-C of the Act should be filed by the election petitioner himself/herself as provided under Section 12-C(3) of the Act as well as Section 81(1) of the Representation of the People Act, 1951. He further submitted that if the election petition has not been presented by the election petitioner herself, the election petition cannot be entertained. He submitted that the other claim set up in the election petition by respondent no.7 was also misconceived as petitioner was not Shiksha Mitra at the time of filing of her nomination for the post of Gram Pradhan. He placed the provisions contained under Section 12-C(3) of the Act as well as

Section 81 of the Representation of the People Act, 1951 in support of his arguments. He further placed the Full Bench decision of this Court, reported in **2020 (6) ADJ 134, Sumitra Devi vs. Special Judge/Addl. District & Sessions Judge, E.C. Act, Hardoi and Others** in order to demonstrate that non-compliance of Section 12-C(3) of the Act would be fatal and incurable. He further placed reliance upon the judgment of Hon'ble Apex Court reported in **2009(0) Supreme (SC) 1438, G.V. Sreerama Reddy and Another vs. Returning Officer and Others** in which the Hon'ble Apex Court has held that Section 81(1) of the Representation of the People Act, 1951 provides for presentation of election petition by any candidate / elector relating to the election personally to the authorized officer of the High Court and failure to adhere to such course would be contrary to said provision and in that event the election petition is liable to be dismissed on the ground of improper presentation. He submitted that in revision filed by the petitioner under Section 12-C(6) of the Act, the specific ground was taken that the election petition was not presented by respondent no.7 herself, as such, the election petition filed by respondent no.7 cannot be entertained and allowed by the Prescribed Authority but the revisional court has dismissed the revision on misconceived grounds. He submitted that non-presentation of the election petition by the election petitioner according to the provisions of Section 12-C(3) of the Act is an incurable defect, as such, the election petition was liable to be dismissed by the Prescribed Authority but the same has been illegally allowed and the vacancy for the post of Gram Pradhan has been declared vacant under the impugned order. He submitted that during pendency of the

instant petition, the notification has been issued for the election on the vacant post of Gram Pradhan which has been challenged by the petitioner in the connected Writ C No.23765 of 2024. He submitted that this Court while hearing the instant writ petition, has passed a detailed order on 6.8.2024, directing that the result of the election of the Pradhan in respect of the gram panchayat concerned shall not be declared till further orders of this Court, as such, the instant petition be heard and disposed of on merit in accordance with law.

5. On the other hand, learned standing counsel and the learned counsel appearing for respondent no.7 submitted that due to notification issued on 15.7.2024 for holding the election on the vacant seat of gram panchayat concerned, the instant writ petition has become infructuous. They further submitted that election petition was filed according to the provisions contained under Section 12-C(3) of the Act by respondent no.7 herself, as such, there is no illegality in the impugned judgment/order passed by the Prescribed Authority / S.D.M. for declaring the election of the petitioner as void. They also submitted that no objection was raised by the petitioner before the Prescribed Authority regarding presentation of the election petition, as such, the petitioner cannot raise the objection regarding the presentation of the election petition in the revision filed by the petitioner under Section 12-C(6) of the Act. They further submitted that in the case of Sumitra Devi (supra), it has been held that objection relating to presentation of election petition, should be raised at the very initial stage before the Prescribed Authority otherwise it shall be deemed that the plea has been waived by the party concerned. They also submitted that the

petitioner was holding the post of Shiksha Mitra, as such, she cannot contest the election for the post of Gram Pradhan. They further submitted that considering the entire facts on record, the Prescribed Authority has allowed the election petition and declared the election of the petitioner as void. They submitted that the record demonstrates that respondent no.7 was very much present before the Prescribed Authority at the time of presentation, as such, there was no defect in the presentation of election petition. They submitted that no interference is required against the impugned judgment/order and the writ petition is liable to be dismissed.

6. In reply, counsel for the petitioner submitted that plea relating to presentation of election petition will go to the root of the matter which is pure legal plea in the election law, as such, the same can be raised at any stage. He placed following case law of Hon'ble Apex Court in support of his argument:-

(i) 2004 13 SCC 340, Paul Industries (India) vs. Union of India and Others;

(ii) 2011 0 Supreme (SC) 862, The National Textile Corporation Ltd. vs. Nareshkumar Badrikumar Jagad & Others;

(iii) AIR 2010 Supreme Court 1089, M/s Sanghvi Reconditioners Pvt. Ltd. vs. Union of India and Others;

(iv) 1979 0 Supreme (SC) 37, Tarinikamal Pandit and Others vs. Perfulla Kumar Chatterjeet (dead) by L.Rs.;

(v) 2000 (3) Supreme 367, Ajaib singh vs. State of Punjab, &

(v) 1997 0 Supreme (SC) 106, Collector of Central Excise, Ahmedabad

vs. Pioma Industries and Imperial Soda Factory.

7. I have considered the arguments advanced by learned counsel for the parties and perused the records.

8. There is no dispute about the fact that petitioner was elected as Gram Pradhan of the gram panchayat concerned. There is also no dispute about the fact that in the election petition filed by respondent no.7, the election of the petitioner was declared void and vacancy for the post of Gram Pradhan in respect to the gram panchayat concerned was declared vacant. There is also no dispute about the fact that the revision filed by the petitioner as well as respondent no.7 against the order of the Prescribed Authority has been dismissed by the District Judge vide order dated 9.1.2024.

9. In order to appreciate the issue involved in the mater, perusal of Section 12-C of the Act and Section 81 of the Representation of the People Act, 1951 will be necessary which are quoted hereunder:-

“12-C. Application for questioning the elections – (1) The election of a person as Pradhan or as member of a Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that –

(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or

(b) that the result of the election has been materially affected – i- by the improper acceptance or rejection of any nomination or; ii- by gross failure to comply with the provisions of this Act or the rules framed thereunder.

(2) The following shall be deemed to be corrupt practices of bribery or undue influence for the purposes of this Act.

(A) Bribery, that is to say, any gift, offer or promise by a candidate or by any other person with the connivance of a candidate of any gratification of any person whomsoever, with the object, directly, or indirectly of including –

(a) a person to stand or not to stand as, or withdraw from being, a candidate at any election; or

(b) an elector to vote or refrain from voting at an election; or as a reward to – (i) a person for having so stood or not stood or having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting.

(B) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or of any other person with the connivance of the candidate with the free exercise of any electoral right;

Provided that without prejudice to the generality of the provisions of this clause any such person as is referred to therein who

(i) threatens any candidate, or any elector, or any person in whom a candidate or any elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to

believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause.

(3) This application under sub-section (1) may be presented by any candidate at the election or any elector and shall contain such particulars as may be prescribed.

Explanation – Any person who filed a nomination paper at the election whether such nomination paper was accepted or rejected, shall be deemed to be a candidates at the election.

(4) The authority to whom the application under sub-section (1) is made shall in the matter of -

(i) hearing of the application and the procedure to be followed at such hearing;

(ii) setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner, have such powers and authority as may be prescribed.

(5) Without prejudice to generality of the powers to be prescribed under subsection (4) the rules may provide for summary hearing and disposal of an application under sub-section (1).

[(6) Any party aggrieved by an order of the prescribed authority upon an application under sub-section (1) may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more the following grounds, namely –

(a) that the prescribed authority has exercised a jurisdiction not vested in it by law;

(b) that the prescribed authority has failed to exercise a jurisdiction so vested;

(c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity.

(7) The District Judge may dispose of the application for revision himself or may assign it for disposal to any Additional District Judge, Civil Judge or Additional Civil Judge under his administrative control and may recall it from any such officer or transfer it to any other such officer.

(8) The revising authority mentioned in sub-section (7) shall follow such procedure as may be prescribed, and may confirm, vary or rescind the order of the prescribed authority or remand the case to the prescribed authority for re-hearing and pending its decision pass such interim orders as may appear to it to be just and convenient.

(9) The decision of the prescribed authority, subject to any order passed by the revising authority under this section, and every decision of the revising authority passed under this section, shall be final.]

Section 81. Presentation of petitions.—(1) An election petition calling in question any election may be presented on one or more of the grounds specified in [sub-section (1)] of section 100 and section 101 to the [High Court] by any candidate at such election or any elector [within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates].

Explanation.—In this sub-section, “elector” means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]”

10. The perusal of the provisions as quoted above, demonstrate that election petition has to be given or filed by any candidate of the election. The provision further provides that presentation of the election petition by the advocate of the candidate or his clerk is not permissible unless election petitioner is present in person.

11. The perusal of Rule 3 of the Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994 will be relevant which is quoted hereunder:-

3. Election Petition.- (1) An application under sub-section (1) of Section 12-C of the Act shall be presented before the Sub-Division Officer, within whose jurisdiction the concerned Gram Panchayat lies, within ninety days after the day on which the result of the election questioned is announced and shall specify the ground or grounds on which the election of the respondent is questioned and contain a summary of the circumstances alleged to justify the election being questioned on such ground:

Provided that no such application shall be entertained unless it

is accompanied by a treasury challan to show that the amount of rupees fifty has been deposited in the Personal Ledger Account of the Gram Panchayat concerned as security.

(2) The person whose election is questioned and where the petition claims that the petitioner or any other candidates shall be declared elected in place of such person, every unsuccessful candidate shall be made a respondent to the application.

(3) Every respondent may give evidence to prove that any person in respect of whom a claim is made that such person be declared elected, should not be declared so elected on the same ground or ground on which his election could have been questioned if he had been elected.

12. The perusal of the Rule quoted above, provides that the S.D.O. who is to discharge his duty as Prescribed Authority should record about the presence of the election petitioner at the time of presentation of the election petition.

13. The issues which were framed before the Prescribed Authority will be relevant for perusal which are as under:-

“वाद पत्र एवं प्रतिवाद पत्र पर प्रस्तावित वाद बिन्दु प्रस्तुत हुये जिनके आधार पर न्यायालय द्वारा दिनांक 15.09.2022 को निम्नलिखित वाद बिन्दु विरचित किये गये:-

बिन्दु सं 1- क्या प्रतिवादी सं०1 शिक्षामित्र (लाभ का पद) धारण करते हुए ग्राम पंचायत धनौरी विकास खण्ड स्वार के

प्रधान पद का चुनाव लड़ने के लिए निरह (अयोग्य) थी। यदि हां, तब प्रभाव।

बिन्दु सं०2 - क्या प्रतिवादी नं० 1 प्राथमिक विद्यालय धनौरी प्रथम में शिक्षामित्र (लाभ का पद) धारण करते हुए ग्राम पंचायत धनौरी के प्रधान पद पर निर्वाचित हुयी है। यदि हां, तब प्रभाव।

बिन्दु सं०3- क्या प्रतिवादी नं० 1 द्वारा ग्राम पंचायत धनौरी का प्रधान पद का चुनाव पंचायत राज एक्ट अधिनियम की धारा 5क में उल्लेखित निरहता (अयोग्यता) के कारण लडे जाने के कारण अवैध घोषित कर निरस्त करते हुए नये चुनाव का आदेश पारित किया जाना उचित है। यदि हां, तब प्रभाव।

बिन्दु सं०4- क्या प्रतिवादी नं०1 तथ्यों को छुपाकर चुनाव लड़ने के कारण अपराधिक अवमानना की दोषी है। यदि हां, तब प्रभाव।

बिन्दु सं०5- क्या कानूनन तौर पर प्रतिवादी नं०1 पंचायत राज अधिनियम की धारा 5क के अन्तर्गत निरहता के आधार पर विजयी होने के पश्चात् त्याग पत्र देने से उसकी निरहता (अयोग्यता) समाप्त हो जाएगी। यदि नहीं तब प्रभाव।

बिन्दु सं०6 - क्या त्रिस्तरीय पंचायत चुनाव सन् 2021 में विपक्षी नं०1 को ग्राम पंचायत धनौरी विकास खण्ड स्वार जिला रामपुर को ग्राम प्रधान पद हेतु विजयी घोषित किया गया है यदि हां तो इसका प्रभाव।

बिन्दु सं०7 - क्या त्रिस्तरीय पंचायत सन् 2021 में विपक्षी नं०1 को ग्राम पंचायत धनौरी विकास खण्ड स्वार के प्रधान पद हेतु सबसे अधिक 881 मत प्राप्त हुए। यदि हां तो इसका प्रभाव।

बिन्दु सं०8- क्या विक्षी नं०1 ने नियमानुसार निर्धारित अवधि में नामांकन प्रक्रिया प्रारम्भ होने से पूर्व अपना शिक्षामित्र पद से त्याग पद तत्कालीन प्राधानाध्यापिका महोदया प्रारम्भिक विद्यालय धनौरी प्रथम विकास खण्ड स्वार रामपुर को लिखित रूप से दिनांक 23.3.2021 को दे दिया था, यदि हां तो इसका प्रभाव।

बिन्दु सं०9- क्या विपक्षी नं०1 उत्तरदाता के त्यागपत्र पर विचारार्थ तत्कालीन प्राधानाध्यापिका महोदया स्वार सम्बन्धित उच्च अधिकारियों को समय से अग्रसारित करना था सम्भवतः समय अभाव कोविड-19 महामारी के वजह से अग्रसारित न हो सकने फलतः विपक्षी नं०1 प्रभाव उत्तरदाता ने पत्र दिनांक 05.05.2021 द्वारा श्रीमान बेसिक शिक्षाधिकारी महोदय रामपुर को अवगत कराया, यदि हां तो इसका प्रभाव।

बिन्दु सं०10- क्या विपक्षी नं०1 उत्तरदाता के खाते में दिनांक 22.03.2021 से 22.06.2021 तक का मानदेय खाते में आने व विपक्षी नं० 1 उत्तरदाता द्वारा दिनांक 23.03.2021 से 22.06.2021 तक का मानदेय जरिए चैक सं० 005141 दिनांक

22.06.2021 द्वारा मुवलिग 12581/-रु० श्रीमान बेसिक शिक्षाधिकारी महोदय रामपुर को लौटा दिया गया/वापस कर दिया गया। यदि हां, तो इसका प्रभाव।

बिन्दु सं०11- क्या विपक्षी सं०1 ग्राम पंचायत धनौरी विकास खण्ड स्वार रामपुर की निर्वाचित मौजूदा प्रधान है यदि हां तो इसका प्रभाव।”

14. The issue regarding presentation of election petition under Section 12-C of the Act has already been examined by Full Bench of this Court in the case of Sumitra Devi (supra). The Full Bench has answered the issue which was referred in the following manner:-

81. Based on the discussion made, and subject to it, we summaries our answers to the questions referred to us (as rephrased by us), as under:-

1. (a) An Election Petition under Section 12-C(1) and (3) of the Act, 1947 has to be necessarily and mandatorily presented by the candidate/ Election petitioner himself, personally, if it is in his name. However, if it is presented by the Advocate or his clerk, in the presence of the candidate/ Election Petitioner before the Prescribed Authority, it would be sufficient compliance of Section 12-C(3) .

(b) In the event an election petition is not presented as aforesaid then it would be fatal and an incurable defect which has to result in dismissal of the petition by the Prescribed authority with liberty however, to the candidate to file a fresh petition, if the limitation is still available and before it expires, in accordance with Section 12-C(3),

personally, or by his Advocate or Clerk in his presence. He can not adjourn the matter to some other date for rectification of the incurable defect in those proceedings.

2. The decision in Lal Bahadur Singh's case (supra) does not lay down the law correctly as regards Question No.1. The decision in Viresh Kumar Tiwari's case (supra) lays down the law correctly subject to the proposition that an election petition filed by the Advocate or his Clerk in presence of the candidate before the Prescribed Authority is also in accordance with section 12-C (3) of the Act 1947. In Urmila's case (supra) Question No.1 has not been decided.

15. The perusal of the issue answered by the Full Bench in **Sumitra Devi** (supra) as quoted above fully demonstrates that the election petition under Section 12-C (1) & (3) of the Act has to be necessarily and mandatorily presented by the candidate/election petitioner himself/herself personally if it is in his/her name. However, if it is presented by advocate or his clerk in presence of the candidate/election petitioner before the Prescribed Authority which would be sufficient compliance of Section 12-C(3) of the Act. The answer as quoted above further demonstrates that if the election petition is not presented as aforesaid, then it would be fatal and incurable defect which has to result in dismissal of the petition by the Prescribed Authority with liberty to the candidate to file fresh petition if the limitation is still available before it expires in accordance with the provisions of Section 12-C(3) of the Act personally or by his advocate or clerk in his presence.

16. In paragraph no.74 of the judgment of the Full Bench in **Sumitra**

Devi (supra), it has been held that any objection regarding non-presentation of the election petition by a candidate as aforesaid should be raised at the earliest when the trial is pending before the Prescribed Authority and not after disposal of the election petition, such as, at the revisional stage or before the High Court as if the objection is not raised during trial, a specific issue cannot be framed in this regard and the parties would not be able to lead evidence in respect to it as well as if the objection is raised at a later stage, evidence may not be available by then or the officer before whom the petition was presented. It has been also held by the Full Bench in the same paragraph that once there is adjudication of election petition on merit, then it would be highly inequitable to allow such a plea or objection to be raised at the revisional level or before the High Court under Article 226 of the Constitution when the election petition has succeeded and it will be treated that objection regarding presentation of the election petition has been waived by the party concerned. The paragraph no.74 of the judgment rendered in **Sumitra Devi** (supra) is as under:-

“74. We are also of the view that any objection regarding non-presentation of an Election Petition by a candidate as aforesaid should be raised at the earliest when the trial is still pending before the Prescribed Authority and not after disposal of the Election Petition such as at the Revisional stage or before the High Court. This is for the reason firstly, if not raised during trial a specific issue can not be framed in this regard and the parties would not be able to lead evidence in respect to it, secondly, if raised at a later stage evidence may not be available by then or the Officer

before whom the petition was presented may himself not be available. Thirdly, once there is an adjudication of the Election petition on merits, then, it will be highly inequitable to allow such a plea or objection to be raised at the Revisional level or before the High Court under Section 226 of the Constitution, especially when, the Election Petition has succeeded. It will therefore have to be treated as waived, as has been held in Devendra Yadav's case (supra)."

17. In the instant matter, the objection regarding presentation of the election petition has admittedly not been raised during trial before the Prescribed Authority, accordingly, the issue was not framed before the Prescribed Authority. The objection regarding presentation of the election petition for the first time has been taken in revision after conclusion of trial by the Prescribed Authority by which the election petition was allowed and the election of the petitioner was held to be void.

18. In view of the ratio of law laid down by the Full Bench of this Court in **Sumitra Devi** (supra), there is no illegality in the impugned order passed by respondent no.3/Prescribed Authority/Sub Divisional Magistrate.

19. **The writ petition is dismissed.**

20. Interim order granted earlier by this Court on 6.8.2024 by which declaration of election result was stayed, stands vacated.

21. No order as to costs.

22. The Registrar (Compliance) is directed to communicate this order to

respondent no.5/District Election Officer/District Collector, District Rampur, forthwith.

(2024) 9 ILRA 690
ORIGINAL JURISDICTION
CIVIL SIDE
DATED LUCKNOW 18.09.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ - C No. 3418 of 2022
 With
 Writ - C No. 14794 of 2021

**Arya Pratinidhi Sabha, Lucknow Thru
 Pradhan Devendra Pal Verma & Anr.**
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Lalita Prasad Misra, Sri Atul Kumar Dwivedi, Sri Vineet Bihari Patel

Counsel for the Respondents:

C.S.C., Sri Gaurav Mehrotra, Maria Fatima, Sri Nadeem Murtaza, Sri Nakul Pathak, Sri Ratnesh Chandra, Sri Santosh Kumar Tripathi, Sri Sharad Dwivedi, Sonal Bajpai

A. Civil Law - Societies Registration Act, 1860- Sections 4-B & 25 - Election dispute - genuine and bona fide dispute regarding the election of the committee of management -Deputy Registrar is not to act as a rubber stamp authority. Deputy Registrar is required to apply his judicial mind to the facts and circumstances to determine whether there is any genuine and bona fide dispute regarding the election of the committee of management or relating to the continuance in office of any office bearer of such committee - In order to thwart a duly elected committee, few erring members can create rival elections and stake a claim before the Registrar. In such a situation, if the

Registrar, merely noticing that there are multiple claims, refers such disputes to the Prescribed Authority in a mechanical manner, it may have an adverse impact on a duly elected committee. To avoid such a situation, it is required that the Deputy Registrar, even if referring the matter to the Prescribed Authority, must apply his mind to ensure that the complaints before him actually reflect some bona fide dispute relating to the elections before referring the matter to the Prescribed Authority for adjudication. (Para 98, 100, 111, 114)

B. Societies Registration Act, 1860-Section 25 - Issue of membership - The Prescribed Authority, while dealing with an issue of an election, can, as an ancillary issue, examine, determine, and adjudicate the issue of membership, as it would impact the electoral college and affect whether there has been a rightful reception of votes or the denial of a bona fide vote, which would influence the result of the election. (Para 97)

C. Societies Registration Act, 1860, Sections 4-B & 25 - Election dispute - In the instant case, the impugned order passed by the Deputy Registrar was completely bereft of reasoning. There was no finding as to whether the conflicting claims had some basis to refer the matter to the Prescribed Authority. Whether the claim, prima facie, made by the four warring factions had any substance should have been noticed at the threshold. It should have been initially examined whether there was compliance with the bye-laws in holding the alleged elections to test the veracity of the elections claimed by the four warring factions, only for the purpose of satisfying itself whether there was a bona fide dispute or not. (Para 98, 111, 114)

Allowed. (E-5)

List of Cases cited:

1. C/M, Raja Tej Singh Vidyalaya & anr. Vs D.I.O.S., Mainpuri & ors., (2002) 2 UPLBEC 993;

2. T.P. Singh Vs Registrar/Assistant Registrar Firms, Chits & Societies, (2019) 37 LCD 186;

3. C/M, Shri Swami Vivekanand Madhyamik Vidyalaya Vs St. of U.P., (2015) 33 LCD 2383

4. C/M, Kisan Siksha Sadan Bakshi District Basti Vs Assistant Registrar Firms, Chits & Societies, Gorakhpur, (1995) 2 UPLBEC 1242.

5. Mani Mandir Sewa Nyas Samiti, Ayodhya Vs Registrar, Firms, Societies & Chits, (2014) 32 LCD 1857;

6. Chris Church McConaghy School Society Vs Registrar Firms, Societies & Chits, (2015) 33 LCD 2454;

7. Shri Ram Laxmi Narayan Marwadi Hindu Hospital, Varanasi - 23 - Vs Assistant Registrar Firms, Societies & Chits, (2000) 3 UPLBEC 2063;

8. Umesh Chandra & ors. Vs Mahila Vidyalaya Society & ors., (2006) 24 LCD 1373;

9. Ayaub Khan Noor Khan Pathan Vs St. of Maharashtra & ors., (2013) 4 SCC 465

10. Literacy House Staff Welfare Asso. & ors. Vs Registrar Firms, Societies & Chits, U.P. & ors., (2006) 29 LCD 1439

11. C/M, Jay Ram Verma Kisan Siksha Samiti Vs U.P. Zilaadhikari/Prescribed Authority, Ambedkar Nagar passed in Writ Petition No.2203 (M/S) 2015, decided on 18.04.2016;

12. C/M, Unchahar Madhyamik Vidyalaya, Nevadiya Vs St. of U.P. & ors., passed in WRIT-C No.1492/2020, decided on 25.02.2020

13. Indrajit Barua & ors. Vs Election Commission of India, (1985) 4 SCC 722

14. Commissioner Karnataka Housing Board Vs C. Muddaiah, (2007) 7 SCC 689

15. Committee of Management Shri Vidur Sewa Ashram & ors. Vs St. of U.P. & 4 other, 2018 (5) ADJ 717

16. Kishan National Education Trust, Pratapgarh & anr. Vs Prescribed Authority (S.D.M.) & ors., WRIT-C No.23628/2014, decided on 14.09.2018

17. C/M Anjuman Kherul Almin Allahganj & anr. Vs St. of U.P. & ors., Special Appeal Defective No.1286/2013, decided on 18.12.2013

18. C/M Al-Jamiatul Ghausiaarabic College Samiti Utraula & anr. Vs St. of U.P. & ors., 2017(35) 2018 LCD 2080

19. Prabhu Narayan Union Club & anr. Vs St. of U.P. and 3 others, WRIT-C No.10742/2020, decided on 15.10.2020

20. C/M Baba Prem Das Junior High School through Manager & ors. Vs Registrars, Firms, Societies & Chits & ors., Writ Petition No.28607 (M/S) of 2021, decided on 07.12.2021

21. Sarv U.P. Gramin Bank Vs Manoj Kumar Sinha, (2010) 3 SCC 556

22. Surendra Kumar Verma Vs St. of U.P. & ors., 2002 SCC OnLine All 188

23. Jagmittar Sain Bhagat & ors. Vs Director, Health Services, Haryana & ors., (2013) 10 SCC 136

24. Mathevan Padmanabhan @ Ponnai (Dead) through LRs Vs Parmeshwaran Thampi & ors., 1995 Suppl (1) SCC 479

25. Ajai Kumar Singh Vs St. of U.P. & ors. Special Appeal No.337 of 2022 dated 10.08.2022

26. The committee of management Shri Vidhur Sewa Ashram & ors. Vs St. of U.P. & ors. 2018 (5) ADJ 717

27. Cyril Lasrado (Dead) by LRs & anr. Vs Juliana Maria Lasrado & anr., (2004) 7 SCC 431,

Act, 1860 (for short, "the Act of 1860") having its registered office at 5, Meerabai Marg, Lucknow. However, in both the petitions, the society is represented by different officer bearers inasmuch as in WRIT-C No.3418/2022, it is represented by its alleged President Shri Devendra Pal Verma, who is the petitioner No.2 whereas in WRIT-C No.14794/2021, it is represented through its Secretary namely Shri Bhuwan Tiwari, who is impleaded as petitioner No.2, therein.

2. There is an internal conflict relating to the management of the society and as such four set of factions have claimed rights on the basis of four separate alleged elections. One faction has set up their rights on the basis of an election said to have been held on 21.03.2021 wherein Shri Devendra Pal Verma is said to have been elected as a President, who has filed WRIT-C No.3418/2022. The second faction is led by Shri Bhuwan Tiwari, who has filed WRIT-C No.14794/2021 wherein he claims rights on the basis of his election allegedly held on 20.02.2021. The third faction is led by Shri Vivek Singh, who alleges that his election was held on 07.03.2021, though Shri Vivek Singh is not a party in WRIT-C No.14794/2021 but he is impleaded as respondent No.5 in WRIT-C No.3418/2022. The fourth faction is led by Shri Ram Ratan Chaturvedi, who claims rights on the basis of an alleged election dated 27.11.2021. Shri Chaturvedi has not been impleaded in WRIT-C No.14794/2021, but he is respondent No.6 in WRIT-C No.3418/2022.

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The instant two petitions have been filed by Arya Pratinidhi Sabha, a society registered under the Societies Registration

3. Since, contesting parties are all represented in WRIT-C No.3418/2022 and it encompasses all the warring factions, hence, this Court for the sake of convenience shall consider and refer to the

parties as they are impleaded in WRIT-C No.3418/2022. The issue involved in both the petitions is common, hence, by deciding the controversy in terms of WRIT-C No.3418/2022, it shall also dispose of WRIT-C No.14794/2021. Accordingly, both the petitions are being decided by this common judgment.

4. The faction led by Shri Devendra Pal Verma, the petitioner of WRIT-C No.3418/2022 is represented by Dr. L.P. Misra and Shri Atul Kumar Dwivedi, learned counsel. The faction of Bhuwan Tiwari is represented by Shri Ratnesh Chandra, who is the counsel for the petitioner in the connected WRIT-C No.14794/2021. The third faction led by Shri Vivek Singh, who is respondent No.5 and is represented by Shri Nadeem Murtaza, Advocate and the fourth faction led by Shri Ram Ratan Chaturvedi, who is respondent No.6, is represented by Shri Gaurav Mehtrotra, Advocate.

5. Under challenge in WRIT-C No.3418/2022 is the order passed by the respondent No.2 dated 23.04.2022 whereby the Deputy Registrar, Society, Chit and Fund, Lucknow Region has referred the matter to the Prescribed Authority in terms of Section 25(1) of the Act of 1860. While doing so, the Deputy Registrar noticed that four separate factions have set up their own separate elections and in terms of the legislative prescription, the Deputy Registrar is mandated to refer the matter to the Prescribed Authority who is the competent authority to decide the validity of the rival elections set up by the four separate factions.

6. In the connected WRIT-C No.14794/2021 which was filed prior in time to the WRIT-C No.3418/2022, a

challenge has been made to the order impugned and said to have been passed by the Deputy Registrar registering the list of Members of Managing Committee of the Society in context with an election allegedly held on 26.03.2021 wherein Shri Devendra Pal Verma (who is the petitioner No.2 in WRIT-C No.3418/2022) was elected as the President and a further prayer has been made to register the names of the Committee Members of the faction led by Bhuwan Tiwari in pursuance of the election said to have been held on 20.02.2021.

7. This ongoing litigation between the warring factions has a chequered and a long drawn history. Several writ petitions have been filed and were decided by this Court from time to time. In order to appreciate the controversy involved in the instant two petitions, it will be worthwhile to take a glimpse in the past through the background facts:-

BACKGROUND FACTS

8. Historically, Arya Samaj was founded by Swami Dayanand Saraswati in the year 1875 with the prime objective to promote social, spiritual, cultural upliftment of the society. The aforesaid Arya Samaj has a four tier composition namely (i) Sarvadeshik Arya Pratinidhi Sabha (ii) Pradeshik Arya Pratinidhi Sabha (iii) Zila Arya Pratinidhi Sabha (iv) Arya Samaj Units.

9. The Arya Pratinidhi Sabha was formed in the State of Uttar Pradesh on 03.07.1987 and was duly registered under the provisions of the Societies Registration Act, 1860. The Arya Pratinidhi Sabha has its own registered bye-laws which regulate and governs the functioning of the Society. The bye-laws also define the constitution of

the Arya Pratinidhi Sabha and further elucidates the powers and duties of the General Body, the Governing Body as well as the office bearers of the Governing Body. The registered office of Arya Pratinidhi Sabha is situate at Narayan Swami Ashram at 5 Meera Bai Marg, Lucknow.

10. There are approximately 300 units of Arya Samaj spread over the various districts within the State of Uttar Pradesh which constitutes the electoral units of the Arya Pratinidhi Sabha to elect its general body. The General Body of the Arya Pratinidhi Sabha elects its own Governing body which is known as 'Antrang Sabha'. The Sarvadeshik Arya Pratinidhi Sabha at New Delhi has its own rules which are known as Rules-Sub Rules of Arya Samaj. The aforesaid rules are binding over every Arya Samaj Unit which is affiliated with the Pradeshik Arya Pratinidhi Sabha.

11. The last undisputed elections of Arya Pratinidhi Sabha was held on 27.03.2016. Term of the said Committee of governing body was of 5 years and it expired on 26.03.2021. In the last undisputed election, a Committee of 90 Members was constituted wherein Shri Devendra Pal Verma was elected as the President while one Dr. Dheeraj Singh (now deceased and in the instant context he belonged to the faction of the private-respondent No.6 namely Ram Ratan Chaturvedi).

12. It is soon after the election on 27.03.2016 that the disputes emerged and certain charges were leveled against Devendra Pal Verma and the Deputy Registrar vide his order dated 09.11.2016 restrained Shri Verma from performing his duties as the President of Arya Pratinidhi

Sabha and by the said order charge was handed over to Dr. Dheeraj Singh.

13. Shri Devendra Pal Verma preferred a writ petition before this Court at Lucknow bearing Writ Petition No.10563 (MS) of 2017. In the meantime, the Deputy Registrar, Firms, Societies and Chits passed an order dated 16.01.2017 whereby the charge which was given to Dr. Dhiraj Singh was modified as a result the charge was now directed to be given to Smt. Gayatri Dixit.

14. Now, it was the turn of Dr. Dhiraj Singh to prefer a Writ Petition bearing No. 1829 (MS) of 2017 wherein he assailed the order dated 16.01.2017 by means of which the charge of the Pradhan which was given to him was directed to be handed over now to Smt. Gayatri Dixit.

15. During this period, another interesting event took place, inasmuch as, the General Body of the Arya Pratinidhi Sabha by means of its Resolution dated 26.03.2017 expelled Shri Devendra Pal Verma from the post of President as well as from the membership of the Society for a period of 6 years for various irregularities committed and as the actions of Shri Verma were not found to be in the interest of the Society.

16. Shri Devendra Pal Verma preferred a complaint before the Deputy Registrar, Firms Societies and Chits against the said Resolution dated 26.03.2017 and challenging his expulsion from the membership of the Society upon which the Deputy Registrar by means of its order dated 30.03.2017 stayed the proceedings and the operation of the resolution dated 26.03.2017.

17. Dr. Dhiraj Singh preferred another writ petition bearing Writ Petition

No.7613 (M/S) of 2017 assailing the order passed by the Deputy Registrar dated 30.03.2017 staying the resolution dated 26.03.2017 by which Shri Devendra Pal Verma was expelled.

18. Again in a meeting of the Governing Body held on 23.07.2017, the petitioner Dr. Dhiraj Singh was elected as Pradhan for the remaining term up to 26.03.2021 and in the same meeting the membership of Smt. Gayatri Dixit was also terminated on the ground that she was ineligible for membership in terms of Clause 2 (e) (b) (1) and (2) of the bye-laws.

19. Now, Smt. Gayatri Dixit filed a complaint dated 25.07.2019 before the Deputy Registrar against the decision terminating her membership taken by the Governing Body in the meeting held on 23.07.2017.

20. All the three petitions bearing Writ Petition No.1829 (MS) of 2017, Writ Petition No.10563 (MS) of 2017 and Writ Petition No.7613 (MS) of 2017 were clubbed together and decided by means of order dated 30.07.2019. As a result, the orders impugned in the aforesaid three writ petitions were set aside and the matter was remitted to the Deputy Registrar, Firm Societies and Chits to decide the matter afresh and till such decisions, the parties were directed to maintain status-quo. The relevant portion of the said order dated 30.07.2019 passed by this Court on the three clubbed petitions, is being reproduced hereinafter.

"4. So far as impugned orders dated 09.11.2016, 16.01.2017 and 30.03.2017 are concerned, counsels for both the parties agree that the aforesaid order may be set aside. However, the issue as to whether Shri Devendra Pal Verma is

entitled to hold any post in the society or not be left to be reproduced decided after decision of the Deputy Registrar with regard to reproduced membership.

5. In view of aforesaid, following order is being passed:-

(i) The impugned orders dated 09.11.2016, 16.01.2017 and 30.03.2017 are set aside.

(ii) All the parties may approach the Deputy Registrar, Firms, Societies and Chits, Lucknow within a period of two week from today raising all their submissions including with regard to membership of Shri Devendra Pal Verma and Smt. Gaytri Dixit. The said matters shall be decided by the Deputy Registrar by a reasoned and speaking order, in accordance with law, after hearing all the parties concerned, within a period of two months from the date a certified copy of this order is placed before him.

(iii) It is provided that authority of Shri Devendra Pal Verma to hold any post including the post of president in the society will depend upon the final order passed by the Deputy Registrar, Firms, Societies and Chits, Lucknow with regard to membership.

(iv) Till final decision of the Deputy Registrar, parties shall maintain status-quo.

6. With the aforesaid, all these writ petitions are disposed of."

21. In furtherance and as per the directions given by this Court in its judgment dated 30.07.2019, the Deputy Registrar called upon the parties concerned

to file their respective pleadings and submissions.

22. While the matter was still pending before the Deputy Registrar, in the meantime, the elected Secretary of the Society namely Swami Dharmeshwaranand Saraswati expired on 23.10.2019.

23. Soon thereafter, the Deputy Registrar after considering the submissions and the pleadings of the respective parties passed its final order dated 02.11.2019. By means of the said order, the Deputy Registrar, Firms Societies and Chits, did not find any error in the Resolution expelling Shri Devendra Pal Verma as his primary Membership had been terminated. It also noted that Smt. Gayatri Dixit had already submitted that her termination has already been revoked, thus, no further adjudication was required on her representation/complaint, hence, in effect the order dated 02.11.2019 primarily focused on the issue of the expulsion of Shri Devendra Pal Verma and the same was upheld by the Deputy Registrar.

24. Shri Devendra Pal Verma assailed the said order dated 02.11.2019 by means of Writ Petition No.4515 (MS) of 2020. He also assailed the consequential order dated 07.11.2019 whereby the list of office bearers as submitted by Dr. Dhiraj Singh was registered by the Deputy Registrar.

25. Dr. Dhiraj Singh in capacity as President circulated an agenda calling for the meeting of the Society to be convened on 01.12.2019 primarily to fill up the post of the Secretary of the Society which had fallen vacant on account of death of Shri Dharmeshwara Nand Saraswati.

26. The meeting of the Governing Body was held on 01.12.2019, however, no

business was transacted and after offering due condolences on account of demise of late Shri Dharmeshwara Nand Saraswati, the meeting of the Governing Body was adjourned for 15.12.2019.

27. In the meeting held on 15.12.2019 for the purposes of filling up the vacancy of the Secretary, the names of the Deputy Secretaries were discussed and Shri Gyanendra Singh's candidature was discussed and by majority he was found suitable and was nominated as the Secretary of the Society.

28. The nomination of Shri Gyanendra Singh as Secretary of the Society was duly ratified by the other office bearers including the Treasurer and the President. The said Resolution was also communicated to the Bank where the Society held its accounts attesting the signatures of Shri Gyanendra Singh. The nomination of Shri Gyanendra Singh as Secretary was also duly published in the Hindi weekly news letter "Arya Mitra" published by the Arya Pratinidhi Sabha for wide circulation and information to all members and persons concerned.

29. On 28.12.2019, the petitioner Dr. Dhiraj Singh also sent a copy of the Minutes of the meeting dated 15.12.2019, the agenda dated 05.11.2019 as well as information regarding nomination of Shri Gyanendra Singh as the Secretary of the Society to the Deputy Registrar.

30. One Shri Vishal Singh in his representation/complaint dated 03.01.2020 depicted himself as the Officiating Secretary of the Arya Pratinidhi Sabha. It was alleged by him that though he was the Deputy Secretary but upon the death of Shri Dharmeshwara Nand Saraswati, he

automatically became the officiating Secretary of the Society, hence, the entire proceedings initiated by the meeting dated 01.12.2019, 15.12.2019 as well as the Agenda dated 05.11.2019 issued by Dr. Dhiraj Singh was unlawful and void.

31. Shri Vishal Singh also complained to the Deputy Registrar that upon the death of Shri Dharmeshwara Nand Saraswati, the post of Secretary was lying vacant and as such directions be issued for calling upon a meeting for filling up the post of the Secretary in due accordance with the rules and bye-laws of the Society.

32. Upon the representation/complaint of Shri Vishal Singh, the Deputy Registrar passed an order dated 09.01.2020 addressed to Dr. Dhiraj Singh and directed him to call for a meeting of the "Antrang Sabha" of Arya Pratinidhi Sabha and fill the post of Secretary in accordance with the bye-laws and within 15 days inform the Deputy Registrar of it.

33. Dr. Dhiraj Singh upon receiving the said notice/order dated 09.01.2020 submitted a detailed reply before the Deputy Registrar on 17.01.2020 informing him of the entire exercise undertaken for nominating the Secretary and that Shri Gyanendra Singh had already been appointed as the Secretary. It was also informed that the minutes of the meeting and other relevant documents were already submitted before the Deputy Registrar on 28.12.2019. It was also stated that Shri Vishal Singh who had attended the meeting dated 15.12.2019 wherein his candidature was considered but as the majority found him unsuitable as he was holding a post with the State Government, hence, all these facts had

been concealed by Shri Vishal Singh and he has mislead the Deputy Registrar to issue the said order dated 09.01.2020. Hence, it was prayed that the order dated 09.01.2020 be recalled.

34. Shri Vishal Singh in his alleged attempt to usurp control of the Society moved another representation/complaint before the Deputy Registrar alleging that the meeting called by Dr. Dhiraj Singh as President on 01.12.2019, 15.12.2019, 02.02.2020 and 14.03.2020 were void and impermissible and the same may not be accepted or given effect to. Shri Vishal Singh levelled various allegations against Dr. Dhiraj Singh that few members and office bearers had also filed affidavits raising a protest against Dr. Dhiraj Singh and a meeting of the Governing Body be called, to be supervised by the Deputy Registrar, Firms Societies and Chits.

35. Once the Deputy Registrar received complaint dated 31.01.2020, he issued another letter to Dr. Dhiraj Singh on 01.02.2020 calling upon Dr. Dhiraj Singh to submit his reply.

36. Shri Dhiraj Singh informed that in the meeting dated 02.02.2020 vide Resolution No. 11, Shri Vishal Singh was expelled from the membership as well as from the post of Deputy Secretary. Shri Vishal Singh did not challenge the said decision dated 02.02.2020 regarding his expulsion, however, in order to browbeat, he issued an illegal agenda on 03.02.2020 while ante-dating the same to 30.01.2020 for convening a meeting on 16.02.2020 at the head office of the Society at Lucknow mainly for considering a 'No Confidence Motion' against Dr. Dhiraj Singh and also for filling up the vacancy for the post of Secretary.

37. As in the alleged meeting dated 02.02.2020 the Governing Body of

the Society had expelled Shri Vishal Singh, hence, Dr. Dhiraj Singh also sent another amended list of members to the Deputy Registrar on 05.02.2020. Shri Vishal Singh by means of his letter dated 14.02.2020 addressed to the Registrar sought an Observer for supervising the alleged meeting slated for 16.02.2020. The Registrar, Firms Societies and Chits by means of his order dated 14.02.2020 and addressed to the Assistant Registrar required the Assistant Registrar to do the needful for appointing an Observer for the meeting dated 16.02.2020. In furtherance thereof the Deputy Registrar informed the Registrar that as per his request from Deputy Registrar, Faizabad, Deputy Registrar, Kanpur, Assistant Registrar, Azamgarh and Assistant Registrar, Gorakhpur anyone may be appointed as the Observer. Accordingly, the Assistant Registrar, Firms Societies and Chits, Azamgarh was appointed as Observer under whose supervision the meeting dated 16.02.2020 was to be held.

38. As per Dr. Dhiraj Singh on the alleged date 16.02.2020 on account of commotion and ruckus created by the members at the behest of Shri Vishal Singh, the meeting could not take place, so much so, that the head office of the Society was locked by the police and the Observer so appointed also noticed the same while submitting its report to the Registrar that no meeting was held for the said reason.

39. As per Shri Vishal Singh, the meeting took place on 16.02.2020 and a resolution was passed by means of which the President Dr. Dhiraj Singh was removed as the No Confidence Motion was passed successfully by the members.

40. It is in furtherance thereof that the alleged list of office bearers was

submitted by Shri Vishal Singh before the Deputy Registrar on 17.03.2020 upon which the Deputy Registrar passed an order dated 19.03.2020 directing the said list to be registered.

41. It is this order dated 19.03.2020 which was assailed by the Dr. Dhiraj Singh in Writ Petition No. 9735 (MS) of 2020 as well as the consequential order dated 20.03.2020 by means of which amended list of office bearers of the Governing Body of the Society has been registered for the year 2019-2020.

42. In light of the aforesaid disputes, this Court by means of its detailed judgment and order dated 07.06.2021 allowed the petition filed by Dr. Dheeraj Singh and dismissed the petition filed by Shri Devendra Pal Verma.

43. The order passed by this Court dated 07.06.2021 was made the subject matter of a Special Appeal No.217/2021 wherein the Division Bench of this Court by means of the judgment and order dated 01.07.2021 disposed of the special appeal with the following observations, which have been reproduced hereinafter for ready reference.

"Mr. Gaurav Mehrotra, learned counsel appearing on behalf of respondent no.1 has taken the Court to the judgment under challenge, particularly paragraph 117 to point out that the matter has been remitted by learned Single Judge to the Deputy Registrar with a direction that Deputy Registrar shall after affording full opportunity of hearing to the parties concerned, shall reconsider the entire matter in the light of the observations made in the order, which may not be taken as an expression on merit of the case and on the

basis of material on record decide the matter afresh on merit by passing a reasoned and speaking order, strictly in accordance with law, preferably within four months from the date an authenticated copy of the judgment is placed before the authority concerned."

44. Shri Devendra Pal Verma had also filed a Civil Misc. Review Application No.94/2021 against the judgment of this Court dated 07.06.2021 passed in WRIT-C No.4315 of 2020 whereby the petition of Shri Verma had been dismissed.

45. Initially the said review petition was also clubbed with the instant petitions, however, a request had been made that the review petition be decided first in point of time before considering these two petitions. Accordingly, after hearing the parties on review, this Court by means of the order dated 16.08.2023 dismissed the review application and the relevant portion thereof reads as under:-

"23. Considering the aforesaid submissions which though on the first blush may sound attractive but there are certain chinks in the said armour of submissions made by the learned counsel for the review-petitioner which are noticed as under:-

(a) It is not disputed that by means of order dated 30.07.2019, the order dated 09.11.2016 along with orders dated 06.01.2017 and 30.03.2017 were set aside by a coordinate Bench of this Court on 30th July, 2019. Thus, apparently, since then the order dated 09.11.2016 ceased to exist, but at the same time, the coordinate Bench in its order dated 30.07.2019 had directed the parties to maintain status-quo and had directed the Deputy Registrar, Firms,

Societies and Chits, Lucknow to decide all issues including the issue of membership of Devendra Pal Verma as well as his authority to hold a post in Arya Pratinidhi Sabha.

(b) What is significant to note is that after the order passed by this Court on 30.07.2019 and while the matter was seized by the Deputy Registrar, Firms, Societies and Chits, Lucknow who was conducting the hearings in light of the directions issued by this Court on 30.07.2019. It was also brought to his notice that the primary membership of Devendra Pal Verma had been terminated in meeting dated 24.07.2019 (prior to the order passed by a coordinate Bench of this Court dated 30.07.2019). This is perhaps the reason that the coordinate Bench while issuing the directions in its order dated 30.07.2019 categorically provided that the Deputy Registrar, Firms, Societies and Chits, Lucknow would consider all issues regarding the membership of Sri Devendra Pal Verma and the issue whether Devendra Pal Verma would have the authority to hold any post of President in the Society would depend on the final orders to be passed by the Deputy Registrar, Firms, Societies and Chits, Lucknow. It is for the said reason that till the final decision of the Deputy Registrar, Firms, Societies and Chits, Lucknow, the parties were directed to maintain status-quo.

(c) The very fact that if a person loses his primary membership in a District Arya Samaj then he is not entitled to hold a post in the Arya Pratinidhi Sabha which is the apex body. Thus, once the primary membership of Devendra Pal Verma had been terminated on 24.07.2019, hence, he could not be permitted to hold the post of President and all these issues were yet to be

decided by the Deputy Registrar, Firms, Societies and Chits, Lucknow, accordingly, the Court had safeguarded the rights of the respective parties by directing them to maintain status-quo.

(d) Admittedly, the order dated 30.07.2019 has not been set aside nor challenged rather it was acceded to by the parties who participated in the proceedings before the Deputy Registrar, Firms, Societies and Chits, Lucknow. It is in the aforesaid factual backdrop, the issue before the Deputy Registrar, Firms, Societies and Chits, Lucknow was two fold;

(i) the correctness of removal of Devendra Pal verma in pursuance of the order dated 09.11.2016 which had been set aside and its effect;

(ii) the removal of Devendra Pal Verma from the primary membership of Arya Samaj, Muzaffarnagar on 24.07.2019 and its effect.

(e) Taking a complete view of the matter including the various pleadings and contentions, the Deputy Registrar, Firms, Societies and Chits, Lucknow by a detailed order dated 02.11.2019 rejected the representation of Sri Devendra Pal Verma. This was challenged in W.P. No. 4515 (MS) of 2020. This Court while considering W.P. No. 4515 (MS) of 2020 was required to adjudge the correctness of the order dated 02.11.2019 and 07.11.2019 in exercise of its power of judicial review. It may be reminded that this Court does not act as an Appellate Authority. Taking the consideration and looking into the facts which were brought before the Deputy Registrar, Firms, Societies and Chits, Lucknow at the relevant point of time when the order was passed, this Court concluded

that no error could be found in the order passed by the Deputy Registrar, Firms, Societies and Chits, Lucknow, therefore to that extent this Court does not find that there is any merit in the submissions of the learned counsel for the review-petitioners in so far as they have tried to link up the entire issue of membership with that of the order dated 09.11.2016.

(f) In so far as the issue raised regarding the restoration of the membership of Devendra Pal Verma is concerned, it would be found that the primary membership of Devendra Pal Verma was terminated on 24.07.2019, as noticed above, prior to the order dated 30.07.2019. The review-petitioner in his rejoinder affidavit dated 18.03.2021 in paragraphs 10 to 14 stated that the Arya Samaj, Muzaffarnagar has reversed the resolution dated 24.07.2019 and has restored the primary membership of the review-petitioner by means of resolution dated 19.07.2020 and this resolution has further been affirmed by the Arya Pratinidhi Sabha on 26.09.2020. It will also be relevant to notice that these two orders regarding restoration of primary membership is post order dated 02.11.2019 and thus this could not have been taken as a ground to hold that the order dated 02.11.2019 passed by the the Deputy Registrar, Firms, Societies and Chits, Lucknow was bad. Nevertheless, the Court was cautious of this fact and already in paragraph 129, 130 and 131 of the judgment dated 07th June, 2021, it recorded its observations that if the membership of Devendra Pal Verma has been restored, the same will have its own consequences and since that was not the subject matter before the Court then, hence, it refrained from making any observations in respect thereto.

24. Thus, any apprehension as allayed by the review-petitioner on this

count is also misfounded as it is well settled that an impugned order and in this case the order dated 02.11.2019 and 07.11.2019 were to be adjudged by this Court on the basis of material before it and the order impugned could not have been improved upon merely on the basis of some subsequent events. However, the fact remains that even if at all the membership has been restored, it still is open for the review-petitioner to participate in the proceedings and raise his objections on the strength of the same and the same would be considered but it cannot be said that the Deputy Registrar, Firms, Societies and Chits, Lucknow while passing the order dated 02.11.2019 had committed any error.

25. It is also another aspect to be noted that a membership of a person can be terminated for a limited time and once the membership is restored, he gains back his status from the date of restoration but that does not mean that the order dated 02.11.2019 was bad since the order by which the membership was terminated dated 24.07.2019 was actually never challenged seriously, by Sri Devendra Pal Verma, before any appropriate competent forum. Thus, taking care of the aforesaid situation, the Court had made the observations as noticed above and, therefore, to that extent, the submission of learned counsel for the review-petitioner does not find favour with the Court.

26. Lastly, what has been argued that the effect of elections which were held on 21.03.2021 has also not been appropriately considered by the Court for the reason that in the order it has been mentioned that no material was brought on record by the review-petitioner in its rejoinder affidavit dated 18.03.2021 whereas the elections were held only subsequent thereto on 21.03.2021.

This also does not impress the Court for the reason that for any elections it is not the date of polling alone which is important since the review-petitioner had filed his rejoinder affidavit on 18.03.2021, he could have very well brought on record certain documents regarding the notification of elections and other ancillary documents indicating the various stages of an election leading up to the polling but that was not brought on record.

27. Even otherwise, it will be noticed that the hearing of the petitions continued on a number of dates and finally the matter was reserved as late as on 23.03.2021 and in case if the elections had been held on 21.03.2021, it was always open for the review-petitioner to have informed the Court apart from the fact that despite assistance sought from the learned Standing Counsel, he also did not inform the Court and this has also been recorded in the judgment dated 07.06.2021.

28. Thus, for all the aforesaid reasons, this Court is of the clear view that the judgment dated 07.06.2021 does not require a review and the entire endeavour made by the review-petitioner is to get a rehearing on merits which this Court is unable to persuade itself to permit and nevertheless it would also be against the settled legal principles relating to review as this Court does not find any error apparent on the face of the record.

29. For all the aforesaid reasons, this Court is of the humble opinion that the instant review-petition is sans merit and is accordingly dismissed. In the facts and circumstances, there shall be no order as to costs. "

46. The aforesaid factual matrix would reveal that this Court by means of its

judgment dated 07.06.2021 had remitted the matter to the Deputy Registrar to consider the matter afresh leaving all pleas open to the respective parties to be raised before the said authority in a time bound fashion. This judgment was further affirmed by the Division Bench vide its order dated 01.07.2021 whereby the time of four months was extended in the sense that it was now to be reckoned from the date of order passed by the Division Bench i.e. 01.07.2021 and not from 07.06.2021.

47. It is in the aforesaid backdrop that the Deputy Registrar was seized of the matter and he had called upon the contesting parties to furnish their respective submissions and the documents upon which they wished to rely.

48. The Deputy Registrar by means of the impugned order dated 23.04.2022 noticed the orders passed by this Court dated 07.06.2021 and 01.07.2021 and further noticed that the contesting parties had claimed rights over the management of the society by setting up four different elections i.e. dated 20.02.2021 (which is the election claimed by Bhuwan Tewari), the other dated 07.03.2021 (this is claimed by Vivek Singh, who is the respondent No.5 in the instant petition), the third dated 21.03.2021 (claimed by Devendra Pal Verma) and the fourth dated 27.11.2021 (claimed by Shri Ram Ratan Chaturvedi), hence, the Deputy Registrar observed that in order to adjudicate the controversy in the given facts and circumstances, it would require him to either way comment and give some observations regarding the conflicting elections and the same was not within his jurisdiction as in terms of Section 25(1) of the Act of 1860 (as amended in the State of U.P.), the jurisdiction to look into the

validity of elections is conferred on the Prescribed Authority, hence, he referred the matter to the Prescribed Authority.

49. This order of the Deputy Registrar dated 23.04.2022 is the subject matter of challenge in WRIT-C No.3418/2022 which has been filed by the society through Devendra Pal Verma while contemporaneously the other petition filed by the society through Bhuwan Tiwari bearing WRIT-C No.14794/2021 assails the order of the Deputy Registrar dated 26.03.2021 whereby the list of elected Members in the alleged election held on 21.03.2021 was registered by the Deputy Registrar and another relief seeking directions against the Deputy Registrar that he be directed to recognize the list of Members sent to the Deputy Registrar dated 03.03.2021 which is in context with the elections as claimed by Bhuwan Tiwari.

SUBMISSIONS OF THE RESPECTIVE PARTIES

50. Dr. L.P. Misra along with Shri Atul Kumar Dwivedi, learned counsel for the petitioner in WRIT-C No.3418/2022 opened their submissions and they primarily attacked the order passed by the Deputy Registrar dated 23.04.2022 on the ground that the Deputy Registrar has acted in a mechanical manner without even applying its judicial mind to the controversy involved.

51. It was urged that the Deputy Registrar does not merely act as a rubber stamp rather while referring the matter to the Prescribed Authority, it was incumbent upon him to have entered into the factual controversy, notice the rival claims and then if it came to a conclusion that it was required to adjudge the validity of the

elections only then it could have referred the matter to the Prescribed Authority.

52. Elaborating his submissions, Dr. Misra submitted that the last undisputed election was held on 27.03.2016 and the said term was come to an end in the year 2021. The elections were held by Devendra Pal Verma on 21.03.2021 i.e. prior to the expiry of the term of the Management Committee of the Arya Pratinidhi Sabha and the same had already been placed before the Deputy Registrar, who was obligated to have recognized the same and rather it was done. This necessarily indicated that the new Committee of Arya Pratinidhi Sabha was duly constituted and was incharge of the affairs of the Society. It was not open for the Deputy Registrar to have shirked from his responsibility of following and complying with the observations and directions given by this Court while deciding the earlier two petitions vide judgment dated 07.06.2021. Once the High Court vide its judgment dated 07.06.2021 which was affirmed in Special Appeal vide order dated 01.07.2021 required the Deputy Registrar to look into certain facets as noticed in the said judgment which related to the Membership which could have been decided by the Deputy Registrar himself. Hence, in such circumstances, it was not open for the Deputy Registrar to have referred the matter to the Prescribed Authority which at best could have only seen the validity of an election but could not decide the issue of Membership.

53. Elaborating further it was stressed by Dr. Misra that the Prescribed Authority is not empowered to enter into the dispute of Membership and more so in light of the decision of this Court dated 07.06.2021 and 01.07.2021 of the Division

Bench of this Court. It was for the Deputy Registrar to have examined this issue and thereafter if there was any genuine dispute which affected the elections only then it could have referred the matter to the Prescribed Authority in terms of Section 25(1) of the Act of 1860.

54. It has further been urged by Dr. Misra that insofar as the election of Devendra Pal Verma is concerned, it was prior to expiry of the term, of the Committee of Management of the last undisputed election. The alleged other three elections as set up by the factions headed by Bhuwan Tiwari, Vivek Singh and Ram Ratan Chaturvedi were apparently void and non-est since they were all allegedly set up by persons who were not Members of the General Body of the Arya Pratinidhi Sabha and were also not members of their respective districts.

55. It has been emphasized by Dr. Misra that Shri Bhuwan Tiwari and Shri Vivek Singh had been expelled as their primary Membership had been terminated, hence, there was no way that these persons being strangers to the Society, could have set up any rival elections against the petitioner.

56. Insofar as Shri Ram Ratan Chaturvedi is concerned, even his election prima-facie is mired by inherent contradiction inasmuch as certain Members, who had been elected in the alleged Committee of Vivek Singh and Bhuwan Tiwari also find place in the alleged election claimed by Ram Ratan Chaturvedi.

57. In circumstances, where in the three alleged elections, claimed by three separate contesting parties, certain

members have been shown to be commonly elected and are part of the three rival Committees, this in itself is prima-facie proof that the three alleged elections were ex-facie, tainted and it has deliberately been placed before the Deputy Registrar to obligate and to create an artificial cloud over the election of the Committee dated 21.03.2021 led by Shri Devendra Pal Verma.

58. It is also urged that in exercise of powers under Section 25(1) of the Act of 1860 merely because some stranger or third party sets up a rival election without establishing its basis to say that the person so claiming had any bonafide interest then it will not automatically amount an election dispute between rival factions to goad the Deputy Registrar to refer the matter to the Prescribed Authority.

59. It is further submitted that if the order passed by the Deputy Registrar is seen in the aforesaid context, it would indicate that he has merely referred to the judgments passed by this Court dated 07.06.2021 and 01.07.2021 and thereafter noticing the four rival factions claiming their elections, without adverting to anything further the matter has been remitted to the Prescribed Authority which appears to be a complete mechanical exercise of jurisdiction and the order does not deal with the issue of Membership and other relevant issues as had been noticed by the High Court in its order dated 07.06.2021 which renders the impugned order void for want of compliance and lack of objectivity which establishes the lack of application of judicial mind and renders the order without jurisdiction and liable to be set aside.

60. Dr. Misra while opposing the WRIT-C No.14794/2021 has urged that the

said petition is not maintainable as it has been filed by Bhuwan Tiwari who is not a Member. There is nothing on record which could prima-facie establish the primary Membership of Bhuwan Tiwari, hence, he could not maintain the petition and for the said reasons, he cannot assail the list of Members which had been furnished by Shri Devendra Pal Verma dated 26.03.2021 nor he can indirectly get the recognition for his alleged fake elections, hence, connected petition also deserves to fail.

61. Dr. Misra has relied upon the following decisions to press the propositions that the Deputy Registrar does not act as a mere post office while making a reference under Section 25(1) of the Act of 1860 and he must prima-facie arrive at satisfaction as to whether there is any bonafide dispute or not.

(i) **C/M, Raja Tej Singh Vidyalaya and another v. D.I.O.S., Mainpuri and others**, (2002) 2 UPLBEC 993; (ii) **T.P. Singh v. Registrar/Assistant Registrar Firms, Chits & Societies**, (2019) 37 LCD 186; (iii) **C/M, Shri Swami Vivekanand Madhyamik Vidyalaya v. State of U.P.**, (2015) 33 LCD 2383 and (iv) **C/M, Kisan Siksha Sadan Bakshi District Basti v. Assistant Registrar Firms, Chits & Societies, Gorakhpur**, (1995) 2 UPLBEC 1242.

62. He has further relied upon the following decisions to press that a person who is not a Member of the General Body cannot hold an election nor claim to do so:-

(i) **Mani Mandir Sewa Nyas Samiti, Ayodhya v. Registrar, Firms, Societies & Chits**, (2014) 32 LCD 1857; (ii) **Chris Church McConaghy School Society v. Registrar Firms, Societies &**

Chits, (2015) 33 LCD 2454; (iii) Shri Ram Laxmi Narayan Marwadi Hindu Hospital, Varansi v. Assistant Registrar Firms, Societies & Chits, (2000) 3 UPLBEC 2063; (iv) Umesh Chandra & Ors. v. Mahila Vidyalaya Society & Ors., (2006) 24 LCD 1373; (v) Ayaaub Khan Noor Khan Pathan v. State of Maharashtra & Ors., (2013) 4 SCC 465 and (vi) Literacy House Staff Welfare Asso. & Ors. v. Registrar Firms, Societies & Chits, U.P. & Ors., (2006) 29 LCD 1439.

63. He has further relied upon the following decisions to canvass that the Prescribed Authority is not a competent authority to decide the issue of Membership which effects the electoral college in exercise of powers under Section 25(1) of the Act of 1860.

(i) C/M, Jay Ram Verma Kisan Siksha Samiti v. U.P. Zilaadhikari/Prescribed Authority, Ambedkar Nagar passed in Writ Petition No.2203 (M/S) 2015, decided on 18.04.2016; (ii) C/M, Unchahar Madhyamic Vidyalaya, Nevadiya v. State of U.P. & Ors., passed in WRIT-C No.1492/2020, decided on 25.02.2020 and (iii) Indrajit Barua & Ors. v. Election Commission of India, (1985) 4 SCC 722.

64. Lastly, reliance has been placed on a decision of the Apex Court where it was held that once there is an order passed by the Competent Authority, then the same is to be implemented without any reservation.

Commissioner Karnataka Housing Board v. C. Muddaiah, (2007) 7 SCC 689

65. On behalf of the private-respondents, the arguments have been led by Shri Gaurav Mehtrotra learned counsel appearing for the private-respondent No.6. Defending the order passed by the Deputy Registrar, it has been submitted that the Deputy Registrar as per the Scheme of the Act of 1860 (as amended in the State of U.P.) is not invested with jurisdiction to adjudicate the dispute involving conflicting claims of the Management Committee of a Society. All such conflicts and claims necessarily involves an adjudication of an election claimed by any of warring/rival Committee and for such adjudication, the powers are vested in the Prescribed Authority.

66. It is further submitted that Section 25(1) of the Act of 1860 clearly provides that any dispute regarding election of the office bearers or any dispute in respect of election or continuance in office of an office bearer can be adjudicated by the Prescribed Authority.

67. It is urged that factual matrix of the instant case is a classic example where four rival election claims have been presented and once the same was before the Deputy Registrar who in light of the dispute as evident from the record available with him was required only to form a prima-facie subjective satisfaction and thereafter he is obligated to refer the matter to the Prescribed Authority.

68. In the instant case, where there are multiple claims set up by the rival factions and certain Members of the Committee are common in more than one faction, this apparently indicates that there is an election dispute and it also falls within the scope as mentioned in Section 25(1) of the Act of 1860 relating to the continuance

in office of a Committee Member hence it was required to be referred to the Prescribed Authority.

69. In such circumstances, the Deputy Registrar cannot enter into the issue of fact whether any particular Member of the Committee so elected or the entire Committee as elected, is justified or not, but if there is a prima-facie indication that a particular Member or a Committee as a whole, as elected, suffers from any controversy then it necessarily falls within the parameter of Section 25(1) of the Act of 1860 and is required to be referred to the Prescribed Authority.

70. Shri Mehrotra taking his submissions forward submitted that upon reference made by the Deputy Registrar to the Prescribed Authority under the Act of 1860, it would not only adjudicate regarding the election of the Committee as a whole or of continuance in office of any particular Member of the Committee so elected but the Prescribed Authority is also invested with powers to consider the issue of Membership or the correctness of the list of Members of the General Body which necessarily would be required as an ancillary adjudication as it would affect the election. Hence, it cannot be said that the Prescribed Authority cannot look into the issue of Membership nor there is an embargo in this regard.

71. It has further been urged that there is difference in exercise of powers by the Deputy Registrar while adjudging the list of Members in exercise of powers under Section 4-B (as amended in the State of U.P.) of the Act of 1860. The said provision has been incorporated by an Amendment in the year 2013 which enjoins a duty that at the time of

registration/renewal of the Society, a list of Member of the General Body of that society is required to be filed with Deputy Registrar and he is required to examine the correctness of the list of the Members. Under the aforesaid Section 4-B while examining the correctness of the list of the Members, the Deputy Registrar is not required to adjudicate the Membership dispute but insofar as the provisions of Section 25(1) of the Act of 1860 is concerned, where there are rival claims of different Committees then the Registrar would be justified in referring the dispute to the Prescribed Authority who is required to decide the Membership dispute as an ancillary issue which affects the election of a particular Member of the Committee or of the Committee as a whole, as the case may be.

72. In support of his aforesaid submissions, he has relied upon the following decisions of this Court in (i) **Committee of Management Shri Vidur Sewa Ashram & 7 others v. State of U.P. & 4 other**, 2018 (5) ADJ 717; (ii) **Kishan National Education Trust, Pratapgarh and another v. Prescribed Authority (S.D.M.) and others**, WRIT-C No.23628/2014, decided on 14.09.2018, (iii) **C/M Anjuman Kherul Almin Allahganj and another v. State of U.P. and 2 others**, Special Appeal Defective No.1286/2013, decided on 18.12.2013; (iv) **C/M Al-Jamiatul Ghausiaarabic College Samiti Utraula and another v. State of U.P. and others**, 2017(35) 2018 LCD 2080; (v) **Prabhu Narayan Union Club and Another v. State of U.P. and 3 others**, WRIT-C No.10742/2020, decided on 15.10.2020; (vi) **C/M Baba Prem Das Junior High School through Manager and others v. Registrars, Firms, Societies & Chits and others**, Writ Petition

No.28607 (M/S) of 2021, decided on 07.12.2021.

73. Shri Mehrotra has further urged that the order impugned passed by the Deputy Registrar dated 23.04.2022 has been passed in exercise of jurisdiction as conferred on the Deputy Registrar and it in no manner, causes prejudice to the petitioner inasmuch as he has a forum available for raising all his disputes and grievances, which needless to say, can be adjudicated by the Prescribed Authority on its own merits.

74. It is submitted that while invoking powers of this Court under Article 226 of the Constitution of India apart from indicating a legal wrong, the petitioner is also required to indicate what prejudice has been caused. In case, even if there is some legal infraction but it is not occasioned by any prejudice or failure of justice then the Court will be justified in not interfering with the matter and the present case is of such kind where the indulgence of this Court is not required to interfere with the impugned order. In support of the aforesaid proposition, learned counsel has relied upon the decision of the Apex Court in **Sarv U.P. Gramin Bank v. Manoj Kumar Sinha, (2010) 3 SCC 556** and of this Court in **Surendra Kumar Verma v. State of U.P. and others, 2002 SCC OnLine All 188**.

75. It is also submitted by Shri Mehrotra that the directions which were contained in the judgment of this Court dated 07.06.2021 which was affirmed by the Division Bench vide order dated 01.07.2021 is to be seen as the issues which were to be required to be adjudicated while considering the rival claims, however, it would not mean that it would amount to

investing powers in an Authority who otherwise does not possess such powers in terms of the Scheme of the Act of 1860 nor can it mean that such powers can be usurped from Competent Authority, who is actually required to deal with the controversy.

76. It is further urged that the Court while passing the order dated 07.06.2021 noticed that the issues which were before the Deputy Registrar and required adjudication had not been considered in the correct perspective and the order passed by the Deputy Registrar, which was under challenge in writ petitions decided by the order dated 07.06.2021, was on account of the fact that it was non-reasoned and had been passed without considering the material before it. In such circumstances, the matter was relegated to the authority concerned to look into the disputes based on the material available before it and to decide the same by a reasoned and speaking order. The Court had also observed that any observation made in the order dated 07.06.2021 may not be considered as an expression of opinion on merit.

77. It is also urged that now if the impugned order dated 23.04.2022 is seen in the aforesaid light, it would reveal that taking note of the observations of the High Court made in the order dated 07.06.2021 and the order of the Division Bench of this Court dated 01.07.2021 also noticing the rival claims, the Deputy Registrar in its proper exercise of jurisdiction found that it was legislatively handicapped to adjudicate such conflicting disputes and had rightly referred the matter to the Prescribed Authority and in such circumstances, it cannot be said that the order of the Deputy Registrar suffered from any palpable error

of jurisdiction or that it failed to comply with the orders passed by the High Court dated 07.06.2021 and 01.07.2021 respectively. In this regard, he has placed reliance on the decisions of the Apex Court in **(i) Jagmittar Sain Bhagat and others v. Director, Health Services, Haryana and others, (2013) 10 SCC 136** and **(ii) Mathevan Padmanabhan alias Ponnann (Dead) through LRs v. Parmeshwaran Thampi and Others, 1995 Suppl (1) SCC 479.**

78. Shri Mehrotra has also urged that the reliance placed by the learned counsel for the petitioner on the decision of this Court in **T.P. Singh, Senior Advocate v. Registrar/Assistant Registrar, Firms Societies & Chits, Teliyarganj & 4 Others**, does not help the case of the petitioner as that related to the provisions of Section 4-B and it is not in respect of Section 25 of the Act of 1860.

79. It has lastly been urged by Shri Mehrotra that the issue regarding the fact that the elections as set up by the petitioner Devendra Pal Verma were also called in question and there are observations made in the judgment and order dated 07.06.2021 which was affirmed by the Division Bench in its judgment and order dated 01.07.2021 and noticing it the writ petition of Shri Devendra Pal Verma was dismissed and his review petition bearing No.94/2021 was also dismissed by means of the judgment and order dated 16.08.2023, hence, in the aforesaid circumstances, the issue relating to four conflicting claims by different factions was illustratively a copybook situation to attract the exercise of powers under Section 25(1) of the Act of 1860 to refer the matter to the Prescribed Authority, as has been done in the instant case and as such there is no error which may warrant

any interference of this Court, consequently, the petition deserves to be dismissed and the proceedings pending before the Prescribed Authority be expedited.

80. Shri Nadeem Murtaza, learned counsel for the private-respondent No.5 has adopted the submissions of Shri Mehrotra.

81. Shri Ratnesh Chandra, learned counsel appearing for Bhuwan Tiwari i.e. private-respondent No.4, who is also the petitioner in connected WRIT-C No.14794/2021 has additionally argued that the alleged election as set up by Shri Devendra Pal Verma dated 21.03.2021 also suffers from various discrepancies inasmuch as Shri Devendra Pal Verma is also not a Member of the Society as his primary Membership had been terminated, hence, he could not have participated or be elected as an office bearer of the Management Committee.

82. It has further been urged by Shri Chandra that the allegations leveled against Shri Bhuwan Tiwari are absolutely false inasmuch as lawful elections were held on 20.02.2021 wherein Shri Bhuwan Tiwari was elected as the Secretary. It is also submitted that Shri Bhuwan Tiwari was bonafide Member of Arya Pratinidhi Sabha, Lucknow Ganesh Ganj and a certificate dated 04.02.2020 was issued which evidenced the aforesaid fact.

83. It has been urged that the reference made by the learned counsel for the petitioner relating to Regular Suit No.651/2021 has no bearing to the instant proceedings inasmuch as that suit had been filed against Gayatri Dixit and Sunil Kumar who at the relevant time were interfering in the functioning of Shri Bhuwan Tiwari as

Secretary, hence, the same was neither against Shri Devendra Pal Verma nor against any of the opposite parties, who are contesting the instant two petitions, hence, non-mentioning of the said suit at the behest of the Shri Bhuwan Tiwari would not amount to any concealment.

84. It is further urged that as per the contention of the learned counsel for the petitioner that the election dated 21.03.2021 was duly circulated in the magazine called Arya Mitra also does not have any bearing inasmuch as in light of Section 5 of the Press Registration Act, 1867, there was no proper registration and without such registration, the said newspaper cannot be circulated nor it could have any legal bearing on the alleged elections of Shri Bhuwan Tiwari nor can it clothe the alleged election of Shri Devendra Pal Verma with any legitimacy. Thus, the alleged election as set up by the petitioner Shri Devendra Pal Verma is bad in the eyes of law and rather the election of Shri Bhuwan Tiwari dated 20.02.2021 is one which is required to be recognized. In such circumstances, the petition of Devendra Pal Verma bearing WRIT-C No.3418/2022 be dismissed while the connected WRIT-C No.14794/2021 of Shri Bhuwan Tiwari be allowed.

85. The Court has heard the learned counsel for the parties at length and also perused the material on record including the written submissions filed by the respective parties.

86. The crux of the submission of the learned counsel for the petitioner is that the order impugned passed by the Deputy Registrar dated 23.04.2022 is non-speaking and has been passed in mechanical exercise of powers vested in him. It is also urged

that since the matter was remitted to the Deputy Registrar in furtherance of the order passed by the High Court dated 07.06.2021 and affirmed by the Division Bench vide order dated 01.07.2021, hence, the least that was expected of the Deputy Registrar was to have addressed the issues raised by the parties, even if at all, tentatively, and then he should have given his considered view as to whether the matter required to be referred to the Prescribed Authority in terms of Section 25(1) of the Act of 1860 or not.

87. On the other hand, the contention of the counsel for the private respondent is that the Deputy Registrar noticing that there were four rival claims made by the office bearer of the managing committee of the Arya Pratinidhi Sabha based on four different election, this in itself was sufficient to refer the matter in terms of Section 25(1) of the Act of 1860 and it cannot be said that there was any error committed by the Deputy Registrar while passing the impugned order dated 23.04.2022.

88. In the aforesaid context, if the submission of the parties are examined in light of the facts and circumstances, it would reveal that this Court in terms of its judgment dated 07.06.2021 while remitting the matter to the Deputy Registrar noted the dispute which was raised by the contesting parties in the earlier round of litigation which included continuance in office of certain members of the Sabha. At that point of time, there was a direct conflict between Dr. Dheeraj Singh's Committee and dispute raised by one Dr. Vishal Singh who claimed himself to be the Officiating Secretary. The issue as to whether Dr. Dheeraj Singh had been removed on the basis of no confidence motion passed

against him which was the subject matter of a meeting said to have taken place on 16.03.2020, the issue of membership of Dr. Dheeraj Singh as to whether he was removed from the primary membership of the Arya Samaj Bulandshahar, the issue regarding termination of primary membership of Shri Devendra Pal Verma, inter alia, the impact of the aforesaid issues on the alleged committee who is to represent the Arya Pratinidhi Sabha, was to be examined and determined by a reasoned and speaking order.

89. However, during the pendency of the matter before the Deputy Registrar, Dr. Dheeraj Singh had expired and in light thereof the private respondent Shri Ram Ratan Chaturvedi claims to have been elected as the President of the committee of management which was also an issue to be considered.

90. The facts relating to the earlier round of litigation has already been noticed by this Court in the preceding paragraphs and at this stage, the controversy which has arisen is to determine as a matter of fact whether the Deputy Registrar by simplicitor noticing that four separate persons have put in their claims on the basis of four separate election claiming right of managing committee of the Arya Pratinidhi Sabha was enough to refer the matter in terms of Act of 1860 or the Deputy Registrar was required to apply its judicial mind to the facts and circumstances to determine as to whether there was any genuine and bonafide dispute regarding the election of the committee of management or relating to continuance in office of any office bearer of such committee.

91. In this regard, it will be relevant to notice certain decisions which

have been cited by the parties. This Court in Committee of Management, **Raja Tej Singh Vidyalaya v. District Inspector of Schools, 2000 SCC OnLine All 14** wherein the Court has noticed the scope and powers of the Deputy Registrar, conferred on him, in terms of the Society Registration Act. The relevant portion of the said decision reads as under:-

Powers of the Registrar

10. The Registrar under the Societies Registration Act includes Additional, Joint Deputy or Assistant Registrar on whom the powers under the Societies Registration Act are delegated (Section 21). The Registrar, under the Societies Registration Act, can—

(i) register a society, consider objections against the same (Section 3);

(ii) consider change in name and objects of a society (Section 12-B);

(iii) cancel the registration of a society (Section 12-D)

(iv) apply/refer for dissolution of a society (Section 13 and 13-A);

(v) call for information for from a society (section 21);

(vi) order for audit of a society (S. 23);

(vii) investigate any affair of a society (Section 24);

(viii) call for a meeting to hold election in, case elected term is over (Section 25(2));

(ix) call for objection and decide the same if the names of governing body is different than the previous one, if not certified by the previous members (Section 4);

(x) refer doubt or dispute regarding election to the prescribed authority (Section 25(1));

Explanation III.— The State Government may prescribe the procedure for hearing a decision of doubts or disputes in respect of such elections and make provision in respect of any other matter relating to such elections for which insufficient provision exists in this Act or in the rules of the society.

11. The Registrar, under the Societies Registration Act, has wide powers. He is the overall incharge a final authority, except in the following circumstances:

(a) When any question arises if a society is to be registered or its registration is to be renewed. He has to refer it to the State Government (Section 3-B).

(b) His order cancelling registration is appealable to the Commissioner (Section 12(2)).

(c) Only a Court can dissolve a society (Section 13-D).

(d) The registrar can neither decide any doubt, nor dispute regarding an election. He cannot decide continuance of office bearers. It is within the jurisdiction of the prescribed authority (Section 25(1)).

12. In this case we will examine the powers of the Registrar particularly under clauses (ix) and (x) of the paragraph 9 and exception (d) of paragraph 10. A Registrar cannot dissolve a society; a Court does it. He cannot decide a doubt about an election or an election dispute or about continuance of an office bearer in a society. The Prescribed Authority decides it under Section 25(1) of the Societies Registration Act. The Registrar cannot under the garb of exercising other powers, decide the aforesaid dispute indirectly.

13. Jurisdiction : The Registrar (Proviso to Section 4) As Regards The Prescribed Authority (Section 25)

14. Every society has a governing body (committee of management) entrusted with management of the affairs of the society. This governing body is known by different names in different societies. Section 44 of the Societies Registration Act contemplates that a society has to submit a list of its governing body (committee of management) with the Registrar. Section 4(2) of the Societies Registration Act contemplates that the memorandum of a society including alteration, extension or abridgement of purpose should also be filed along with the list of governing body; it has to be certified by three members. The proviso to Section 4(1) of the Societies Registration Act states that in case any member in the list of governing body is different from the last submission of the list (which can happen only if a new election has been held) then old office bearers should also countersign the list. The purpose of Section 4 is that the correct list of governing body (committee of management) of a society should be maintained and it may not be disputed. Its Proviso contemplates that in case old office bearers do not countersign the list then the registrar may issue public notice inviting objections and decide the same. What is the purpose of such decision? What is the scope of his jurisdiction?

15. The jurisdiction of the Registrar under the proviso to Section 4 of the Societies Registration Act is to see if there is any dispute; whether the dispute is a bona fide dispute or not; whether it is a dispute for the sake of it.⁵ But, if there is a dispute, then his jurisdiction ends; the matter has to be referred to the prescribed

authority under Section 25 of the Societies Registration Act. He cannot in garb of deciding objections decide dispute within the jurisdiction of the Prescribed Authority under Section 25 of the Societies Registration Act.

16. The prescribed authority can neither entertain a dispute by himself nor can he decide a dispute on reference by one member. He can only decide if it is referred by the registrar, or by ¼th of the members (i.e. at least two members) of a society.

17. The legislature thought that in case less than ¼th of the members of a society are raising a dispute, then it is not a bona fide dispute; not worth investigating. In order to decide if there is a bona fide dispute, the Registrar may also decide:

* if the persons raising disputes are members of a society or not;

* or decide if a person presenting the papers is entitled to present the papers for renewal or not.

18. But he can do so only if he does not have to decide—

* a doubt, or a dispute about an election; or

* continuance of any office bearer.

19. In case he has to decide any doubt or dispute about election, or continuance of an office bearer, it becomes bona fide dispute and his jurisdiction ceases. He has to refer the matter to the prescribed authority. The Prescribed Authority has pre-emptive jurisdiction in this regard.

92. A Division Bench of this Court in **T.P. Singh v. Registrar/Assistant Registrar Firms, Chits & Societies, (2019) 37 LCD 186** has held as under:-

25. A plain reading of above provision shows that at the time of registration or renewal, a list of members of General Body of Society has to be filed by Assistant Registrar. Thereafter whenever there is any change in said list, same has to be informed to Registrar by submitting a modified list of members of General Body. When such a modified list is submitted to Registrar, in our view, examination allowed to be made by Registrar in respect of correctness of list of members of General Body in sub-section (1) would also include removal of member(s) for the reason, when modified list is communicated to Registrar, whether modification is on account of induction or removal in any manner, both aspects and correctness thereof can be and must be examined by Registrar.

26. The incidental question which immediately crops up is the extent of authority of Registrar of such examination. Whether it is an indepth examination which may be termed as adjudication of dispute or it is a summary inquiry subject to adjudication of dispute by a Court of Law.

27. On this aspect various judicial precedents have been relied by parties and we may examine the same at length so as to complete our search to answer the questions formulated above.

37. Court also observed that in making inquiry under Section 4-B of Act, 1860, Registrar is not a Post Office but supposed to act administratively by

applying his mind on the facts and documents placed before him. Division Bench also referred to Supreme Court judgment in A.P. Aboobaker Musaliar v. District Registrar (G), Kozhikode, (2004) 11 SCC 247 and observed that when more than one returns are filed before Registrar, it may not hold an elaborate enquiry but bound to satisfy himself prima facie as to which return is to be accepted. Inquiry made by Registrar is not final and aggrieved party can always take up the matter before a Competent Court. Court also held that term "membership" has been defined under Act, 1860 and it indicates that a member of a Society shall be a person who, having been admitted therein according to rules and regulations, paid subscription, signed the roll or list of members and has not resigned in accordance with such rules and regulations. Hence, upholding action taken by Deputy Registrar, Court in para 55 of judgment observed:

"The original records were deposited by the appellant. The Deputy Registrar has undertaken exercise to verify the membership on the basis of agenda, proceedings, membership register and passbook of the bank account etc., and found that there was nothing illegal in the induction of those members and proceeded to accept the membership under Section 4-B of the Act on 17.10.2014."

(emphasis added)

38. This judgment makes it clear that under Section 4-B of Act, 1860, Registrar is not supposed to make adjudication of dispute of correctness of membership like a Court but whenever a list is submitted or there is any change in the list of members and any objection is

raised or otherwise, Registrar has to prima facie satisfy himself that change has been made in accordance with provisions of bye-laws and prima facie genuine. For this purpose, Registrar may examine agenda, minutes of meeting and other relevant steps taken by Society. To this extent, an inquiry can be made by Registrar to find out whether list of members or change in list of members is correct or not.

46. In Allahabad High School Society, Allahabad v. State of U.P., 2011 (4) ADJ 341, a learned Single Judge (Hon'ble V.K. Shukla, J.) considered correctness of decision dated 24.7.2010 taken by Assistant Registrar annulling resolution dated 28.5.2007 passed by Allahabad High School Society, Allahabad, registered under Act, 1860. It examined power of Registrar on the validity of amendment made in the bye-laws. Court observed that Registrar is not a mere post office but can examine whether alleged resolution making amendment in bye-laws is forged, fictitious or otherwise patently illegal. Court also said that though amendment in bye-laws except for the change in the name do not require Registration but all changes in the rules are mandatorily required to be intimated to Registrar, who has to maintain record and hence when it is brought to its notice that there is any manipulation, maneuvering etc., he can examine the said issue. Similar view was taken by Division Bench in Allahabad High School Society, Allahabad v. State of U.P., 2011 (4) ADJ 887, which in fact, a judgment in appeal against Single Judge judgment in Allahabad High School Society, Allahabad v. State of U.P., 2011 (4) ADJ 341 and Division Bench confirmed view taken by learned Single Judge. We

find that the matter was taken by Allahabad High School Society, Allahabad to Supreme Court and Supreme Court dismissed appeal vide judgment reported in (2011) 6 SCC 118.

53. The discussion made by us and facts stated above show that Society in question, in the present case, held a meeting with agenda to consider letters of petitioner and thereupon read those letters as constituting a misconduct, justifying termination of membership and resolved to terminate membership of petitioner. This resulted in change in the list of members of Society and hence was communicated to Assistant Registrar. Petitioner filed objection raising various issues including issue of membership of some other persons as well as some office bearers of Society. It may be noticed that a person, filing objection before Assistant Registrar, may raise a whole gamut of issues to Assistant Registrar which may be a combination of issues, some within jurisdiction of Assistant Registrar and some beyond but then the Registrar/Assistant Registrar can always discern substantive issues which are within the scope of scrutiny and within his jurisdiction and can respond to those aspects. It is the substance and not the tenor of language or draft of letter by Objector, which has to be seen by Assistant Registrar/Registrar who is a statutory authority supposed to look into the matter in exercise of statutory power conferred under Section 4-B of Act, 1860. It is true that Registrar/Assistant Registrar may not go into a detailed adjudication of a disputed question of fact like a Civil Court and remedy obviously would be available to the party concerned to take recourse to Civil Court but the mandate contained in

the Statute regarding scrutiny, to the extent it is provided, has to be observed and discharged. Registrar/Assistant Registrar is obliged to examine the question of correctness of alteration or change or modification in the list of members when an objection is taken. Cancellation/termination/removal of membership is a mode of alteration of list of General Body of Society. Section 4-B of Act, 1860 talks of correctness of list of members, which can be examined by Registrar/Assistant Registrar. Documents, which are supposed to be furnished to Registrar/Assistant Registrar are also specifically mentioned therein and from those documents whatever facts discern, may be seen to find out whether Society, in a bona fide manner has followed its own procedure laid down in Bye laws. For example, if abruptly a resolution is passed without there being any agenda on a particular issue and bye-laws require circulation of agenda to the members before meeting containing subject, it is apparent that action taken by Society is not in accordance with bye-laws and thus its decision would not be correct and can be interfered by Registrar/Assistant Registrar. Similarly, from documents relating to fee, if it is found that requisite fee has not been paid by a person inducted as member though deposit of fee is one of the conditions to become a member of Society, Registrar/Assistant Registrar can interfere and declare induction of such member to be illegal and declare resolution to this effect, bad in law. Similarly, if Society claims that fee has been deposited but from bank passbook, this claim is not found correct, Registrar/Assistant Registrar can again interfere. These are a few illustrations only. This interference includes declaration of resolution bad or illegal, and, mere fact that request has been made that resolution

should be cancelled or be declared illegal, by itself, would not deprive Registrar/Assistant Registrar from entering into scrutiny to the extent it is mandated by Section 4-B of Act, 1860 otherwise the very objective and purpose of insertion of Section 4-B of Act, 1860 would stand defeated.

93. Another Division Bench decision of this Court in **Special Appeal No.337 of 2022 (Ajai Kumar Singh v. State of U.P. & Others)** decided alongwith bunch of writ petitions on 10.08.2022 while noticing the provisions of Section 4-B of the Act 1860 as amended in the State of U.P. has held as under:-

"15. On behalf of respondents, Sri G.K. Singh, learned Senior Counsel submits that the list of 130 members, which has been referred to in the order of the prescribed authority, dated 26.4.2011, has to be necessarily discarded as there is a serious dispute with regard to existence of such a list which has also been noticed by the prescribed authority in his order itself. It is also urged that subsequent orders of the Assistant Registrar also noticed the fact that no undisputed list of 130 members existed on record and that is why the Assistant Registrar while passing the order dated 23.7.2011 restricted the membership to 93 persons only. It is also argued that once the elections were conducted in the year 2011 on the basis of order dated 23.7.2011 and the challenge laid to the order of the Assistant Registrar has failed with no relief being granted in the writ petition, filed against such order, it would not be open for the petitioners to challenge such order, nor the Assistant Registrar can go behind such order, and he has committed no illegality in referring to and relying upon the list of 93 admitted members. A division bench

judgment of this Court in Special Appeal No. 355 of 2019 has also been placed before the Court in order to submit that while exercising powers under Section 4-B of the Act of 1860, the admitted list of members are not liable to be reopened and only subsequent changes made therein including deletion or admission of new members alone are required to be examined by the Assistant Registrar. It is in this context that the controversy raised in the present writ petition needs to be examined."

"18. The order of the prescribed authority, dated 18.12.1987 is a short order and appears to have been passed on the basis of some settlement which has been arrived at between the parties. The order of the prescribed authority, dated 18.12.1987, reads as under:-

"सम्बन्धित वाद के निस्तारण के बावत उभय पक्ष के विद्वान अधिवक्तओ की बहस सुना एवं पत्रावली पर उपलब्ध कागजातों का अवलोकन किया। पक्षों ने अदालत को अवगत कराया कि अब College Management के बावत पक्षों के बीच कोई विवाद नहीं है। पहले Membership को लेकर पक्षों के बीच विवाद था लेकिन अब इस विषय पर स्थिति बहुत ही स्पष्ट है। स्वयं इतर पक्ष ने स्वीकार किया कि कुल 130 सदस्यों की सूची जो विजय नरायन द्वारा प्रेषित की गयी है, वह सही है तथा बहुमत उन्ही का है। इतर पक्ष ने यह भी स्वीकार किया कि कुल 130 सदस्यों द्वारा निर्मित कमेटी उन्हें मान्य है। इनके द्वारा प्रबन्ध संचालन भी उन्हें मान्य है। इस तरह से पत्रावली पर उपलब्ध कागजातों के आधार पर इस निर्णय पर पहुँचा जाता है कि अब उ०मा०विद्यालय नेवद्विया जौनपुर के अध्यक्ष श्री उदरेज एवं प्रबन्धक श्री विजय नरायन तिवारी घोषित किये जाते हैं। कुल 130 सदस्यों की कमेटी भी वैध घोषित की जाती है। इस कमेटी द्वारा पदाधिकारी जो सम्प्रति हैं या घोषित किये जायेंगे व भी वैध माने जायेंगे।

तदनुसार आदेश का क्रियान्वयन हो वाद आ०का० पत्रावली द०८० हो। आदेश की एक प्रति स० रजिस्ट्रार को प्रेषित हो।"

"19. According to petitioners, the list of 130 members is an enclosure to this

order whereas the respondent states that no such list exists or is enclosed with the order. The Court need not enter into the factual issues as to whether the list allegedly annexed alongwith Annexure 3 is a part of the order of prescribed authority in view of the serious dispute on facts raised by the parties. Nevertheless, the order of SDM is not in dispute which does refer to a list of 130 members submitted by Vijay Narayan Tiwari and the fact that such list of 130 members was accepted by the parties. The subsequent order of the prescribed authority dated 26.4.2011 notices the dispute regarding the list of 130 members but in the operative portion of the order a specific direction has been issued to conduct elections on the basis of surviving members from the list of 130 members and 93 members. The operative portion contained in the order of the prescribed authority is not in issue. The subsequent order of the Assistant Registrar, dated 23.7.2011, proceeded to determine the list of 93 members and the elections were also held in the year 2011, accordingly. It is true that a writ petition filed against such order has been disposed of in terms of the order passed in the writ petition relating to constitution of managing committee of the educational institution, but there is apparently no consideration on merits with regard to compliance of the direction contained in the order of the SDM, dated 26.4.2011. The subsequent order of the Assistant Registrar primarily proceeds upon the list of members finalized on 23.7.2011 and also the fact that writ petition filed against such order has been disposed of without interfering with such order. The disposal of the writ petition, in view of the order passed in the leading writ petition relating to committee of management cannot be construed as an approval of the order of

Assistant Registrar dated 23.7.2011. It is true that the term of the elected committee being three years, the order has substantially lost its relevance, but when it comes to determination of list of valid members, all aspects relating to membership would have to be examined. The order of the prescribed authority acknowledging the list of 130 members, therefore, cannot be brushed aside without there being any independent consideration with regard to claim of such members. Even the list of 93 members, which has been accepted by the Assistant Registrar, merely proceeds on the premise that previous elections were held from the list of such members. This may be a relevant fact but the Assistant Registrar cannot be absolved from undertaking the statutory exercise expected of him in terms of Section 4-B of the Act of 1860 when there is a serious challenge to the membership of the society. It is apparently to get over such disputes that Section 4-B has been inserted by way of amendment and this is a fit case in which the Assistant Registrar ought to have called for the original records and determined the list of members before registering the list of 93 members. The order of the Assistant Registrar is absolutely silent with regard to the factors specified in Section 4-B even with regard to the list of 93 persons which has been accepted by him. Apart from the fact that such members had participated in the last elections, there is no other material supporting their claim of membership. Section 4-B statutorily mandates the Assistant Registrar to refer to the original records to examine the correctness of the list of members of General Body of such society on the basis of the register of members of the General Body and minutes book thereof, cash book, receipt book of membership fee and bank pass-book of the

society. The order of the Assistant Registrar is absolutely silent with regard to examination of claim of membership with reference to the statutory factors enumerated in Section 4-B. In a given case where the membership is not disputed, it is always open for the Assistant Registrar to rely upon the list of undisputed members who have participated in previous elections, but in a case where claim of membership is seriously disputed and the orders of the prescribed authority are open to interpretation, the safest course for the Assistant Registrar would be to examine the original records and return an independent finding with regard to claim of membership. So far as the division bench judgment of this Court in Special Appeal No. 355 of 2019, relied upon by the respondents are concerned, this Court finds that the observations made therein were in the context of facts of that case as the previous elections were held on the basis of 63 members and there was apparently no serious challenge laid to it. In the facts of the present case, however, such is not the case. The election of the year 2011 held on the basis of 93 members was challenged and there is no apparently no adjudication on merits of the claim. The writ petition was disposed of in terms of the direction issued to constitute the managing committee of the educational institution. A special appeal is reportedly pending. Technically the respondents may be justified in asserting that no interference has been made by this Court in the order of the Assistant Registrar, but such disposal cannot be construed as an act of approval of the order passed by the Assistant Registrar. The subsequent dispute of membership of society, therefore, will have to be resolved in accordance with law. The disposal of the writ petition in the year 2013, therefore, will not foreclose the claim

of petitioners, nor would it absolve the Assistant Registrar from the statutory responsibility imposed upon him under Section 4-B of the Act of 1860."

94. The same principles as noticed in above mentioned decisions have been reiterated by this Court in **Christ Church McConaghy School Society, Lucknow v. Registrar Firms, Societies and Chits, Lucknow and others 2015 (33) LCD 2454.**

95. From the perusal of the aforesaid decisions, it can clearly be culled out that a list of members of the governing body has to be submitted in terms of Section 4-B of the Act 1860; **(i)** At the time of registration of the society; **(ii)** at the time of renewal; and **(iii)** at the time when there is a change in the list of members of the general body which may be on account of several reasons including in a case of induction, removal or death of any member.

96. Once a situation arises where the Deputy Registrar is confronted with different set of list of general body members, it ought to have applied its mind to sift the grain from the chaff instead of mechanically referring the dispute to the Prescribed Authority in terms of the Act of 1860. These decisions as noted above have been relied upon by the counsel for the petitioner to buttress his submissions whereas, on the other hand, the counsel for the private respondent has relied upon the decision on **(1) 2017 (35) LCD 2080, the committee of management Jamiyatul Hausia Arabic College Samiti Uttraula, (2) the committee of management Anjuman Khairul Almeen Allaganj and others v. State of U.P. & others 2014 (2) AWC 1205, (3) Kisan National**

Education Trust, Pratapganj and another v. Prescribed Authority SDM and two others 2019(1) ADJ 817. The relevant portion of judgment reads as under:

"62. It is apparent that wrong reception of any vote which is void or improper, refusal or rejection of a valid vote could materially affect the result of the election and such elections could be set aside if any doubt or dispute is raised in respect of the said election or continuance in office of the office bearers of the Society. In this case improper rejection of a valid vote or improper reception of a invalid vote could be a valid ground for setting aside an election and for the said purpose, the determination of electoral college was an incidental or ancillary issue which needed to be decided by the Prescribed Authority, while deciding any doubt or dispute in respect of any election.

67. Now the question arises "whether in determining the doubt or dispute regarding elections under Section 25(1)(c), the summary power exercised by the Prescribed Authority to determine the membership would also effect subsequent elections held on the basis of the same electoral college?"

(4) **The committee of management Shri Vidhur Sewa Ashram and others v. State of U.P. & others 2018 (5) ADJ 717.** The relevant paragraphs of the said report read as under:-

"31. The main issue which requires adjudication in the present petition is whether the reference

application of the respondents 4 and 5, with the signature of 165 members, out of whom 8 were found dead, was maintainable keeping in mind that the election under challenge was held with a general body comprising of 686 members, as determined by the Assistant Registrar in exercise of power under Section 25 (2) of the Act, 1860. Incidental to the above issue are two issues: (a) whether the prescribed authority while considering the question of maintainability of the reference application could have sat over /discarded the determination of general body/electoral college made by the Assistant Registrar in exercise of his power under Section 25 (2) of the Act, 1860; and (b) If so, whether the decision of the prescribed authority in respect of the composition of the general body is legally sustainable.

32. The issue which calls for adjudication first is whether the prescribed authority while considering the question of maintainability of the reference application could have sat over /discarded the determination of general body/electoral college made by the Assistant Registrar in exercise of his power under Section 25 (2) of the Act, 1860."

"37. Section 4-B has been inserted in Act, 1860 by U.P. Act No. 23 of 2013 with effect from 9.10.2013. Section 4-B of the Act, 1860 provides that at the time of registration/renewal of a society, list of members of general body of that society shall be filed with the Registrar mentioning the name, father's name, address and occupation of the members. The Registrar is enjoined upon to examine the correctness of the list of members of the general body of such society on the basis of the register

of members of the general body and minutes book thereof, cash book, receipt book of membership fee and bank pass book of the society. Sub-section (2) of Section 4-B provides that if there is any change in the list of members of the general body of the society on account of induction, removal, registration or death of any member, a modified list of members of general body, shall be filed with the Registrar.

38. Section 4-B though does not specifically empower a Registrar to adjudicate membership dispute but membership issue can be incidentally decided while examining correctness of the list of members submitted. However, even this section does not attach finality to the order of the Registrar. Therefore it is open to an aggrieved party to invoke Civil Court's jurisdiction in respect of membership claim."

"40. Sub-section (2) of Section 25 of the Act, 1860 provides that where by an order made under sub-section (1), an election is set aside or an office-bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office-bearer of a society has not been held within the time specified in the rules of that society, he may call a meeting of the general body of such society for electing such office bearer or office bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officer authorized by him in this behalf. Sub-section (3) of Section 25 of the Act, 1860 provides that where a meeting is called by the Registrar under sub-section (2), no other meeting shall be called for the purpose of election

by any other authority or by any person claiming to be an office bearer of the society."

प्रकरण की सुनवाई के दौरान उभय पक्षों द्वारा प्रस्तुत प्रपत्रों, लिखित अभिकथनों एवं पत्रावली में उपलब्ध प्रपत्रों का अधोहस्ताक्षरी द्वारा परीक्षण किया गया। पत्रावली के अवलोकन से यह अवधारित होता है कि संस्था की प्रबन्ध समिति का चुनाव दिनांक 27.03.2016 को कराया गया था, जिसका कार्यकाल दिनांक 26. 03.2021 तक था। माननीय उच्च न्यायालय के निर्णय एवं आदेश दिनांक-07.06. 2021 के पूर्व संस्था की अन्तरिम सभा (प्रबन्धसमिति) के तीन अलग-अलग निर्वाचन कार्यवाहियां कमशः दिनांक-20.02.2021, 07.03.2021 एवं दिनांक-21.03.2021 कार्यालय में पंजीकृत की जाँने हेतु प्रस्तुत की गयीं। संस्था की अन्तरंग सभा (प्रबन्धसमिति) के कथित निर्वाचन दिनांक 20.02.2021 में आचार्य स्वदेश को संस्था। प्रधान पद एवं श्री भुवन तिवारी को मंत्री पद पर निर्वाचित होने की दावेदारी की गयी है। कथित निर्वाचन दिनांक 07.03.2021 में श्री राजीव रंजन मिश्रा को प्रधान, - पद पर एवं श्री विवेक सिंह को मंत्री पद पर निर्वाचित होने की दावेदारी की गयी है। इसी प्रकार कथित निर्वाचन दिनांक-21.03.2021 में श्री देवेन्द्र पाल वर्मा द्वारा संस्था में प्रधान पद पर एवं श्री पंकज जायसवाल द्वारा मंत्री पद पर निर्वाचित होने की दावेदारी की गयी है।

"42. Section 25 of the Act, 1860, as inserted in the State of U.P., creates a forum for settlement of disputes pertaining to election of office bearers of a society as also in respect of their continuance, in a summary manner. To effectively settle the dispute, clause (c) of the proviso to sub-section (1) of Section 25 of the Act, 1860, empowers the Prescribed Authority to assess whether the result of the election has been materially affected by the improper acceptance or rejection of any nomination or by the improper reception of any vote which is void, which implies that the Prescribed Authority has power to decide issue as regards membership of the society. Whether a reference is with the strength of one-fourth of the members or not becomes a jurisdictional fact, which has to be

necessarily determined by the Prescribed Authority. While determining the existence of jurisdictional fact, the Prescribed Authority can arrive at its own conclusion in respect of membership of the society. Such conclusion can be arrived at on the basis of the evidence/material placed before it keeping in mind the relevant parameters including the bye-laws/rules of the society and the documents of the nature mentioned in Section 4 B of the Act, 1860. As no finality has been provided to the incidental determination of membership by the Registrar in exercise of his power to hold an election meeting under Section 25 (2) of the Act, notwithstanding any such determination of the issue made by the Registrar, the Prescribed Authority, while exercising its power under Section 25 (1) of the Act, can determine the electoral college/general body of the society for the purpose of ascertaining whether the reference application is maintainable."

"48. Before proceeding to consider the aforesaid issue, it would be apposite to first consider whether by order of this Court dated 12.1.2012 in Writ C No. 25704 of 2011 the voter list which returned the committee of the college in the year 2000 was declared final or it was provisional, subject to induction/expulsion of members by the committee which was in control as per its term."

97. On the strength of aforesaid judgments, the proposition which can be culled out is that the Prescribed Authority while dealing with an issue of an election can as an ancillary issue examine, determine and can also adjudicate the issue of membership as that would impact the electoral college which may have an impact

on whether there has been a rightful reception of vote or there has been denial of a bonafide vote which would impact the result of the election.

98. Apparently having taken a glance at the conspectus of the decision which has been noticed above, it is clear that the Deputy Registrar is not to act as rubber stamp authority. Even if at all, he desired to refer a matter to the Prescribed Authority doubting an election or continuance in office of an office bearer, he still had to apply its judicial mind to the controversy before him to ascertain as to whether there is any bonafide dispute or not.

99. Illustratively, there can be a case wherein election is held for constituting a committee of management. In case of any dispute, as per the provisions of Section 25(1) of the Act 1860 1/4th members of general body can request the Registrar to refer the disputes relating to the election to the Prescribed Authority. Where such number of members approach the Registrar with the request for reference and they bring glaring defaults or practices which may have vitiated the election to the notice of the Deputy Registrar, who can ascertain from the material before him whether the matter requires to be referred or not. If the number of members do not constitute 1/4th of the general body then in such case it may not be legally feasible to refer the matter.

100. However, they can be another situation where even though there may not be strength of 1/4th members of the general body, but in order to thwart a duly elected committee few erring members can create rival elections and put a stake before the Registrar. In such a situation if the

Registrar merely noticing that there are multiple stakes refers such disputes to the Prescribed Authority in a mechanical manner then it may have an adverse impact on a duly elected committee. It is to avoid such a situation that it is required of the Deputy Registrar that even if he refers the matter to the Prescribed Authority then he must apply his mind to ensure that the complaints which have come before him actually reflects some bonafide dispute relating to the elections and it may be referred to the Prescribed Authority for adjudication.

101. Similarly, there may be a case where the rival faction, who sets up its election on behalf of certain members, who are not the member of the general body as per the last list nor there being any adequate prima-facie material to indicate their induction, but if at behest of such persons, the election of another Committee is put under cloud, without preliminary screening, then it may cause prejudice. There may be another case where the alleged election is claimed by a rival faction and it is said to have been held after the expiry of the undisputed term of the earlier committee of management and that too without the sanction of the Deputy Registrar.

102. Thus, in the aforesaid illustrative circumstances, if the Deputy Registrar does not even ascertain prima facie facts and proceeds without tentative screening then he would be doing injustice as then a validly elected committee of management would be placed under some doubt at the behest of some unscrupulous members/persons and if this dispute is not sorted at the threshold and expeditiously then it would impact not only the current term of a validly elected committee but it

would also result in carrying forward the said disputes for subsequent years or even future terms.

103. It is for the aforesaid reason that it is expected that the Deputy Registrar must scrupulously exercise its power or else it may result in grave consequences which may have a cascading effect in the future years and may result in an eclipse over committee of management of the society for years at an end.

104. In light of the above discussion, if the facts of the case at hand is seen, it would indicate that last undisputed election took place in the year 2016 and since then there have been conflicting claims between the respective parties which gave rise to several petitions which has been noticed by this Court in background facts, and considering the judgment of this Court dated 07.06.2021 wherein the Deputy Registrar was required to examine certain issues as delineated in the judgment dated 07.06.2021, but neither it has been touched nor its impact has been noticed by the Deputy Registrar. Had those issues been addressed even tentatively and if its impact would have been assessed by the Deputy Registrar by a speaking and reasoned order and in that relevant context and stage if the Deputy Registrar would have arrived at a conclusion that the matter required a reference it could have been done validly, but unfortunately it has not been done, leading to further complication.

105. Here, four rival factions have set up their claim based on elections of different dates. One faction is led by Shri Devendra Pal Verma, who claims on the basis of an election said to have been held on 21.03.2021. The other claim is laid by a Committee of which Shri Bhuwan Tiwari is

said to be the Secretary and his election is dated 20.02.2021. The third claim is laid by Shri Vivek Singh who claims to be the Secretary elected on the basis of an election dated 15.03.2021. The fourth rival claim has been laid by Shri Ram Ratan Chaturvedi who claims that initially his committee had been constituted on 27.08.2021 but when Dr. Dheeraj Singh, its President expired, thereafter Shri Chaturvedi was elected as the President and Miss Jaya Tiwari was elected as a Secretary.

106. From the prima facie perusal of the list of the governing body Members which has been submitted before the Deputy Registrar by the aforesaid four faction, something which strikes the attention is that in the claim laid by the faction led by Shri Bhuwan Tiwari, as per the election dated 20.02.2021, he has filed a list of elected members which, inter-alia, includes the name of Shri Swadesh, Shri Gyanendra Gandhi, Smt. Shashi Bala Chopra, Shri Vivek Singh, Shri Vishal Singh and Dr. Dheeraj Singh amongst others.

107. Similarly, the faction led by Shri Vivek Singh who claims his election to have been held on 7/8.03.2021, in his list, it includes the names of Dr. Dheeraj Singh, Shri Vishal Singh, Shri Vivek Singh, Smt. Shashi Bala Chopra and Shri R.R. Chaturvedi, who are shown as office bearers.

108. Similarly in the election said to have been held on 27.08.2021 wherein Dr. Dheeraj Singh was the President and upon his death Shri R.R. Chaturvedi became the President, his committee of member also includes the name of Shri Virendra Ratnam, Shri Gyanendra Gandhi

(who was also a member in the committee of management of the faction led by Shri Bhuwan Tiwari), Shri Rajeev Ranjan Mishra (who is said to be the President of the faction led by Shri Vivek Singh in pursuance of the alleged election held on 07.03.2021), Smt. Shashi Bala Chopra who needless to say is a common office bearer in the alleged committee led by Shri Bhuwan Tiwari, Shri Vivek Singh and Shri Jeevan Singh as well as Shri Ram Ratan Chaturvedi who is common in the committee of Dr. Dheeraj Singh and also Shri Vivek Singh.

109. Once these lists were available before the Deputy Registrar at least he should have seen that some members, who were in the committee of management, as noticed above, were common in the three factions. What would be the impact of these turncoats, who appear to be persons of all seasons. Whether it would be possible to give recognition to the aforesaid list furnished by Shri Bhuwan Tiwari, Shri Vivek Singh and Shri Ram Ratan Chaturvedi relating to their respective elections with these turncoats present in the committee of all the three factions and the alleged election of Dr. Dheeraj Singh's faction is dated 27.08.2021, while the term of the last undisputed committee held in the year 2016 had came to an end on 27.03.2021.

110. It was also incumbent upon the Deputy Registrar to have examined that where bitter litigation was being fought in the earlier round of litigation which was the subject matter of the two writ petitions which came to be decided on 07.06.2021 and by then none of the warring factions had brought on record any fact relating to the alleged elections nor the standing counsel representing the Deputy Registrar

had brought the facts to the notice of the Court. This fact of poor assistance was also noticed by this Court in its judgment dated 07.06.2021.

111. Even the alleged election claimed by Shri Devendra Pal Verma is said to have been held on 21.03.2021 and all its office bearer were practically elected unopposed while at that point of time Shri Devendra Pal Verma was already contesting the termination of his primary membership which came to be decided on 07.06.2021 and his review was dismissed by this Court on 16.08.2023. In the aforesaid background, it should have been seen that Arya Pratinidhi Sabha has its own set of bye-laws which also provides for a procedure for the election. It ought to have been prima facie seen as to whether there was compliance of the bye-laws in holding the alleged election in order to test the veracity of the alleged elections claimed by the four warring factions only for the purpose to satisfying itself whether there was a bonafide dispute or not.

112. In the factual quagmire noticed above, now if the impugned order dated 23.04.2022 passed by the Deputy Registrar is perused and for the ease of reference it reads as under:-

प्रकरण की सुनवाई के दौरान उभय पक्षों द्वारा प्रस्तुत प्रपत्रों, लिखित अभिकथनों एवं पत्रावली में उपलब्ध प्रपत्रों का अधोहस्ताक्षरी द्वारा परीक्षण किया गया। पत्रावली के अवलोकन से यह अवधारित होता है कि संस्था की प्रबन्ध समिति का चुनाव दिनांक 27.03.2016 को कराया गया था, जिसका कार्यकाल दिनांक 26. 03.2021 तक था। माननीय उच्च न्यायालय के निर्णय एवं आदेश दिनांक-07.06. 2021 के पूर्व संस्था की अन्तरिम सभा (प्रबन्धसमिति) के तीन अलग-अलग निर्वाचन कार्यवाहियां कमशः दिनांक-20.02.2021, 07.03.2021 एवं दिनांक-21.03.2021 कार्यालय में पंजीकृत की जानें हेतु प्रस्तुत की गयीं। संस्था की अन्तरंग सभा (प्रबन्धसमिति) के कथित

निर्वाचन दिनांक- 20.02.2021 में आचार्य स्वदेश को संस्था प्रधान पद एवं श्री भुवन तिवारी को मंत्री पद पर निर्वाचित होने की दावेदारी की गयी है। कथित निर्वाचन दिनांक 07.03.2021 में श्री राजीव रंजन मिश्रा को प्रधान पद पर एवं श्री विवेक सिंह को मंत्री पद पर निर्वाचित होने की दावेदारी की गयी है। इसी प्रकार कथित निर्वाचन दिनांक-21.03.2021 में श्री देवेन्द्र पाल वर्मा द्वारा संस्था में प्रधान पद पर एवं श्री पंकज जायसवाल द्वारा मंत्री पद पर निर्वाचित होने की दावेदारी की गयी है।

प्रकरण की सुनवाई के दौरान संस्था की अन्तरंग सभा (प्रबन्धसमिति) का कथित निर्वाचन दिनांक-27.08.2021 को कराया गया, जिसमें डा० धीरज सिंह प्रधान पद पर एवं डा० जया तिवारी के मंत्री पद पर निर्वाचित होने की दावेदारी की गयी है। यहाँ यह उल्लेखनीय है कि प्रकरण की सुनवाई के दौरान एक पक्षकार डा० धीरज सिंह का निधन दिनांक-22.10.2021 को हो जाने से उनके द्वारा प्रस्तुत कथित निर्वाचन कार्यवाही दिनांक- 27.08.2021 की अन्तरंग सभा (प्रबन्धसमिति) में निर्वाचित कोषाध्यक्ष डा० राम रतन चतुर्वेदी को रिक्त प्रधान पद पर दिनांक- 28.11. 2021 की कार्यवाही में चुना गया।

उपरोक्त वर्णित विवचना से यह स्पष्ट रूप से अवधारित होता है कि संस्था की अन्तरंग सभा (प्रबन्धसमिति) के चार पक्षकारों द्वारा कथित निर्वाचन कार्यवाहियां कमशः दिनांक- 20.02.2021, 07.03.2021, 21.03.2021 तथा दिनांक-27. 08.2021 कार्यालय में अलग-अलग दिनांक में प्राप्त हुई हैं तथा उक्त चारों कथित निर्वाचन कार्यवाहियों में संस्था की अन्तरंग सभा (प्रबन्धसमिति) में पृथक-पृथक पदाधिकारी सदस्य दशयेंि गये हैं, जिनकी वैधानिकता पर विचारण करने का अधिकार सो०रजि०अधि० 1860 की धारा-25 (1) के अन्तर्गत विहित प्राधिकारी / उपजिलाधिकारी में निहित है।

अतः सो०रजि०अधि० 1860 की धारा-25 (1) के अन्तर्गत प्रकरण विहित प्राधिकारी/उपजिलाधिकारी सदर, लखनऊ को इस आशय से सन्दर्भित किया जा रहा है कि पक्षकारों को सुनने के उपरान्त संस्था की अन्तरंग सभा (प्रबन्धसमिति) के निर्वाचन के सम्बन्ध में निर्णय पारित करते हुए कृत कार्यवाही से अधोहस्ताक्षरी को भी अवगत कराने का कष्ट करें।

113. At this stage, it will also be relevant to notice the observations made by the Apex Court in Cyril Lasrado (Dead) by

LRs and another v. Juliana Maria Lasrado and another, (2004) 7 SCC 431, which reads as under:-

"11. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable.

12. Even in respect of administrative orders Lord Denning, M.R. in Breen v. Amalgamated Engg. Union [(1971) 1 All ER 1148 : (1971) 2 QB 175 : (1971) 2 WLR 742 (CA)] observed : (All ER p. 1154h) "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree [1974 ICR 120] it was observed: "Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in

other words, a speaking out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

114. Now, adjudging the order impugned on the touchstone of the decision which have been noticed herein above it would be found that the order passed by the Deputy Registrar is completely bereft of reasons. It will be significant to note that in the earlier round of litigation when this Court had passed the judgment dated 07.06.2021 it had clearly stated that all the issues raised were to be considered by the Deputy Registrar who was to decide the matter after affording an opportunity of hearing to the parties concerned by a reasoned and speaking order but then again the Deputy Registrar has committed the same error; inasmuch as he has quoted the paragraphs from the judgment dated 07.06.2021 and 01.07.2021 including the subsequent events regarding the claim made by the four rival faction but whether the claim prima facie made by the four warring faction had any prima facie substance to their respective claims or not ought to have been noticed at the threshold. It did not even find that there was a genuine and a bona fide disputes which enabled the Deputy Registrar to form a prima facie subjective satisfaction as to whether the conflicting claims had some basis to refer to the the matter to the Prescribed Authority.

115. This Court is conscious of the fact that in exercise of its jurisdiction under Article 226/227 of the Constitution of India, this Court cannot enter into the disputed question of fact which may require evidence. For the aforesaid reasons, this Court is not making any observations

(Delivered by Hon'ble Dr. Yogendra
Kumar Srivastava, J.)

1. Heard Sri K.P.S. Yadav, learned Advocate holding brief of Sri Pradyumna Kumar Yadav, learned counsel for the petitioner, Sri J.N. Maurya, learned Chief Standing Counsel appearing along with Sri Abhishek Shukla, learned Additional Chief Standing Counsel, for the State-respondents and Sri Krishna Kant Singh, learned counsel representing the respondent Gram Sabha.

2. The present petition has been filed seeking to assail a notice dated 09.01.2024 issued by the respondent No. 4, the Tehsildar, Khair, District Aligarh, in R.C. Form- 20, under Section 67(2) of U.P. Revenue Code, 2006.

3. Contention of the counsel for the petitioner is that earlier proceedings under Section 122-B of Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950, had been initiated in the year 2012, against the petitioner's father, in respect of the same plot of land, which resulted in passing of an order dated 15.09.2012, by the Tehsildar, directing eviction and payment of compensation.

4. The aforesaid order was subjected to challenge in a revision preferred by the Gram Sabha, under Section 122-B(4-A) of the Z.A. Act, which was decided by means of an order dated 27.03.2014, passed by the Additional Collector (Finance & Revenue), Aligarh, in terms of which the earlier order dated 15.09.2012 was set aside and the matter was remanded, for passing a fresh order, on merits.

5. It is sought to be asserted that the aforesaid case being pending, there is no

occasion for initiating fresh proceedings by issuing a notice under Section 67(2) of the Revenue Code, in respect of the same plot of land.

6. Counsel for the State-respondents has pointed out that pursuant to the previous order, instructions dated 23.07.2024, have been received from Sub Divisional Magistrate, Khair, Aligarh, indicating therein that after remand by the revisional court, the proceedings which had been drawn under Section 122-B of the Z.A. Act, against the father of the petitioner, could not be concluded since the petitioner's father had died, and an order dated 03.04.2023 was passed in terms of which the notice issued in Z.A. Form- 49-A was withdrawn and a direction was issued to the Area Lekhpal and Revenue Inspector to carry out a spot inspection of the land in question being Gata No. 173 and to submit a report.

7. It is submitted that since a fresh report has been submitted by the Area Lekhpal, on the basis of a spot inspection, indicating encroachments over the land in question, by the petitioner, proceedings under Section 67 of the U.P. Revenue Code, 2006, have been initiated with the issuance of a statutory notice under R.C. Form- 20.

8. It has been submitted that in a case where there is a report which indicates existence of encroachments, there is no bar to initiation of fresh proceedings under Section 67 of the Revenue Code, merely because the earlier proceedings had been dropped for same reason.

9. Accordingly, it has been contended that the statutory notice which has been issued, cannot be said to suffer from any

want of jurisdiction, and a writ petition challenging the same, would not be entertainable, at this stage.

10. Section 67 of the Revenue Code provides power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat properties.

11. Where any property entrusted or deemed to be entrusted to a Gram Panchayat or other local authority is damaged or misappropriated, or where any Gram Panchayat or other authority is entitled to take possession of any land under the provisions of the Revenue Code and such land is occupied otherwise than in accordance with the provisions of the Revenue Code, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, are required to inform the Assistant Collector concerned in R.C. Form – 19.

12. The Assistant Collector from the information received or otherwise coming to his knowledge as to damage, misappropriation or wrongful occupation of Gram Sabha property, is required to initiate action by issuing a notice under Section 67(2) of the Revenue Code to the person concerned in R.C. Form– 20. The notice which is to be issued is for showing cause, as to why compensation for damage, misappropriation or wrongful occupation, be not recovered, and the person concerned be not evicted from the land in question.

13. In the instant case the Area Lekhpal having submitted a report on the basis of a spot inspection indicating encroachments over the land in question, by the petitioner, the Assistant Collector, in exercise of powers under Section 67(2) of the Revenue Code, has issued a notice to

the petitioner to show cause, in the prescribed R.C. Form– 20.

14. The earlier proceedings, under Section 122-B of the Z.A. Act, drawn against the petitioner's father, having been dropped upon his death, and there being no adjudication on merits, and the fresh report submitted by the Area Lekhpal, on the basis of a spot inspection, being indicative of encroachments over the land in question by the petitioner, there would be no bar to initiation of fresh proceedings under Section 67 of the Revenue Code.

15. Counsel for the petitioner has not been able to point out any patent illegality or lack of jurisdiction in issuance of the notice by the Assistant Collector.

16. Learned counsel for the petitioner states that as the petitioner has already filed his objections, he does not wish to press the petition, and that the petitioner would contest the proceedings before the concerned respondent authority.

17. The petition stands **disposed of** accordingly.

(2024) 9 ILRA 727
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABD 20.09.2024

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 5229 of 2021
 With
 Writ C No. 4980 of 2021

Somesh Prakash & Ors.	...Petitioners
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioners:

Tarun Agrawal

7. M/s. Aegis BPO Services Ltd. Vs St. of U.P. & ors., [2010 (9) ADJ 237

Counsel for the Respondents:

A.C. Mishra, A.C.S.C.

(Delivered by Hon'ble Piyush Agrawal, J.)

Civil Law-Indian Stamp Act, 1899-Section

2 (15) - Parties had already occupied their respective shares of the property before reducing the memorandum of settlement in writing on 23.05.2012 and therefore, they cease to be co-owners-Administrative authority or judicial authority, before levying penalty, reason whatsoever has to be recorded, as without the same, the consequence of the impugned order may be very harsh and the same may fail to justify the essence of the order-No finding recorded in the impugned orders that there was any attempt to evade stamp duty or to deprive the St. Exchequer or the rightful revenue-Reason is the heartbeat of every conclusion. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice-Any amount deposited by the petitioners shall be refunded to them along with interest @ 4% from the date of deposit till the actual payment is made. **(Para 32,35,37,38 & 45)**

Petition allowed. (E-15)**List of Cases cited:**

1. Siya Ram & ors. Vs St. of U.P. (Misc. Stamp Act Reference No.104 of 1972), decided on 08.05.1972

2. S. Sai Reddy Vs S. Narayana Reddy & ors., (1991) 3 Supreme Court Cases 647

3. A. Krishna & anr.Vs A. Arjun Rao & anr.AIR 2004 AP 502

4. Mangat Ram & anr.Vs Ram Narain Gupta & anr.[(I.A. 2698/07 in CS (OS) No.549/1995]

5. Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs Shukla & Brothers, (2010) 4 SCC 785

6. M/s Travancore Rayon Ltd. v. U.O.I., 1969 (3) SCC 868

1. Since the similar controversy involved in the both the writ petitions, both are being decided together with this common judgment.

2. For convenience, the facts of Writ-C No. 5229 of 2021 are being delineated here:-

3. Heard Sri Tarun Agrawal, learned counsel for the petitioners, and Sri A.C. Mishra, learned Additional Chief Standing Counsel for the State-respondents.

4. By means of instant writ petition, the following prayer has been made:-

“(I) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 22.12.2020 passed by the respondent no.2 and the impugned order dated 31.05.2106 passed by the respondent no.3 (Anneuxre Nos. 13 & 9 respectively);

(II) Issue a writ, order or direction in the nature of mandamus restraining the respondents from undertaking any coercive measures to recover the amount of deficiency of and penalty imposed vide the impugned order dated 22.12.2020 passed by the respondent no.2 and impugned order dated 31.05.2016 passed by respondent no.4;

(III) Issue a writ, order or direction in the nature of mandamus commanding the respondents to forthwith refund the one third amount deposited by the petitioners alongwith interest @ 9% per annum compounded annually;

(IV)

(V) ”

5. Counsel for the petitioners submits that the petitioners, who are nine in numbers, belongs to the same family, who possess a joint family properties. He further submits that in order to avoid complication and to maintain peace and harmony in the family, in the month of July/August, 2011, the petitioners entered into an oral settlement for partition of the family properties amongst themselves and also exchanged possession of their respective shares. Thereafter, in order to avoid any further controversy in future, they resolved to reduce the aforesaid oral settlement into writing in the form of a memorandum of settlement on 23.05.2012; wherein terms and conditions of the oral settlement dated July/August 2011 was mentioned. It was also mentioned therein that ten months’ ago, the possession was occupied by the respective family members.

6. Thereafter, one of the family members to seek declaration of his title instituted a suit in which compromise dated 29.09.2012 was filed, which took place pursuant to the memorandum of settlement dated 23.05.2012. Thereafter, order dated 8.10.2012 was passed and on 16.10.2012 pursuant to the aforesaid compromise, decree order was passed.

7. Thereafter, one of the family members, namely; Raghav Swarup applied for sanction of map of his portion before Muzaffar Nagar Development Authority along with copy of the decree and memorandum of settlement. Afterward, memo of the same was forwarded by the officer of Muzaffar Nagar Development Authority to the Collector to enquire about payment of stamp duty.

8. On the said basis, the proceedings were instituted against the petitioners under

Indian Stamp Act, 1899 and a notice was issued to which the petitioners submitted their reply, but not being satisfied from the same, the impugned order was passed against which an appeal was filed, which also met the same fate. Hence the instant writ petition.

9. Learned counsel for the petitioners further submits before reducing the memorandum of settlement in writing, the petitioners occupied their respective share of properties pursuant to the oral partition which took place way back in July/August, 2011. He further submits that at the time of execution of Memorandum of Settlement dated 23.05.2012, they were already in possession of their respective share of property as per oral settlement between them.

10. He further submits that once the petitioners were not co-owners of the property in question, Section 2 (15) of the Indian Stamp Act is not applicable. He further submits that even Article 45 of Schedule 1-B of Indian Stamp Act, 1899 does not aid to the State-respondents in any manner. He further submits that the partition deed is also not required for registration, if the petitioners were not co-owners of the property in question, at the time of reducing the same in writing.

11. In support of his submission, learned counsel for the petitioners has placed relied upon the Full Bench Judgment of this Court passed in the case of **Siya Ram and Ors. Vs. State of U.P. (Misc. Stamp Act Reference No.104 of 1972), decided on 08.05.1972** as well upon the judgment of Hon’ble Apex Court passed in the case of **S. Sai Reddy Vs. S. Narayana Reddy and Others, (1991) 3 Supreme Court Cases 647** and upon the

judgment of Delhi High Court passed in the case of ***Mangat Ram and Another Vs. Ram Narain Gupta and Another [(I.A. 2698/07 in CS (OS) No.549/1995]***.

12. He further submits that even after amendment of Section 2 (15) by which clause (iii) has been added, does not aid in any manner to the State authorities as on the date of reducing the memorandum of settlement in writing i.e. on 23.05.2012, petitioners cease to be co-owners.

13. He further submits that for imposing of penalty, reason for the same is mandatory and where there is no intention to avoid stamp duty, the penalty cannot be imposed.

14. In support of his submission, he has placed reliance upon the judgment of this Court passed in the case of ***M/s. Aegis BPO Services Limited Vs. State of U.P. and others, [2010 (9) ADJ 237]***. He prays for allowing the writ petition.

15. *Per contra*, learned Additional Chief Standing Counsel supports the impugned orders and submits that the partition deed was executed on 23.05.2012, but the same was not got registered in order to avoid payment of stamp duty thereof as prescribed under Section 2(15) of the Indian Stamp Act, 1899.

16. He further submits that an Original Suit No. 710 of 2012 was filed and during the pendency of the said suit, a compromise dated 29.09.2012 was filed, which took place between the parties, in pursuance whereof, order dated 8.10.2012 and thereafter, the decree dated 16.10.2012 was passed in favour of the petitioners.

17. Once, it is an admitted fact that the partition deed was executed on 23.05.2012,

in view of Section 2(15) of the Indian Stamp Act, 1899, it was required to register as well as payment of due stamp duty thereof was required to be paid. But the petitioners did not choose to do the same and therefore, proceedings were rightly been initiated against the petitioners. The petitioners would have succeeded in defaulting the State Exchequer for not paying the due stamp duty, if present proceedings were not initiated against them. He further submits that so far as the penalty is concerned, if the officer of the Muzaffar Nagar Development Authority have not referred the matter to the Collector, the petitioners would have succeeded in their intention for not paying the stamp duty to State Exchequer, therefore, the levy of penalty is also justified.

18. Upon hearing the counsel appearing for the parties, the Court has perused the records.

19. The record reveals that the partition deed was executed in writing on 23.05.2012; wherein it has specifically been mentioned that the petitioners being the family members, entered into an oral partition of the joint property of the family and after due process, they occupied their respective shares of the property, this fact has not been disputed at any stage of litigation by the State-respondents.

20. Once the possession had already been taken by the respective family members i.e. ten months ago from the date of execution of the partition deed, the question arises as to whether Section 2 (15) of the Indian Stamp Act, 1899 as amended in 1972 is applicable, which reads as under:-

“Section 2(15)-"Instrument of partition means any instrument whereby

co-owners of any property divide or agree to divide such property in severalty, and also includes

(i) a final order for effecting a partition passed by any revenue authority or any civil court;

(ii) an award by an arbitrator directing a partition; and

(iii) when any partition is effected without executing any such instrument, any instrument or instruments signed by the co-owners and recording, whether by way of declaration of such partition or otherwise, the terms of such partition amongst the co-owners.

21. From bare reading of the afore-quoted Sections, it clearly shows that if an instrument of partition is executed, duly signed by the co-owners, on previous terms of partition without possession, stamp duty is liable to be paid on the said instrument.

22. In other words, Section 2 (15) (iii) of the Act will be applicable, if an instrument of partition is executed by co-owners of the property, on a declaration of terms of a previous partition by co-owners, then it should be without possession.

23. Once the shares of each family member were divided and separate possession of their respective shares were occupied by them, they cease to be co-owners of the property on the date of execution of memo of partition in written. In other words, once the respective parties had taken possession of their shares, they cease to be the co-owner of the property.

24. From perusal of the memorandum of settlement, it further reveals that an agreement of partition of the property was reduced in writing, which had already completed and respective parties had come

into actual physical possession of their respective shares of the property, which was agreed to be allotted to them and the necessary steps were already taken into consideration to get their respective title duly recorded in terms of oral family settlement and to abide by the memorandum.

25. But in the case at hand, at the time of execution of partition deed, the possession of the respective shares of the petitioners had already been occupied by them.

26. The Full Bench of this Court in the case of ***Siya Ram*** (supra), in para no.3 has specifically held as under:-

“..... .. before aid of this sub-section can be taken, the instrument must be one which is executed by co-owners, and the partition must be effected by that instrument. In the present case as the partition had already taken place earlier and the parties had entered into separate possession of their shares, they ceased to beco-owners of the properties over which they had taken over separate possession. Moreover, inasmuch as the present document only referred to the fact of partition having taken place earlier, it did not come within the purview of this sub-section.”

27. The Hon’ble Supreme Court in the case of ***S. Sai Reddy*** (supra) has dealt with the issue of the claim of the daughters to claim a share in the joint Hindu family property on the basis of a State amendment to the Hindu Succession Act granting equal rights to the daughters in Hindu joint families. A preliminary decree defining the shares of the parties had already been passed in the suit when the law was

amended by the State granting equal rights to daughters. The Supreme Court held “unless and until the final decree is passed and the allottees of the shares are to be in possession of the respective property, the partition is not complete”. A completed partition was explained as “a partition of the property by metes and bounds”.

28. The Hon’ble Apex Court in **S. Sai Reddy** (supra) in para no.7 has held as under:-

“ Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. ”

29. Further, no cogent material was brought on record by the State-respondents to show that the partition was not complete on the date of execution of settlement of memorandum as well as petitioners were not in possession of their respective shares of the property.

30. In the case in hand, the petitioners, on an oral settlement, had already put in possession of the respective shares, the partition was completed much before the date of reducing in writing the memo of partition.

31. The aforesaid principle was applied by the A.P. High Court in A. Krishna and Anr. Vs. A. Arjun Rao and Anr. AIR 2004 AP 502. The Court held:

“10. The underlying object of Section 35 of the Stamp Act is to ensure that the instrument chargeable with duty is duly stamped, as otherwise it would cause

loss to the exchequer, and in order to save revenue to the State, the provision makes the instrument which is not duly stamped inadmissible in evidence. In the instant case, the plaintiffs by seeking to produce the document dated 3-6-1977, which is in the nature of memorandum of partition between the parties, are seeking to extinguish the exclusive right created in favour of Defendant No. 2. As per the recitals of the document, it is clear that partition has been effected by specifying the shares, which includes payment of maintenance to their mother, in that view of the matter, the document dated 3-6-1977 cannot be said to be memorandum regarding past partition. A perusal of the document further discloses that actual partition was not done by metes and bounds as per earlier partition. By virtue of the document, according to the plaintiffs, separate possession was sought to be delivered to the respective parties, and as such, it is evidencing partition. In this context, it is relevant to state that the document sought to be marked does not contain recitals that the parties have already taken possession of the properties by virtue of the earlier oral partition and continue to enjoy the said property separately after taking possession by virtue of the earlier partition. In the absence of any such recitals in the document, the Court below has rightly come to the conclusion that the document is required to be stamped and registered.”(emphasis supplied)

32. The Delhi High Court in the case of **Mangat Ram** (supra) has held that the parties had not taken complete possession of their shares, therefore, instrument for partition are covered under Section 2 (15) of the Indian Stamp Act, 1899 and the same is liable for payment of due stamp duty.

However, in the case at hand, the parties had already occupied their respective shares of the property before reducing the memorandum of settlement in writing on 23.05.2012 and therefore, they cease to be co-owners.

33. Process of partition is not complete until the parties have divided the properties by metes and bounds.

34. The record further reveals that the parties had arrived at an oral family settlement and to implement its terms, steps were taken to occupy the respective possession by metes and bounds i.e. by delivery of possession of the respective shares of property that were occupied before reducing the memo of partition deed in writing.

35. The record furthermore reveals that for imposing penalty, not a single reason has been assigned and however, for levying the penalty, the mens rea is essential. It is further essential that every administrative authority or judicial authority, before levying penalty, reason whatsoever has to be recorded, as without the same, the consequence of the impugned order may be very harsh and the same may fail to justify the essence of the order.

36. The record shows that in view of the oral family settlement, the respective parties not only divided their shares but also taken possession of their respective shares by metes and bounds, then at the time of reducing in writing the memorandum of settlement, will not be treated as instrument which is covered under Section 2 (15) (iii) of the Act.

37. There is no finding recorded in the impugned orders that there was any attempt

to evade stamp duty or to deprive the State Exchequer or the rightful revenue. In the absence of such finding, there appears to be no justification for imposing the penalty.

38. It is settled law that reason is the heartbeat of every conclusion. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. One of the most important aspect for necessitating to record reason is that it substitutes subjectivity with objectivity. It is well settled that not only the judicial order, but also the administrative order must be supported by reasons recording in it.

39. Highlighting this rule, the Hon'ble Supreme Court, in the cases of **Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs. Shukla & Brothers, (2010) 4 SCC 785, M/s Travancore Rayon Ltd. v. Union of India, 1969 (3) SCC 868** have observed that the administrative authority and the tribunal are obliged to give reasons, absence whereof would render the order liable to judicial chastisement.

40. This Court in the case of **M/s. Aegis BPO** (supra) has held that so far as imposition of penalty is concerned, no reason has been assigned for imposing the same.

41. Once the reason has not been assigned by the competent authority for levying the penalty then on this ground alone, the impugned orders cannot be sustained.

42. In the case in hand, the impugned orders do not refer any reason whatsoever for justifying the levy of penalty, hence the

into an agreement agreeing to settle the differences and the petitioner has also undertaken not to initiate any legal proceedings against the respondent no. 3 in pursuance of the order of the Employees Compensation Commissioner- Challenge to the order of Employees Compensation Commissioner was made on account of subsequent agreement entered between the parties, and the said agreement is held to be "null & void".- Authorities executing the order of the Employees Compensation Commissioner are directed to continue to recover the outstanding amount but while recovering the said amount they shall take into account the fact that Rs.1,80,000/- has already been paid to the petitioner and they shall also deduct the value of the land transferred in favour of the petitioner as per the prevailing circle rate.

(Para 25 & 26) (E-15)

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

1. Heard Shri Rajan Mishra, learned counsel for petitioner, Ms. Aishwarya Mathur, learned amicus curiae appointed by the Court, Shri Rahul Shukla, learned Additional Chief Standing Counsel for respondent nos. 1 & 2, Shri Shambhu Nath Mishra, learned counsel for respondent no. 3 and perused the material available on record.

2. By means of the present writ petition, the petitioner has challenged the order dated 30.04.2024 passed by the learned Commissioner, Workmen Compensation/Additional Labour Commissioner, Hardoi wherein he has passed the award in favour of the petitioner along with all consequential benefits.

3. Brief facts of the case are that the son of the petitioner was in employment of respondent no. 3 and while on duty on 18.10.2017 at 8:00 a.m. met with an unfortunate accident, where a portion of building of respondent no. 3 fell on her son

Smt. Bitto Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Respondents:
C.S.C., Shambhunath Misra

**Civil Law- The Constitution of India, 1950-
Article 226 - The Employees Compensation
Act, 1923-Section 17** - writ petition filed on
the ground that after passing of the order of the
Employees Compensation Commissioner, the
petitioner and respondent no. 3 had entered

Ram Veer, who received serious injuries and subsequently succumbed to the same.

4. The petitioner made several applications and met the employer i.e., respondent no. 3 seeking damages and compensation on the ground of death of her son but she did not receive any compensation and accordingly, moved an application before the Employees Compensation Commissioner for seeking the same. Her application was duly registered as Case No. WC 02/2018 and notices were sent to the employer i.e., respondent no. 3. The respondent no. 3 despite being served notices did not appear before the Employees Compensation Commissioner and accordingly, by means of order dated 15.02.2019, the proceedings had proceeded ex-parte against him. The petitioner adduced evidence before the Employees Compensation Commissioner with regard to the employment of her son with respondent no. 3 and also that he had met with an accident during the course of the employment in which he died to the injuries sustained therein.

5. In the latter part of the proceedings, respondent no. 3 put in appearance before the Employees Compensation Commissioner. The respondent no. 3 was also given opportunity to cross-examine the witnesses, who had adduced the evidence before the Employees Compensation Commissioner but respondent no. 3 never availed of the opportunity and same was closed on 16.06.2022 and again proceedings were held ex-parte. The Employees Compensation Commissioner after due consideration allowed the claim directing the respondent no. 3 to pay compensation of Rs.10,28,430/- along with interest at the rate of 6%. The order of the Employees Compensation

Commissioner was passed on 23.08.2022. The respondent no. 3 thereafter had moved an application for recall on 11.01.2024, which was rejected on 30.04.2024. While rejecting the application for recall, a finding has been returned that respondent no. 3 despite notice has failed to appear before the Employees Compensation Commissioner and also that several opportunities were given to him during the proceedings and he had only sought to seek time to delay the proceedings and hence his application was rejected.

6. Surprisingly, instead of respondent no. 3 assailing the order of the Employees Compensation Commissioner dated 23.08.2022 and 30.04.2024, it is the petitioner, who is the claimant and on whose behest, the proceedings were initiated by the Employees Compensation Commissioner, had approached this Court seeking a direction to set aside the order dated 30.04.2024.

7. The present writ petition has been filed on the ground that after passing of the order of the Employees Compensation Commissioner dated 23.08.2022, the petitioner and respondent no. 3 had entered into an agreement on 08.01.2024 agreeing to settle the differences and the petitioner has also undertaken not to initiate any legal proceedings against the respondent no. 3 in pursuance of the order of the Employees Compensation Commissioner. It is on the basis of the said agreement dated 08.01.2024 when the present writ petition has been filed and also a prayer has been made for setting aside the order of the Employees Compensation Commissioner.

8. It is in the aforesaid circumstances and especially finding that a claimant in whose favour the order of award has been passed by the Employees Compensation Commissioner has been

challenged, this Court had directed the parties to be present in person before this Court. It is when the parties approaches the Court, it was found that the present writ petition has in fact been sponsored by respondent no. 3, who has given a small plot of land to the petitioner and also given her some money and on the pressure made by the villagers, an agreement was entered into between the petitioner and respondent no. 3 wherein they have purportedly agreed to settle the differences and the petitioner had undertaken not to initiated any legal proceedings for recovery against respondent no. 3.

9. It is in the aforesaid circumstances, this Court was of the view that interest of the petitioner cannot be served in the present petition in case it is continued to be proceeded and prosecuted in the manner in which it is, accordingly, had appointed Ms. Aishwarya Mathur a practicing lawyer of this Court to assist this Court as amicus curiae. The amicus curiae was in contact with the petitioner, who informed her that respondent no. 3 has given her Rs.50,000/- in cash and he had proposed to transfer two biswa of land in her favour. At that stage, only money had been paid in cash to the petitioner but the land had not legally been transferred in her favour.

10. It is in the aforesaid circumstances that proceedings were continued and respondent no. 3 was asked to pay the amount to the petitioner as directed by the Employees Compensation Commissioner and during the pendency of proceedings, the petitioner has started constructing a small house on the land given by respondent no. 3 and sum of Rs.1,80,000/- has been given to the petitioner.□ The payment of Rs.1,00,000/- has been deposited

in Account No. 025110100014674 in Aryavart Bank on 14.08.2024. The amount of Rs.20,000/- has been deposited in the same account on 09.09.2024 and Rs.9,999/- on 17.09.2024 through online mode and therefore on□ totaling of sum, Rs.1,80,000/- has been transferred to the account of the petitioner. It is also noticed that even if, it is admitted that amount of Rs.1,80,000/- has been transferred by respondent no. 3 to the account of the petitioner still the said amount is about 20% of the amount awarded in favour of the petitioner.

11. Learned amicus curiae has submitted that the agreement dated 08.01.2024 entered into between the petitioner and respondent no. 3 itself is illegal and arbitrary and dehors the expressed provisions contained in Section 17 of the Employees Compensation Act, 1923. It has been submitted that Section 17 provides for a clear injunction of any agreement being entered into between the employer and the employee, which has the effect of removing or reducing the liability of any person to pay compensation under the said Act.

12. For the sake of convenience, Section 17 of the Employees Compensation Act, 1923 is being quoted below:-

17. Contracting out.-Any contract or agreement whether made before or after the commencement of this Act, whereby a 2[employee] relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment, shall be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under this Act.

13. From the aforesaid, it is noticed that the agreement dated 08.01.2024 is

clearly hit by the provisions of Section 17 of the Act of 1923, inasmuch as by the said agreement the entire liability of respondent no. 3 has been removed. According to the agreement, the petitioner has undertaken not to initiate any legal proceedings to recover the outstanding amount as directed by the Employees Compensation Commissioner. In the teeth of provisions of Section 17 such an agreement is clearly illegal and arbitrary and deserves to be declared null and void.

14. Accordingly, agreement dated 08.01.2024 is declared to be null and void and in-operational. The Act of 1923 was made to give protection to the employees, who received injuries or died due to such injuries received during course of employment.

15. This Court in the case of **M/s Vasu Infrastructure Private Limited Vs. State of U.P. and others in Writ C No. 26540 of 2019** by means of order dated 23.09.2019 has held as under:-

11. *The objects of the E.C. Act, 1923 came up for consideration in the case of Oriental Insurance Co. Ltd. Vs. Mohd. Nasir and Ors.* 4, and after taking notice of the statutory provisions contained therein it was held that the Act is a beneficial legislation in so far as it provides for payment of compensation to workmen employed by the employers and accordingly the provisions therein are to be liberally construed keeping in mind the legislative intent with a view to give effect to its objects.

12. *The E.C. Act, 1923 being thus a piece of social security and welfare legislation with its dominant purpose to protect the employees, the provisions of the Act have to be interpreted*

so as to subserve the object of the legislation which is to make the employer responsible for the loss caused to the employee by injuries or death arising out of and in the course of employment.

13. *The provisions under the Act provide for necessary measures to protect the employees and their dependents from the hardships arising from the accidents occurring during the course of employment and with this object in mind the rights of the employees are to be generously treated while applying the statutory provisions so as to ensure a speedy and efficient mechanism for determination and payment of compensation as per the provisions of the Act.*

14. *Applying the rule of beneficial construction, the provisions of the E.C. Act, 1923 are to be interpreted so as to give them a wide meaning rather a restrictive meaning which may negate the very object of the enactment. A beneficial legislation, it is well settled, as to be construed in its correct perspective so as to fructify the legislative intent underlying its enactment.*

15. *In construing a remedial statute courts are to give it the widest amplitude which its language would permit. The principle of applying a liberal construction to a remedial legislation has been emphasised in the Construction of Statutes by Crawford 5 pp. 492-493 in the following terms:-*

"...Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, should be given a liberal construction, in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute be included, even though outside the letter, if within its spirit or reason."

16. To a similar effect is the observation made by Blackstone in *Construction and Interpretation of Laws*⁶, by stating as under:-

"It may also be stated generally that the courts are more disposed to relax the severity of this rule (which is really a rule of strict construction) in the case of statutes obviously remedial in their nature or designed to effect a beneficent purpose."

17. In the context of beneficial construction as a principle of interpretation, it has been observed in *Maxwell on The Interpretation of Statutes*⁷ as follows:-

"...where they are faced with a choice between a wide meaning which carries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose the former. Beneficial construction is a tendency, rather than a rule."

18. Further, in the same treatise, in the context of industrial legislation, it has been stated as follows:-

"Industrial legislation provides a fruitful field for the application of the tendency towards beneficial construction..."

19. The principle of applying a liberal construction to a labour welfare legislation was emphasised in the case of **The Workmen of M/s Firestone Tyre & Rubber Company of India Pvt. Ltd. Vs. The Management & Ors** where in the context of the provisions of the Industrial Disputes Act, 1947, it was observed as follows:-

"35. ...We are aware that the Act is a beneficial piece of legislation enacted in the interest of employees. It is well settled that in construing the provisions of a welfare legislation, courts should adopt, what is described as a beneficent rule of

construction. If two constructions are reasonably possible to be placed on the section, it follows that the construction which furthers the policy and object of the Act and is more beneficial to the employees, has to be preferred..."

20. The mode of interpretation of a social welfare legislation, in the context of the provisions of the Industrial Employment (Standing Orders) Act, 1946, came up for consideration in the case of **B.D. Shetty & Ors. Vs. CEAT Ltd. & Anr.**, and it was held as follows:-

"12. ...a beneficial piece of legislation has to be understood and construed in its proper and correct perspective so as to advance the legislative intention underlying its enactment rather than abolish it. Assuming two views are possible, the one, which is in tune with the legislative intention and furthers the same, should be preferred to the one which would frustrate it."

21. The principle of applying a liberal construction to a beneficial legislation having a social welfare purpose was reiterated in the context of the Payment of Gratuity Act, 1972 in the case of **Allahabad Bank & Anr. Vs. All India Allahabad Bank Retired Employees Association**, and it was observed as follows:-

"16. ...Remedial statutes, in contradistinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled and needs no restatement at our hands that labour and welfare legislation have to be broadly and liberally construed having due regard to the directive principles of State policy. The Act with

which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country."

22. A similar view was taken with regard to adopting the beneficial rule of construction in respect of social welfare legislation, in the case of **Jeewanlal Ltd. & Ors. Vs. Appellate Authority under the Payment of Gratuity Act & Ors.**, wherein it was stated as follows:-

"11. In construing a social welfare legislation, the court should adopt a beneficent rule of construction ; and if a section is capable of two constructions, that construction should be preferred which fulfills the policy of the Act, and is more beneficial to the persons in whose interest the Act has been passed..."

23. Reference may also be had to the case of **Bharat Singh Vs. Management Of New Delhi Tuberculosis Centre, New Delhi & Ors.** where purposive interpretation safeguarding the rights of have-nots was preferred to a literal construction in interpreting a welfare legislation, and it was held as follows:-

"11....the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to

say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided..."

24. The aforementioned position of law has been discussed in recent judgments of this Court in **U.P.S.R.T.C. Thru Its R.M. Vikasnagar Kanpur Vs. State Of U.P. And 3 Others and Nagar Nigam Gorakhpur Thru Nagar Ayukt Vs. Suresh Pandey And 2 Others.**

25. In the case at hand the facts as reflected from the order dated 28.7.2017 indicate that the Employees Compensation Commissioner has duly taken note that before filing of the claim petition the requisite notice of claim under Section 10 had been duly served upon the petitioner-employer and upon registration of the claim also a registered notice dated 8.1.2016 had been sent to the petitioner and only thereafter the order dated 5.8.2016 was passed directing the case to proceed exparte. It was subsequent thereto that the Employees Compensation Commissioner upon taking into consideration the facts of the case and the evidence on record had proceeded to allow the claim petition of the claimant respondent.

26. The order dated 29.3.2019 passed upon the recall application filed by the petitioner also takes note of the fact that prior to filing of the claim petition the claimant had served a registered notice under Section 10 upon the petitioner-employer and in response to the same a

reply had also been submitted by the employer admitting the factum of employment of the claimant with the petitioner. The order also records that after filing of the claim petition and despite issuance of notice the petitioner did not appear and allowed the case to proceed *ex parte* and only after passing of the order dated 28.7.2017 awarding compensation and upon issuance of a show cause notice dated 9.12.2017 pursuant thereto the petitioner-employer filed the recall application. The Employees Compensation Commissioner has accordingly drawn an inference that the petitioner deliberately wanted to linger the proceedings and in the facts of the case where the claimant had suffered 100% disability and was not in a position to contest the proceedings further, taking into considering the larger interest of justice the recall application has been rejected.

27. The aforementioned order passed by the Employees Compensation Commissioner can also not be faulted with for the reason that E.C.Act, 1923 is a piece of social security legislation providing for a speedy and efficient machinery for determination and payment of compensation to the employees. It may also be taken note of that as per the provisions under Section 4A compensation is to be paid as soon as it falls due. In this regard reference may be had to the judgment in the case of **Pratap Narain Singh Deo Vs. Srinivas Sabata and Ors.**, wherein it was held that compensation becomes payable on the date of the accident and not on the date of determination of the amount thereof. The relevant observations made in the judgment are as follows:-

"7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section, provides that the employer shall be liable to pay

compensation if "personal injury is caused to a workmen by accident arising out of and in the course of his employment". It was not the case of the employer that the right to compensation was taken away under Sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore become liable to pay the compensation as soon as the aforesaid personal injury was caused to the workmen by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the commissioner's order dated May 6, 1968 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, be settled by the commissioner.

8. It was the duty of the appellant, under Section 4A(1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent.."

16. Applying the aforesaid principle to the facts of the present writ petition, this Court is of the considered view in absence of the said agreement, the recovery should have been proceeded against the respondent no. 3 and the award, awarded by the Employees Compensation Commissioner deserves to be handed over to the petitioner to which she is legally entitled.

17. This Court is also of the considered view that once the agreement dated 08.01.2024 has been declared null & void, no benefit of the same would accrue to respondent no. 3, who shall continue to

be liable for payment of the award dated 23.08.2022 passed by the Employees Compensation Commissioner in favour of the petitioner.

18. During these proceedings, respondent no. 3 had also appeared before this Court and he had also promised to handover a portion of his land in favour of the petitioner. There were certain doubts with regard to the ownership of the land, and to verify as to whether the said piece of land is infact owned by the respondent no. 3, this Court had called upon the concerned revenue authorities to be present in Court and to verify the title of the said land.

19. In this regard, an affidavit has been filed by learned Additional Chief Standing Counsel, which has been sworn by Shri Ajai Kumar, Tehsildar, Tehsil Shahabad, District Hardoi. In the said affidavit it has been submitted that to verify the ownership and title of the said land, a revenue team was constituted which they duly inspected the Gata No. 185 and also prepared the spot memo and all the stake holders were present when the proceedings were conducted.

20. Paragraph nos. 9 and 10 of the counter affidavit filed by the State, reads as under:-

"9. That the perusal of the report dated 04.09.2023, spot memo dated 04.09.2024 and the site map dated 04.09.2024 reveal the following:-

a) That the original khatauni landowners of Gata No. 185 are in possession of the land on the basis of the Vahami Batwara (oral understading between the co-holders) and on the basis of the possession on the land in question the site map was prepared.

b) That according to the aforesaid site-map the portion identified and marked as 'ABCD' is the land on which the house of the petitioner Bitto Devi is being constructed which is of 35 square meter (3.5 X 10 sq. meter) and in front of which the land shown and marked as 'CDEF' measuring 60 sq. meter (6 X 10 sq. meter) is the 'sahan land'. The 'sahan land' is covered from both sides with pillars and is also in possession of the petitioner. Thus, a total area of 95 sq. meters has been given to the petitioner.

*c) That the perusal of the site map clarifies the fact that the house in question of the petitioner is being constructed on the Gata No. 185 on the portion on which there is possession of Om Prakash and Munni Devi wife of Om Prakash. Om Prakash is the real cousin brother of the opposite party no. 3 Ganesh Chandra. Om Prakash and Munni Devi have agreed and permitted to give the 95 sq. meters [35 square meter (3.5 X 10 sq. meter) marked as ABCD in the site map for construction of the house and in front of the constructed house the land shown and marked as 'CDEF' measuring 60 sq. meter (6 X 10 sq. meter) as the 'sahan land'] to the petitioner. The opposite party no. 3 Ganesh Chandra, Om Prakash and Munni Devi have also given an affidavit to give effect to this agreement. The copy of the agreement on affidavit dated 09.09.2024 by the opposite party no. 3 Ganesh Chandra, Om Prakash and Munni Devi giving an area of 95 sq. meters to the petitioner is annexed as **Annexure No. A-8** to this affidavit.*

10. That thus on the basis of the averments as submitted herein the aforesaid land identified and marked as 'ABCD' in the site map is the land on which the house of the petitioner Bittoo Devi is being constructed which is of 35 square

meter (3.5 X 10 sq. meter) and in front of which the land shown and marked as 'CDEF' measuring 60 sq. meter (6 X 10 sq. meter) is the 'sahan land'. The 'sahan land' is covered from both sides with pillars and is also in possession of the petitioner. Thus, a total area of 95 sq. meters has been given to the petitioner and an agreement on affidavit by the owners of the land who are in possession of the same namely Opposite party no. 3 Ganesh Chandra, Om Prakash and Munni Devi has also been executed on 09.09.2024."

21. A copy of the agreement, which has been entered into between the respondent no. 3 and all his brothers, who are joint owner of the land in question has also been recorded when they all jointly transferred the said piece of land in favour of the petitioner and accordingly, the said land stands transferred in favour of petitioner.

22. Accordingly, the ownership of the piece of land situated in Gata No. 185 measuring 95 square meters is now beyond pale of any doubt or would be subject matter of any litigation after the compromise has been entered into between all the stake holders including the petitioner, respondent no. 3 and his relatives Om Prakash and Munni Devi and according to the map land situated at 'ABEF' has been transferred in favour of the petitioner.

23. It is open for the petitioner to move an appropriate application for mutation and once the said application is moved, the revenue authorities are directed to pass an order for mutation expeditiously within a period of one month in favour of the petitioner without considering that the same land is under attachment in pursuance to the

order of the Employees Compensation Commissioner and also duly considering the agreement which has entered into between the parties on 09.09.2024.

24. The petition was entertained only to the extent that this Court wanted to ensure compliance of the order of the Employees Compensation Commissioner and considering the fact that the petitioner is a poor and illiterate lady, who has been forced to enter into between an illegal agreement and an effort was made to deny her claim to which she was legally entitled as per the order of the Employees Compensation Commissioner. It is anyway the bounden duty of the Superior Courts to do complete justice.

25. In light of the above, considering the fact that the challenge to the order of Employees Compensation Commissioner was made on account of subsequent agreement entered between the parties, and the said agreement has been held to be null & void and there is no other ground remains for the challenging the impugned order of Employees Compensation Commissioner. The writ petition must fail and accordingly it is dismissed.

26. The authorities, who are executing the order of the Employees Compensation Commissioner dated 23.08.2022 are directed to continue to recover the outstanding amount but while recovering the said amount they shall take into account the fact that Rs.1,80,000/- has already been paid to the petitioner and they shall also deduct the value of the land transferred in favour of the petitioner as per the prevailing circle rate.

27. This Court also appreciates the work of Ms. Aishwarya Mathur, learned

amicus curiae, who has assisted this Court in arriving the aforesaid judgment. The Legal Services Authority is directed to pay remuneration to her within two weeks from the date of copy of the order is produced before him in accordance with the relevant rules.

28. With the aforesaid observations/directions, this petition is dismissed.

(2024) 9 ILRA 743
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.09.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Writ C No. 6444 of 2024

Chandra Pal Verma ...Petitioner
Versus
State Information Commission, U.P. & Anr.
...Respondents

Counsel for the Petitioner:
Lohitaksha Shukla, Tung Nath Tiwari

Counsel for the Respondents:
Shikhar Anand, Akhilesh Kumar Srivastava,
Akhilesh Srivastava, Ratnesh Chandra

A. Civil Law - Constitution of India, 1950-Right to information Act, 2005-Sections 18 & 19-The petitioner challenged the actions of the State Information Commission, U.P. and the Lucknow Development Authority under the Right to information Act-Petitioner filed an RTI application on nine points from the LDA-despite favorable orders from the First appellate authority and the State Commission, the LDA failed to provide the requested information-The commission imposed penalty on the

LDA's public information officer but did not ensure that the requested information was provided-Held, the court emphasized the distinction between sections 18 and 19 of the RTI Act, reiterating that section 19 provides a complete appellate mechanism for obtaining information-Penalties under section 18 do not substitute the obligation to ensure information disclosure-The State information Commission is obligated to uphold the RTI Act's objectives, ensuring transparency and accountability in public authorities-The court set aside the impugned order and remanded the matter to the State Commission.(Para 1 to 11)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Lok Nyayarth Sanstha Thru. its Gen. Secy Vs St. of U.P., WP No. 7523 of 2015
2. CIC & anr. Vs St. of Manipur & anr.(2011) 15 SCC 1
3. Vishwamitra Bajpai Vs. St. Info. Commn. U.P. & ors. , Writ-C No. 301 of 2024
4. Kishan Chand Jain Vs U.O.I. (2023) SCC Online SC 1021

(Delivered by Hon'ble Mrs. Sangeeta
Chandra, J.
&

Hon'ble Brij Raj Singh, J.)

1. We have heard the learned counsel for the petitioner at length and Shri Shikhar Anand, who appears for the Respondent no.1- State Information Commission and Shri Akhilesh Kumar Srivastava, who appears on behalf of the Respondents no.2- LDA.

2. This petition has been filed by the petitioner for the following prayers:-

"i) Issue a writ, order or direction in the nature of Mandamus directing the Respondent no.2 to provide the information sought by the petitioner.

ii) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 07.02.2024 and direct the Respondent No.2 to pay the fine imposed on it to the petitioner.

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

3. It is the case of the petitioner that he had made an application under the Right to Information Act on 03.04.2021 to the Public Information Officer of the Lucknow Development Authority (LDA) in which information was sought on Nine points. Information that was given by the LDA was incomplete. The petitioner approached the First Appellate Authority who passed an order on 03.04.2021 allowing the Appeal and directing the Public Information Officer to provide all information as was requested by the petitioner in his RTI application within 15 days of the order. However, such order was not complied with. The petitioner was forced to file a Second Appeal before the Respondent no.1 pointing out the information that was not provided by the Public Information Officer despite the order passed by the First Appellate Authority. The State Information Commission repeatedly passed orders directing the Respondent no.2 to furnish the information on 31.10.2022, 05.06.2023 and 11.12.2023. The Respondent no.2, however, refused to provide such information and also refused to appear before the Respondent no.1. The Respondent no.1 then proceeded to pass impugned order dated 07.02.2024 directing

the Respondent no.2 to pay a penalty of Rs.25,000/- to the petitioner and also provided that such penalty shall be deducted from the salary of the Public Information Officer of the LDA and shall be deposited under the relevant head maintained for the said purpose by the Account Section. It has been submitted by the counsel for the petitioner that the petitioner is still aggrieved as the information that he had sought, was not provided by the Respondent no.2. It is also not clear whether the order dated 07.02.2024 was challenged by the Respondent no.2 anywhere.

4. The Counsel for the petitioner submitted that the Respondent no.1 did not direct the Respondent no.2 to provide the required information to the petitioner in the order passed finally on 07.02.2024 disposing of his Second Appeal and the Commission has abicated its responsibility and has instead imposed a fine which is to be deposited with the Commission itself.

5. The counsel appearing on behalf of the Respondent no.1 has pointed out the judgment rendered by the Division Bench of this Court on 20.08.2015 in Writ Petition No.7523 (M/B) of 2015 [***Lok Nyayarth Sanstha thru. its General Secretary Vs. State of U.P. and others***], where this Court after considering the arguments raised by the petitioner, who was the General Secretary of the said *Lok Nyayarth Sanstha*, has noted that the grievance of the petitioner was that non-disclosure of information under the Act can only result in imposition of fine on the errant Public Information Officer and no further action is envisaged to ensure disclosure of information sought. The Court observed that whether a more stringent provision should be made, is a matter of Legislative

Policy and the Court cannot direct that the Provision which has been made by Parliament should be amended or that it should be re-framed. Whether a better provision for compliance and for enforcing the statutory provisions for the disclosure of information should be made, is a matter for the law making Body to consider. Beyond this, it would not be appropriate or proper for the Court to issue any direction or issue any Mandamus.

6. We have also noticed that the judgment of the Hon'ble Supreme Court in the case of **Chief Information Commissioner and Another Vs. State of Manipur and Another reported in (2011) 15 SCC 1**, where the Hon'ble Supreme Court considered the difference between complaint made under Section 18 and the Second Appeal filed under Section 19 of the Act and the relevant Paragraphs nos.32, 39, 42, 48, 49 & 51 are being quoted hereinbelow:-

"32. We uphold the said contention and do not find any error in the impugned judgment of the High Court whereby it has been held that the Commissioner while entertaining a complaint under Section 18 of the said Act has no jurisdiction to pass an order providing for access to the information."

"39. The nature of the power under Section 18 is supervisory in character whereas the procedure under Section 19 is an appellate procedure and a person who is aggrieved by refusal in receiving the information which he has sought for can only seek redress in the manner provided in the statute, namely, by following the procedure under Section 19. This Court is, therefore, of the opinion that Section 7 read with Section 19 provides a

complete statutory mechanism to a person who is aggrieved by refusal to give information. Such person has to get the information by following the aforesaid statutory provisions. The contention of the appellant that information can be accessed through Section 18 is contrary to the express provision of Section 19 of the Act."

"42. We are of the view that Sections 18 and 19 of the Act serve two different purposes and lay down two different procedures and they provide two different remedies. One cannot be a substitute for the other."

"48. Apart from that the procedure under Section 19 of the Act, when compared to Section 18, has several safeguards for protecting the interest of the person who has been refused the information he has sought. Section 19(5), in this connection, may be referred to. Section 19(5) puts the onus to justify the denial of request on the Information Officer. Therefore, it is for the officer to justify the denial. There is no such safeguard in Section 18. Apart from that the procedure under Section 19 is a time-bound one but no limit is prescribed under Section 18. So out of the two procedures, between Section 18 and Section 19, the one under Section 19 is more beneficial to a person who has been denied access to information."

"49. There is another aspect also. The procedure under Section 19 is an appellate procedure. A right of appeal is always a creature of statute. A right of appeal is a right of entering a superior forum for invoking its aid and interposition to correct errors of the inferior forum. It is a very valuable right. Therefore, when the statute confers such a right of appeal that must be exercised by a person who is

aggrieved by reason of refusal to be furnished with the information.”

“51. This Court, therefore, directs the appellants to file appeals under Section 19 of the Act in respect of two requests by them for obtaining information vide applications dated 9-2-2007 and 19-5-2007 within a period of four weeks from today. If such an appeal is filed following the statutory procedure by the appellants, the same should be considered on merits by the appellate authority without insisting on the period of limitation.”

7. We have also noticed a judgment rendered by a Co-ordinate Bench of this Court in Writ-C No.301 of 2024 [***Vishwamitra Bajpai Vs. State Information Commission, U.P. and others***], where also the writ petitioner had challenged order passed in Second Appeal by the State Information Commission allowing the Review Application made by the Public Information Officer and setting aside its order of Penalty and order of Recovery. The Court while considering the fact of the writ petitioner filing an Appeal under Section 19 of the RTI Act also noted that the primary object of the State Information Commission is to uphold the spirit of the Act and to facilitate access to information in a fair, transparent and fruitful manner. It observed that the Commission had enormous Power under Section 18 to ensure that information seekers are furnished information regarding what they asked for and should not be driven away through filibustering tactics and while quoting the judgment rendered by the Hon'ble Supreme Court in the case of ***Kishan Chand Jain Vs. Union of India*** reported in 2023 SCC Online SC 1021, the Court had made observations that the State Information Commission or for that matter

any Authority under the RTI has an obligation to ensure a culture of information disclosure so as to promote transparency and accountability in the working of every Public Authority. It observed that the State Information Commission had abdicated its Power and Obligation under the RTI Act to furnish information which was demanded by the petitioner and to adjudicate whether the information that was supplied was incomplete or misleading or false. Even while setting aside its order of imposition of Penalty and Recovery, the State Information Commission had the power to issue direction to the Public Information Officer to ensure that the information that was demanded by the petitioner should be given to him.

8. We have noted the judgment as cited before this Court in the case of *Lok Nyayarth Sanstha* which relates to a grievance regarding the Powers given to the Information Commission under Section 18 of the Act. Section 18 relates to Complaint and in such cases no doubt the State Information Commission can either impose a penalty or recommend initiation of Disciplinary Proceedings against the errant Public Information Officer. However, insofar as Section 19 of the Act is concerned, the observations of the Hon'ble Supreme Court in *Chief Information Commissioner and Another Vs. State of Manipur and Another* (supra), which we have quoted hereinabove, are relevant.

9. The order dated 07.02.2024 is **set aside**. The matter is remanded to the Respondent no.1- State Information Commission, U.P., Lucknow, to ensure that it may exercise all its Powers to extricate information from the Public Information

Officer of the LDA which the petitioner had sought in his application.

10. Necessary orders be passed as are required under Section 19, in view of the observations made by Hon'ble the Supreme Court and by this Court, in the aforecited judgments, and the matter be tried to be disposed of within a period of six months from the date a certified copy of this order is produced before the Respondent no.1.

11. The writ petition is, accordingly, allowed.

(2024) 9 ILRA 747
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 8140 of 2024

Ram Yagya (Village Pradhan)

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Amit Kr. Singh Bhadauriya

Counsel for the Respondents:

C.S.C.

A. Civil Law - Constitution of India,1950-Article 226-U.P. Panchayat Raj Act,1947-Section 95(1)(g)-The petitioner challenged the District Magistrate order directing a preliminary inquiry under section 95(1)(g) of the Act,1947, concerning allegations of fraud and misappropriation of funds related to a village pond-the petitioner argued that the District Magistrate order is arbitrary since two earlier inquiries found the complaints baseless-Held, The court ruled

that the District Magistrate's order for a preliminary inquiry is within legal bounds and does not affect the petitioner's rights at this stage-allegations involving defalcation or misappropriation of state funds warrant investigation-Prior inquiries by other authorities do not preclude the District Magistrate from ordering a fresh inquiry under section 95(1)(g) of the Act,1947-If the inquiry finds substance in the allegations, the petitioner will have full opportunity to defend himself during subsequent proceedings-Hence, the court dismissed the petition, stating that no interference requires.(Para 1 to 12)

The writ petition is dismissed. (E-6)

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

1. Heard Sri Amit Kumar Singh Bhadauriya, learned counsel for the petitioner and the Standing counsel.

2. It has been submitted by learned counsel for the petitioner that the petitioner is a duly elected Pradhan of Village Nidura, Block Jaisinghpur,k District Sultanpur and has been holding the office since 2021. The grievance raised in the present writ petition is with regard to repeated frivolous complaints made against the petitioner by one Kapil Muni. It has been submitted that the first complaint was made against the petitioner on 15.6.2024 which was made on Sampurna Samadhan Divas. It is stated that the said complaint was with regard to a pond situated at gata No.485/0.708 hectare which has been made stating that the petitioner by playing fraud has misappropriated the fund and subsequently allegations have been made for selling the same illegally. Inquiry was conducted by Block Development Officer on 31.7.2024 and he held that he could not find any merit in the allegations in the complaint which could not, therefore, be verified.

3. The second compliant was made on 24.6.2024 which was addressed to the District Magistrate and it seems that the said letter was endorsed to Chief Development Officer and in the second complaint also inquiry was conducted by Block Development Officer, who submitted report on 25.6.2024 recording a finding that the facts in the complaint could not be verified. At this stage, it is pertinent to mention that though the complaints made on Sampurna Samadhan Divas was prior to the complaint made to the District Magistrate who had directed inquiry be conducted by Khand Vikas Adhikari who submitted report prior to the inquiry conducted by Gram Vikas Adhikari. It is also been submitted that it is on the basis of the aforesaid complaint that the District Magistrate has proceeded under the provisions of Section 95(1) (g) of U.P. Panchayat Raj Act, 1947 and directed the District Social Welfare Officer to conduct inquiry into the complaint made by Kapil Muni and accordingly in the present writ petition has been filed in which prayer has been made to quash the order of the District Magistrate dated 26.7.2024 wherein he has directed for conducting inquiry under Section 95 (1) (g) of the Act of 1947.

4. Learned counsel for the petitioner submits that the order is illegal and arbitrary in as much as there is no material on the basis of which the impugned order has been passed considering the fact that for the same allegations two inquiries have been previously conducted by Village Development Officer as well as Block Development Officer and in both the inquiries the complaint was found to be false and frivolous.

5. Learned Standing counsel, has opposed the writ petition. He submits that

by means of the impugned order the District Magistrate has only directed to conduct inquiry into the allegations made by the complainant, namely Kapil Muni. He submits that it is only a fact finding inquiry and the petitioner cannot be said to be adversely affected by the said inquiry. In case in the inquiry any material is found linking to the petitioner to the irregularities committed with regard to the said pond, then appropriate charge sheet would be issued to the petitioner then he will have full opportunity to defend himself in the said inquiry and all these grounds will be available to him during the said inquiry and accordingly, there is no ground for interference in the impugned order as prayed by the petitioner.

6. I have heard the rival contentions.

7. Considering the aforesaid facts, it is evident that the complainant has been making complaints with regard to the pond situated at Village- Nidura, Block Jaisinghpur, District Sultanpur before various authorities firstly at the village level and then at District Level. It seems that at the village level report was filed on 31.7.2024 and at the block level the Block Development Officer also conducted inquiry on 25.6.2024. It is noticed that both the inquiries do not relate to the proceedings under Section 95 (1) (g) of the Act of 1947 and the District Magistrate on going through the aforesaid complaints has thought it proper to get the matter inquired for which purposes by means of the order dated 26.7.2024 he directed the matter to be inquired by District Social Welfare Officer. Considering the fact that the matter is only at preliminary stage where the District Magistrate has directed the inquiry to be conducted under Section 95 (1) (g) and a preliminary inquiry is sought to be

conducted so as to ascertain the facts alleged in the complaint, it cannot be said that the petitioner is adversely affected at this stage.

8. This Court is of the considered opinion that whenever there are allegations of defalcation or misappropriation of the State fund, it is the bounden duty of the authorities concerned to immediately look into the complaint at the earliest to test the veracity of the said complaint. At this stage, no right of any individual is affected and only limited inquiry is conducted to verify the facts as mentioned in the complaint. It is only when the allegations is found to be prima facie true then the proceedings can be initiated for taking action against the person responsible for defalcation of fund or misappropriation of State fund for which purposes due inquiry is to be conducted and in the present case, detailed procedure has also been prescribed under Section 95 (1) (g) of the Act of 1947

9. May be in case, two other inquiries by two other authorities have independently been conducted they would not have any bearing in the present inquiry to be conducted under Section 95 (1) (g) where District Magistrate will have to consider the reports as submitted by District Social Welfare Officer and in case he finds that there is some material fact he shall proceed further in the matter and in case the allegations in the complaint are not verified then he would be at liberty to drop the proceedings. At this preliminary stage, the Court cannot interfere on the ground that preliminary inquiry is sought to be conducted and previously also other authorities have conducted two other inquiries.

10. In any view of the matter District Magistrate is bound by the statutory

provisions under Section 95 (1) (g) where there is no prescription of taking into account of the said inquiries submitted by other authorizes.

11. In proceedings under the said Sections the petitioner will have full opportunity to defend himself and in case it is found that there is prima facie substance in the complaint made by the complainant for which purposes the District Magistrate will be bound by the procedure prescribed under the Act of 1947 and it is only after giving opportunity of hearing to the petitioner that he would proceed further in the matter and when that stage is reached the petitioner will have full opportunity to defend himself and adduce all the material available whit him before the authorities.

12. In light of the above, no interference is called for by this Court. The petition being devoid of merits is accordingly **dismissed**.

(2024) 9 ILRA 749

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 01.10.2024

BEFORE

THE HON'BLE MAHESH CHANDRA

TRIPATHI, J.

THE HON'BLE PRASHANT KUMAR, J.

Writ - C No. 16616 of 2024

Larsen & Toubro Ltd.

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Raghuvansh Misra (Sr. Adv.)

Counsel for the Respondents:

C.S.C., Mohd. Afzal, Rahul Agarwal

A. Civil Law - Constitution of India,1950-Article 226-Real Estate(Regulation and Development) Act,2016-Section 5(2)-The petitioner acquired development rights for a project in Jaypee Greens Wish Town,Noida through Assignment agreements-UPRERA rejected the petitioner's application for project registration, citing procedural defects, including the omission of JIL as a co-promoter-The petitioner claimed deemed registration u/s 5(2) of the Act,2016 due to UPRERA's failure to decide within the statutory 30 day period-Held, the court found that UPRERA's failure to act within 30 days triggered the deeming provision u/s 5(2) of the Act-Hence, rejection after deemed approval was impermissible-The writ petition is maintainable as UPRERA's actions constituted an excess of jurisdiction-UPRERA's inconsistent treatment of similarly situated developers evidenced a "pick and choose" policy, violating principles of fairness-The court quashed the rejection orders and notices issued by UPRERA and directed it to provide the petitioner with the necessary registration details for its project.(Para 1 to 186)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Astd. Commr. Sales Tax & ors. . Vs Commercial Steel Ltd.(2021) SCC OnLine SC 884
2. M/s Singh Brother, Kan. Nagar thru, Partner & 7 Ors Vs UPRERA, LKO & ors. ., Writ-C No. 2928 of 2024
3. St. of W.B. & ors. . Vs. Gitashree Dutta(Dey)(2022) SCC Online SC 691
4. U.P Power Transm. Corpn Ltd. & anr. Vs CG Power & Indus. Solutions Ltd & anr. (2021) 6 SCC 15
5. Vaidehi Akash housing (P) Ltd Vs New D.N Nagar Co-op. Housing Socy. Union Ltd. (2014) SCC OnLine Bom 5068
6. Goregaon Pearl CHSL Vs Dr. Seema Mahadev Paryekar & ors. .(2019) SCC Online Bom 3274
7. Bhavnagar Univ. Vs. Palitana Sugar Mill (P) Ltd. & ors. (2003) 2 SCC 111
8. Sharif-UD -din Vs Abdul Gani Lone(1980) 1 SCC 403
9. Chandrakant Kolavale Vs Govt of Mah. & ors. (2003) SCC Online Bom 34
10. St. of Bih. & ors. . Vs Bihar Rajya Bhumi Vikas Bank Samiti(2018) 9 SCC 472
11. Vyas Narain Singh & ors. . Vs The B.R Ambedkar Bih. Univ.((2006) SCC Online Pat 461
12. Commr.Income Tax Vs Muzaffar Nagar Authority(2015) AIR All 76 FB
13. Commr.Income Tax Vs Raghuragi Devi Foundation Trust (2022) SCC Online All 1295
14. Tata Chemicals Ltd. Vs Commr. of Custom(2015) 11 SCC 628
15. M/s Siemens Aktiengesellschaft & Siemens Ltd Vs Delhi Metro Rail Corpn. Ltd.& ors. .(2014) 11 SCC 288
16. Sarku Engr. Services & ors. . Vs U.O.I. & ors. (2017) AIR NOC 49 Bom
17. Doiwala Sehkari Shram Samvida Samiti Ltd. Vs St. of U.K. & ors. (2007) 11 SCC 641
18. U.O.I. & anr.Vs. International Trading Co. & anr..(2003) 5 SCC 437
19. Kastha Niwarak Grahnrman Sahakari Sanstha Maryadit, Indore Vs President, Indore Development.(2006) 2 SCC 604
20. Mohd. Abdul Wahid Vs Nilopher & anr.(2024) 2 SCC 144
21. Bachhaj Nahar Vs Nitima Mandal & anr..(2008) 17 SCC 491
22. P. Kasilingam Vs P.S.G. College of Tech.(1995) AIR SC 1395

23. Punj. Land Development & Reclamation Corpn. Ltd Chandigarh Vs P.O., Labour court, Chandigarh(1990)3 SCC 682

24. Kehar Singh Vs St.(Delhi Admn)(1988)3 SCC 609

25. Distt.Mining Officer Vs Tata Iron & Steel Co.(2001) 7 SCC 358

26. Hardeep Singh Vs St. of Punj. & ors. . (2014) 3 SCC 92

27. M/s Newtech Promters & Developers Vs St. of U.P.(2021) 18 SCC 1

(Delivered by Hon'ble Mahesh Chandra
Tripathi, J.
&
Hon'ble Prashant Kumar, J.)

1. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Raghuvansh Misra, Sri Shivang, Ms. Saloni Kapadia, Sri Devansh Misra, Sri Anup Shukla, Sri Asvani Tripathi and Sri Shubam Yadav, Advocates appearing on behalf of the petitioner, Sri Anil Tiwari, learned Senior Counsel assisted by Sri Mohd. Afzal and Sri Rahul Agarwal, Advocates appearing on behalf of respondent nos.2 and 3-Uttar Pradesh Real Estate Regulatory Authority¹ and Sri R.M. Upadhyay, Ms. Uttara Bahuguna, Sri Ambrish Shukla, learned Additional Chief Standing Counsel and Sri Fuzail Ahmad Ansari, learned Standing Counsel for State-respondent.

FACTUAL MATRIX

2. Yamuna Expressway Industrial Development Authority² had granted a concession in favour of Jaiprakash Industries Limited vide Concession Agreement on 07.02.2003 whereby YEIDA has agreed to transfer land admeasuring 2,50,00,000 square metres to Jaiprakash

Industries Limited, for commercial, amusement, industrial, institutional and residential development, at five(5) or more locations alongside the Yamuna Expressway. In furtherance of the same, YEIDA executed various lease deeds in favour of Jaiprakash Industries Limited for a period of ninety(90) years spread out in various sectors of Noida/Greater Noida ("Lease Deeds-I"). The said lease deeds covered land measuring 248.6704 hectares (614.00 acres) in Sectors 128, 131 and 133 at Noida thereon.

3. This Concession Agreement also conferred rights in favour of the allottee/Jaiprakash Industries Limited to transfer the whole or any part of the said land, whether developed or undeveloped, by way of plots or constructed properties, or otherwise dispose of its interest in the said land or part thereof to any person in any manner whatsoever without requiring any consent or approval of YEIDA or of any other relevant authority.

4. Subsequent to the execution of the Concession Agreement, Jaiprakash Industries Limited got merged with Jaypee Cement Limited by virtue of a scheme of amalgamation and merger, which was sanctioned by this Court vide order dated March 10, 2004. Further, on March 11, 2004 the name of Jaypee Cement Limited got changed to Jaiprakash Associates Limited (JAL). By virtue of the same, all rights, interest, entitlement, benefits and obligations of Jaiprakash Industries Limited under the Concession Agreement and the Lease Deeds-I came to be vested with JAL.

5. Thereafter, in terms of the Concession Agreement, JAL incorporated a Special Purpose Company (SPC)/Special

Purpose Vehicle, namely Jaypee Infratech Limited³ for the implementation of the Expressway project. All the rights and obligations of JAL, under the Concession Agreement and the Lease Deed-1 were transferred/assigned to this SPC(JIL).

6. JIL prepared a layout plan including the land use plan, road network plan, landscape plan and area charts for the development of 453 acres situated in Sectors 128, 129, 131, 133, and 134 at Noida. The same was initially sanctioned on 31.10.2007. Subsequently, the said layout plans were revised and the amended plan was sanctioned on 23.03.2011. Yet again, these layout plans were revised on 20.02.2015. The project now is known as "Jaypee Greens Wish Town"

7. Thereafter, a registered Assignment Agreement was entered on 31.07.2017 between JIL/JAL and the petitioner as the developer, wherein the petitioner took over the development rights in respect of the Floor Area Ratio⁴ ("FAR") over a portion of the Development Lands. JIL/JAL after receiving ₹487.5 crores from the petitioner, had executed an "Assignment Agreement" on 31.07.2017.

8. In furtherance of the Assignment Agreements, an irrevocable General Power of Attorney⁵, was executed on 31.07.2017 by JIL in favour of the petitioner.

9. On this land, the petitioner intended to develop a project in the name of Green Reserve, which comprises of 4 Towers, Towers 1 & 2 were to be built on a plot of 12,394 square metres land bearing Group Housing Pocket No.B-24A and Towers 3 & 4 were to be built on plot of 12,311 square metres land bearing Group Housing Pocket No..B-22B.

10. In order to develop the project on 02.06.2023, the petitioner made an application under Section 4 of the Real Estate (Regulation and Development), Act, 2016⁶ before the UPRERA for registration of Towers 1 & 2 on the Development Land. (Application No.1)

11. On 07.06.2023, UPRERA issued a letter asking the petitioner to include JIL as a 'Promoter' for the project, since the approved map and layout for the Developments Land was in the name of JIL. Again on 08.06.2023, UPRERA asked the petitioner to get a letter from the Suraksha Consortium clarifying that the Project Land do not form part of the resolution plan of Suraksha Realtors Pvt. Limited and Lakshdeep Investments and Finance Private Limited, approved by the Hon'ble National Company Law Tribunal⁷ in the corporate insolvency resolution process of JIL.

12. On 12.06.2023, the petitioner responded that they had legal, valid and marketable rights in respect of the project through the registered GPAs and Assignments Deeds. It was submitted that the petitioner (Larsen & Toubro Ltd.) has the right to advertise, offer, book, sell, dispose, assign, transfer, in any manner whatsoever, the units of the Project along with the sub-lease of proportionate undivided interest in the Development Land, in favour of the allottees, without the prior consent of JIL/JAL, and for such purposes sign and execute booking application form, booking confirmation-cum-allotment letter, agreement for sale, sale deed to transfer title and all necessary assurances, writings, letters, agreements etc. (without the requirement of JIL

personally executing such documents), and receive in its name all revenues, receivables and consideration thereof. It was further stated that the petitioner was not required to add JIL as a 'Promoter' in the project.

13. In response thereto, UPRERA called upon the petitioner to appear before it on 23.06.2023 and provide clarifications with respect to the queries raised vide letter dated 08.06.2023. The petitioner appeared before UPRERA on 23.06.2023 and provided the requisite clarifications/responses to the queries raised by them, and also filed a letter issued by the Implementation and Monitoring Committee of JIL.

14. UPRERA, on technical grounds, rejected the first application of the petitioner on 06.07.2023 giving right to the petitioner to re-apply for registration of Towers 1 & 2 inter alia by providing the following:

i. A copy of the Concession Agreement,

ii. A confirmation on which party will sign and execute the deed and which party will be the confirming party in the deed along-with the promoter to be executed in favour of the homebuyer, and

iii. A confirmation on which party will bear/pay the Farmer's additional compensation as demanded by YEIDA.

15. On the request of the petitioner, the Implementation and Monitoring Committee of JIL issued

another letter dated 20.07.2023 to UPRERA inter alia making the following submissions:

(a) *As per the various conditions of the Assignment Agreements, the Petitioner is entitled to develop the Project, sale booking, allotment of the units and flats in the Project.*

(b) *Further in terms of RERA Act and the Assignment Agreements, **the Petitioner shall always be the promoter/developer of the Project** as all rights to develop the said land, selling, marketing, and advertising are of the Petitioner only.*

(c) ***The responsibility with respect to construction, quality and all promises made to the allottees/home-buyer shall be of the Petitioner only.***

(d) *JIL is only responsible to execute sub-lease in favour of allottees/homebuyers to whom the unit have been sold by the Petitioner as developer/promoter for their impartible and undivided share/rights in the Project as per Clause 10.5 of the Assignment Agreements.*

(e) *It is confirmed that in terms of the agreements JIL's role and responsibility shall only be of executing the Sub-Lease Deed in favour of the allottees of the Project for which JIL has also executed the GPAs separately to enable the Petitioner to execute Sub-Lease Deed as provided in Clause 10.5 of the Assignment Agreements.*

(f) *A sub-lease deed executed by JIL in a similar case to an allottee of M/s. Genx Estate LLP was enclosed. It was also*

submitted that the said project named Golf Street Hub was assigned to M/s. Genx Estate LLP and the project is registered with RERA vide registration No. UP RERA/PRJ439474 ("Genx Estate LLP Project").

(g) It was also submitted that the additional compensation with respect to the Development Lands has already been paid by the Petitioner to the Noida Authority directly.

16. The petitioner re-applied for the registration of Towers 1 & 2 with UPRERA on 21.07.2023 and which was uploaded on the portal of UPRERA on 31.07.2023("Application 3"), wherein the petitioner provided all the clarifications sought by UPRERA in the Rejection Letter and also submitted the Assignment Agreements and GPAs, and provided a copy of the Conveyance Deed.

17. UPRERA, on 22.08.2023, once again sought the same clarifications from the petitioner as were sought earlier vide letters 07.06.2023 and 08.06.2023. Yet again, the petitioner gave the same response to the queries put forth by UPRERA and stated that the said rights, interest, and obligations of the petitioner are derived from clauses 2.1, 2.4, 2.6, 2.7, 3.3, 10.4, and 10.5 of the Assignment Agreements, and clauses 24, 26, and 27 of the GPAs.

18. UPRERA raised its objection on 22.08.2023 for Towers 1 & 2 and had noted following defects in the application :

"1. The project land and the approved map are not under the ownership of the promoter M/s Larsen & Toubro Limited-Add the land and map owner as the promoter of the project.

2. The promoter should provide a letter from M/s Suraksha Realtors Pvt. Ltd. And M/s Lakshadeep Investment and Finance Pvt. Ltd mentioning that the project land B-24A, Jaypee wishtown Sector-128 Noida do not come under the Resolution Plan accepted by Hon'ble NCLT and should upload the same on the UPRERA project registration portal."

19. Thereafter, the petitioner applied for the registration of Towers 3 & 4 with UPRERA vide an application on the portal of UPRERA dated 23.08.2023.

20. Thereafter, further notices were sent by UPRERA to the petitioner on 02.09.2023 and 11.09.2023 qua Towers 1 & 2 asking the petitioner to appear before the UPRERA and to submit response inter alia as to why JIL has not been added as a 'Promoter' for Towers 1 & 2. In response to it, the petitioner appeared before UPRERA and submitted the same response which was submitted earlier that JIL need not be a promoter and all its rights have been assigned over to the petitioner. UPRERA still not being satisfied did not grant the registration to the petitioner.

21. Petitioner issued a letter on 25.04.2024 stating that the applications filed on 31.07.2023 and 23.08.2023 were pending for more than 30 days, hence, as per Section 5(1) and 5(2) of the RERA Act, they are deemed to have been approved. The applications are deemed to have been registered on 30.08.2023 and 22.09.2023. Hence, the registration numbers including a login Id and password should have been provided to the promoter/petitioner by 06.09.2023 for Towers 1 and 2 and by 29.09.2023 for Towers 3 & 4 for accessing the website of the Authority and to create its web

page and to fill therein the details of the proposed project.

22. It appears that some advertisement was placed by a third person for the project of the petitioner have a notice dated 08.05.2024 was issued by UPRERA stating that the petitioner has violated Section 3 of the RERA Act by advertising its Project on the website 'www.gaurnewyorkcityghaziabad.com', while the Project was not registered and the petitioner was called upon to provide an explanation to UPRERA by May 23, 2024, failing which action would be taken against the petitioner under the RERA Act.

23. This notice dated 08.05.2024 has been assailed by the petitioner by means of the instant petition seeking inter alia the following reliefs:-

“(i) issue writ, order or direction in the nature of Certiorari, to call for the records and proceedings pertaining to the notice dated May 8, 2024 bearing no. 6687/Technical Cell- Media/2024-25 and upon perusing the same, quash and set aside the notice dated May 8, 2024 bearing no. 6687/Technical Cell- Media/ 2024-25 (Annexure No. 1 to this petition) issued by the Uttar Pradesh Real Estate Regulatory Authority to Larsen & Toubro Limited;

(ii) issue writ, order or direction in the nature of Mandamus declaring that the project of Larsen & Toubro Limited ie. Green Reserve Towers 1, 2, 3, and 4 on land admeasuring 12,311 square meters, bearing Group Housing Pocket No. B-22B and land admeasuring 12,394 square meters or thereabouts bearing Group Housing Pocket No. B-24A are deemed to be registered under Section 5(2) of the Real Estate (Regulation and Development) Act, 2016;

(iii) issue writ, order or direction in the nature of mandamus directing the Uttar Pradesh Real Estate Regulatory Authority to provide the respective registration numbers for the project of Larsen & Toubro Limited Green Reserve Towers 1, 2, 3, and 4 on land admeasuring 12,311 square meters, bearing Group Housing Pocket No. B-22B; and land admeasuring 12,394 square meters or thereabouts bearing Group Housing Pocket No.B-24A under Section 5(2) of the Real Estate (Regulation and Development) Act, 2016;”

24. On 17.05.2024, this Court has passed the following order :-

“1. Heard Sri Shashi Nandan and Sri Anurag Khanna, learned senior advocates assisted by Sri Raghuvansh Misra and Ms. Saloni Kapadia, learned counsels for the petitioner, Sri R.M. Upadhayay, learned Additional Chief Standing Counsel for the State respondents and Sri Rahul Agrawal and Sri Mohd. Afzal, learned counsels for the contesting respondent Nos.2 and 3 - Uttar Pradesh Real Estate Regulatory Authority (UPRERA).

2. Sri Rahul Agrawal, learned counsel for the contesting respondent Nos.2 and 3 - Uttar Pradesh Real Estate Regulatory Authority (UPRERA) prays for an adjourned on behalf of Sri Anil Tiwari, learned Senior Advocate as he is ill and admitted in P.G.I., Lucknow.

3. Matter is adjourned.

4. Put up this matter again as fresh on 29.05.2024.

5. It is informed that two simultaneous proceedings under Section 3/59 and Section 4 of the Real Estate

(Regulation and Development) Act, 2016 (RERA Act) are ongoing against the petitioner. So far as the proceeding under Section 3/59 of the RERA Act is concerned, the same entails imprisonment and penalty and in case it is finalized on the next date fixed, i.e. 23.05.2024, the petitioner would suffer irreparable loss and injury even though on the ground of medical exigency the matter is adjourned. Suffice to indicate, on the next date, the parties shall appear in response to the impugned notice but no final decision shall be taken till 29.05.2024.”

25. UPRERA filed a counter affidavit on 28.05.2024, which was sworn on 27.05.2024, wherein it was stated that the respondent has a preliminary objection regarding maintainability of the present writ petition on the ground that there exists an equally efficacious alternative remedy under Section 43(5) read with Section 44 of the RERA Act, which provides that any aggrieved person by any order or decision or direction of the Authority or Adjudicating Officer, may prefer an appeal to the Appellate Tribunal. Apart from it no other ground was taken.

26. Thereafter, on 29.05.2024 this Court passed the following order :-

“1. Counter affidavit filed by Sri Rahul Agarwal and Mr. Mohd. Afzal on behalf of respondent nos. 2 and 3 is taken on record.

2. Heard Sri Shashi Nandan and Sri Anurag Khanna, learned Senior Counsels assisted by Sri Raghuvansh Misra, learned counsel on behalf of the petitioner, Mr. Mohd. Afzal, learned counsel for the respondent nos. 2 and 3 and Ms. Uttara Bahuguna, learned Additional

Chief Standing Counsel assisted by Mr. Fuzail Ahmad Ansari, learned Standing Counsel for the State-respondents.

3. On the request of learned counsel for the petitioner, the matter is passed over.

4. Put up this matter on 31.05.2024 as fresh.

5. Interim order, if any, is extended.”

27. During pendency of case, the application of the petitioner was rejected in UPRERA’s 147th Meeting on 16.05.2024, which was communicated to the petitioner on 29.06.2024.

28. It was then the petitioner preferred an amendment application on 05.07.2024, which was allowed. By means of the amendment, following prayers were made in the amended writ petition :-

“(i) issue writ, order or direction in the nature of Certiorari, to call for the records and proceedings pertaining to the notice dated May 8, 2024 bearing no. 6687/Technical Cell- Media/ 2024-25 and upon perusing the same, quash and set aside the notice dated May 8, 2024 bearing no. 6687/Technical Cell- Media/ 2024-25 (Annexure No. 1 to this petition) issued by the Uttar Pradesh Real Estate Regulatory Authority to Larsen & Toubro Limited;

(ii) issue writ, order or direction in the nature of Mandamus declaring that the project of Larsen & Toubro Limited ie. Green Reserve Towers 1, 2, 3, and 4 on land admeasuring 12,311 square meters, bearing Group Housing Pocket No. B-22B and land admeasuring 12,394 square

meters or thereabouts bearing Group Housing Pocket No. B-24A are deemed to be registered under Section 5(2) of the Real Estate (Regulation and Development) Act, 2016;

(ii.1) issue writ, order or direction in the nature of Certiorari, to call for the records and proceedings pertaining to the rejection letter dated June 29, 2024 bearing no. 9073/UPRERA/Projreg/2024-25 and upon perusing the same, quash and set aside the rejection letter dated June 29, 2024 bearing 9073/UPRERA/Projreg/2024-25 (Annexure No.39 to the present writ petition) issued by the Uttar Pradesh Real Estate Regulatory Authority to Larsen & Toubro Limited;

(ii.2) issue writ, order or direction in the nature of Certiorari, to call for the records and proceedings pertaining to the rejection letter dated June 29, 2024 bearing no. 9053/UPRERA/Projreg/2124-25 and upon perusing the same, quash and set aside the rejection letter dated June 29, 2024 bearing 9053/UPRERA/Projreg/2024-25 (Annexure No. 40 to the present writ petition) issued by the Uttar Pradesh Real Estate Regulatory Authority to Larsen & Toubro Limited;

(iii) issue writ, order or direction in the nature of Mandamus directing the Uttar Pradesh Real Estate Regulatory Authority to provide the respective registration numbers for the project of Larsen & Toubro Limited Green Reserve Towers 1, 2, 3, and 4 on land admeasuring 12,311 square meters, bearing Group Housing Pocket No. B-22B; and land admeasuring 12,394 square meters or thereabouts bearing Group Housing Pocket No. B-24A under Section 5(2) of the Real

Estate (Regulation and Development) Act, 2016;”

PRELIMINARY OBJECTION OF RESPONDENTS

29 . During the course of hearing a preliminary objection was raised by learned Senior Counsel appearing for respondent nos.2 and 3-UPRERA on the ground of availability of alternative remedy. He has cited a judgment of Hon’ble Supreme Court passed in the matter of **Assistant Commissioner Sales Tax and others vs. Commercial Steel Ltd.**⁸ wherein the Hon’ble Apex Court has held as follows:-

“11. The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:

(i) a breach of fundamental rights;

(ii) a violation of the principles of natural justices;

(iii) an excess of jurisdiction; or

(iv) a challenge to the vires of the statute or delegated legislation.”

30. In addition, in the case of **M/s Singh Brother, Kanpur Nagar through, Partner & 7 others versus UPRERA, Lko. & 3 others in Writ-C No.2928 of 2024**, the Lucknow Bench of this Hon’ble Court has held that writ petition is not

maintainable in cases where there exists an alternative remedy.

31. It was submitted that, moreover, the petitioner does not fall within the ambit of the exceptions carved out by the Apex Court in cases where an alternative remedy is available and hence, the writ petition is liable to be dismissed on this ground alone. He further submitted that since the authority has passed the rejection order in exercise of its jurisdiction and not in excess of jurisdiction thus the petitioner fails to satisfy the requirement of law as laid down by the Hon'ble Apex Court and the remedy is, therefore, before the appellate tribunal.

32. In response to it, learned counsel for the petitioner submitted that in the instant matter, UPRERA has passed an order of rejection, when the application of the petitioner has been deemed to have been allowed. He submitted that after deeming provision has come into play, UPRERA had no jurisdiction to pass any such order, hence, it is a case of an "excess of jurisdiction". Since it is a case of an "excess of jurisdiction", it definitely falls within the third category of the judgment cited by learned counsel for the respondent. As such, the instant writ petition cannot be dismissed on the ground of alternative remedy. To buttress his argument, he has relied on judgments passed by Hon'ble Supreme Court in the matter of State of West Bengal and others vs. Gitashree Dutta (Dey)⁹ and Uttar Pradesh Power Transmission Corporation Ltd. and another vs. CG Power and Industrial Solutions Limited and another¹⁰.

CONSIDERATION ON PRELIMINARY OF OBJECTION

33. After hearing the parties at length for couple of days, specially, the parties have argued and advanced all the

legal issues, and specially in the light of paragraph no.11 (iii) of the judgement of Hon'ble Apex Court passed in the matter of **Assistant Commissioner Sales Tax and others (supra)**, which provides that a writ petition can be entertained in exceptional circumstances where there is an excess of jurisdiction, therefore, it will be a futile exercise to relegate the matter to the appellate authority.

34. Therefore, we are of the considered opinion that the instant writ petition cannot be dismissed on the ground of alternative remedy, and it has to be adjudicated on merits.

ARGUMENTS ON BEHALF OF THE PETITIONER

35. Sri Shashi Nandan, Senior Advocate assisted by Sri Raghuvansh Misra, Sri Shivang, Ms. Saloni Kapadia, Sri Devansh Misra, Sri Anup Shukla, Sri Asvani Tripathi and Sri Shubam Yadav, Advocates appearing on behalf of the petitioner advanced his arguments. The argument of the petitioner is on the following points:-

OBJECTS OF THE REAL ESTATE (REGULATION & DEVELOPMENT) ACT, 2016

36. Sri Shashi Nandan, learned Senior Counsel for the petitioner submitted that the statement and objects of the RERA Act was primarily to protect the interest of the flat buyers/addressees. For ready reference relevant provision of the statement of objects and reasons of RERA Act is being quoted below:-

"The Real Estate (Regulation and Development) Bill, 2013, inter alia, provides for the following, namely:-

“(a) to impose an obligation upon the promoter not to book, sell or offer for sale, or invite persons to purchase any plot, apartment or building, as the case may be, in any real estate project without registering the real estate project with the Authority;

.....

(d) to impose liability upon the promoter to pay such compensation to the allottees, in the manner as provided under the proposed legislation, in case if he fails to discharge any obligations imposed on him under the proposed legislation;

(e) to establish an Authority to be known as the Real Estate Regulatory Authority by the appropriate Government, to exercise the powers conferred on it and to perform the functions assigned to it under the proposed legislation;

(f) the functions of the Authority shall, inter alia, include-(i) to render advice to the appropriate Government in matters relating to the development of real estate sector; (ii) to publish and maintain a website of records of all real estate projects for which registration has been given, with such details as may be prescribed; (iii) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the proposed legislation;

.....

(1) to make provision for punishment and penalties for contravention of the provisions of the proposed legislation and for non-compliance of orders of Authority or Appellate Tribunal;

.....

37. In Clause (d) of the statement of objects and reasons, it is specifically mentioned that UPRERA is established to impose liability on the promoter to pay compensation to the allottees, in case, if he fails to discharge its obligations imposed on him under the RERA Act. He further submitted that at best UPRERA while registering the project has only to see whether the developer has clear title, free from all encumbrances and whatever he does, has to be transparently shown on the website of the Authority. The Authority can only ensure timely development of the project and in case the same is not done, the promoter can be penalised for the same.

PROMOTER

38. The counsel for the petitioner emphasized that the petitioner is a “Promoter” as per the definition provided under Section 2(zk) of the RERA Act. Section 2(zk) is being reproduced hereunder for ready reference:-

2(zk) “*promoter*” means,—

(i) *a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or*

(ii) *a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said*

project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of—

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by Government,

for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and

the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;”

39. Section 2(zk) of the RERA Act, which defines ‘promoter’, states that a person who has been assigned development rights in respect of a project for the purpose of selling the apartments, a power of attorney holder, or a person who develops land as a project for the purpose of selling (all being petitioner in this case), would qualify as being a ‘promoter’. In this backdrop, he submits that the RERA Act does not mandate, landowner to be a promoter, as the definition of ‘promoter’ does not include ‘owner’.

40. The learned Senior Counsel elaborated that as per the definition, a promoter is a person, who constructs ‘OR’ causes to be constructed. Here, the definition uses the words “OR” and not “AND” while defining promoter and hence, an owner can be a ‘Promoter’ if he is developing himself or anyone who is building on his land after a proper agreement can be a ‘Promoter’.

41. He next submitted that JIL does not fall under the provisions of Section 2(zk) of the RERA Act. Respondent has failed to identify a single provision under the RERA Act or the Rules and Regulations thereunder for justifying their action to include JIL as a promoter for the Project. UPRERA is seeking to expand the scope of a clear and unambiguous section 2(zk), which is impermissible. In the event, the intention is to include

landowners then appropriate amendments will have to be brought in the RERA Act.

42. The learned Senior Counsel vehemently submitted that it is settled that merely being the owner of a land would not make the party a promoter and ought not to suffer the consequences of being a promoter, and further it is not correct to say that a land owner ought to be a promoter on the premise that he is providing his land for the project. It is clarified that only the promoter is one, who is responsible for constructing the project or can cause it to be constructed. He has placed reliance on **Rajasthan RERA Notification No. F.1(152)RJ/RERA/LAND/2020/1202 dated June 30, 2020, Vaidehi Akash Housing (P) Ltd. v. New D.N. Nagar Co-op. Housing Society Union Ltd.**¹¹, **Goregaon Pearl CHSL vs. Dr. Seema Mahadev Paryekar and Others**¹².

43. He further submitted that Rule 3(1)(f) of the U.P. Real Estate(Regulation and Development) Rules, 2016¹³ is as follows:

“3.(1)(f) where the promoter is not the owner of the land on which development is proposed details of the consent of the owner of the land along with a copy of the collaboration agreement, development agreement, joint development agreement or any other agreement, as the case may be, entered into between the promoter and such owner and copies of title and other documents reflecting the title of such owner on the land proposed to be developed.”

44. With reference to Rule 3(1)(f) learned Senior Advocate specifically stated that where the promoter is not the owner of the land which is being developed, the

consent of the owner should be included when applying for registration. The forms annexed to The Uttar Pradesh Real Estate (Regulation and Development) (Agreement For Sale/Lease) Rules, 2018¹⁴ and Circular dated 16.03.2024 of UPRERA also contemplate a situation where the promoter is not the landowner. Hence, the Act and Rules framed thereunder clearly contemplates, both, the one who owns the land and construct, and the other, who constructs on someone else's and sells the apartments after executing a proper agreement by the owner, both of them would independently be the promoter.

45. He further raised objection that without prejudice to the above, it is admitted that it is YEIDA and not JIL which is the owner of the land and UPRERA has never insisted on making YEIDA a promoter and hence it cannot insist on making JIL a promoter.

46. He lastly relied on the letters dated June 9, 2023, July 20, 2023 and October 18, 2024 issued by the JIL wherein it has been stated that all rights in the Project are with the petitioner, who is the sole promoter and are in a position to meet all the obligations of the promoter. Hence, the objection of UPRERA is illegal and misplaced.

SECTION 4 OF RERA ACT (APPLICATION BY THE PROMOTER)

47. The counsel for the petitioner further submitted that Section 4 of RERA Act deals with application for registration of real estate projects. For ready reference Section 4 of RERA Act is reproduced herein:-

(a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship,

societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;

(b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;ll or some of the apartments to other persons and includes his assignees

(c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;

(d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;

(e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;

(f) the location details of the project, with clear demarcation of land dedicated for the project along with its

boundaries including the latitude and longitude of the end points of the project;

(g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;

(h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas appurtenant with the apartment, if any;

(i) the number and area of garage for sale in the project;

(j) the names and addresses of his real estate agents, if any, for the proposed project;

(k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;

(l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:—

(A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;

(B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;

(D) that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose:

Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project:

Provided further that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project:

Provided also that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for that project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

Explanation.— For the purpose of this clause, the term “scheduled bank” means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934;

(E) that he shall take all the pending approvals on time, from the competent authorities;

(F) that he has furnished such other documents as may be prescribed by the rules or regulations made under this Act; and (m) such other information and documents as may be prescribed.

48. He further submitted that the petitioner had made an application under Section 4 of the RERA Act and enclosed all the relevant documents as has been specified under Section 4(2) of the Act, and had furnished all the documents as prescribed under the Rules and Regulations framed under the Act and had applied in requisite form as has been presented under the Act & Rules.

49. As per Section 4(2)(l), the Promoter has to make a declaration, supported by an affidavit, which has to be signed by the promoter under which he has to make certain statements. When the petitioner applied under Section 4(1) of the RERA Act, he has complied with all the provisions of Section 4(2) of the Act. Once all the compliance was done, there was no reason for the respondent authority to hold back the project or reject the same.

DEEMING PROVISION

50. He further submitted that Section 5 of the RERA Act deals with registration. Section 5(1) lays down that on receipt of application under Section 4(1), the authority shall within a period of thirty days grant registration and provide registration number including login Id and password to the applicant for accessing the website of the authority and to create his web page and fill therein the details of the proposed project, or reject the application for the reasons to be recorded in writing, if such application is not in confirmation to the provisions of the Act and the Rules.

Section 5(2) of the Act clearly lays that if the authority fails to grant registration or rejects the application within the stipulated time, the project shall be ‘**deemed**’ to have been registered and the authority shall within a period of seven days of the expiry of said period of thirty days as specified under section 5(1), shall provide the registration number, login Id and password to the promoter for accessing the website of the Authority and to create its web page and to fill therein the details of the proposed project.

51. It is the argument of the petitioner that the Act, specifically provides the deeming clause if the application is not rejected, hence, in the present case invocation of deeming clause is imperative. In support of the aforesaid argument, learned counsel for the petitioner has placed reliance on a judgment passed by Hon’ble Supreme Court in the matter of **Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and others**¹⁵ in which in paragraph 42 it has been held as under :

“42. We are not oblivious of the law that when a public functionary is required to do a certain thing within a specified time, the same is ordinarily directory but it is equally well settled that when consequences for inaction on the part of the statutory authorities within such specified time is expressly provided, it must be held to be imperative.”

52. He has further placed reliance on a judgment passed by Hon’ble Supreme Court in the matter of Sharif-Ud-Din vs. Abdul Gani Lone¹⁶, wherein it has been held that whenever a Statute prescribes that a particular Act has to be dealt with in a particular manner and also lays down that if failure to comply with the said requirement,

would lead to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.

53. Learned Senior Counsel submitted that a deeming fiction is indicative of the framers of the law that they expect compliance of the requirements of the provision, in a prescribed time frame, and in case of failure to dispose of an application within the statutory time limit, the application for registration shall be deemed to have been registered and failure of the authority to communicate the decision of refusal within the prescribed period entitles the applicant to claim deemed acceptance. **(Ref: Chandrakant Kolavale vs. Government of Maharashtra and others**¹⁷**).**

54. He further elaborated that when a public functionary is required to do a certain act within a specified time period, the same is ordinarily directory, however, when the consequence for inaction on the part of the said functionary within such specified time is expressly provided (as in the present case under Section 5(2) of the RERA Act), it must be held to be mandatory. **[Bhavnagar University (supra), State of Bihar and others vs. Bihar Rajya Bhumi Vikas Bank Samiti**¹⁸**, Sharif-Ud-Din vs. Abdul Gani (supra), Vyas Narain Singh and others vs. The B.R. Ambedkar Bihar University**¹⁹**, Commissioner Income Tax vs. Muzaffar Nagar Authority**²⁰ **upheld in Commissioner of Income Tax vs. Raghuraji Devi Foundation Trust**²¹**.**

55. He argued that correspondence after the deemed registration of the Project under the RERA Act would not act as an estoppel against the petitioner claiming

deemed registration as there can be no estoppel against a Statute/law and if law requires something to be done in a particular manner, it must be done in that manner, and if not done in that manner, it has no existence in the eyes of law at all. **[Tata Chemicals Ltd. v. Commr. Of Customs²²; State of W.B. vs. Gitashree Dutta (Dey) (supra) and Uttar Pradesh Power Transmission Corporation Ltd (supra)].**

56. The Senior Counsel next submitted that the deeming fiction in Section 5(2) of the RERA Act interpreted with the aid of the scheme of the RERA Act (including the purpose of the RERA Act as provided in the Frequently Asked Questions issued by the Ministry of Housing & Urban Poverty Alleviation, Government of India) and the preamble shows that the same has been incorporated by the Legislature to counter inter alia the delays and laches in compliance processes.

57. In this backdrop he submitted that the petitioner had initially made an application for Towers 1 & 2 on 02.06.2023, which was rejected by UPRERA on 16.07.2023 with the right to the petitioner to re-apply for registration. Accordingly, the petitioner had made a fresh application on 31.07.2023 along with all the relevant documents, Assignment Agreement, GPAs, which were sought for while rejecting the earlier application. An objection was raised on 22.08.2023, which was duly answered by the petitioner.

Thereafter, the petitioner made another application for Towers 3 & 4 on 23.08.2023 and the same was pending before the Authority. Neither the application was rejected nor any order was passed thereon. Hence, as per Section 5(1)

of the Act, if the application is deemed to have been allowed. Section 5 of RERA Act is reproduced hereunder for ready reference:-

*“(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall **be deemed to have been registered**, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.”*

58. He further submitted that after completion of statutory period of thirty days, the deeming provision comes into play and the application alternatively stands allowed. Once the application is allowed, the Authority has no right to reject the same as they are denuded of the power to reject the application, which is deemed to have been allowed. He submitted that once deeming provision has come into effect, the respondents has no authority to reject the application, otherwise the deeming clause will itself become redundant. Since, the application was deemed to have been allowed, thereafter, the Authority had no jurisdiction to reject the same.

ASSIGNMENT AGREEMENT

59. The learned Senior Counsel invited our attention to the relevant clauses of the Assignment Agreements dated 31.07.2017 entered into by JIL/JAL and the petitioner, which are as follows:

Clause 2.4:

“The Developer shall be entitled to develop the Group Housing Project on the Development Land by utilizing the FAR Area and Additional Area² which includes development of Common Areas and Facilities, parking spaces, services, amenities, fittings, fixtures and enjoy all rights, privileges and benefits arising there from, including but not limited to exclusive right to/ for:

...

(v) sale, booking, allotment, renting, license, transfer, nomination, substitution etc., of the units/flats in the Group Housing Project and enter into agreements, contracts etc., with third parties for the same and receive in its name all revenues, receivables and consideration for the same and other facilities and amenities over the Development Land. **JIL and JAL shall have no right/claim of any nature whatsoever in such revenues, receivables and consideration and same shall accrue to the sole benefit of the Developer;**

(vi) to cause JIL to execute sub-lease of impartible and undivided share/rights in the Development Land, as per Clause 10.5;

...

(viii) to enter into tri-partite agreements with financial institution and apartment buyers for housing loans for which NOC(s) will be issued by JIL and/or JAL to the Developer;

...

(x) to decide on the pricing of the units and other facilities and amenities

developed by the Developer over the Development Land;.....”

Clause 2.6:

*“The Developer shall have all rights to deal with the Development Rights including but not **limited to right to sell, enter into any arrangement with any third parties, to allot and enter into arrangement for sub-lease, renting, license of units /residential apartments to be constructed on the Development Land and receive consideration and all other amounts for** booking, allotment, sub-lease, renting, license and maintenance of areas in the Group Housing Project, as per terms of this Agreement.”*

Clause 2.7:

“This Agreement shall not be construed in any manner as conveying sub-lease/ownership rights in the Development Land to the Developer. However, the Developer shall have the right to cause JIL to execute sub-lease of impartible and undivided share/rights in the Development Land beneath the building(s)/tower(s) thereon, as per Clause 10.5. It is hereby clarified that the structure developed by the Developer over the Development Land shall always belong to the Developer unless same has been conveyed/ sub-leased to unit owners.”

Clause 3.3:

“The Developer shall have the right to develop and to offer or advertise, sale of apartments or accept any booking amount from apartment buyers in respect of whole or port of the development in the Development Land, from the execution hereof.”

Clause 10.4:

“Subject to the Developer not being in breach of the conditions of this Agreement, the Developer shall, on execution hereof, be entitled to offer, market, book, allot and advertise the proposed residential Group Housing Project on the Development Land to third parties without prior consent of JIL & JAL. However, for this purpose, all the documents shall be finalized by the Developer and the Developer shall keep JIL/JAL informed, in this regard.”

Clause 10.5:

“After completion of the building(s)/tower(s) in the Development Land and the Developer obtaining occupancy/completion certificate thereof, JIL and JAL along with the Developer shall execute the conveyance deeds in the form of sub-lease of land sale of super structure in favour of the allottees/customers of the Developer. JIL and JAL shall grant such allottees/customers impartible and undivided sub-lease rights up to the period expiring on 27.02.2093 i.e. for the remaining period of lease deed expiring first out of the Lease Deeds of which the Development Land is a part, in the Development Land and such right shall be proportionate to the super area of his/her unit to the total super area of the said building/tower. JIL and JAL shall execute such authorities/Power of Attorney in favour of the Developer to transfer/convey the rights and title, in the superstructure of the said units and/or in respect of the Development Land, to the association and/or the body/organization of the allottees/customers. The sub-lease in favour of allottees/customers shall be

executed by JIL/JAL, subject to Developer obtaining requisite NOC(s) from the Bank/Financial Institution from whom the Developer has raised funds for executing Group Housing Project on the Development Land.”

60. Learned Senior Counsel for the petitioner submitted that Assignment Agreement dated 31.07.2017 was executed between JIL/JAL and the petitioner. In its Clause 1c, “Common Areas & Facilities” and in Clause 1f, “Shared Areas and Facilities” had been defined. Clause 4 mentions Assignment of Development Rights. Clause 2.4 (vi) allows the petitioner to execute sub-lease of impartible and undivided share/rights in the Development Land, as per Clause 10.5. Clause 2.6 gave the petitioner all rights to deal with the development rights including but not limited to right to sell, enter into any arrangement with any third parties, to allot and enter into arrangement for sub-lease, renting, license of units in the project land. Clause 2.7 makes it clear that by this Assignment Agreement, JIL/JAL is not executing any sub-lease or the ownership rights. However, the Developer have the right to cause JIL and execute sub-lease of impartible and undivided share in the development land. As per Clause 8.1, JIL/JAL is obliged to make necessary arrangement of electricity supply, water supply, sewage system and drainage system as a part of Shared Areas and Facilities similar to those made available to other sub-projects/plots in Jaypee Greens, Wish Town, Noida. Clause 8.2 also gave right to way to the roads adjoining the development land and was entitled to enter upon such roads for the purpose of accessing the project land. As per Clause 10.5 of the Assignment Agreement after completion of the project, the Developer would get

occupancy/completion certificate thereof, JIL/JAL along with the Developer shall execute conveyance deed in the form of sub-lease of land sale of super structure in favour of the allottees/customers of the Developer. JIL/JAL would further provide impartible and undivided sub-lease rights to the customers/owners of the flats. It was further clarified that the flat owners would have proportionate share in the undivided land on which the building and the towers were constructed and for this JIL/JAL executed a power of attorney in favour of the Developer to transfer the conveyance right and title to the Association/body or Association of allottees/customers.

POWER OF ATTORNEY

61. While referring to the Power of Attorney, the Senior Counsel submitted that JIL has authorized the petitioner to undertake certain acts by way of General Power of Attorney. As per Clause 24 of the Power of Attorney, the petitioner had right to sell, dispose, assign, transfer the premises in the project to third parties or intended purchasers and for this he can sign and execute Booking Application, agreement to sale, sale deed and all other necessary agreements and get the sale registered before the proper registration authority and to carry on all the acts and deeds in relation to the sale of premises, as may be necessary for the registration. As per Clause 26 of the Power of Attorney, the petitioner is entitled to receive sale consideration from the sale of said premises and to refund the money to the purchasers in the event of cancellation. As per Clause 27, the petitioner was authorized to represent before regulatory authorities and any other third parties in connection with the sale of premises in the project and to take all necessary incidental steps for the sale of premises.

SIMILARLY DEVELOPERS APPROVAL

SITUATED GRANTED

62. Learned Senior Counsel vehemently submitted that there are four identically situated companies, who had applied with UPRERA and their applications were allowed placing reliance on the verbatim identical Assignment Deeds/Agreements and Power of Attorneys, as were entered into between the petitioner and JIL/JAL. He raised serious objection by submitting that the respondent authority is adopting “pick and choose” policy as they have rejected the application of the petitioner, and had granted registration to these projects in Jaypee Greens Wish Town, which are as follows:-

(i) *Mahagum Manorialle*
(Registration granted on 27.07.2017)

(ii) *Kalpatru Vista* (Registration granted on 22.01.2018)

(iii) *Genx Estate LLP Project*
(Registration granted on 17.08.2019)

63. He submitted that apart from these three, another identically situated company, namely, M/s Golf Lake LLP for their Trecento Residents-A which has also been built on the land owned by JIL/JAL, RERA granted registration in October, 2023 wherein no such restriction of making JIL/JAL as a co-promoter was raised by UPRERA. The letter given by JAL in favour of M/s Golf Lake LLP clearly shows that lease holder was JAL and the map/building plan was sanctioned in the name of J.P. Greens wherein all the development, maintenance and execution of sub-lease deed would be the sole responsibility of M/s Golf Lake LLP. This

registration certificate was issued much after rejection of the application of the petitioner. It clearly shows that UPRERA herein is adopting a 'pick and choose' policy wherein they have earlier granted permission to identically situated companies, i.e. Mahagun India Pvt. Ltd., Kalpataru Urban Space L.L.P. and M/s GenX Estate L.L.P., whereas refused to register the Project of the petitioner.

CONDUCT OF UPRERA

64. With regard to conduct of RERA, the learned Senior Counsel submitted that the application was filed on 31.07.2023 and after expiry of the period of thirty days, it is deemed to have been allowed, since it was not rejected till that time, and since the password has not been issued, which was to be issued within a period of seven days of the deeming provision, and RERA had initiated proceedings against the petitioner under Section 3 of the Act because of some advertisement given by some unknown third party, the petitioner was left with no option but to file the instant writ petition. During pendency of the writ petition, on the ground of illness of Sri Anil Tiwari (learned Senior Advocate appearing on behalf of UPRERA), the matter was adjourned. However, this Court vide order dated 17.05.2024 has categorically directed that the Authority will not take any decision till 29.05.2024. On the next date of listing i.e. 29.05.2024, the matter was adjourned till 31.05.2024, and the interim order, granted earlier, was extended. In spite of clear direction that no orders will be passed by the respondent-Authority on 28.05.2024, UPRERA rejected the application preferred by the petitioner under Section 4 of the RERA Act. Such conduct of UPRERA is nothing but an

endeavour to just overreach the order of this Court.

65. He further submitted that an affidavit was filed by respondents on 28.05.2024, which was sworn on 27.05.2024, wherein there was not an iota of suggestion that the rejection has already taken place on 16.05.2024. When the rejection order was passed on 16.05.2024, it ought to have been brought to the notice of the Court in the said affidavit. It was only on 29.06.2024 it was communicated to the petitioner that the application stands rejected vide decision taken in a meeting, which was held on 16.05.2024. This entire exercise seems to be a back dated exercise, just to overreach the orders of this Court. In spite of a clear direction by this Court, the application of the petitioner was rejected and to ensure no adverse order is passed against the Authority, on the next date of hearing, which was barely two days away.

66. Section 38 of the RERA Act provides for principles of natural justice to be followed, which has not been done. The rejection orders were passed without giving the petitioner an opportunity of being heard and despite information given by the petitioner to UPRERA by its letter dated 16.05.2024 that the matter was subjudice before the Court and any hearing before UPRERA could only be done, after the writ petition is heard.

67. He further submitted with vehemence that once a matter is subjudice and a question of law is pending consideration before a court of law, the Authority ought not have acted with undue haste and interfere in the adjudication process of court, and any attempt of the authority to decide the same matter, which is pending before the court, would be an

overreach. To buttress this proposition he had relied on the judgement passed by Hon'ble Supreme Court in the matter of [M/s Siemens Aktiengesellschaft and Siemens Limited vs. Delhi Metro Rail Corporation Ltd. and others²³, Sarku Engineering Services and others vs. Union of India and others²⁴]

MISCELLANEOUS

68. Learned Senior Counsel for the petitioner further raised its submissions qua Uttar Pradesh Real Estate Regulatory Authority, Rules, 2016 wherein Chapter II Rule 3 lays down the details of the documents which has to be furnished by the promoter for registration of the project. Rule 3(d) states that only a copy of the title deed of the promoter of the land has to be supplied by the promoter if the land is owned by them. Rule 3(e) lays down that the details of encumbrances on the land on which the development is to be carried out has to be mentioned and Rule 3(f) postulates the possibility when the developer does not own the title of the land but he is only developing, in that case the promoter needs to submit the consent of the owner of the land along with the copy of collaboration agreement/development agreement or any other agreement as the case may be and also copy of the title of the document. He further submitted that in this case the promoter is not the owner of the land. He falls under the category of Rule 3 (f) and Rule 14 (I) (e) (vi) (E), which specifically states that, if the promoter is not the owner of the land, all he has to produce is an agreement, development agreement or any other agreement by which he is carrying on the development and also copy of the title deed.

69. He further submitted that as per Rule 3(4) of these Rules a declaration

has to be submitted under Clause 1 of sub-section 2 of Section 4 in the form B. Form B along with the Rules specifically in the first clause clarifies that the promoter who owns the land can develop the land or anybody else on behalf of the promoter can develop the land. Accordingly, the petitioner had filled up Form B as per the Rules. He further submitted that even the Form A which is made as per Rule 3(2), which is nothing but an application for registration of the project, also recognizes that if promoter is not the owner of the land on which the development is to be carried out, the consent of the owner of the land along with the copy of the collaboration agreement, development agreement or any other agreement entered between them and the copy of the title has to be furnished. The same has been furnished. He next submitted that as per clause 9 and 10 of Form A the project proponent has to give the boundary wall and the locations of the project and also a proforma of allotment letter, agreement for sale and conveyance deed proposed to be signed with the allottees. All these things had been carried out by the petitioner. He further submitted that Rule 1 of U.P. Real Estate(Regulation and Development)(Agreement for sale/lease) Rules, 2018²⁵, sets out a proforma for agreement of sale. Even in that proforma the Statute recognizes that if the project proponent is not the owner of the land, all he has to mention is about the development agreement/any other agreement which should be registered in the office of Registrar.

70. In this backdrop, he argued that all these documents have been furnished and in spite of completing all the formalities as laid down under Rule 3 of Rules, 2016 yet the respondent have illegally held back the registration.

71. The learned Senior Counsel submitted that as per RERA Act and Rules, 2016, there is no provision for the owner of the land to be made co-promoter. The RERA Act as well as Rules, 2016 itself recognize a party who is developing a project on somebody's land as a promoter. He submitted that there is no clause, section or rule in the RERA Act or Rules framed under the Act which makes it mandatory for the owner of the land to be a co-promoter in case it is being developed by someone else.

72. Learned Senior Counsel for the petitioner further submitted that as per the Assignment Agreement JIL does not have the power to construct or sell. The power of constructing and selling is with the petitioner, and therefore, JIL does not fall in the definition of the promoter. To be a promoter, the two cardinal conditions are that he should have the power to construct and to sell and both of them are lacking from the obligations of JIL. Therefore, Uttar Pradesh Real Estate Regulatory Authority cannot ask them to sign the application as a co-promoter. UPRERA cannot create any other person as promoter who is not covered under Section 2(zk) of the RERA Act.

73. He submitted that even Section 11 of the RERA Act lays down the obligation of the promoter. Section 11 (4) (a) specifically states that the promoter shall be responsible for all obligation, responsibilities and function till the conveyance of the apartments, plots or the building, as the case may be is executed in favour of the allottees, and the common areas in favour of the Association of allottees. Here, the petitioner is in a position to execute the conveyance deed of apartment and is in a position to hand over

the common areas to the Association of allottees as per the Assignment Agreement and also as per the General Power of Attorney executed by JIL/JAL in favour of the petitioner. He further submitted that as per Clause 11(4)(f), the petitioner is in a position to execute a registered conveyance deed of the apartment/plot in favour of the allottees along with undivided proportionate share in the common area to the Association of the allottees.

74. He further submitted, that the only power which UPRERA can exercise is under Section 18, 32, 38 and 40 of RERA Act. Section 18 specifically mentions return of the amount and compensation, if the promoter fails to complete the project or is not able to give possession of the flats in accordance with the terms of the agreement or discontinuance of his business. Section 32 lays down functions of Authority for promotion of real estate sector, Section 38 gives power to UPRERA to impose penalty or interest if there is any contravention of obligations cast upon the promoter. Section 40 lays down recovery of interest or penalty or compensation and enforcement of the orders in case where a penalty has been imposed on the promoter and he is not paying. Apart from these four sections, UPRERA has no authority to check the obligations of the builders. UPRERA cannot pass any order except under these four sections, and that is how they protect the interest of the allottees, and in this case the interest of the allottees can very well be protected under these four sections.

75. Sri Nandan, Senior Advocate further submitted that under the RERA Act, the owner has no role to play. It is only the promoter who is liable for each and everything and even the RERA Act

recognizes both the categories, firstly, the promoter as the owner of the land secondly, and the promoter, who has the development agreement or any other agreement with the owner of the land. All that UPRERA can see is whether the owner of land has a valid title and is free from all encumbrances.

76. Learned Senior Advocate further submitted that the power of UPRERA starts from conceptualizing of the project and ends up once the completion certificate is given and the possession is handed over to the Association of allottees(AOA), thereafter, the provisions of Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010²⁶ (For Brevity Act of 2010) comes into play. Section 3(d) defines “apartment owner”, Section 3(i) defines of Act 2010 “common areas and facilities” and Section 3(w) defines “promoter”. The definition of the “promoter” in the Apartment Act is quite different from the definition of “promoter” in the RERA Act. Under the Apartment Act, promoter is one who constructs. Keeping this in mind, in Clause 7.3 of the Assignment Agreement it has been specifically stated that the developer (petitioner) shall abide by the provisions of RERA Act and also the Apartment Act. Section 9 of the Apartment Act lays down certain rights, and it is only because of this Section that Clause 10.5 was incorporated in the Assignment Agreement.

77. The argument is thus raised by Senior Advocate that the obligation of the promoter to ensure the project is completed as per the specifications and time line given while applying for registration of RERA Act and get the occupancy certificate. If he fails to fulfil his obligation, RERA can direct the Promoter to hand over the

possession of the apartment or return the money along with interest. In this case, the petitioner is solely responsible for constructing and selling the apartments and, hence, he is responsible for completing the project. Hence, even on this ground there is no need to include JIL as a promoter in the Project as including JIL in no manner protects the interest of the allottees in any manner. Further, in the present case JIL has just come out of the corporate insolvency resolution process with a huge debt still outstanding and hence, no allottee would invest if JIL is included as a promoter for the Project.

78. Learned Senior Advocate concluded his arguments by lastly submitting that a reading of the RERA Act and the Rules thereunder makes it clear that the statutory obligation cast upon UPRERA is to protect the interest and investment of the allottee. This protection must be assessed on a case-to-case basis. In the present case, the investment of the allottees as well as their interest is well protected as the petitioner is far better equipped to ensure compliance of all obligations of a promoter under the RERA Act and Rules thereunder to protect the investment of the investors than JIL. On the other hand, JIL itself has stated that it does not fall under the ambit of a promoter and hence does not want to be included as a promoter in the Project as they are not developing and selling the apartments, and hence rightly they can not shoulder the liability of the Developer, as that is the sole domain of the petitioner.

ARGUMENTS ON BEHALF OF THE RESPONDENTS

79. Per contra, Sri Anil Tiwari, learned Senior Counsel assisted by Sri

Mohd. Afzal and Sri Rahul Agarwal, Advocates appearing on behalf of respondent nos.2 and 3-Uttar Pradesh Real Estate Regulatory Authority and opposed the petition. His contentions are summarized as follows:-

RERA ACT AND ITS OBJECT

80. Learned Senior Counsel for the respondents submitted that the objects of RERA Act are as follows:-

“for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.”

81. He further submitted that the objects of the Act clearly suggests that the Act has been made to established an authority to regulate, promote the real estate sector and to ensure that the apartments are sold in transparent manner. As per the objects of the Act, it is the duty of UPRERA to ensure that the interest of flat buyers/customers are well taken care of. Keeping the objects in mind UPRERA has passed the impugned order as per the objects of the RERA Act. The authority is not against the petitioner per se and has only asked to make JIL/JAL as co-promoter.

APPLICATION MADE UNDER SECTION 4 OF RERA ACT

82. Sri Anil Tiwari, learned Senior Advocate stated that the application of the petitioner was not as per Section 4 of the

RERA Act. He submits that the petitioner has not disclosed anything in the affidavit enclosed with the application for registration, hence, it is contrary to Section 4(l) of the RERA Act. He submitted that the documents filed by the petitioner does not show that the petitioner has got right to transfer the title of the land to the allottees. He submitted that the petitioner was given absolute right to sell the residential apartment in favour of the allottee and there is no dispute about it, but so far as common area of the apartment is concerned, the right is given to JAL/JIL and the petitioner jointly. He further submitted that undivided share of the land can only be transferred by JIL and not by the petitioner. In support of his submission, he has placed reliance on Section 5 and 17 of the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 201027.

83. He has further placed reliance on Rule 10 of Rules, 2018, which provides that the promoter, on receipt of total price of the apartment/plot as per Para 1.2 under the Agreement from the Allottee, shall execute a conveyance deed and convey the title of the apartment/plot together with proportionate indivisible share in the common areas within three months from the date of issuance of the completion certificate to the allottee. He has placed reliance on Clauses 2.4(vi), 2.7 and 10.5 of the Assignment Agreement, which specifically stated that the Developer after obtaining occupancy/completion certificate thereof, JIL and JAL along with the Developer shall execute the conveyance deeds in the form of sub-lease of land sale of super structure in favour of the allottees/customers of the Developer. JIL and JAL shall grant such allottees/customers impartible and undivided sub-lease rights up to the period

expiring on 27.02.2093 i.e. for the remaining period of lease deed.

authority had rightly rejected the application filed by the petitioner.

DEEMED PROVISION

84. Learned Senior Counsel, appearing on behalf of respondent authority stated that the petitioner cannot seek benefit of Section 5(2) of the RERA Act as his first application had already been rejected on merits after providing ample opportunity of hearing within thirty days. Since, the petitioner had again applied for registration of the same project without removing deficiencies, hence, it cannot get benefit of Section 5(2) of the RERA Act. The petitioner was directed by the answering respondent vide order dated 06.07.2023 to make fresh application in prescribed Form D within three months after clarifying on the queries raised by UPRERA supported by requisite documents. The rejection order dated 06.07.2023 was never challenged by the petitioner before any Court of Law, and has attained finality. However, the petitioner without removing serious legal deficiencies directed by the authority vide order dated 06.07.2023, an application (2nd Application ID-809171) for registration of its Tower 1 & 2 on 31.07.2023. This application on 31.07.2023 was not a fresh application but was an extended application, which was filed earlier. Since the second application was not accompanied by mandatory fees under Section 4 of RERA Act, hence, it cannot be said that the second application was a fresh application. He submitted that all applications have to be filed along with mandatory documents as per the provisions laid down under Section 4 of the RERA Act, but all the mandatory documents were not filed and the affidavit filed along with the document was false. Hence, the

85. He submitted that the application dated 31.07.2023 was uploaded on RERA website without resolving shortcoming as was previously reported on 06.07.2023. Respondent on 31.10.2023 granted an opportunity of hearing to the Petitioner. But, no satisfactory reply was provided with respect to the first query raised i.e. the map owner and the lease owner (JIL) was not added as a promoter of the project. The petitioner cannot seek benefit of section 5 (2) of the Real Estate (Regulation and Development) Act 2016 as his first application had already been rejected on merits after 30 days. Since, the Petitioner had again applied for registration of the same project without removing deficiencies the case of the Project is not protected by Section 5(2) of the Real Estate (Regulation and Development) Act 2016.

86. He submitted that from the documents filed by the petitioner in the amended petition, it is clearly evident that application dated 21.07.2023 had been uploaded on 31.07.2023. The date for counting thirty days would start from the date of uploading. Since, the objections were raised by UPRERA on 22.08.2023, which were not rectified, hence, it cannot be said that the mandatory period of thirty days has elapsed. Hence, the petitioner is not entitled for the benefits of deeming provision as provided under section 5(2) of the RERA Act.

87. He submitted that the petitioner has never been serious in removing/rectifying the shortcoming in the application, and this fact is evident from the own conduct of the petitioner as when the matter was scheduled on 13.03.2024

before the UPRERA for hearing, the petitioner himself filed an application dated 12.03.2024 seeking two weeks further time for hearing. Despite, being afforded numerous opportunities to the petitioner, the petitioner till date had failed to rectify the deficiencies and have now approached this Hon'ble Court. If the petitioner was desirous of claiming benefit of deemed approval then he would not have been seeking time for curing the deficiencies.

88. He submitted that keeping in view of the principle of natural justice, an opportunity of hearing was once again provided to the petitioner on 10.01.2024 to answer/reply/clarify on the following points:-

a. The Project Land and Approved Map are not under the ownership of the petitioner but it is owned by JIL. Thus, it was advised to add the land and the map owner as the Promoter of the Project.

b. According to clause 2.7 and 10.5 of assignment agreement by whom the conveyance deed will be executed in favour of the allottees. Moreover, it was even not clarified as to who amongst JIL or Suraksha Realtors Pvt. Ltd. or Lakshdeep Investment & Finance Ltd. Will handover title in lieu of the title conveyance deed and who will be confirming party while the execution of the sub-lease agreement along with the petitioner.

c. Who amongst JIL or Suraksha Realtors Pvt. Ltd. or Lakshdeep Investment & Finance Ltd. will bear the additional compensation of farmers as demanded by YEIDA paying the additional compensation to the farmers is also necessary.

89. He further submitted that Section 5(2) of the RERA Act nowhere

contemplates that even if there are serious shortcomings in the registration application of the Promoter then also, if thirty days are elapsed, and in the meantime if the deficiencies are not rectified, the project will be deemed to be allowed and registered. The issue of deemed registration is well settled and there is no dispute about it. But the instant case is not a case of deemed registration, because several conditions precedent pertaining to concept of deemed registration is not there.

90. Sri Tiwari, Senior Advocate further submitted that the provision of the deeming clause cannot be interpreted and given effect in a way which will defeat the very object and purpose of the Act. If the contention is allowed then the interest of the allottee would be compromised in getting the valid title in the land which is mandatory requirement under Section 11 & 17 of the Act.

PROMOTER

91. Learned Senior Counsel for the respondent submitted that the petitioner cannot independently file application under section 4 of the RERA Act without mentioning JIL/JAL as Promoter/Co-promoter, since JIL/JAL falls within the ambit of Section 2(zk)(1), hence, it is imperative to make JIL/JAL as a promoter. He submitted that a plain reading of Section 2(zk) of the RERA Act, which defines the word "promoter", clearly shows that JIL is a promoter, and necessarily has to sign an application before the same is considered by UPRERA. It is only after adding JIL as a Promoter the application of the petitioner will be in consonance of the Act.

92. To buttress his argument he submitted that by making land owner as a

promoter, the promoter can be forced to execute sub-lease deed in favour of the allottees to discharge the duties and functions of the promoter as per Section 11(4)(f) and perfect titles can be transferred to the allottees as per Section 17 of the RERA Act, so that the rights and interest of allottees can be protected, but if he does not sign as a promoter, it will be very difficult to safeguard the interest of the allottees.

TRANSFER OF TITLE

93. Sri Tiwari, learned Senior Counsel, further submitted that as per the provision of RERA Act, at the time of purchase of a plot/apartment/flat by the allottee, the transfer of title has to be ensured at the level of the promoter, as per the provisions of Section 17 of RERA Act, it is the promoter, who shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or building to the allottees and the common areas to the association of the allottees and the other title documents pertaining thereto within three months from the date of issue of occupancy certificate.

94. He submitted that it is thus clear that no person other than the legal owner of the property has a right to transfer the title in that property. Hence, if JIL is made a promoter to the project, then if required, action against them under Sections 34(f), 11(4)(f), 17 and 37 of the RERA Act can be initiated in case of non-compliance with the provisions of the Act.

95. He submitted that it is well settled principle of law that a person can

transfer only those rights which are vested with oneself. In the present matter, the petitioner cannot transfer this right to the allottees unless that title has been transferred by way of a sub-lease deed in favour of the petitioner. If sub-lease is not executed in favour of the petitioner then the transfer of title to the allottees is possible only when JIL/JAL become promoters because undisputedly, title of land as well as the map are in the name of JIL/JAL.

96. In this background the argued that therefore, the claims made by the petitioner that JIL has provided them with absolute, unfettered and unqualified rights to transfer the sub-lease deed and title in favour of the allottees under section 17 of the Real Estate (Regulation & Development) Act, 2016, are false and it is not acceptable.

ASSIGNMENT AGREEMENT & GENERAL POWER OF ATTORNEY

97. Learned Senior Counsel for respondent-UPRERA has further drawn attention of the Court towards definition of word "common area" given in Rule 2(d) of RERA Rules, which reads as follows:-

2(d) "Common area" means:-

(i) *the entire land for the real estate project, or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;*

(ii) *the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;*

(iii) *the common basements, terraces, parks, play ground, open parking areas and common storage spaces;*

(iv) the premises for the lodging of persons employed for the

management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;

(v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;

(vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;

(vii) all community and commercial facilities as provided in the real estate project;

Explanation:- community & commercial facilities shall include only those facilities which have been provided as common areas in the real estate project.

(viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;

He submitted that as per the Assignment Deed/Agreement the petitioner has not been given any specific right over the common area rather the petitioner has specifically been excluded from it.

98. He submitted that the Assignment Agreement dated 31.07.2017 relied by learned counsel for the petitioner are also against them. He submitted that in clause 24 of the Assignment Agreement whereby Power of Attorney was executed

in favour of the petitioner it has clearly been mentioned that, the petitioner has right to sell, dispose, assign, transfer, in a manner whatsoever, the newly constructed premises in the project to third parties/intended purchasers and for that purpose to sign and execute booking application form, booking confirmation cum allotment letter, agreement for sale, sale deed and all necessary assurances, writings, letters, agreements etc. as was set out in the assignment agreement dated 19.10.2007. He submitted that even this Assignment Agreement dated 31.07.2017 does not give right to the petitioner to transfer the title of land to the allottees.

99. Relying upon Clause 10.5 of the Assignment Agreement learned Senior Counsel submitted that after completion of building(s)/tower(s) in the project land, the developer/petitioner would get the occupancy/completion certificate. Thereafter, JIL/JAL is supposed to grant the allottees/customers the impartible and undivided sub-lease rights for the remaining period of lease.

100. Learned Senior Counsel while referring to Clause 10.5 of the Assignment Agreement submitted that it is specifically mentioned that the Developer shall be transferring/conveying the right, title in the superstructure of the said unit to the allottee/customer. Further, it says that the sub-lease in favour of allottees/customers shall be executed by JIL/JAL, subject to Developer obtaining requisite NOC(s) from the Bank/Financial Institution from whom the Developer has raised funds for executing Group Housing Project on the Development Land. Thus, it is clear from the provisions of the assignment agreement that transferring/conveying of the rights by the

developer is not independent of the rights of the JIL to execute the sub-lease deed in favour of the allottees as transferring of rights and execution of sub-lease deed have been given two different connotations and sub-lease deed is to be executed only with the JIL being the confirming party.

101. He submitted that a bare perusal of both clauses of the Assignment Agreement does not construe in any manner as conveying sub-lease/ownership rights in the Development Land to the Developer. Even as per Assignment Agreement, the petitioner has to approach JIL to execute sub-lease of impartible and undivided share/rights in the Development Land beneath the building thereon.

102. Refuting the submission of the petitioner that Clause 24 of the General Revocable Power of Attorney dated 31.07.2017 gives full right to transfer ownership and sell the constructed premise to third parties he submitted that Clause 24 of the General Revocable Power of Attorney has to be tested on the anvil of clause 2.7 and 10.5 of Assignment Agreement, as to whether clause 24 of the General Revocable Power of Attorney supersedes clause 2.7 and 10.5 of Assignment Agreement or not. It is noteworthy that both the Assignment Agreement and the General Revocable Power of Attorney were executed on 31.07.2017. Therefore, it to be seen as to who overrides whom in case of conflict between the two. Learned Senior Counsel vehemently submitted that the provisions of fully stamped and registered assignment agreement will supersede the general irrevocable power of attorney.

103. He next submitted that from a bare perusal of the abovementioned clauses

it becomes clear that only development and marketing rights have been transferred by JIL to the petitioner and all the other rights such as right to acquire title and execute sub-lease has been reserved by JIL itself. Therefore, the petitioner cannot be sole promoter in this development project as they are not legally entitled to execute the sub-lease in favour of the allottees.

104. He submitted that even in the Assignment Agreement, JIL/JAL has not assigned the petitioner the right to execute such agreement with the allottees for undivided share of the land for that project. If JIL/JAL are not made the co-promoters and for some reason they refuse to execute the transfer deed of the undivided share of land in favour of the allottees then it would be very difficult task for UPRERA to ensure that the interest of flat buyers is secured.

105. At this juncture, it is vehemently argued that any right or title, which was not conferred by the Assignment Agreement, now cannot be confirmed through a confirmation letter. Further, in reality the General Revocable Power of Attorney has not given any rights to the petitioner other than the rights mentioned by the Assignment Agreement.

LAUNCHING PROBLEMS

106. Sri Anil Tiwari, learned Senior Counsel submitted that the RERA Act was enacted in 2016 and was enforced with effect from 01.05.2016. Under Section 84 of the RERA Act power has been accorded to appropriate Government to make rules, and accordingly, Uttar Pradesh Real Estate Regulatory Authority Rules, 2016 were made which came into effect on 27.10.2016 and immediately thereafter,

U.P. Real Estate Regulatory Authority was constituted and its web portal was launched on 26.07.2017. Thereafter, all the Developers were asked to register their respective projects within three months from the date of commencement of the RERA Act. In the initial days, the registration was granted by UPRERA on the basis of self certification by the Promoters due to shortage of manpower. Since, all the on going projects were to be registered, the projects were registered on the basis of self certification by the Promoters. There was some technical glitch in the website of UPRERA during initial period, which was revamped in May, 2018 by putting minimum validation check to minimize the errors in the registration on the basis of self certification.

SIMILARLY SITUATE COMPANIES

107. Learned Senior Counsel further submitted that, immediately after launch of website of UPRERA, one Mahagun India Pvt. Ltd. applied on the basis of self certification and the registration for the project was accorded automatically. Another company, Kalpataru Urban Space L.L.P. also applied on the web portal and registration was automatically generated on 22.01.2018 without any proper scrutiny of the application. Another company, M/s GenX Estate L.L.P. also applied for its project Golf Street Hub on 10.05.2019 and same was also registered on 17.08.2019. Undoubtedly, those few identically placed companies got registered on the basis of self certification. In the interregnum period, they have launched the project and booked number of apartments with the prospective customers.

108. In this backdrop, he submitted that now in case their registration is tampered with, the interest of a number of flat buyers/allottees/customers would be put in jeopardy, and as such, in consonance with its main objective to safeguard the interest of flat buyers/allottees/customers, UPRERA cannot proceed to cancel their registration. Hence, request of the petitioner asking for negative parity cannot be entertained by UPRERA. To buttress his argument, he placed reliance on a judgment passed by Hon'ble Supreme Court in the matter of **Doiwala Sehkar Shram Samvida Samiti Ltd. vs. State of Uttaranchal and others**²⁸ has observed as under:-

“This Court in Union of India & Anr. vs. International Trading Company & Anr.²⁹ has held that two wrongs do not make one right. The appellant cannot claim that since something wrong has been done in another case, directions should be given for doing another wrong. It would not be setting a wrong right but could be perpetuating another wrong and in such matters, there is no discrimination involved. The concept of equal treatment on the logic of Art. 14 cannot be pressed into service in such cases. But the concept of equal treatment pre-supposes existence of similar legal foothold. It does not countenance repetition of a wrong action to bring wrongs at par. The affected parties have to establish strength of their case on some other basis and not by claiming negative quality. In view of the law laid down by this Court in the above matter, the submission of the appellant has no force. In case, some of the persons have been granted permits wrongly, the appellant cannot claim the benefit of the wrong done by the Government.”

109. He further placed reliance on another judgment passed by Hon'ble Supreme Court in **Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit, Indore vs. President, Indore Development**³⁰, has held as under :

“So far as the allotment to non-eligible societies is concerned even if it is accepted, though specifically denied by the Authority, to be true that does not confer any right on the appellants. Two wrongs do not make one right. A party cannot claim that since something wrong has been done in another case direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong. In such matters, there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the appellant cannot strengthen its case. It has to establish strength of its case on some other basis and not by claiming negative equality.”

110. He submitted that on perusal of the aforesaid judgments of Hon'ble Supreme Court, it is quite apparent that the Court has clearly laid down that, two wrongs will not make a right. A party cannot claim advantage for something wrong, which has been done in the past.

111. Learned Senior Counsel for the respondents further submitted that permission was granted to M/s Golf Lake

LLP for their Trecento Residents-A project, in this facts are different, as the applicant company had bought the property in auction and has become the owner. Hence, case of Golf Lake LLP is completely different from that of the petitioner, as the petitioner is not the owner of the development land and hence the petitioner cannot claim a parity with the registration granted to M/s Golf Lake LLP.

MISCELLANEOUS

112. He further submitted that in the assignment agreement it has been mentioned that the map of the project was approved in the name of JIL. This has to be read in the light of township policy prevalent in the Industrial Development Authority. Hence, the occupancy certificates will also be issued in the name of JIL. In future if, because of any reason the project is not completed, and the occupancy certificate is not issued, then no direction could be issued against JIL. Since, the project map has been approved in favour of JIL and the occupancy certificate has to be issued in favour of JIL/JAL, as such it becomes mandatory to incorporate/add JIL as a promoter.

113. Referring to Rule 10 of UPRERA Rules, 2018 he submitted that the promoter, on receipt of total price of the apartment/plot as per paragraph 1.2 under the agreement from the allottee, shall execute a conveyance deed and convey the title of the apartment/plot together with proportionate indivisible share in common area within three months from the date of issuance of the completion certificate and the certificate as the case may be, to the allottee. However, in this case the applicant/petitioner had no right to execute the conveyance deed, on the land on which

the project is made, for the indivisible share in the common area.

114. He further submitted that the impugned order passed by the Authority is a well considered order and all the possible facts have been taken into consideration while passing the order, hence, there is no reason for this Court to interfere in the matter and the instant writ petition is liable to be dismissed.

115. Learned Senior Counsel for respondent nos.2 and 3-UPRERA further submitted that the interest of the allottees/customers would be put in jeopardy if JIL/JAL do not come up as a promoter along with the petitioner. He further submitted that there is an apprehension that JIL/JAL after execution of the project might not sign or assign the undivided share in that building to the customers/Association of Apartment Owners/Association of allottees. He submitted that what if the road access, sewage system, water supply, electricity supply in the project, which is provided by JIL/JAL, is interrupted and if JIL/JAL is not a promoter before UPRERA and if the authority find JIL/JAL liable for the interruption and cannot proceed against them.

REJOINDER BY PETITIONER

116. In rejoinder, the Senior Counsel for the petitioner submitted that UPRERA is reading clause 10.5 in piecemeal,- under clause 10.5 of RERA Act, it has been expressly stated that JIL will execute power of attorneys in favour of the petitioner to transfer and convey the rights and title in the Project (units and land) Recital J and clause 30 of the GPA state the same, and same are being reproduced below for ready reference:-

“Recital J. The Developer shall construct a group housing/residential project on the Development Land, which will include the sale and transfer of the premises/apartments constructed thereon, to the prospective purchasers/buyers(“Project”). Upon construction of the entire Project, the Developer shall transfer the Development Land to the association of the apartment purchasers by executing a Deed of Conveyance/Sub-Lease.”

“Clause 30. To prepare and execute, for and on our behalf, the deed of conveyance/sub-lease and any other necessary deed or document or writing for the transfer of the Development Land in favour of the society/organization.”

117. From clauses 2.6 and 3.3 of the agreement it is evident that the right to sell includes the right to execute Agreements in favour of the allottees which necessarily carries the right to the land as well and clause 10.5 must be read harmoniously with other clauses.

118. Further, he submitted that the rights of the allottees under the RERA Act including Section 19 can be claimed against the petitioner as per the terms of the contract between the parties. Under Section 34(f) of the RERA Act, UPRERA is required to ensure compliance by the promoter of its obligations, which obligations have been undertaken by the petitioner.

119. He submitted that even Section 11(4) of the RERA Act lays down the obligation of the promoter. Section 4(a) specifically states that the promoter shall be responsible for all obligation, responsibilities and function till the

conveyance of the apartments, plots or the building, as the case may be, to the allottees and the common areas to the Association of allottees. Here, the petitioner is in a position to execute the conveyance deed of apartment and is in a position to hand over the common areas to the Association of allottees as per Clause 2.7, 10.5 of the Assignment Agreement and also as per the General Power of Attorney executed by JIL/JAL in favour of the petitioner. He further submitted that as per Section 11(4)(f) of RERA Act, the petitioner is in a position to execute a registered conveyance deed of the apartment/plot in favour of the allottees along with undivided proportionate share in the common area to the Association of the allottees.

120. He further submitted that UPRERA today is acting like a court, empowering itself with granting specific performance of a contract and on the basis of far-fetched future contingencies seeking to pass orders as opposed to limiting itself to the mandate of the RERA Act. As per the Act, JIL does not fall within the definition of a “promoter”. To buttress his argument, he has placed reliance on an order passed by Rajasthan RERA (vide notification No.F.1 (152) RJ/RERA/LAND/2020/1202 dated 30.06.2020) wherein they have notified that a landowner shall not be named or treated as a promoter and this Notification squarely applies to the present matter.

121. Learned Senior Counsel submitted, without prejudice, that UPRERA during its oral arguments has made various submissions for including JIL as a promoter which do not form a part of the Reply or Supplemental Reply or even the Rejection Orders and on this ground

alone the oral submissions of UPRERA should be rejected. It is settled law that the Court must limit its judgment to the pleadings[Mohd. Abdul Wahid vs. Nilopher and another³¹; Bachhaj Nahar vs. Nilima Mandal and another³²]

122. He further submitted that all the apprehensions raised by learned Senior Counsel appearing for respondent nos.2 and 3-UPRERA, that the interest of the allottees/customers would be in jeopardy if JIL/JAL do not come up as a promoter along with the petitioner, does not have any valid ground as the Assignment Agreement when read with Power of Attorney clearly indicates that JIL/JAL had allowed the Developer to develop the towers and after getting completion certificate it would execute sub-lease deed in favour of the customer and the same would be done by the Developer and by JIL/JAL and for this JIL/JAL had already given Power of Attorney to the Developer to execute the deed on their behalf.

123. He submitted that the other apprehension of learned counsel for respondent nos.2 and 3 that JIL/JAL after execution of the project might not sign or assign the undivided share in that building to the customers/Association of Apartment Owners/Association of allottees, is also misconceived as the petitioner in the Assignment Agreement as well as Power of Attorney has the right to transfer the undivided share of the land on behalf of JIL/JAL in favour of such allottees/Association of Apartment Owners/Association of allottees.

124. With regard to the apprehension raised by learned counsel for the respondents that what if the road access, sewage system, water supply,

electricity supply in the project, which is provided by JIL/JAL, is interrupted and if JIL/JAL is not a Promoter before UPRERA and if the authority find JIL/JAL liable for the breach and cannot proceed against them. He submitted that it is also without any basis as the Assignment Letter read with Power of Attorney makes it clear that this right of providing road access, sewage system, electricity supply, water supply and other such basis amenities has already been assigned to the petitioner by means of Assignment Agreement and Power of Attorney.

125. Learned Senior Counsel for the petitioner further submitted that Section 18 of RERA Act provides for return of amount and compensation. If the petitioner/promoter fails to complete or is unable to give possession of an apartment as per terms of the agreement for sale, he shall be liable to compensate the allottee to any loss caused to him due to defective title of the land, and the project is not being developed as provided under this Act, and for any reason if the Promoter fails to discharge any obligation imposed on him under the Act or the Rules/Regulations made therein, he shall be liable to pay such compensation to the allottees in the manner as provided under the Act. He submitted that with this provision the interest of the allottees are completely secured and it is open for the UPRERA to proceed against the petitioner in case he defaults or is unable to meet his obligations.

126. The learned Senior Counsel refuting the argument of counsel for UPRERA vehemently submitted that UPRERA by not granting/rejecting the application of the petitioner has acted in benefit of the allottees, as the petitioner completely falls in the ambit of Section

2(zk) of the RERA Act, which defines “Promoter”. In all aforesaid three identically situated companies, who were granted registration, the agreement executed by JIL/JAL were identical. The reason given for this by learned Senior Counsel appearing for respondent-Authority in its reply is that these permissions were automatically granted as the website set up was in initial stage and all the permissions were granted on the basis of self certification. The agreement of the respondent that they would not like to continue with this wrong practice as they have realized their mistake. It was also argued on behalf of the Authority that they are not recalling their registrations as significant third party right has been created and if the registration is recalled then the interest of the flat buyers/customers/allottees might be adversely affected. If that be so, then how can the application of the petitioner was rejected on 06.07.2023 and permission was not accorded to the petitioners in the second and third application and they were made to run from pillar to post, while at the same time on 09.10.2023, they granted registration to yet another company namely, M/s Golf Lake LLP., which had come with the project of Trecento Residents-A.

127. Learned counsel for the petitioner, in reply to the apprehensions raised by UPRERA that, if JIL/JAL decided not to sign, what will happen to the allottees, in response he further submitted that the respondents have not read properly the clauses of the Assignment Agreement as well as the General Power of Attorney executed between them, which specifically allows the petitioner to execute the deed in favour of the allottees, and Association of allottees on behalf of JIL and JAL. When

the petitioner takes the full responsibility to complete all the functions, responsibilities and obligations of the promoter there is no reason for UPRERA to force the petitioner to ask JIL/JAL to sign the said deed and come up as a co-promoter. He further submitted that the object of UPRERA is only to ensure timely completion of the project and to watch the interest of the allottees and as per RERA Act, in case the builder fails to deliver the project or fails to complete his obligation, in that case UPRERA at best can impose refund of money along with the penalty.

ANALYSIS BY THE COURT

HISTORY OF THE ACT

128. Before proceeding with the matter, the Court would like to delve deep into the objects and statement of the RERA Act, followed by the provisions of the Act and the Rules framed thereunder.

129. The erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs) in consonance with the Ministry of Law & Justice, Government of India enacted the Real Estate (Regulation and Development Bill). After approval of the Union Cabinet on 4.6.2013, said Bill was introduced in Rajya Sabha on 14.8.2013. Thereafter on 23.9.2013 this Bill was referred to the Standing Committee of Urban Development for examination. The Standing Committee sought public opinion and analysed the memoranda/suggestions received from various stake holders/experts, developer associations such as Confederation of Indian Industry (CII), Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Real Estate Developers'

Association of India (CREDAI), National Real Estate Development Council (NAREDCO) and other associations working in the field of real estate, on various provisions of the Bill. The Standing Committee also had the briefing of the representatives of the erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs), Ministry of Finance, Reserve Bank of India, National Housing Bank, Ministry of Consumer Affairs, Ministry of Law and Justice (Department of Legal Affairs and Legislative Department), State Bank of India and other banks. The Committee also heard views of NGOs working in the field of real estate and sought clarifications on various issues and thereafter the RERA Act was enacted.

130. Initially, the real estate sector was largely unregulated and the professional and standardization was completely absent and lacking. To bring in the standardization and professionalism in the real estate sector, so there was a need to set up a Real Estate Regulatory Authority to ensure that development was carried out in an efficient and transparent manner and also to protect the interest of consumers in real estate sector and to establish an Appellate Authority to hear the appeals from the decisions of UPRERA. To achieve this object, a bill was introduced known as The Real Estate(Regulation and Development) Bill, 2013 to ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction cost. The statement of objects and reasons of RERA Act reads as under:-

“The Real Estate (Regulation and Development) Bill, 2013, inter alia, provides for the following, namely:-

“(a) to impose an obligation upon the promoter not to book, sell or offer for sale, or invite persons to purchase any plot, apartment or building, as the case may be, in any real estate project without registering the real estate project with the Authority;

(b) to make the registration of real estate project compulsory in case where the area of land proposed to be developed exceed one thousand square meters or number of apartments proposed to be developed exceed twelve;

(c) to impose an obligation upon the real estate agent not to facilitate sale or purchase of any plot, apartment or building, as the case may be, without registering himself with the Authority;

(d) to impose liability upon the promoter to pay such compensation to the allottees, in the manner as provided under the proposed legislation, in case if he fails to discharge any obligations imposed on him under the proposed legislation;

(e) to establish an Authority to be known as the Real Estate Regulatory Authority by the appropriate Government, to exercise the powers conferred on it and to perform the functions assigned to it under the proposed legislation;

(f) the functions of the Authority shall, inter alia, include-(i) to render advice to the appropriate Government in matters relating to the development of real estate sector; (ii) to publish and maintain a website of records of all real estate projects for which registration has been given, with such details as may be prescribed; (iii) to ensure compliance of the obligations cast upon the promoters, the allottees and the

real estate agents under the proposed legislation;

(g) to establish an Advisory Council by the Central Government to advice and recommend the Central Government on-(i) matters concerning the implementation of the proposed legislation; (ii) major questions of policy; (iii) protection of consumer interest; (iv) growth and development of the real estate sector;

(h) to establish the Real Estate Appellate Tribunal by the appropriate Government to hear appeals from the direction, decision or order of the Authority or the adjudicating officer;

(i) to appoint an adjudicating officer by the Authority for adjudging compensation under sections 12, 14 and 16 of the proposed legislation,

(1) to make provision for punishment and penalties for contravention of the provisions of the proposed legislation and for non-compliance of orders of Authority or Appellate Tribunal;

(k) to empower the appropriate Government to supersede the Authority on certain circumstances specified in the proposed legislation;

(1) to empower the appropriate Government to issue directions to the Authority and obtain reports and returns from it.”

131. In the bill, there was an attempt to balance the interests of consumers as well as promoters and also to impose certain responsibilities on both of them. In this bill, it was imperative that the promoter cannot sell or offer to sale, or

invite people to purchase any plot, building without proper registration with UPRERA. It was also to impose liability upon the promoter to pay such compensation to the allottees in the manner as provided under the proposed legislation, in case, he fails to discharge his obligation imposed on him under the proposed legislation. The other object was to establish an Authority, Advisory Council and Appellate Tribunal. This bill later on after getting the assent of the President became the Real Estate (Regulation and Development) Act, 2016.

132. The object and scheme of the Real Estate (Regulation and Development) Act, 2016 was to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

133. It is evidently clear that UPRERA has only to assure that the land on which the development was to be carried out has clear title, and is free from all encumbrances while registering a project, and whatever the promoter does, has to be transparently shown on the website of the Authority. The Authority has to ensure timely development of the project and in case the same is not done, the promoter can be penalised for the same.

134. RERA Act was introduced with sole intention of improving the eco-

system to ensure consumer protection, transparency and fair and ethical business practices in matters of sale and purchase of properties in the real estate sector. RERA provides for institution of a uniform regulatory environment, aimed at protecting the interests of all stakeholders. Infact, adjudicatory mechanism for speedy adjudication of justice was to be set up .

135. The relevant Section of the Act and Rules of RERA Act, which are important for adjudication of this case, are being reproduced below for ready reference :

‘2(zk) “promoter” means,—

(i) *a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or*

(ii) *a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or*

(iii) *any development authority or any other public body in respect of allottees of—*

(a) *buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or*

(b) *plots owned by such authority or body or placed at their disposal by the*

Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;

x x x x

Section 3. Prior registration of real estate project with Real Estate Regulatory Authority.—(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without

registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

X X X X

Section 4: Application for registration of real estate projects.

4. (1) Every promoter shall make an application to the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed.

(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely:—

(a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;

(b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any

delay in its completion, details of cases pending, details of type of land and payments pending;ll or some of the apartments to other persons and includes his assignees

(c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;

(d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;

(e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;

(f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;

(g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;

(h) the number, type and the carpet area of apartments for sale in the

project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas appurtenant with the apartment, if any;

(i) the number and area of garage for sale in the project;

(j) the names and addresses of his real estate agents, if any, for the proposed project;

(k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;

(l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:—

(A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;

(B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;

(D) that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the

cost of construction and the land cost and shall be used only for that purpose:

Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project:

Provided further that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project:

Provided also that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for that project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

Explanation.— For the purpose of this clause, the term “scheduled bank” means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934;

(E) that he shall take all the pending approvals on time, from the competent authorities;

(F) that he has furnished such other documents as may be prescribed by the rules or regulations made under this Act; and

(m) such other information and documents as may be prescribed.

x x x x

Section 5. Grant of registration.-

(1) On receipt of the application under sub-section (1) of section 4, the Authority shall within a period of thirty days.

(a) grant registration subject to the provisions of this Act and the rules and regulations made thereunder, and provide a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or

(b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.

(3) The registration granted under this section shall be valid for a period declared by the promoter under sub-clause (C) of clause (l) of sub-section (2) of

section 4 for completion of the project or phase thereof, as the case may be.

x x x x

Section 6.-Extension of registration.-The registration granted under section 5 may be extended by the Authority on an application made by the promoter, due to force majeure, in such form and on payment of such fee as may be prescribed:

Provided that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year:

Provided further that no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

Explanation.-- For the purpose of this section, the expression force majeure shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

x x x x

Section 7. Revocation of registration.

(1) The Authority may, on receipt of a complaint or suo motu in this behalf or on the recommendation of the competent

authority, revoke the registration granted under section 5, after being satisfied that—

(a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made thereunder;

(b) the promoter violates any of the terms or conditions of the approval given by the competent authority;

(c) the promoter is involved in any kind of unfair practice or irregularities.

Explanation. — For the purposes of this clause, the term “unfair practice means” a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

(A) the practice of making any statement, whether in writing or by visible representation which,—

(i) falsely represents that the services are of a particular standard or grade;

(ii) represents that the promoter has approval or affiliation which such promoter does not have;

(iii) makes a false or misleading representation concerning the services;

(B) the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;

(d) the promoter indulges in any fraudulent practices.

(2) The registration granted to the promoter under section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.

(3) The Authority may, instead of revoking the registration under sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.

(4) The Authority, upon the revocation of the registration,—

(a) shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;

(b) shall facilitate the remaining development works to be carried out in accordance with the provisions of section 8;

(c) shall direct the bank holding the project bank account, specified under sub-clause (D) of clause (l) of sub-section (2) of section 4, to freeze the account, and thereafter take such further necessary

actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;

(d) may, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

x x x x

17. Transfer of title. -(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title ll or some of the apartments to other persons and includes his assignees in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary

documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the [completion] certificate.

18. Return of amount and compensation.-.....

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

.....

34. The functions of the Authority shall include—

.....

(f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;

(emphasis supplied)

136. Section 4 of RERA Act deals with application for registration of real estate projects. As per Section 4, every promoter shall make an application for registration of the real estate project and for that promoter has to enclose the mandatory documents. Section 11(4) of the RERA Act lays down the obligation of the promoter. Section 11(4)(a) specifically states that the promoter shall be responsible for all

obligation, responsibilities and function till the conveyance of the apartments, plots or the building, as the case may be, to the allottees or the common areas to the Association of allottees. Section 18 of RERA Act provides for return of amount and compensation. If the petitioner/promoter fails to complete or is unable to give possession of an apartment as per terms of the agreement for sale or transfer the common area to the Association of Allottees and to provide the other basic facilities like road, electricity, sewerage etc. he shall be liable to compensate the allottee to any loss caused to him as if there is a defect in the title or the project is not being developed as provided under this Act. If for any reason if the Promoter fails to discharge any obligation imposed on him under the Act or the Rules/Regulations made therein, he shall be liable to pay such compensation to the allottees in the manner as provided under the Act. The interest of the allottees is completely secured by the aforesaid provision and UPRERA is always at liberty to proceed against the petitioner, if he defaults or is unable to meet the obligations.

137. Further, the rights of the allottees under the RERA Act including Section 19 can be claimed against the Promoter as per the terms of the contract between the parties. Under Section 34(f) of the RERA Act, UPRERA is required to ensure compliance by the promoter of its obligations, which obligations have been undertaken by him. Section 32 deals with functions of authority for promotion of real estate sector. Under this section there are certain guidelines for the Authority for making recommendation to the appropriate Government or the competent authority, as the case may be, in order to facilitate

growth and promotion of a healthy, transparent, efficient and competitive real estate sector. Section 38 talks about powers of authority. By this Section, RERA has been empowered to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents. This Section further enunciates that the Authority shall be guided by the principles of natural justice and, subject to other provisions of the Act and rules made thereunder, the Authority shall have powers to regulate its own procedure.

138. Rule 3 of RERA Rules in Chapter II lays down the mandatory documents which has to be furnished by the promoter for registration of the project. Rule 3(d) states that only a copy of the title deed of the promoter of the land has to be supplied by the promoter if the land is owned by them. Rule 3(e) lays down that the details of encumbrances on the land on which the development is to be carried out has to be mentioned and Rule 3(f) postulates the possibility when the developer does not own the title of the land but he is only developing, in that case the promoter needs to submit the consent of the owner of the land along with the copy of proper agreement with the person who has the title.

139. As per Rule 3(4) of these Rules, 2016, a declaration has to be submitted under Clause 1 of sub-section 2 of Section 4 in the form B. Form B along with the Rules specifically in the first clause clarifies that the promoter who owns the land can develop the land or anybody else on behalf of the promoter can develop the land. Form A under Rule 3(2) (which is an application for registration of the project) also recognizes that if promoter is

not the owner of the land on which the development is to be carried out, the consent of the owner of the land along with the copy of the collaboration agreement or any other agreement entered between them and the copy of the title has to be furnished. As per clause 9 and 10 of Form A the project proponent has to give the boundary wall and the locations of the project and also a proforma of allotment letter, agreement for sale and conveyance deed proposed to be signed with the allottees. Rule 1 of U.P. Real Estate (Regulation and Development) (Agreement for sale/lease) Rules, 2018, sets out a proforma for agreement of sale. Even in that proforma the Statute recognizes that if the project proponent is not the owner of the land, all he has to mention is about the development agreement/any other agreement which should be registered in the office of Registrar.

140. Rule 3 of RERA Rules, lays down information and documents to be furnished by the promoter for registration of the Project. Rule 3(1)(f) states that where the promoter is not the owner of the land on which development is proposed, details of the consent of the owner of the land along with copy of the collaboration agreement, development agreement, joint development agreement or any other agreement restricting the title of the land has to be submitted. As per Rule 14(1)(e)(vi)(E), where the promoter is not the owner of the land on which development is proposed, he has to submit copy of the collaboration or any other agreement has to be placed. These rules further goes to show that two kinds of promoters have been recognized, first is one who constructs and the other, who causes to construct. The RERA Act as well as Rules, 2016 itself recognize a party who

is developing a project on somebody's land as a promoter(s).

141. A plain reading of Section 2(zk)(i) shows that a promoter is a person "who constructs or causes to be constructed an independent building consisting of apartments for the purpose of selling". Further, Section 2(zk)(v) also defines the promoter as any other person who acts as a builder, developer holding the power of attorney from the owner of the land on which the apartment is to be constructed. A plain reading of this section shows that the promoter is defined as a person who has been assigned development rights in respect of a project for the purpose of constructing and selling the apartments. The Parliament in its wisdom has used the word 'or' and not 'and' and hence the promoter need not be the owner of the land, but can be a person who is developing the land even on the basis of power of attorney. When the definition is not ambiguous, it has to be read as it is, and the scope of promoter cannot be expanded.

142. On the touchstone of above provisions we find that in the present case, the promoter is not the owner of the land, so he will fall under the category of Rule 3 (f). All these documents sought under the Rules have been furnished and inspite of completing all the formalities as laid down under Rule 3 of Rules 2016 yet the respondents have illegally held back the registration. There is no Section, Rules or Clause under the RERA Act or Rules, which makes it mandatory for the owner to be a Promoter.

143. It is apparent that a promoter is the one who is responsible for constructing the project or causes to be constructed and is responsible for selling

the project. In this case, on a plain reading of the definition the petitioner falls within the category of the promoter as he is constructing and selling the project and also have the necessary agreements from the owner of the land.

DOES JIL NEEDS TO BE CO-PROMOTER

144. As per Section 2(zk) of the RERA Act, the word 'promoter' has been defined, which is comprehensive and not inclusive definition, which shows that the person who has been assigned development rights in a project for the purpose of selling apartments would qualify as being a "promoter". RERA does not require owner of the land to be a promoter, infact the other consequences in the rule makes it clear that the promoter could be the owner OR the person who is developing the project on his land. The definition of 'promoter' is not ambiguous, hence, no other meaning could be assigned to the expression than what is stated in Section 2(zk) of the RERA Act. The attempt of the respondent/RERA to expand the definition of word 'promoter' to include the landowner would not be correct.

145. While drafting the Act, the legislature intended for two parties to be made co-promoters and they have expressly said so in the "Explanation" to Section 2(zk) wherein it has been provided that "For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified", under this Act or the rules and

regulations made thereunder. The words “cause it to be constructed” in Section 2(zk) have to be read in context of the entire subsection and further apply only to a promoter who is responsible for construction.

146. Earlier, the Hon’ble Supreme Court in the matters of **P. Kasilingam vs. P.S.G. College of Technology**³³ and **Punjab Land Development and Reclamation Corporation Ltd. Chandigarh vs. Presiding Officer, Labour Court, Chandigarh**³⁴ has held that when a definition used the word “means”, it means that such definition is hard and fast definition and no other meaning can be assigned to the expression than what is put down in the definition.

147. Bombay High Court in the matter of **Vaidehi Akash Housing (P) Ltd. vs. New D.N. Nagar Co-op Housing Society Union Ltd.**³⁵ has clearly held that a society, who is owner of the property, who has entered into an agreement with the developer, there the society cannot be treated as a promoter and cannot be foisted with the responsibilities of the promoter in relation to the projects made by the promoter.

148. Similar view was taken by Bombay High Court in the matter of **Goregaon Pearl CHSL vs. Dr. Seema Mahadev Paryekar and others**³⁶ wherein it is settled that being owner of the land would not essentially make them the promoter and they would not suffer the consequence of being a promoter.

149. The forms annexed to U.P. Real Estate (Regulation and Development)(Agreement for Sale/Lease) Rules, 2018 provides standard form of agreement to sale/lease which clearly

contemplates a situation where the owner is not a promoter. This goes to show the builder who do not own the land can be a promoter alone. It further shows the intent of the Legislature that the promoter need not be the owner. The person who constructs and sells is the promoter even if he is carrying on the construction activities on someone else’s land, provided that a valid agreement has to be there between the owner of land and the developer. Therefore, in our considered opinion, JIL would not fall in the category of promoter for the project.

APPLICATION UNDER SECTION 4 OF RERA ACT

150. Section 4 of the RERA Act lays down how a promoter has to make an application for registration of his project under RERA Act. As per Section 4(1) every promoter has to make an application to the Authority for registration of the UPRERA project in the form and manner provided accompanied by the fees. Section 4(2) of the Act lays down that while making an application the promoter shall enclose the documents set out in the Section.

151. In this case, the petitioner has made an application as a developer wherein it was clearly stated by him that the land is owned by JIL. The fact is that said land is actually owned by YEIDA and leased out to JAL/JIL, who has given a permission by way of Assignment Deed to develop the project land on which the petitioner is supposed to construct/sell the apartments to the allottees. The petitioner apparently comes within definition of ‘promoter’ wherein he does not own the land but he is developing the land. The application filed by the petitioner on 02.06.2023 completes

all the formalities and has been accompanied by all the documents as contemplated under Section 4(2) of RERA Act. However, an objection was raised by UPRERA on 07.06.2023 that the petitioner may include JIL as a co-promoter. However, the first application of the petitioner was rejected on technical grounds on 06.07.2023 giving right to the petitioner to re-apply for registration of Towers 1 & 2 inter alia by providing (i) A copy of the Concession Agreement, (ii) A confirmation on which party will sign and execute the deed and which party will be the confirming party in the deed along-with the promoter to be executed in favour of the homebuyer, and (iii) A confirmation on which party will bear/pay the Farmer's additional compensation as demanded by YEIDA.

152. In response to the same, the petitioner made fresh application dated 21.07.2023 which was uploaded in UPRERA website on 31.07.2023. All the documents sought under Section 4(2) of RERA Act were annexed along with the application. In the second application, UPRERA for the first time took an objection on 22.08.2023 for Towers 1 & 2 and pointed out two defects wherein they stated that, the project land and approved map are not under the ownership of the petitioner and further asked to add the landowner JIL as the promoter. The second objection raised by them was asking the petitioner to provide a letter from M/s Suraksha Realtors Pvt. Ltd. and M/s Lakshadeep Investment and Finance Pvt. Ltd showing that the proposed land was not under the resolution plan which was accepted by the NCLT. The promoter immediately provided a letter, which was provided earlier as well from M/s Suraksha Realtors Pvt. Ltd. And M/s Lakshadeep

Investment and Finance Pvt. Ltd, which goes to show that the proposed land was not under the resolution plan accepted by NCLT. As far as first objection was concerned, this Court is of the view that to add the landowner as promoter was contrary to the provisions of Section 2(zk) of RERA Act. Evidently, Section 2(zk) of the Act, which contains the definition of 'promoter', specifically lays down that the promoter can be a person who owns the land and wants to construct on it, or a promoter can just be a developer who is developing the apartments on the land owned by somebody else.

153. In the supplementary reply filed by UPRERA, the annexures confirm that all the details and documents as required to be filed by the petitioner have been received and they have marked 'no objection' to the same. This was reflected from the print out of the website of UPRERA, which was filed along with the supplementary reply. A plain perusal of the document uploaded shows that all the documents as required by UPRERA to be submitted, have been duly uploaded by the petitioner. Since Section 4(2) lays down a format and all the documents have to be uploaded in the particular format and it has been done so, since it is an online portal, no further document can be uploaded. The objections raised by UPRERA to include JIL as co-promoter was not a mandatory requirement as per the Act.

154. In view of the foregoing paragraph it is clear that the application filed by the petitioner was complete in all respect and the objections raised were the same which were raised earlier. Since the application was in proper format and accompanied by all the documents as laid down in Section 4(2), we find that there is

no illegality in the application and UPRERA cannot do a hair-splitting exercise and ask for further documents which are not even been asked for in Section 4(2) of the RERA Act.

155. Thus, in view of clear provisions of the Act, this Court is of the firm view that it is not open for UPRERA to impose the condition on the petitioner to get JIL/JAL sign the application as a co-promoter. The application filed by the petitioner under the provisions of the Act and Rules of RERA was complete and there was no occasion for UPRERA to raise an objection, which is not contemplated under the Act and also to hold back the application for more than a period of thirty days.

DEEMED PROVISION

156. To examine the import of Deemed provision, it is imperative to refer Section 5 of RERA Act, which is again reproduced below:-

Section 5. Grant of registration.-

(1) On receipt of the application under sub-section (1) of section 4, the Authority shall within a period of thirty days.

(a) grant registration subject to the provisions of this Act and the rules and regulations made thereunder, and provide a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or

(b) reject the application for reasons to be recorded in writing, if such application does not conform to the

provisions of this Act or the rules or regulations made thereunder:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.

(3) The registration granted under this section shall be valid for a period declared by the promoter under sub-clause (C) of clause (l) of sub-section (2) of section 4 for completion of the project or phase thereof, as the case may be.

157. Section 5 lays down provision for grant of registration. Section 5(1) clearly lays down that on receipt of the application under sub-section(1) of Section 4, the Authority shall within a period of thirty days grant the registration or reject the application for the reasons to be recorded in writing. It also provides that no application shall be rejected without giving opportunity of hearing to the applicant. Section 5(2) lays down that if the Authority fails to grant the registration or reject the application, as the case may be, the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period

of thirty days provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.

158. In the instant case, the petitioner had initially made an application for Towers 1 & 2 on 02.06.2023 and for that an objection was raised on 07.06.2023 by the UPRERA and the same has been complied with. UPRERA was still not satisfied, hence, physical hearing took place on 23.06.2023. Thereafter, vide order 06.07.2023, UPRERA rejected the application of the petitioner with a liberty that the petitioner can move a fresh application within three months. In response to this letter/rejection order, the petitioner made a fresh application for Towers 1 & 2 on 31.07.2023. Along with the application, the three specific queries raised in rejection order dated 26.07.2023 were properly answered. Not only the Concession Agreement executed between YEIDA and JAL/JIL was provided but also further agreements between JAL and JIL, Assignment Agreement and General Power of Attorney and further contract letters from JIL/JAL between the petitioner and JIL/JAL were provided to the Authority. In response to second query the petitioner specifically stated that JIL has executed an Assessment Agreement as well as Power of Attorney in favour of the petitioner.

159. A plain reading of both these agreements shows that JIL has empowered the petitioner to execute sub-lease deed in favour of the allottees. Further, JIL has also issued confirmation letter to UPRERA to satisfy their queries. In response to the third query of payment of extra compensation to the farmers it was made clear that the

petitioner would pay the additional compensation to the farmers by way of demand draft to the tune of ₹6.49 crores. With the application dated 31.07.2023, all the three queries raised by UPRERA were properly answered. It is on 22.08.2024 that a fresh query has been raised by UPRERA that the project map is not under the ownership of the promoter. Secondly, they asked the Promoter to provide letters from Suraksha Realtors Pvt. Ltd. and Lakshdeep Investments and Finance Private Limited that the land do not come under the resolution plan. Reply to this objection was given on 29.08.2023 wherein all the queries raised by the respondents were completely answered. In the meanwhile, on 23.08.2023, the petitioner made second application for Towers 3 & 4. Since all the queries were answered, but still RERA did not allow the application for registration though it was complete in all respects.

160. Hon'ble Supreme Court in **Bhavnagar University's case (supra)** has rightly held that when a public functionary is required to do a certain thing within a specified time period, the same is ordinarily directory but when the consequence for inaction on the part of the statutory authorities within such specified time is specifically provided, it becomes imperative.

161. Hon'ble Supreme Court in **Sharif-Ud-Din's case (supra)** has specifically held that, whenever a Statute prescribes that a particular act has to be dealt with in a particular manner and also lays down for failure to comply with the said requirement, would lead to specific consequence, it would be difficult to hold that the requirement is not mandatory and specific consequence should not follow.

162. Hon'ble Supreme Court in the matter of **Kehar Singh v. State (Delhi Admn.)**³⁷ has held as follows:-

"231. During the last several years, the 'golden rule' has been given a go-by. We now look for the 'intention' of the legislature or the 'purpose' of the statute. First, we examine the words of the statute. If the words are precise and cover the situation on hand, we do not go further. We expound those words in the natural and ordinary sense of the words. But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine the act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation...."

163. Similar view has been taken by Hon'ble Supreme Court in the matter of **District Mining Officer vs. Tata Iron & Steel Co.**³⁸ wherein it has been held as under :-

"A statute has to be construed according to the intent of them that make it and the duty of the court is to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation, the court has to choose that interpretation which represents the true intention of the legislature. The function of the courts is only to expound and not to legislate. The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used

in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. It is also a cardinal principle of construction that external aids are brought in by widening the concept of context as including not only other enacting provisions of the same statute, but is preamble, the existing state of law, other statutes in pari materia and the mischief which the statute was intended to remedy."

164. Argument of the learned counsel for the respondents, that the application of the petitioner was not complete and had deficiencies/shortcomings, hence, the same was kept pending by UPRERA, giving opportunity to the petitioner to complete the deficiencies, but since the petitioner did not cure the defects, hence, he cannot get benefit of Section 5(2), cannot be accepted as it is the **mandatory duty** of UPRERA to act in accordance to the provisions of the Act, and the UPRERA cannot hide from its statutory obligations on the ground that the application was incomplete and was pending. As per Section 5(2) of the Act, UPRERA had only two options to be exercised within thirty days,- (a) to grant registration (b) reject the application. As per the Act, it was mandatory for UPRERA to exercise one of these options within stipulated time of thirty days. However, in this case, UPRERA did not exercise the above options. Section 5(2) of the RERA Act clearly lays down that in case registration is not granted or rejected within a period of thirty days, the project shall be deemed to have been registered within seven days after the expiry of thirty days and thereafter UPRERA had to provide registration number, login Id and password to the applicant/petitioner for accessing the

website of the Authority and to create his web page. This provision of Section 5(2) has been embedded in the Act with sole purpose to strangle the ill practices going on in certain authorities. It is mandatory for UPRERA to have taken call of either granting or rejecting the registration within stipulated time and since the same was not done, Section 5(2) of the Act comes into play. If UPRERA had serious objections on the application of the petitioner, and if they thought it necessary to include JIL as promoter, and if the same was not done within stipulated time, they ought to have rejected the application. UPRERA cannot keep any application pending beyond the statutory period of thirty days.

165. When the words of a section in the Act is unambiguous, it is presumed that the legislature has deliberately and consciously used the words for achieving the purpose of the Act. Such a situation had been considered in legal maxim “A Verbis Legis Non Est Recedendum” which means “From the words of law there must be no departure”. The Court has to decide on the footing that the legislature intended what has been said in the Act. A statute is required to be interpreted without doing any violence to the language used therein. This ratio has been followed by Hon’ble Supreme Court in the matter of **Hardeep Singh vs. State of Punjab and others**³⁹.

166. Similar view has been taken by Hon’ble Supreme Court in the matter of **M/s Newtech Promoters and Developers vs. State of U.P.**⁴⁰ wherein the court has held as under :-

“It is well established principle of interpretation of law that the court should read the section in literal sense and cannot

rewrite it to suit its convenience, nor does any canon of construction permits the court to read the section in such a manner as to render it to some extent otiose.”

167. The Legislature while framing the Act could have well anticipated of such a situation, and to cure all the ills, which comes from keeping the application pending, this clause of ‘deemed approval’ was brought into the Act.

168. Since, the application of the petitioner was kept pending much beyond the period of thirty days, hence, as per Section 5(2) of the RERA Act, the project of the petitioner is deemed to have been registered and UPRERA is bound to provide the petitioner registration number, login Id and password to the applicant/petitioner for accessing the website of the Authority and to create his web page.

169. The Legislature in its wisdom has enacted Section 5 of the Act which states that any application moved under Section 4 has to be allowed or rejected within a period of thirty days, failing which the application will be deemed to have been approved. Definitely, this provision has been introduced by the Legislature to address the mischiefs which could possibly happen. This Section 5(2) was an answer to the prospective ills in the system whether to grant registration, the officers of the authorities could harass the promoter or extract a pound of flesh.

ASSIGNMENT AGREEMENT AND GENERAL POWER OF ATTORNEY

170. It is an admitted fact between the parties that Assignment Agreement

dated 31.07.2017 was executed between JIL/JAL and the petitioner. In its Clause 1c, “Common Areas & Facilities” and in Clause 1f, “Shared Areas and Facilities” had been defined. Clause 4 mentions Assignment of Development Rights. Clause 2.4 (vi) allows the petitioner to execute sub-lease of impartible and undivided share/rights in the Development Land, as per Clause 10.5. Clause 2.6 gave the petitioner all rights to deal with the development rights including but not limited to right to sell, enter into any arrangement with any third parties, to allot and enter into arrangement for sub-lease, renting, license of units in the project land. Clause 2.7 makes it clear that by this Assignment Agreement, JIL/JAL is not executing any sub-lease or the ownership rights. However, the Developer has the right to cause JIL and execute sub-lease of impartible and undivided share in the development land.

171. As per Clause 8.1, JIL/JAL is obliged to make necessary arrangement of electricity supply, water supply, sewage system and drainage system as a part of Shared Areas and Facilities similar to those made available to other sub-projects/plots in Jaypee Greens, Wish Town, Noida. Clause 8.2 also gave right to way to the roads adjoining the development land and was entitled to enter upon such roads for the purpose of accessing the project land. As per Clause 10.5 of the Assignment Agreement after completion of the project, the Developer would get occupancy/completion certificate thereof, JIL/JAL along with the Developer shall execute conveyance deed in the form of sub-lease of land sale of super structure in favour of the allottees/customers of the Developer. JIL/JAL would further provide impartible and undivided sub-lease rights to

the customers/owners of the flats. It was further clarified that the flat owners would have proportionate share in the undivided land on which the building and the towers were constructed and for this JIL/JAL executed a power of attorney in favour of the Developer to transfer the conveyance right and title to the Association/body or Association of allottees/customers.

172 . A plain reading of the Assignment Agreement read with general Power of Attorney answers all the apprehensions raised by the respondents. The petitioner by means of the agreement has right to built and sell the apartments made on the contracted area, and also has right to transfer undivided portion of the land on which the project has been made in favour of the Association of Allottees, and also has a right to provide water/sewerage/road/electricity etc. to the project on behalf of JIL/JAL.

REGISTRATION GRANTED TO SIMILARLY SITUATED DEVELOPERS

173. It has been brought to the notice of the Court that few companies, who had identical Assignment Agreement from JIL/JAL and General Power of Attorney has made application with UPRERA and their projects were granted registration. The companies are as follows:-

- (i) Mahagum Manorialle
(Registration granted on 22.07.2017)
- (ii) Kalpatru Vista (Registration
granted on 22.01.2018)
- (iii) Genx Estate LLP Project
(Registration granted on 17.08.2018)

174. The case set up by the petitioner is that all these promoters had

identical agreement as that of the petitioner while the application of the petitioner has been rejected but their application for grant of registration has been accepted by UPRERA, Response given by UPRERA for them is that as per the Act, UPRERA has set up a website, on which on the basis of self certification, the aforesaid three projects were granted automatic registration without scrutinization of their documents. It was later on that UPRERA realized that number of promoters were defaulting, and thereafter, they started scrutinizing the documents and a Circular dated November 27, 2018 was issued by UPRERA wherein it was said that automatic registration would not be granted and the application would be scrutinized.

175. It has been argued on behalf of the petitioner that the registration certificate has been issued to M/s Golf Lake LLP in October, 2019 aforesaid company much after rejection of the application of the petitioner. This goes to show that UPRERA has adopted a pick and choose method wherein they have earlier granted permission to similarly situated companies whereas they have rejected the application of the petitioner. In response to aforesaid, UPRERA submitted that since Golf Lake LLP had purchased the land in an auction and had become the developer, hence, there was no need for them to make JIL/JAL as co-promoter.

176. It is evident that first the projects were granted registration on the basis of self certification it happened because of technical glitch and the teething problem. They got the automatic registration without their application being scrutinized, once RERA realized the mistake, they started scrutinizing the applications, hence, the ratio laid down in

the matter of Doiwala Sehkar Shram Samvida Samiti Ltd. (supra) will be applicable and the petitioner cannot claim the negative parity. Moreover, as far as the last registration granted to M/s Golf Lake LLP is concerned, they have bought the land in auction and has become the owner, hence, there were no need for them to get the owner to sign as a co-promoter. Case of M/s Golf Lake LLP is different from that of the petitioner's case.

177. The stand of the respondents in aforesaid respect is well accepted and the petitioner cannot ask for negative parity on the ground of similarly situated companies who had been granted registration whereas the petitioner has been refused for registration.

CONDUCT OF UPRERA

178. It is not in dispute that the petitioner has filed the second application on 31.07.2023 and when after expiry of stipulated time period of thirty days, neither the application was rejected nor the registration number, login Id and password were issued to the petitioner, which ought to have issued within a period of seven days after expiry of thirty days as per the deeming provision under Section 5 of the Act, the petitioner had no choice but to file the instant writ petition. The main ground in the writ petition was that under Section 5 of the RERA Act, the petitioner gets the deemed registration, and hence, all the formalities post registration has to be complied with. On the first date of hearing i.e. 17.05.2024, while passing an order the Court has observed as under:-

“5. It is informed that two simultaneous proceedings under Section 3/59 and Section 4 of the Real Estate

(Regulation and Development) Act, 2016 (RERA Act) are ongoing against the petitioner. So far as the proceeding under Section 3/59 of the RERA Act is concerned, the same entails imprisonment and penalty and in case it is finalized on the next date fixed, i.e. 23.05.2024, the petitioner would suffer irreparable loss and injury even though on the ground of medical exigency the matter is adjourned. Suffice to indicate, on the next date, the parties shall appear in response to the impugned notice but no final decision shall be taken till 29.05.2024.”

179. It is evident from the record/order sheets of this petition that once the matter was adjourned on the ground of illness of Sri Anil Tiwari, learned Senior Advocate appearing on behalf of UPRERA and this Court vide order dated 17.05.2024 specifically directed the Authority to not take any decision till 29.05.2024. On the next date of listing i.e. 29.05.2024, the matter was adjourned till 31.05.2024, and the interim order, granted earlier, was extended. Despite of such clear direction by this Court, the application preferred by the petitioner under Section 4 of the RERA Act was rejected by the Authority vide order dated 28.05.2024. Such conduct of UPRERA is nothing but an endeavour to just overreach the order of this Court and in our view, the same is not appreciable.

180. In addition to above, an affidavit was filed by respondents on 28.05.2024, which was sworn on 27.05.2024, wherein there was not even an iota of suggestion that the rejection has already taken place on 16.05.2024 in Authority's 147th Meeting. When the rejection order was already passed on 16.05.2024, it ought to have been brought

to the notice of the Court in the said affidavit. It was only on 29.06.2024 that it was communicated to the petitioner that the application stands rejected in a meeting, which was held on 16.05.2024. It has been argued that the entire exercise seems to be a back dated exercise, just to overreach the orders of this Court. In spite of a clear direction by this Court, the application of the petitioner was rejected which appears just to ensure that no adverse order is passed against the Authority, on the next date of hearing, which was barely two days away.

181. Further, it is settled that once a matter is subjudice and a question of law is pending consideration before a court of law, the Authority ought not to act with undue haste and interfere in the adjudication process of the Court and any attempt of the authority to decide the same matter, which is pending before the court, would be an overreach. **[Seimens Aktiengesellschaft and Seimens Limited vs. Delhi Metro Rail Corporation Ltd. and others⁴¹, Sarku Engineering Services and others vs. Union of India and others⁴²].**

182. Though it has been argued by learned counsel for the petitioner vehemently on the conduct of RERA, but we refrain ourselves to pass any observation on the conduct of RERA.

APPREHENSIONS OF UPRERA

183. All the apprehensions raised by learned Senior Counsel appearing for UPRERA, regarding putting the interest of allottees/customers in jeopardy, has been very well taken care of in Sections 18, 32, 38 and 40 of the Act itself.

184. An apprehension was raised by counsel for the respondents that in case JIL/JAL is not made a co-promoter, there could be a chance that the common area of the building as well as amenities like water supply, sewage system, electricity, road etc., which fall in the domain of JIL/JAL, could not be provided to the allottees. No authority or the court could move on apprehensions, specially when, the apprehension is far-fetched. The Act is absolutely clear that it does not interfere in the ownership rights of the owner and it is only there to take care of interest of the allottees, in case, the project is not completed or handed over in time to the allottee, the Authority has to ensure the refund of his money along with interest. Section 18 of the RERA Act is answer to the apprehensions raised by learned counsel for the respondents wherein return of amount and compensation has been laid down.

185. Hon'ble Supreme Court in the matter of **S. Rangarajan vs. P. Jagjivan Ram**⁴³ has observed that, "The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression."

CONCLUSION

A. The definition of the Promoter is clear that a person, who does not own the land but is constructing for selling would fall under the definition of "promoter" as per Section 2(zk) of the RERA Act. There is no provision under the Act which calls for the owner of the land to co-sign as a promoter. Hence, the objections raised by the UPRERA for not according the registration to the petitioner, on this ground, is baseless and incorrect.

B. Section 5 (2) of the Act is clear that UPRERA has only two choices either allow the application for registration of the project within 30 days, or reject the same, but for any reason if the same is kept pending beyond the prescribed period of 30 days it would amount to a "deemed registration". Hence, the application of the petitioner is deemed to have been registered after lapse of the mandatory period, since the same was not rejected, and it is mandatory on UPRERA to provide the registration number, Login ID and Password to the petitioner.

C. Once the project is deemed to have been approved under the deeming provision, it is beyond the jurisdiction of UPRERA to reject the application. The application could only be rejected as per Section 7 of the RERA Act.

D. The petitioner is not entitled for the negative parity with the other builders as their registration was granted on self certification and that too without scrutinizing, the act of UPRERA is justified on this account.

E. In view of the above discussions, the order and rejection of the petitioner's application taken in the meeting dated 16.05.2024 and communicated on 23.06.2024 are set aside.

F. As per Section 5 (2) of the RERA Act, the petitioner is entitled to the benefit of deemed approval, hence, the advertisement given by the third party would not be an offence under Section 3 of the RERA Act and no penalty under the RERA Act can be imposed on the petitioner.

186. The instant writ petition, accordingly, stands **allowed**.

(2024) 9 ILRA 806
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2024

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE DONADI RAMESH, J.

Writ - C No. 17736 of 2019
 With
 Writ - C No. 19326 of 2019

Vishnu Behari Tewari **...Petitioner**
Versus
The High Court of Judicature at Allahabad
& Ors. **...Respondents**

Counsel for the Petitioner:
 Vishnu Behari Tewari (In Person)

Counsel for the Respondents:
 Sri Amit Kumar Srivastava, Sri Hritudhwaj
 Pratap Sahi, In Person, Sri Sankalp Narain,
 Sri Sanjiv Singh, Sri Chandan Sharma, Sri
 Ashish Mishra, Sri G.K. Singh (Sr. Adv.)

Advocates Act, 1961 - Section 16 - Designation of Senior Advocate Rules, 2018, Rule 6(5), Rule 6(6) - Conferment of distinction of Senior Advocate - Rule 6 (5) of the Rules created a discretion with the Permanent Committee to waive personal interaction "if it so desires". Rules 6 (5) clearly allow for waiver of interview. Permanent Committee chose to waive the requirement of interview in terms of Rule 6 (5) of the statutory Rules. Evaluation of the valid applications remained to be made against 75 marks, in face of personal interview of 25 marks, waived. Permanent Committee took a decision to shortlist the suitable applicants from the list of 95 applicants, on the strength of marks obtained by them on their individual applications, which was legally permissible. Cut-off marks were permissible to be prescribed and those were prescribed under a resolution of the Permanent Committee, unanimously passed by all five members. The Permanent Committee did not lack that inherent jurisdiction. The criteria to shortlist all applicants based on qualifying marks

fixed by the Permanent Committee was rationale, fair, objective and a transparent criteria. Permanent Committee has power to evolve cut-off marks to shortlist the total number of applicants recommended for conferment of distinction as Senior Advocates. Rule 6(6) of the Rules only required the Permanent Committee to place before the Full Court its Assessment Report. That did not mandate or require the Permanent Committee to disclose or place before the Full Court, the exact marks awarded to individual applicants, in the process of short-listing adopted by it. Issue of lack of interview may have arisen only at the instance of those short-listed, but not the rest. Petitioners not being shortlisted on the basis of cut-off marks prescribed, they never earned a right to be interviewed by the Permanent Committee.(Para 76, 78, 82)

Dismissed. (E-5)

List of Cases cited:

1. Indira Jaising Vs Supreme Court of India & anr., (2017) 9 SCC 766 [Indira Jaising (Ist case)]
2. Ms. Indira Jaising Vs Supreme Court of India, AIR Online 2023 SCC 24 [Indira Jaising (IInd case)]

(Delivered by Hon'ble Saumitra Dayal
 Singh, J.
 &
 Hon'ble Donadi Ramesh, J.)

1. Heard Sri Vishnu Behari Tewari, in person and Sri Rohit Kumar, learned counsel for the petitioner *in Writ-C No.19326 of 2019* and Sri G.K. Singh, learned Senior Advocate assisted by Sri Ashish Mishra & Sri Chandan Sharma, learned counsel for the Allahabad High Court.

2. Matter has been received upon nomination made. Since one of us was

party to the Full Court Meeting held on 18.05.2019, that fact was clarified to the parties, on 08.04.2024. All parties consented that the matter may be heard by this bench. Accordingly, it has been proceeded.

3. On 25.09.2019, the present petition was filed for the following relief:

(i) *TO ISSUE a writ, order or direction in the nature of certiorari quashing the minutes of the meeting of Permanent Committee constituted under sub-rule (1) of Rule 3 of The Designation of Senior Advocate Rules, 2018 held on 10.05.2019 at 4.30 P.M. in the Committee Room at Allahabad High Court;*

(ii) *TO ISSUE writ, order or direction in the nature of mandamus declaring the words "if it is so desires may in the sub-rule (5) of Rule 6 of The Designation of Senior Advocate Rules, 2018 is contravention of the paragraph No.73.7 of the Apex Court judgment cited in (2017) 9 Supreme Court Cases: 766 "Indira Jaising vs. Supreme Court of India though Secretary General & others", as ultra vires being arbitrary, discriminatory, unjust, illegal and violative of Article 14, 15 & 21 of the Constitution of India,*

(iii) *TO ISSUE a writ, order or direction in the nature of mandamus restraining the Chief Justice of the High Court of Judicature at Allahabad not to designate the approved Advocates by Full Court Meeting held on 18.05.2019 as Senior Advocate under Section 16 of the Advocates Act, 1961;*

(iv) *TO ISSUE a writ, order or direction in the nature of mandamus restraining the Registrar General of the*

High Court of Judicature at Allahabad not to notify the designation of Advocate as Senior Advocate in compliance of sub-rule (2) of Rule 7 of the Designation of Senior Advocate Rules, 2018;

(v) *TO ISSUE any other writ order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case;*

(vi) *TO AWARD cost of the writ petition to the petitioner."*

4. Challenge raised in the present petition, amongst others, is to the proceedings, resolution and consequential action arising from the Full Court Meeting of this Court dated 18.05.2019. Since both writ petitions have been heard together, for the sake of convenience, we refer to the facts in **Writ - C No. 17736 of 2019**, as that petition has been argued first.

5. Section 16 of the Advocates Act, 1961 (hereinafter referred to as the Act) provides for designation of Senior Advocates. It reads as under:

"Section 16 of the Advocates Act states the following:

(1) There shall be two classes of advocates, namely, senior advocates and other advocates.

(2) An advocate may, with his consent, be designated as senior advocate if the Supreme Court or the High Court is of opinion that by virtue of his ability, [standing at the Bar or special knowledge or experience in law] he is deserving of such distinction.

(3) *Senior advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interests of the legal profession, prescribe.*

(4) *An advocate of the Supreme Court who was a senior advocate of that Court immediately before the appointed day shall, for the purposes of this section, be deemed to be a senior advocate:*

[Provided that where any such senior advocate makes an application before the 31st December 1965 to the Bar Council maintaining the roll in which his name has been entered that he does not desire to continue as a senior advocate, the Bar Council may grant the application and the roll shall be altered accordingly.]

6. Thus, other things apart, under the scheme of the Act, designation as a Senior Advocate comes by way of a 'distinction' conferred, either by the Supreme Court or a High Court. It arises on the subjective opinion of the Supreme Court or a High Court, that an Advocate is deserving of that 'distinction' by virtue of (i) his ability and (ii) standing at the Bar or special knowledge or experience in law.

7. To cut the controversy short, earlier issues arose before the Supreme Court primarily in the matter of designation being conferred that Court. Those were dealt in ***Indira Jaising Vs. Supreme Court of India & Anr., (2017) 9 SCC 766*** [hereinafter referred to as ***Indira Jaising (1st case)***]. Following relief was claimed in that petition:

(a) *Issue writ, order, or direction declaring that the system of designation of Senior Advocates*

by recently introduced method of vote is arbitrary and contrary to the notions of diversity violating Articles 14, 15 and 21 and therefore, it is unconstitutional and null and void; and

(b) *Issue writ, order or direction for appointment of a permanent Selection Committee with a Secretariat headed by a lay person, which includes Respondent 4 Attorney General of India, representatives from Respondent 5 SCBA and Respondent 6 AOR Association and academics, for the designation of Senior Advocates on the basis of an assessment made on a point system as suggested in Annexure P-8; and*

(c) *Issue a writ of mandamus or direction directing Respondent 1 representing the Chief Justice and the Judges of the Supreme Court to appoint a Search Committee to identify the Advocates who conduct public interest litigation (PIL) cases and Advocates who practice in the area of their domain expertise viz. constitutional law, international arbitration, inter-State water disputes, cyber laws, etc. and to designate them as Senior Advocates;*

(d) *Issue a writ of mandamus or direction directing Respondent 1 representing the Chief Justice and the Judges of the Supreme Court to frame guidelines requiring the preparation of an Assessment Report by the Peers Committee on the Advocates who apply for designation based on an index 100 points as suggested in Annexure P-8;*

(e) *Issue a writ of mandamus or direction directing Respondent 1 representing the Chief Justice and the Judges of the Supreme Court to reconsider*

its decision taken in the Full Court held on 11-2-2014 and 23-4-2015 and designate as Senior Advocate all those advocates whose applications seeking designation had received recommendation by not less than five Judges of the Supreme Court (including deferred applicants) during the process of circulation ordered by the Chief Justice."

8. Upon hearing, the Supreme Court noted the thrust of the submissions raised before it by the petitioner in that case, in the following terms:

"65. Ms. Indira Jaising, who has spearheaded the entire exercise before the Court, at no stage, pressed for declaration of Section 16 of the Act or the provisions of the Supreme Court Rules, 2013 as unconstitutional. Her endeavour, particularly in the rejoinder arguments, has been to make the exercise of designation more objective, fair and transparent so as to give full effect to consideration of merit and ability, standing at the bar and specialised knowledge or exposure in any field of law."

9. By way of its decision, the Supreme Court observed in paragraph no.73 to 75, as below:

"73. It is in the above backdrop that we proceed to venture into the exercise to lay down the following norms/guidelines which henceforth would govern exercise of designation of Senior Advocates by the Supreme Court and all the High Courts in the country. The norms/guidelines, in existence, shall be suitably modified so as to be in accord with the present.

73.1. All matters relating to designation of Senior Advocates in the

Supreme Court of India and in all the High Courts of the country shall be dealt with by a Permanent Committee to be known as "Committee for Designation of Senior Advocates";

73.2. The Permanent Committee will be headed by the Hon'ble the Chief Justice of India and consist of two senior most Judges of the Supreme Court of India or High Court(s), as may be; the learned Attorney General for India (Advocate General of the State in case of a High Court) will be a Member of the Permanent Committee. The above four Members of the Permanent Committee will nominate another Member of the Bar to be the fifth Member of the Permanent Committee;

73.3. The said Committee shall have a permanent Secretariat, the composition of which will be decided by the Chief Justice of India or the Chief Justices of the High Courts, as may be, in consultation with the other Members of the Permanent Committee;

73.4. All applications including written proposals by the Hon'ble Judges will be submitted to the Secretariat. On receipt of such applications or proposals from Hon'ble Judges, the Secretariat will compile the relevant data and information with regard to the reputation, conduct, integrity of the advocate(s) concerned including his/her participation in pro bono work: reported judgments in which the advocate(s) concerned had appeared; the number of such judgments for the last five years. The source(s) from which information/data will be sought and collected by the Secretariat will be as decided by the Permanent Committee;

73.5. The Secretariat will publish the proposal of designation of a particular advocate in the official website of the Court

concerned inviting the suggestions/views of other stakeholders in the proposed designation;

73.6. After the database in terms of the above is compiled and all such information as may be specifically directed by the Permanent Committee to be obtained in respect of any particular candidate is collected, the Secretariat shall put up the case before the Permanent Committee for scrutiny;

73.7. The Permanent Committee will examine each case in the light of the data provided by the Secretariat of the Permanent Committee; interview the advocate concerned; and make its overall assessment on the basis of a point based format indicated below :

Sl.No.	Matter	Points
1.	Number of years of practise of the applicant advocate from the date of enrolment. (10 points for 10-20 years of practise; 20 points for practise beyond 20 years 20 points	20 points
2.	Judgments (reported and unreported) which indicate 40 points the legal formulations advanced by the advocate concerned in the course of the proceedings of the case; pro bono work done by the advocate	40 points

	concerned, domain expertise of the applicant advocate in various branches: of law, such as Constitutional law, Inter-State Water Disputes, Criminal law, Arbitration law, Corporate law. Family law, Human Rights, Public Interest Litigation, International law, law relating to women, etc.	
3.	Publications by the applicant advocate	15 points
4.	Test of personality and suitability on the basis of interview/interaction	25 points

73.8. All the names that are listed before the Permanent Committee/cleared by the Permanent-Committee will go to the Full Court.

73.9. Voting by secret ballot will not normally be resorted to by the Full Court except when unavoidable. In the event of resort to secret ballot, decisions will be carried by a majority of the Judges who have chosen to exercise their preference/choice

73.10. All cases that have not been favourably considered by the Full Court may be reviewed/reconsidered after expiry of a period of two years following the manner indicated above as if the proposal is being considered afresh;

73.11. In the event a Senior Advocate is guilty of conduct which

according to the Full Court disentitles the Senior Advocate concerned to continue to be worthy of the designation, the Full Court may review its decision to designate the person concerned and recall the same.

74. We are not oblivious of the fact that the guidelines enumerated above may not be exhaustive of the matter and may require reconsideration by suitable additions/ deletions in the light of the experience to be gained over a period of time. This is a course of action that we leave open for consideration by this Court at such point of time that the same becomes necessary.

75. With the aforesaid observations and directions and the guidelines framed, we dispose of Writ Petition (Civil) No. 454 of 2015."

10. Thereafter, in exercise of power vested under Article 225 of the Constitution of India, the Allahabad High Court enforced the Allahabad High Court (Amendment) Rules, 2018 whereby it substituted the then existing The Designation of Senior Advocate Rules, 1999 with The Designation of Senior Advocate Rules, 2018 (hereinafter referred to as the Rules). For ready reference, Rule 1 to Rule 12 of the Rules, are quoted below:

"1. Short title, extent and commencement:

(1) These Rules shall be called "The Designation of Senior Advocate Rules, 2018,

(2) These Rules shall extend to the entire jurisdiction of the High Court of Judicature at Allahabad

(3) These Rules shall come into force from the date of their publication in the Official Gazette

2. Definitions: In these Rules, unless the context otherwise requires:

(a) "Advocate" means an Advocate whose name is entered on the rolls prepared and maintained under the provisions of the Allahabad High Court Rules, 1952,

(b) "Committee" means the "Permanent Committee for Designation of Senior Advocates as constituted under sub-rule (1) of Rule 3 of these Rules;

(c) "Court" means the same as defined in the Rules of the Court, 1952;

(d) "High Court" means the same as defined in section 2 (g) of the Advocate's Act 1961;

(e) "Roll" means the roll of Advocates prepared and maintained under the provisions of the Allahabad High Court Rules, 1952,

(f) "Secretariat" means the Permanent Secretariat established by the Chief Justice of the High Court under sub-rule (2) of Rule 3 of these Rules.

3. Permanent Committee for designation of Senior Advocates:-

(1) All designation of Bentar Advocates in the High Court shall be dealt with by the Permanent Committee, which will be headed by the Chief Justice and consist of the two senior-most judges of the High Court; (ii) the Advocate General of the State of Uttar Pradesh; and (iii) a designated senior Advocate of the Bar to be nominated by the members of the Committee.

(2) The Committee constituted under sub-rule (1) shall have a Secretariat, the composition of which will be decided by the Chief Justice of the High Court, in consultation with other members of the Committee.

(3) The Committee may issue such directions from time to time as deemed necessary regarding functioning of the Secretariat, including the manner in which, and the source/s from which, the necessary data and information with regard to designation of Senior Advocates are to be collected, compiled and presented.

4. Designation of an Advocate as Senior Advocate:

(1) The High Court may designate an Advocate as a Senior Advocate, if in its opinion, by virtue of his/her ability and standing at the Bar, the said Advocate is deserving of such distinction.

Explanation: The term "standing at the bar" means position of eminence attained by an Advocate at the Bar by virtue of his/her seniority, legal acumen, and high ethical standard maintained by him, both inside and outside the Court.

(2) An advocate who has put in at least ten years of actual practice as an advocate shall be eligible to be designated as Senior Advocate :

Provided that a retired Judge of any High Court, who is qualified to practice in the Allahabad High Court may also be recommended for being designated.

5. Motion for Designation as Senior Advocate: Designation of an Advocate as Senior Advocate by the High Court may be considered :

(a) on the written proposal made by the Chief Justice or any sitting Judge of the High Court of Judicature at Allahabad.

Provided that a sitting Judge will not make a proposal for more than two Advocates in a calendar year; or

(b) on the written application submitted by an Advocate, recommended by two designated Senior Advocates.

Provided further that such designated Senior Advocates will not recommend the names of more than two Advocates in a calendar year.

6. Procedure for Designation:-
(1) All the written proposals and applications for designation of an Advocate as a Senior Advocate shall be submitted to the Secretariat.

Provided that every application by an advocate shall be made in Form No. 1 of APPENDIX-A appended to these Rules.

Provided further that in case the proposal emanates from a Judge it need not

be submitted in the prescribed form. However once the proposal is received, the Secretariat shall request such advocate to submit Form No. 1 duly filled in within such time as directed by the Committee and in such a case the requirement of having recommendation of two Senior Advocates would stand dispensed with.

(2) On receipt of an application or proposal for designation of an Advocate as a Senior Advocate, the Secretariat shall compile the relevant data and the information with regard to the reputation, conduct, integrity of the advocate concerned including his participation in pro bono work, reported judgments of the last five years in which the concerned advocates has appeared and has actually argued.

(3) The Secretariat will notify the proposed names of the advocates to be designated as Senior Advocates on the official website of the High Court of Judicature at Allahabad, inviting suggestions and views within such time as may be fixed by the Committee.

(4) After the material in terms of the above is compiled and all such information, as may be specifically required by the Committee to be obtained in respect of any particular candidate, has been obtained and the suggestions and views have been received, the Secretariat shall put up the case before the Committee for scrutiny.

(5) Upon submission of the case by the Secretariat, the Committee shall examine the same in the light of the material provided and, if it so desires, may also interact with the concerned advocate(s) and thereafter make its overall assessment on the basis of the

point based format provided in APPENDIX-B to these Rules.

(6) After the overall assessment by the Committee, all the names listed before it will be submitted to the Full Court along with its Assessment Report.

(7) Normally voting by ballot shall not be resorted to unless unavoidable. The motion shall be carried out by consensus, failing which voting by ballot may be resorted to. In the event of voting by ballot, the views of the majority of the Judges present and voting shall constitute the decision of the Full Court. In case the Judges present be equally divided, the Chief Justice or in his absence the Senior Judge present shall have the casting vote.

(8) The cases that have not been favorably considered by the Full Court may be reviewed/reconsidered after the expiry of a period of two years, following the same procedure as prescribed above as if the proposal is being considered afresh.

7. Designation of Advocates as Senior Advocates by the Chief Justice:- (1) On the approval of the name of the Advocate by the Full Court, the Chief Justice shall designate such an advocate as a Senior Advocate under section 16 of the Advocate's Act, 1961.

(2) The Registrar General shall notify the designation to the Secretary General of the Supreme Court of India, the Bar Council of Uttar Pradesh, Bar Council of India and also to all the District and Sessions Judges subordinate to the High Court.

(3) A record of the proceedings of the Committee and the record received from the Full Court in this regard shall be

maintained by the Permanent Secretariat for further reference.

8. Restrictions on Designated Senior Advocates: A Senior Advocate shall be subject to such restrictions as the Supreme Court, High Court, the Bar Council of India or the Bar Council of the State may prescribe from time to time.

9. Canvassing: Canvassing in any manner by a nominee/applicant for designation as a Senior Advocate shall disqualify him/her from being so considered or designated for the next five years.

10. Interpretation:- All questions relating to the interpretation of these Rules shall be referred to the Chief Justice, whose decision thereon shall be final.

11. Review and Recall:- (1) If, after being designated as a Senior Advocate, it is reported by a Judge of the Court, that by virtue of his/her conduct or behavior either inside or outside the Court he/she has forfeited his/her privilege to the distinction conferred upon him/her by the Court, the matter may be placed by the Chief Justice before the Full Court for consideration of withdrawal of designation as Senior Advocate. If the Full Court is of the view that Senior Advocate by virtue of his/her conduct or behavior either inside or outside the Court has disentitled himself/herself to be worthy of the designation, the Full Court may review its decision to designate the concerned person and recall the same.

(2) The procedure for review and recall shall be the same as provided under sub-rule (7) of Rule 6. After the approval by the Full Court the Chief Justice shall

recall the designation of such Senior Advocate. The Registrar General shall notify the decision in the same manner as provided in sub-rule (2) of Rule 7 of these Rules.

12. Repeal and Saving:- All previous Rules, except Rule 11 of Chapter XXIV of Allahabad High Court Rules, 1952, on the subject matter covered by these Rules including the guidelines for designating an advocate as Senior Advocate are hereby repealed. However this repeal shall not, by itself, invalidate the actions taken under the repealed rules/guidelines."

11. Also, since much submissions have been advanced on the strength of marks awarded to the applicants seeking designation, we consider it appropriate to extract Appendix 'B' referred to in Rule 6(5) of the Rules. It reads as below:

APPENDIX-B

[See Rule 6 (5)]

POINT BASED FORMAT FOR ASSESSMENT OF AN ADVOCATE FOR BEING DESIGNATED AS SENIOR ADVOCATE

Sl. No.	Matter	Points
1.	Number of years of practise of the applicant advocate from the date of enrolment. (10 points for 10-20 years of practise; 20 points for practise beyond 20 years)	20 points
2.	Judgments (reported and unreported) which indicate 40 points the legal formulations	40 points

	<i>advanced by the advocate concerned in the course of the proceedings of the case; pro bono work done by the advocate concerned, domain expertise of the applicant advocate in various branches: of law, such as Constitutional law, Inter-State Water Disputes, Criminal law, Arbitration law, Corporate law. Family law, Human Rights, Public Interest Litigation, International law, law relating to women, etc.</i>	
3.	<i>Publications by the applicant advocate</i>	15 points
4.	<i>Test of personality and suitability on the basis of interview/interaction</i>	25 points

12. We note here itself, no format is prescribed or provided by the Rules for submission of the Assessment Report by the Permanent Committee to the Full Court in terms of Rule 6 (6) of the Rules.

13. Later, a notice was published by the High Court inviting applications to confer designation as Senior Advocate, by 31.07.2018.

14. It is a fact that the two petitioners before us along with 98 others sought conferment of distinction - of Senior Advocate, by the Allahabad High Court. Also, in its meeting dated 10.05.2019, the Permanent Committee resolved that it had received suggestions with respect to the

four applicants. The Permanent Committee also considered the fact that three out of hundred applicants had already been elevated to the bench of this Court. Therefore, their names had to be excluded.

15. The writ petition discloses - thereafter the Permanent Committee headed by Hon'ble the then Chief Justice, considered the impact of Indira Jaising (Ist case) and resolved as below:

“as per criteria laid down in the judgement and in our Rules as Appendix ‘B’, aforesaid, Advocates / applicants who earns 45 or more point out, of 75 points, shall only be considered to be eligible as such for their nomination for designation as Senior Advocate”.

Office is directed to prepare and list eligible Advocate / Applicant accordingly.

The Committee feels that interview / interaction with Advocates / Applicants to be dispensed with.”

16. Thereafter further resolutions (of date 10.05.2019), are shown to exist with which we may not be concerned. After that, there appear names along with signatures of five Members of the Permanent Committee. Thereafter, a dissenting note of one of the members / nominated Senior Advocate is found recorded. In effect, it clearly records as below:

“The Committee did not undertake the exercise of assessing the merits of the applicants for designation as Senior Advocates. The Apex Court has also interdicted the determination of Income limit of such applicants. The besides

awarding marks as laid down by the Apex Court, as per Para 73.8, the committee was also to Interview the applicants.”

17. Even according to the dissenting note though marks were awarded to the applicants, they ought to have been interviewed as well, in terms of the ratio laid down in **Indira Jaising (1st case)**.

18. Thereafter, further meeting of the Permanent Committee is disclosed on 13.05.2019. Agenda Item No.3 and resolution passed thereon is extracted as below:

Sl. No.	Agenda	Resolution
1.	-----	----
2.	-----	-----
3.	Consideration of directions given vide earlier resolution dated 10.5.2019 for preparing list of Advocates/Applications falling under zone of consideration	The office has placed the information as directed vide our earlier resolution dated 10.5.2019 in a tabular form. The names of the advocates/applicants who have submitted their forms to consider their names for designation of senior advocate are to be considered as per the criteria adopted by us is annexed herewith as

		Table 'A' The list of the advocates/applicants qualified for consideration as per Table 'A' are awarded points as per the criteria laid down in Appendix-B of the Designation of Senior Advocate Rules 2018 is annexed herewith as Table 'B' On the basis of table 'A' and Table 'B' the Advocates/Applicants who are found eligible to be under zone of consideration is annexed herewith as Table 'C' Details of the Advocates/Applicants not falling under zone of consideration for the reasons assigned before their names is annexed herewith as Table 'D'

19. This again is signed by all members of the Permanent Committee. At this stage, it was further indicated that one applicant withdrew his application, and another application was found defective. Thus, 95 applications survived. It is not in doubt that as per Table-C, 78 applicants were found eligible by the Permanent Committee. Further, as per Table-D, the remaining applicants including the petitioners before us were included in the list of the applicants not found eligible, by the Permanent Committee. To that extent, there is no factual dispute. Limited dispute exists with respect to permissibility of waiver of interview requirement; marks not awarded on the scale of maximum 100 marks; the Permanent Committee did not disclose to the Full Court the marks awarded to the individual applicants; the Permanent Committee erred in fixing cut off marks and; it further erred in not sending the remaining 17 names to the Full Court along with its Assessment Report.

20. In that background, at the Full Court meeting of the Allahabad High Court held on 18.05.2019, resolution was passed to confer distinction of designation as Senior Advocate, on 75 out of 78 names cleared by the Permanent Committee. The distinction sought by two the applicants was declined at that Full Court meeting whereas the matter pertaining to one applicant was deferred. It is a matter of common knowledge that that designation was conferred on him, later, by a separate Full Court Meeting resolution.

21. Before requisite Notification could be issued pursuant to the resolution of the Full Court meeting, on 18.5.2019 itself, the petitioner (Sri Vishnu Behari Tewari) served notice on the High Court to not give effect to the report of the

Permanent Committee. On 20.5.2019, at 10:00 A.M., notice of the present petition was served on the High Court. However, the impugned Notification No.162/VIII-C-168 also dated 20.5.2019 came to be published on that itself. Consequently, the petitioner moved an Amendment Application in the writ petition. It was allowed on 23.5.2019 and the following two prayers were added as prayer nos. i(a) and iv(a) to the Prayer clause of the writ petition.

“i(a). To issue a writ, order or direction in the nature of certiorari quashing the notification bearing notification No. 162/VIII-C-168/Permanent Secretariat dated: Allahabad, May, 20, 2019 (Annexure No. 10 to this writ petition).

iv(a). To issue a writ, order or direction in the nature of mandamus directing the respondents to place the list of Advocates mentioned in Table-D annexed with the Minutes dated 10.5.2019 before Full Court of Parliament Committee, to secure the ends of justice.”

22. The Stay Application filed was rejected on 23.5.2019 itself. It is also on record that the petitioner moved another application seeking to implead the 75 newly designated Senior Advocates as party respondents in these proceedings. Time was spent in serving notices. Upon exchange of pleadings, the matter has remained pending for long. In the meanwhile, 5 years have passed. Since then, besides one designation conferred, no other designation has yet been conferred by the Allahabad High Court.

23. Also, during pendency of this writ petition, the matter of designation of

Senior Advocates came to be further considered by the Supreme Court in **Ms. Indira Jaising Vs. Supreme Court of India**, AIR Online 2023 SCC 24 [hereinafter referred to as **the Indira Jaising (IInd case)**]. Those proceedings were decided on 12.5.2023. Perusal of the same reveals that the matter came to be reconsidered by the Supreme Court in terms of observations made in paragraph 74 of **Indira Jaising (Ist case)**. In paragraph 11 of **Indira Jaising (IInd case)**, it was observed as below:

“11. In paragraph 74 of the 2017 judgment, this Court noticed that the guidelines enumerated may not be exhaustive and may require reconsideration by suitable additions/deletions in the light of the experience to be gained over a period of time. Thus, the Bench left it open for consideration by this Court at such point of time that the same may become necessary. The debate before us in the present applications is in this conspectus.”

(emphasis supplied)

24. Considering the same, the Supreme Court made the following pertinent observations with respect to Voting by Secret Ballot, in paragraphs 17, 18, 19 and 20 of the report:

“17. In our view, the matter before us is in a limited compass. Our remit is to fine-tune the guidelines laid by this Court in the 2017 judgment. The constitution of a Permanent Committee, reliance on certain objective criteria for assessment, and final decision through voting are the central aspects of the 2017 judgment. Our remit does not extend to reviewing the same, but only to modifying

the criteria through our experience gained over a period of time.

18. We agree that the elaborate procedure carried out by the Permanent Committee would serve no purpose if the ultimate decision is taken by secret ballot. **It has been found that even the applicants who were beyond the cut-off were at times put through a secret ballot.** This has resulted in both the exclusion of people from the list prepared by the Permanent Committee and expansion of the list by further inclusion.

19. The aforesaid aspect has to be considered in the conspectus of the concept of ‘Senior Designation’. **This designation has always been held to be an honour conferred.** While it is alleged that voting by secret ballot may not always subserve the interests of transparency, in practice judges may be reluctant to put forth their views openly. This is especially the case where the comments of a judge can have a deleterious effect on the advocate’s practice.

20. Thus, we find merit in the contention that voting by secret ballot should not be the rule but clearly an exception. In case it has to be resorted to, the reasons for the same should be recorded.”

(emphasis supplied)

25. With respect to the Cut-off marks to be awarded to the applicants by the Permanent Committee, the following pertinent observations came to be made paragraph 21 of the report:

“21. A grievance was raised that while the cut-off marks may have already

been decided, the same are neither published in advance nor communicated to those applying for senior designation, thereby leading to speculation at the Bar. It was thus prayed that the cut-off marks be released in advance.”

(emphasis supplied)

26. Then, with respect to the points to be assigned for Publications further observations were made as below:

“25. We have considered the aforesaid aspect and find some merit on both sides. We find that the allocation of 15 points for publication is high, and thus we deem it fit to reduce the available points under this category to 5 points. Most practicing advocates find very little time to write academic articles. In any case, academic publications require a different aptitude. However, given that Senior Advocates are expected to make nuanced and sophisticated submissions, academic knowledge of the law is an important prerequisite. Thus, we would not like to do away with this criteria, but expand what should fall under this criteria, while reducing the points under this category.

26. We believe that confining these criteria merely to the authorship of academic articles would not be enough. Instead, it must also include teaching assignments or guest courses delivered by advocates at law schools. This would be a more holistic reflection of the advocate’s ability to contribute to the critical development of the law. It also shows their interest in guiding and helping their peers at the Bar.

28. Here, we would also like to add that the quality of writing by an

advocate should be an important factor in allocating points under this category. We leave it to the Permanent Committee to decide on the manner of assigning points under this category, including the possibility of taking external assistance to gauge the quality of publications. This can be through other Senior Advocates or academics. We are conscious that this would increase the load of the Secretariat assisting the Permanent Committee, but that is inevitable.”

27. Next, with respect to marks to be awarded for Unreported or Reported judgments pro bono work etc., the Supreme Court made the following observations:

“30. We deem it fit to enhance the number of points under this category by 10 points, having deducted the same from Sl. No. 3, i.e. publications. We are also increasing the scope of this category.

31. The first aspect to be noticed under this head is that of reported and unreported judgments. We deem it fit to clarify that it is not orders (not laying down any proposition of law) but judgments that have to be considered. We say so as judgments ordinarily deal with significant and contested legal issues.

32. Here, we ought to also consider the role played by the advocate in the proceedings. In recent times, and particularly in the Supreme Court, the number of advocates present for a matter are very high. However, that is not ipso facto reflective of the assistance that they are providing to the Court. A matter may be argued by a counsel who may be assisted by others, including an Advocate-on-Record. Thus, an assessment would have to be carried out in enquiring into the

role played by the advocate in the matter they have appeared in with their role specified by them in their application. Merely looking into the number of appearances would not be enough.

33. We believe that this would also take care of any perceived disadvantages arising due to the larger number of appearances by Government counsel, as compared to counsel who are engaged in private work.

34. One suggestion that we are inclined to accept is that while analyzing the role of lawyers, the quality of the synopses filed in Court ought to be considered. Synopses can be a useful indicator for assessing the assistance rendered by an advocate to the Court. Candidates should thus be permitted to submit five of their best synopses for evaluation with their applications.”

28. Another aspect dealt with by the Supreme Court on this occasion was with respect to advocates who may have set up their practice at particular Tribunals. In that regard, following observations came to be made :

“36. Often appeals from those Tribunals lie to this Court and, thus, such advocates also appear before this Court, although the frequency of their appearances may be less. Specialised lawyers with domain expertise should be permitted to concentrate on their fields and not be deprived of the opportunity of being designated as Senior Advocates. Thus, in the case of such advocates, a concession is required to be given with regards to the number of appearances. This category of advocates and their expertise is also essential for the

advancement of all specialized fields of law.

“37. We also believe that due consideration should be given in the interest of diversity, particularly with respect to gender and first-generation lawyers. This would encourage meritorious advocates who will come into the field knowing that there is scope to rise to the top. The profession has seen a paradigm shift over a period of time, particularly with the advent of newer law schools such as National Law Universities. The legal profession is no longer considered as a family profession. Instead, there are newer entrants from all parts of the country and with different backgrounds. Such newcomers must be encouraged.”

29. Then, with respect to Personal Interview, taking note of the original recommendations to award marks against maximum 25 marks for interview, it was noted as below:

“38. The requirement of allocating 25 points in this category was debated. One of the criticisms against retaining this category was that it would delay the process of designation, keeping in mind the practical issue of interviewing a large number of candidates. Further, very little purpose would be served by an interview as the candidates were already being assessed by their appearances before the Court.

39. We are conscious of the aforesaid criticisms. We believe that an interview process would allow for a more personal and in-depth examination of the candidate. An interview also enables a more holistic assessment, particularly as

the Senior Advocate designation is an honour conferred to exceptional advocates. A Senior Advocate is also required to be very articulate and precise within a given timeframe, which are values that can be easily assessed during an interview.

40. It is in this spirit that we have sought to make the interview process more workable. We have thus restricted the number of interviews to the appropriate amount as deemed feasible by the Permanent Committee, keeping in mind the number of Senior Advocates to be designated at a given time.

41. As we have streamlined the process by restricting the number of interviews in the context of number of candidates to be designated, we believe a meaningful exercise can be carried out. Thus, we are not inclined either to do away with or to reduce the marks assigned under this category, especially in view of the fine-tuning we have done by the present order to make this exercise more meaningful.”

(emphasis supplied)

30. Thereafter, the Supreme Court referred to General Aspects of the matter. It made the following observations:

“44. In this regard, we would only like to say that the process should be carried out at least once a year so that applications do not accumulate. In this respect, some disturbing instances have emerged from certain High Courts where the exercise of designation has not been undertaken for many years. As a consequence, meritorious advocates at the relevant time lose out on the opportunity of being considered for designation.

46. We must also say that the Supreme Court rests on a different footing as the highest court of the land. Although designations in the Supreme Court in comparison to High Courts have usually taken place at the age of 45 plus, younger advocates have also been designated. While we would not like to restrict applications only to advocates who are above 45 years of age, only exceptional advocates should be designated below this age. We say no more and leave this aspect to the wisdom of the Permanent Committee and the Full Court.

47. Here, we would like to reiterate the observation made in the 2017 judgment that the power of suo motu designation by the Full Court is not something that is being taken away. This power has been and can continue to be exercised in the case of exceptional and eminent advocates through a consensus by the Full Court.”

(emphasis supplied)

31. Last, the Supreme Court also made observations with respect to the procedure to be followed to deal with the pending applications. In that, it was observed as below:

“41. As we have streamlined the process by restricting the number of interviews in the context of number of candidates to be designated, we believe a meaningful exercise can be carried out. Thus, we are not inclined either to do away with or to reduce the marks assigned under this category, especially in view of the fine-tuning we have done by the present order to make this exercise more meaningful.”

(emphasis supplied)

32. In such facts and contextual background, Sri Vishnu Behari Tewari, has strenuously urged, though the directions issued by the Supreme Court in **Indira Jaising (Ist case)**, contained in paragraph 73.1 to 73.6 were complied, no compliance was made by the Permanent Committee to the directions contained in paragraph 73.7 and 73.8 of that report. According to him, the Permanent Committee did not examine individual case of each applicant on its merit. It did not hold interview, as was mandatory. Thus, it did not make overall assessment of each applicant, as prescribed. It did not award marks out of total 100, as was mandatory. Arbitrarily, the maximum/marks were reduced to 75 without sanction of the law the Permanent Committee prescribed cut-off marks. Contrary to the law, it prescribed cut off marks, 45. In view of such completely erroneous and illegal action of the Permanent Committee to do away with the interview carrying of 25 marks, the petitioners were wrongly non-suited. He has referred to the dissenting note of the fifth member of the Permanent Committee to assert – there is clear evidence of the Permanent Committee having deliberately not complied with the law declared by the Supreme Court in **Indira Jaising (Ist case)**.

33. Referring to the **Indira Jaising (IInd case)**, it has been vehemently urged that the conduct of interview is a mandatory condition. In that later decision, the Supreme Court has laid down the requirement to hold interactions with individual applicants by the Permanent Committee, mandatory. Neither the Permanent Committee could have avoided those directions nor Rule 6 (5) of the Rules is a valid piece of legislation – to the extent it confers discretion with the High Court, to not hold interview.

34. He has also referred to certain documents namely information received by the petitioners under the Right to Information Act dated 16.8.2019 and 20.7.2019, wherein it has been disclosed as below:

“A. No merit list on the basis of points scored by the Advocates/applicants for being designated as the Senior Advocates was prepared. Therefore, no such list as sought by the applicant exists.”

35. Since, originally the applicants including the present petitioners were not aware of any attempt of the Permanent Committee to waive the personal interactions, the petitioners had no occasion to challenge the validity of the Rules, till Rule 6(5), was actually invoked by the High Court. Insofar as, that waiver was granted on 10.5.2019, there is no delay on the part of the petitioner in approaching the Court on 20.5.2019.

36. As to facts, reference has been made to the pleadings made in paragraph 35 to 38 of the writ petition. Reference has also been made to the reply to those proceedings contained in paragraphs 35 and 40 of the Counter Affidavit filed by the High Court, to assert that there is no denial offered, to the essential pleadings that the entire action taken by the High Court was contrary to the directions issued by the Supreme Court in **Indira Jaising (Ist case)**. At the same time, the petitioner does not dispute the fact that along with the information furnished on 16.8.2019, the following information was also divulged to him, against his query to the marks awarded:

“The applicant has obtained 40 marks out of 75.”

37. It has been submitted that the entire process of holding and completion of

Full Court proceeding, issuance of the impugned Notification was done in great haste i.e. the first meeting of the Permanent Committee was held on 10.5.2019 and the second on 13.5.2019. The Full Court meeting was held on 18.5.2019. The resolution was prepared and signed and thereafter the impugned Notification was issued on 20.5.2019. Relying on **S.P. Kapoor (Dr.) Vs. State of Himachal Pradesh & Ors., AIR 1981 SC 2181**, it has been submitted, such action taken in unusual haste and rush is per se arbitrary. That principle has been further invoked on the strength of another decision of the Supreme Court in **Bahadursinh Lakhubhai Gohil Vs. Jagdishbhai M. Kamalia and others (2004) 2 SCC 65**.

38. Since, the petitioners have been unfairly dealt with and they have been unfairly and arbitrarily deprived of opportunity to be designated at the Full Court meeting on 10.5.2019 on account of acts attributable solely to the conduct of the Permanent Committee and the Full Court of this Court, the right to pre-audience that may otherwise have been conferred on them (upon designation as a Senior Advocate) in terms of Section 23 of the Act, must be preserved. Relying on **Tika and Others Vs. State of Uttar Pradesh 1975 CRLJ 337**, it is submitted, that right must be preserved to the petitioners.

39. Then, reference has been made to a decision of the Orissa High Court in **Banshidhar Baug Vs. Orissa High Court, AIR Online 2021 ORI 127**. In that case as well, the process of designation had been completed (by the Orissa High Court) contrary to the law laid down by the Supreme Court in **Indira Jaising (Ist case)**. Repelling the preliminary objection as to maintainability of that writ petition, the

Orissa High Court ruled in favour of the petitioners (in that case) and stayed the Notification till consideration was offered to the applications filed by the petitioners (in that case). In no unclear terms, the Orissa High Court reached the conclusion that the scheme for designation throughout the country had to remain one i.e. as prescribed by the Supreme Court in **Indira Jaising (Ist case)** and any modification to that scheme may be made only by that Court and no other. To the extent, Rule 6(5) of the Rules departs from the scheme prescribed by the Supreme Court and to the extent that Rule was invoked by the Permanent Committee, the entire action taken by the Permanent Committee as was approved by the Full Court, was vitiated.

40. Then, referring to decision of the Calcutta High Court in **Debasish Roy Vs. High Court at Calcutta & Anr., 2019 AIR (Cal) 77**, it has been urged that no prescription may have been made by the Permanent Committee to provide for qualifying marks. It was the bounden duty of the Permanent Committee to make overall assessment of each individual applicant - strictly in terms of the law laid down in **Indira Jaising (Ist case)** and place the entire material before the Full Court. That body alone may have taken the decision to confer the distinction of Senior Advocate on all or any applicant. By prescribing the qualifying marks and by doing away with the interview process, the Permanent Committee reduced the overall assessment against 75 marks only, as against 100 marks prescribed. Thus, the Permanent Committee acted in a manner completely contrary to the directions of the Supreme Court. To the extent the petitioners have been excluded from the zone of consideration (by the Permanent Committee), the impugned Notification cannot be sustained.

41. Here, it has been also submitted that the Permanent Committee did not forward to the Full Court, the marks awarded by it. In that regard, again reliance has been placed on the information received by the petitioners under the Right to Information Act. Thus, it has been suggested that the correct facts had not been disclosed to the Full Court.

42. Then petitioner (Shri. Vishnu Behari Tewari) has specifically emphasized (at the stage of dictation of this order), that the Court may also take note of the fact that the Permanent Committee though impleaded as a party respondent and though represented has chosen not to file reply to the specific allegations made in the writ petition that the complete list of the applicants was not forwarded by it to the Full Court and it has also not offered any denial to the pleadings that the procedure prescribed by the Supreme Court in **Indira Jaising (Ist case)** was deliberately not followed by the Permanent Committee. Referring to Chapter XXII Rule 4 A of the Rules of the Court and relying on **Bharat Sanchar Nigam Limited and others v. Abhishek Shukla and others, (2009) 5 SCC 368; Seth Ram Dayal Jat v. Laxman Prasad, (2009) 11 SCC 545; Asha vs Pt. B.D. Sharma University of Health Sciences & Ors., (2012) 7 SCC 389 and Standard Chartered Bank vs Andhra Bank Financial Services Limited & Ors., (2016) 1 SCC 207**, the principle of non-traverse has been invoked. It has been submitted - therefore, it stands admitted to the respondents that there was a clear omission on the part of the Permanent Committee in complying with the mandatory provisions of law. Consequently, only one result may arise i.e. the writ petition be allowed with exemplary costs and the impugned Notification be

quashed or it be stayed till due consideration is offered to all the applicants whose applications were placed before the Permanent Committee. Once the petitioners would be found entitled to conferment of distinction as Senior Advocate, consequentially their right of pre-audience may be preserved to be availed along with others to whom that right that has been conferred at the Full Court held on 18.05.2019.

43. Responding to the above, Sri G.K. Singh, learned Senior Advocate appearing for the Allahabad High Court has first referred to the observations of the Supreme Court recorded in paragraph no.73 of **Indira Jaising (Ist case)**. It is his submission that the Supreme Court did not seek to enact or lay down a rigid law for the purpose of grant of distinction of Senior Advocate by itself or by the High Courts. It only sought to provide norms/guidelines to be followed generally, for that purpose. No doubt, such norms and guidelines may be considered to suitably modify the distinct Rules at various High Courts, the norms may not themselves be enforced as a law, contrary to the statutory Rules. In that regard, he also referred to the different Rules considered by the Supreme Court in that decision.

44. Following the above, it is his submission, the Allahabad High Court amended its Rules while applying the norms and guidelines laid down by the Supreme Court in **Indira Jaising (Ist case)**. That amendment was enforced w.e.f. 18.04.2018. Considering the peculiar needs of, and circumstances operating at this Court, Rule 6 (5) of the Rules created a discretion with the Permanent Committee to waive personal interaction "if it so desires".

45. In the instant case, all applications were first considered by the Permanent Committee at its meeting dated 10.05.2019. Against 100 applications made, three had been rendered infructuous by virtue of those applicants having been elevated to the bench of this Court. Later, two other applications came to be excluded - one occasioned by withdrawal and the other on a technical ground. Thus 97 applications survived. Keeping in mind the totality of the facts that may have obtained, at that stage i.e. on 10.05.1919, the Permanent Committee chose to waive the requirement of interview. Since that condition was waived in terms of Rule 6 (5) of the statutory Rules, the evaluation of the valid applications remained to be made against 75 marks. Therefore, no provision could be made for evaluation against 100 marks in face of personal interview of 25 marks, waived.

46. Thus, it is the submission of learned Senior Counsel for the High Court that the decision in **Indira Jaising (Ist case)** is not to be read as a statutory law over and above the Rules framed by High Court. Interview may have to be waived considering the large number of candidates who may seek designation at any given point in time. Because the applicants who had applied for designation were mostly regular practitioners of the Court who were having regular interactions with the Court on its judicial side, a decision appears to have been taken by the Permanent Committee to waive the interview requirement.

47. As to the award of cut off marks for consideration by the Full Court, again it has been submitted, occasioned by the large number of applications received by the Permanent Committee, and overall

assessment made on objective criteria of marks awarded on specified parameters, that objective benchmark was fixed by the Permanent Committee to ensure that the conferment of distinction of Senior Advocate is done in an objective and efficient manner. In that regard, heavy reliance has been placed on **Indira Jaising (IInd case)** to submit that the criteria adopted by the Permanent Committee of this Court (on the administrative side), as is impugned in these proceedings, has found the stamp of approval of the Supreme Court on the judicial side. The same principle has been recognized and applied by the Supreme Court in **Indira Jaising (IInd case)**, to allow the Permanent Committee to fix qualifying marks for the purpose of interview.

48. It has also been submitted, the Rules were notified in April 2018 whereas Notification inviting applications was published later. Applications were invited up to 31.07.2018. Over a long period of 11 months, no challenge was raised. The said Notification clearly mentioned that the applications were invited strictly in terms of the Rules. Rules 6 (5) clearly allowed for waiver of interview. Still no objection was raised till as late as the impugned Notification was issued notifying the names of 75 advocates as Senior Advocates. The petitioners themselves applied under the same Rules, procedure and notification. Therefore, they cannot now turn around and raise challenge to the Rules, only because they have not been conferred the distinction sought. He has relied on **Ashok Kumar and Ors. Vs. State of Bihar & Ors, 2017 (4) SCC 357**.

49. Referring to the Minutes of meeting of the Permanent Committee dated 10.05.2019 as also substance of the

dissenting note relied upon the petitioners, it has been submitted that the dissenting note itself makes plain that marks were awarded by the Permanent Committee. Only two disputes exist - (i) that marks were not awarded for interview, and (ii) cut off marks were fixed. It cannot be held that the procedure followed by the Permanent Committee was in contravention to the norms and guidelines laid down by the Supreme Court in the case of **Indira Jaising (Ist case)**.

50. Next, referring to the Minutes of the Permanent Committee dated 13.05.2019, it has been submitted that four lists were prepared in Table-A, Table-B, Table-C and Table-D. While contents of Table-B are not on record, during the course of the hearing, we had required learned counsel for the High Court to produce the original record. That has been shown to us. From the record we find Tables A, B, C and D were prepared by the Permanent Committee. Table A is the list of all valid applications (95). Table B is the list of table of marks awarded by the Permanent Committee to all 95 applicants. Table C is the list of 78 candidates forwarded by the Permanent Committee for consideration by the Full Court for the purpose of conferment of designation and Table D is the list of 17 applicants not found eligible, in the opinion of the Permanent Committee. Strictly speaking it is Table D which alone forms the subject matter of challenge in these proceedings.

51. Referring to **Indira Jaising (IInd case)**, it has been submitted that the ratio of the said decision impliedly overrules the ratio of the Calcutta High Court in **Debasish Roy (supra)** to the extent the Calcutta High Court had ruled that no eligibility marks may be fixed by

the Permanent Committee. Also, relying on that later decision, he would submit, if at all, interviews had to be granted to those who had secured the cut-off marks. Only for those applicants, interviews were made mandatory to be granted. Inasmuch as the Permanent Committee found only 75 applicants made the cut-off, of whom only two have not been conferred designation and none of them are before this Court, the submission being raised by the petitioners is described to be not available to the petitioners.

52. As to the decision of Orissa High Court in **Bansidhar Baug (supra)**, he would submit that the said decision arose on completely different facts. There, the Orissa High Court had chosen to confer designation through suo moto exercise of power though it had earlier invited and was considering applications in terms of its Rules. However, **Indira Jaising (IInd case)** protects the power of the Supreme Court and the High Courts to confer such distinction of Senior Advocate on a *suo moto* exercise of power.

53. Having heard learned counsel for the parties, we first proceed to deal with the preliminary objection raised by learned senior counsel appearing for the High Court. Section 16 of the Act contemplates designation to be granted to an Advocate as a Senior Advocate by the Supreme Court or a High Court, by way of distinction conferred on individual advocates. The validity of Section 16 of the Act was upheld in **Indira Jaising (Ist case)**. Thereafter, the Supreme Court laid down guidelines to govern the exercise of designation of an Advocate as a Senior Advocate – both by itself and by all High Courts of the country. To that end, a framework was devised in that decision.

54. Conferment of designation as a distinction may never be equated with selection to a post or office of profit. It is the highest and the only distinction that the higher Courts confer on the most deserving member/s of the bar. The considerations on which such distinction arises, are governed by statute i.e. Section 16 of the Act. Thus, the designation as a Senior Advocate may not be conferred on any advocate except one who may qualify the strict test of Section 16(2) of the Act. To the extent the conferment of distinction is not a selection to a post and further to the extent the exercise of confirmation of distinction by this Court must remain transparent and not be shrouded with doubts, misgivings and unaddressed objection, the challenge that has arisen must be dealt with on merits, with sensitivity and clarity. Keeping that principle in mind, these being the only petitions filed immediately after the conclusion of the Full Court meeting held on 18.5.2019, that too including on the date of issuance of the impugned Notification - notifying 75 newly designated Senior Advocates, we overrule the preliminary objection and choose to deal with the writ petition, on merits.

55. Next, coming to the scope of challenge that may arise on the strength of the decision of the Supreme Court in **Indira Jaising (Ist case)**, it is to be noted that there first exists a statutory provision of Section 16 of the Act. That has already been extracted above. Then, Article 225 of the Constitution of India reads as below:

“225. Jurisdiction of existing High Courts – Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the

jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

[Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.]”

56. It is in exercise of that power vested by the Constitution of India that this Court and the other High Courts have framed their Rules, amongst others, governing the designation of advocates as Senior Advocates. Prior to **Indira Jaising (Ist case)**, there were in force - The Designation of Senior Advocate Rules, 1999. Those rules, amongst others, were considered by the Supreme Court in **Indira Jaising (Ist case)**. In paragraph 66 of that report, the Supreme Court noted that the words “is of opinion” and the words “in their opinion” appearing in the Supreme Court Rules, referred to a subjective opinion formed on objective material. Then, in paragraph 69 of that report, the Supreme Court further noted existence of guidelines governing the exercise of designation of advocates by the Supreme Court and also the guidelines in vogue at various High Courts. Having noted that, the Supreme Court was of the view that the existing guidelines must be made more

comprehensive - to enforce conformity of the actions or the decisions taken under Section 16 of the Act in a fair, transparent and reasonable exercise of statutory discretion.

57. Therefore, in paragraph 70 of the report, the Supreme Court set out to introduce a “*framework*” to regulate the system of designation of Senior Advocates. Also, it attempted to introduce “*uniform parameters and guidelines*” to govern the exercise of designations. In the words of the Supreme Court, “*the sole yardstick by which we propose to introduce a set of guidelines to govern the matter is the need for maximum objectivity in the process so as to ensure that it is only and only the most deserving and the very best who would be bestowed the honour and dignity.*” In that view, further observations (as have been referred to above) appear in that decision of the Supreme Court, in paragraphs 73 and 74 (extracted above).

58. There can be no denial to the statement made by the petitioners, that the decision of Supreme Court in **Indira Jaising (Ist case)** causes binding effect in law. The decision of the Supreme Court in **Indira Jaising (Ist case)** is clearly a law laid down under Article 141 of the Constitution of India, insofar as the ratio of that decision is directly and inherently to give effect to the scheme of Section 16 of the Act. At the same time, the said judgement does not seek to enact or replace or supersede the statutory Rules, framed either by that Court or by any High Court. On the contrary, the decision develops the law recognizing the federal framework in which the scheme of section 16 of the Act to the extent it takes note of different Rules and guidelines operating at different High Courts. It then seeks to bring conformity in

the existing guidelines and to further bring the maximum objectivity of uniform parameters to be adopted by the Supreme Court and all High Courts in the exercise of their power under Section 16 of the Act. No Rule of any High Courts was declared to be *ultra-vires* or contrary to any pre-existing or that precedential law. The primacy of the High Courts in the matter of framing Rules as emanates from Article 225 of the Constitution of India, was maintained intact. Having said that we do recognize that in pursuing the object of maintaining uniformity, a positive direction is contained in that decision itself. It required all existing norms/guidelines “*shall be suitably modified so as to be in accord with the present*”. Yet, though it framed the guidelines and reserved to itself the power to modify the same, notably, the Supreme Court did not frame any model Rules for designation of Senior Advocates. Consequently, it did not direct the High Courts to adopt such model Rules.

59. Though words used in a judgement are not words of a statute, at the same time, such words having become subject matter of discussion in the present case they may also be examined in the context of their dictionary meaning first. According to the Concise Oxford English Dictionary (Indian Edition), meaning of words ‘guideline’ and ‘norm’ are given as below:

(i) *guideline* – a general rule or piece of advice.

(ii) *norm* – 1. the usual, typical, or standard thing. A required or acceptable standard: the norms of good behaviour. 2. Mathematics the sum of the squares of the real and imaginary components of a complex number, or the positive square

root of this sum. v. adjust (something) to conform to a norm.

-ORIGIN C19:from L.norma
'precept, rule, carpenter's square'

60. Black's Law Dictionary (11th Edition) refers to word 'norm' as below:

"norm. 1. A model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something. An example of a norm is the standard for right or wrong behavior. 2. An actual or set standard determined by the typical or most frequent behavior of a group."

61. Then, we are inclined to accept the submission advanced by learned counsel for the petitioners that the decision of the Supreme Court in **Indira Jaising (Ist case)** is binding law. As to the extent to which the judgement bound the High Court in the context of the statutory/constitutional power of the High Court to frame the Rules and to work the same, is another matter. In view of the discussion made above and in the context of the Rules framed by the Allahabad High Court under Article 225 of the Constitution of India, it would survive for consideration if the guidelines and norms or framework or uniform approach prescribed by the Supreme Court by way of law laid down, would per se override the statutory rules or render the Rules otiose or ultra-vires those guidelines, by own force of law declared by the Supreme Court, under Article 141 of the Constitution of India.

62. The pre-existing statutory Rules that were directly in issue or that were plainly considered by the Supreme Court [in **Indira Jaising (Ist case)**], were not

declared ultra-vires and the direction issued by the Supreme Court to bring the norms and guidelines in existence by making suitable modifications, to bring them in accord with its decision. Hence, we may explore the nature of the norms/guidelines issued, a little further. If the Rule complained of is not seen to be falling foul of the law laid down under Article 141 of the Constitution of India or the application of the offending rule is not seen to be contrary to the specific law laid down by the Supreme Court, no finer or more extensive examination may be called, by this Court.

63. In **Narendra Kumar Maheshwari vs Union of India, 1990 Supp SCC 440**, an issue arose as to the binding nature of certain guidelines issued by the Competition Commission of India. In that context, the Supreme Court noted that those guidelines were *"not statutory in character"*. Yet, it was further recognized that even those guidelines may be *"intended to clarify or implement the conditions and requirements precedent to the exercise of certain rights conferred in favour of citizens or persons and a deviation therefrom directly affects the rights so vested."* There *"the persons whose rights are affected have a clear right to approach the court for relief."* Then, it was also noted *"if the guidelines are departed without rhyme or reason, an arbitrary discrimination may result which may call for judicial review."* In that way, it was further observed, the guidelines *"have only an advisory role to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particular fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or*

discrimination or is so fundamental as to undermine the basic public purpose which the guidelines and the statute under which they are intended to achieve.” That principle has been consistently followed and applied.

64. In the first place, the decision of the Supreme Court in **Indira Jaising (1st case)** framed the guidelines to bring uniformity of approach by the Supreme Court and the High Courts, in matters of conferment of distinction of advocates as Senior Advocates. Second, the power to revise those guidelines was reserved to Supreme Court. Third the guidelines were to be applied by each High Court. Yet, by way of a direct application of that principle, a statutory rule framed by the High Court under Article 225 of the Constitution of India may not be easily exposed to vice of ultra-vires unless it stands in patent conflict to that law declared under Article 141 of the Constitution of India. Each and every departure that may be alleged or be pointed out in the Rule or its implementation, in contrast to the norms/guidelines/uniform policy laid down by the Supreme Court in **Indira Jaising (first case)**, may not be seen as a conflict with that law declared by the Supreme Court. To the extent the said decision deliberately chose not to declare invalid - any of then existing Rules framed by any of the High Courts (framed under Article 225 of the Constitution of India), and laid down general norms and guidelines to be followed by the Supreme Court and all High Courts - to bring uniformity in the procedure of designation of Senior Advocates, the alleged deviation and departures from those norms and guidelines may only expose the actions performed by the statutory Rules against to the test of arbitrariness and discrimination pervading such action.

65. We hasten to add the issue of vires may also arise where a High Court may not have made any compliance to the general norms/guidelines – whatsoever or may have acted in a manner that may be described as wholly contrary to or in conflict to the norms and guidelines enforced by way of law laid down in **Indira Jaising (1st case)**. That is not the case here.

66. As to the present challenge, it is the petitioners' own case that the High Court first amended its Rules and substituted the old Rules of 1999 with the Rules. Barring the challenge raised to the Rule 6(5) of the Rules, it is not the case of the petitioners that any part of those Rules is in conflict to the ratio of the Supreme Court in **Indira Jaising (1st case)**. Further, as to the procedure for designation actually adopted, it is the submission of the petitioners that the guidelines/norms laid down by the Supreme Court in **the Indira Jaising (1st case)** from paragraph nos. 73.1 to 73.6 were followed. Once that admission/status exists, all that is required to be examined is whether guidelines formulated by the Supreme Court in paragraph nos. 73.7 and 73.8 in **Indira Jaising (1st case)** were followed and whether departure if any, was informed with reason and fairness of procedure.

67. Here, as a fact it may be noted, according to the petitioners the Permanent Committee did not make overall assessment of each applicant because it did not interact with the applicants, personally. It did not award marks against total 100 marks. Last, reference has been made to the dissenting note of one of the five members of the Permanent Committee, dated 10.05.2019.

68. First, we may deal with the issue of processing of applications by the Permanent Committee and examine if it made an overall assessment of individual applicants. As has been extracted above, in the first meeting of the Permanent Committee dated 10.05.2019, three applications were dropped from consideration for reason of those applicants having been elevated to the bench, in the meanwhile. As to the surviving 97 applications, proceedings were held. As per minutes of that meeting, all members participated. We have seen the original record. The original record as is the custom/practice of the Court has been prepared on official/green (colour) ledger paper. It has been signed by all five members of the Permanent Committee, in hand writing. Thereafter, at the foot of those minutes, the dissenting note of the fifth member has been pasted on non-official/white paper. It is printed and not hand written. It is signed separately, by that member of the Permanent Committee. It opens with the words *"I had participated in the deliberations of the committee held on 11th May 2019....."*. It ends with the words *"besides awarding marks as laid down by the Apex Court, as per Para 73.8, the committee was also to interview the applicants"*.

69. The dissenting note unequivocally suggests to us that the same was submitted after the minutes dated 10.05.2019 had been signed by all members of the Permanent Committee. What may have transpired and when and why it came to be submitted later is not a subject matter we may go into, at this stage. Suffice to note that for all reasons noted above, namely that the dissenting note is prepared on non-official/white paper; it is printed and not hand written; it refers to

deliberations of the committee held on 11.05.2019 and not 10.05.2019 and it is pasted below the signatures of all five members of the Permanent Committee, affixed to the resolution dated 10.05.2019, we cannot doubt the true recovered of the proceedings conducted by the Permanent Committee on 10th May 2019, are found recorded in its minutes. Besides the above fact - being the Permanent Committee, it is obligated with the most onerous task of processing applications to confer the distinction of Senior Advocate, there exists an implied faith and trust in that body, both collectively and individually in all its members. In the context of the challenge raised, we have given our consideration to the objections raised in an objective manner. We are however unable to accept the objections with respect to the conduct of the meeting dated 10.05.2019. The minutes of that meeting clearly record what they record.

70. Further, since the making of the dissenting note was also not in doubt (even if made later), we have examined its contents. The fact that the fifth member himself recorded - that besides awarding of marks to the applicants (on the strength of their applications), interviews were also necessary, the said member has indirectly but by necessary implication, confirmed through his dissenting note that marks were awarded by the Permanent Committee to all applicants, at its meeting held on 10.05.2019.

71. As to interviews being waived, the resolution of the Permanent Committee dated 10.05.2019, first records that the Committee resolved that 45 out of maximum possible 75 marks (to be allotted against applications) be the cut off marks for consideration of award of distinction as

a Senior Advocate, by the Full Court. In continuation thereto further resolution has been recorded that interview/interaction with the advocates/applicants be dispensed with. Therefore, the resolution of the Permanent Committee to prescribe cut-off marks and waive requirement of interview were made in a fair and transparent manner.

72. Insofar as challenge has been raised to the lack of overall assessment for reason of cut off marks being fixed out of 75 marks by excluding the interview marks, we find a departure had been made by the Permanent Committee from the general norms/guidelines laid down by the Supreme Court in **Indira Jaising (Ist case)**. It is this fact departure enabled by Rules 6(5) that falls for our consideration including therein the validity of the Rule 6(5) of the Rules.

73. In that we first take up the issue of award cut off marks. Here it is an admitted case between the parties that 100 applications had sought designation. Of that 97 survived for consideration by the Permanent Committee, at the first instance. One more application came to be dropped through withdrawal and another on technical issue. Thus the Permanent Committee was required to deal with 95 applications. If the guidelines and norms framed by the Supreme Court in **Indira Jaising (Ist case)** requiring conduct of interviews are held mandatory, 95 interviews had to be held by the five member Permanent Committee, comprising of none other than the Chief Justice and two senior most judges of the Court, the learned Advocate General and the fifth member. How much time if not days would have been required to complete that exercise is not for us to contemplate. At the

same time, it cannot be denied -s much time would be required to interview 95 practising advocates that to those having flourishing practices and distinguished careers.

74. In this context we may take note of the specific directions issued by the Supreme Court in **Indira Jaising (Ist case)**. In Paragraph 73.8 of the said decision reads as below:-

"73.8. All the names that are listed before the Permanent Committee/cleared by the Permanent Committee will go to the Full Court."

Clearly, in the context of general norms/guidelines laid down by the Supreme Court, it was mindful, even at that stage that names of only such applicants may fall for consideration by a Full Court of the Supreme Court or of the High Court as may either be "listed" before the Permanent Committee or as may be "cleared by the Permanent Committee". The suggestion (as was strenuously urged), that only hindsight wisdom has given rise to that consequential direction in **Indira Jaising (IInd case)** – to allow for prescription of cut-off marks, is therefore not acceptable. Even in the first decision (as noted above), the Supreme Court had allowed or left open to the Permanent Committee of the Supreme Court and/or the High Court to evolve an objective or rational criteria to "clear"/recommend only such applicants to the Full Court, as it may consider fit. To that extent, the action taken by the Permanent Committee was fully in conformity to the guidelines/norms issued in **Indira Jaising (Ist case)**.

75. Then, as per the original record, Table B does contain tabulation of

marks awarded to individual applicants by the Permanent Committee, on the basis of facts disclosed in their respective applications. Those marks were available to the Permanent Committee when it resolved to prescribe the cut off marks 45 out of 75 - for the purpose of consideration for designation, by the Full Court. The marks awarded to the petitioners are clearly included in Table B. Also those were disclosed to the petitioner Shri Vishnu Behari Tewari in response to his application made under the Right to Information Act, 2005.

76. Thus, the Permanent Committee took a decision to shortlist the suitable applicants from the list of 95 applicants, on the strength of marks obtained by them on their individual applications. As noted above, by way of a process adopted, it was legally permissible. The Permanent Committee did not lack that inherent jurisdiction. Second, by way of method adopted, the criteria to shortlist all applicants based on qualifying marks fixed by the Permanent Committee was rationale, fair, objective and a transparent criteria. Third, in any case, we are also not to explore the challenge to rationality of that criteria, in view of the later pronouncement in **Indira Jaising (IInd case)** which clearly recognises and gives judicial approval to the power of the Permanent Committee to evolve cut-off marks to shortlist the total number of applicants recommended for conferment of distinction as Senior Advocates.

77. What then survives for our consideration is whether lack of personal interview [contemplated in Indira Jaising (Ist case) and as has been made mandatory by **Indira Jaising (IInd case)**] leads to any infirmity in the Rules and/or leads to

infraction of the rights to the applicants. Read co-jointly, the two decisions in **Indira Jaising (Ist case)** and **Indira Jaising (IInd case)** clearly lead us to a conclusion that no distinction by way of designation as a Senior Advocate may be conferred except against prior interview granted. That being the norm/guideline, challenge may arise where such distinction is granted without prior interview, except in cases where the Supreme Court or the High Court may chose to confer that distinction by way of suo moto exercise of power. That power has also been specifically preserved in the later decision in **Indira Jaising (IInd case)**.

78. Insofar as the cut-off marks were permissible to be prescribed and as a fact, those were prescribed under a resolution of the Permanent Committee - unanimously passed by all five members, the issue of lack of interview may have arisen only at the instance of those short-listed, but not the rest. Seen in that light, the ground for challenge being pressed, that designation has been deprived to the petitioners without interview, may not lead to any success to these petitioners. The petitioners not being shortlisted on the basis of cut-off marks prescribed, they never earned a right to be interviewed by the Permanent Committee. Thus, out of 78 applicants shortlisted by the Permanent Committee, initially, three applicants were not conferred designation at the Full Court. The claim of one applicant was deferred and to two others the distinction was positively declined. The applicant whose application was deferred was also granted designation, later. The other two applicants never challenged the action of the Full Court. Five years have passed since then. No challenge may even arise or exist on that count, now.

79. Besides the above, we also do not find any justification to consider the possibility of that challenge for reason of passage of time. Five years have passed since designation were conferred by this Court. Those designated have been regularly appear amongst others, before this Court, at Prayagraj and at Lucknow. The distinction conferred may never be thought to be withdrawn or be doubted now for reason of interview not held five years ago. Equally, no useful purpose may be serve in now requiring that condition to be fulfilled, at this later stage, with these facts.

80. Seen in that light, we now examine the raw validity of the Rules. By virtue of the discussion made above, we have no doubt that Rule 6(5) of the Rules if read in a manner to do away with the process of interview completely, would fall foul with the mandatory directions of the Supreme Court in **Indira Jaising (IIInd case)** read with **Indira Jaising (Ist case)**. Seen in that light, the words "and, if it so desires, may also interact with the concerned advocate(s)" appearing in Rule 6(5) of the Rules only refer to the power and discretion of the Permanent Committee to interview such applicants who may be shortlisted on the strength of any objective criteria such as cut-off marks allotted on their applications. Thus, by way of example, if there is only one applicant who may seek the distinction to be designated as a Senior Advocate, the Permanent Committee (at a given occasion) may necessarily interact with him through personal interview before requiring that matter to be considered by the Full Court. At the same time, where many applicants exist, or are in the waiting, it may remain open to the Permanent Committee to interact with only such applicants who may first be shortlisted on an objective criteria -

of cut-off marks etc. In that, the process of short listing may also be permissible to be adopted by the Permanent Committee again or after the conduct of the interview of all or any (shortlisted) applicants. Conduct of interview may not vest any right on any applicant to be necessarily considered by the Full Court for the purpose of conferment of distinction of Senior Advocate. However, we make it plain that that exercise may fall in the exclusive discretion and domain of the Permanent Committee.

81. As to the further challenge that no merit list was prepared by the Permanent Committee and the marks allotted were not placed before the Full Court, those fact assertions must be accepted to be true. At the same time, no merit list was required to be prepared. In the matter of distinction being conferred by the High Court, no merit list is required to be prepared. In the first place, there were no posts available and there was no selection to those posts being made by the High Court. All who were worthy of the distinction, deserved to be vested with the same with the right of pre-audience arising on same day, in order to their *inter se* seniority/standing at the bar. To prepare a merit list of such advocates would be to demean and devalue the distinction being conferred.

82. Second, Rule 6(6) of the Rules only required the Permanent Committee to place before the Full Court its Assessment Report. That did not mandate or require the Permanent Committee to disclose or place before the Full Court, the exact marks awarded to individual applicants, in the process of short-listing adopted by it. The Full Court was only to be informed by the Permanent Committee that an objective

criteria had been followed to shortlist the applicants. Neither in the **Indira Jaising (Ist case)** nor in **Indira Jaising (IInd case)**, any norm or guideline has been framed necessitating supply of the marks awarded to the applicants by the Permanent Committee to be placed before the Full Court. Award of marks is sufficient evidence of objective criteria applied by the Permanent Committee. Its disclosure is neither mandated nor desirable for the purpose and/or the conduct of the Full Court.

83. As noted above, the Permanent Committee being burdened with the onerous task of scrutinising applications to determine the suitability for conferment of distinction as Senior Advocate, works on an implied trust. It is required to screen those applications to help the Full Court form its subjective opinion. There is no quarrel that such objective criteria was adopted.

84. Further submission has been advanced and specifically pressed by the petitioners that the Permanent Committee though impleaded as a party respondent, it has not submitted any Counter Affidavit and there is no specific denial by the High Court to the material pleadings made in paragraphs 35 to 38 of the writ petition and other paragraphs of the writ petition. In the context of the challenge raised to the validity of the Rules and bonafides of the exercise of power made by the Permanent Committee and the Full Court, we had considered the challenge raised with that much care. For that reason we had called for the original records of the Permanent Committee and the Full Court. Those records reveal the true facts, as noted above. Being matters of record that are before the Court, the alleged

lack/inadequacy of pleadings pales into insignificance. For that reason, we find, the ratio of the decision of the Supreme Court in **Bharat Sanchar Nigam Limited (supra)**, **Seth Ram Dayal Jat (supra)**, **Asha vs Pt. B.D. Sharma University of Health Sciences (supra)** and **Standard Chartered Bank (supra)** to be distinguishable, on facts. No *malafides* have been pleaded against any individual nor such presumption may ever arise especially in the context of power exercised by the Permanent Committee and the Full Court.

85. The ground of challenge of action performed in post haste manner also does not merit our acceptance. It is an undoubted fact that the Full Court was concluded on 18.05.2019. It was an exercise of and by the Court. The resolution of the Full Court is clear. It deserved a prompt notification to be made. The fact that on earlier occasions, in similar circumstances more time may have been taken, may never be a yardstick to measure the bonafides of the impugned action. We are therefore constrained to offer our unequivocal observation that we are dismissive of these contentions advanced by the petitioners. For that reason, we are also unable to confirm the applicability of the law laid down in **Bahadursinh Lakhubhai Gohil (supra)** and **Smt. S.R. Venkata Raman Vs. Union of India, AIR 1979 SC 49**.

86. The petitioners had a grievance with the Court on the administrative side. That they have voiced. They also have every right to pursue their grievance and seek adequate relief, on the judicial side. At the same time, that challenge process cannot arise or be propelled or be pursued on unsubstantiated doubts, suspicions or

presumptions or assumed bias. The entire exercise is found to have been conducted in a transparent and fair manner with objective consideration, at every stage. Even at the Full Court, three names did not go through. Two were declined. The fact that the petitioners may have missed out, may give them a right to be reconsidered as contemplated under the Rules where any applicant who may not be successful at seeking designation in one Full Court may be reconsidered after two years. Yet, the petitioners may not have acted recklessly, by giving wings to their worst imaginations.

87. The decision of the Orissa High Court in **Banshidhar Baug (supra)** is wholly distinguishable. In that case, the Orissa High Court had first invited applications for conferment of the distinction as Senior Advocate. During pendency of those applications, suo motu power was also exercised by that High Court - to confer distinction on some of the applicants while leaving out the others. There, the process of conferment of designation in the manner prescribed by the Rules and as guided by the guidelines and norms laid down by the Supreme Court in **Indira Jaising (Ist case)** and the *suo motu* power of the Court, arose simultaneously. Once the regular mechanism governed by the statutory Rules had been undertaken, it may not have been open to exercise suo motu power, that too with respect to some of the applicants, leaving others aside. It is in that context that the right of pre audience may have been altered prejudicially. Such facts do not obtain in the cases before us.

88. Insofar as the decision of the Calcutta High Court in **Debasish Roy (supra)** is concerned, we find, the principle objection noted by the Calcutta High Court

has been taken care of in the **Indira Jaising (IInd case)**. We may also note, in view of our observations and reasoning that the decisions in **Indira Jaising (Ist case)** and **Indira Jaising (IInd case)** have been given effect and the Rules are consistent to the guidelines/norms enforced thereunder, the test to be applied is whether the procedure followed by the Permanent Committee is arbitrary but not per-se, *ultra vires*.

89. Thus, we find ourselves at permissible variance with the opinion of the Orissa High Court and Calcutta High Court. To that extent, as a High Court, it is our privilege to be in respectful disagreement with an other High Courts and to that extent, those decisions of other High Court are of persuasive value, with which we respectfully disagree.

90. Before we part, we may take note of the fact that in **Indira Jaising (IInd case)**, the Supreme Court has amongst others observed, in paragraph 44 of that report that exercise of conferment of distinction should be carried out at last once a year. That exercise has not been undertaken since the last Full Court giving rise to the present case, held on 18.05.2019. Five years have passed. On a query made, learned counsel for the High Court informs us that in 2019, there were more than 18000 advocates registered as Advocate on Roll (AOR) at Prayagraj and more than 10000 advocates were registered as AOR, at Lucknow, with this Court. Against those large numbers, in 2019, there were in all, 85 designated Senior Advocates designated by this Court. Consequent to the last designations made, there are about 143 Senior Advocates.. At present, there are 26170 advocates registered as AOR at Prayagraj and 15300 advocates registered

as AOR at Lucknow, with this Court. In that background, about 236 applications are described to have been made to the Permanent Committee for conferment of the distinction as Senior Advocate. Those are pending consideration. With that parting observation, both the writ petitions are **dismissed**. No order as to costs.

(2024) 9 ILRA 837
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 20118 of 2012

Mohd. Raza ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Tripathi B.G. Bhai

Counsel for the Respondents:

Anuj Kumar, Brijesh Kumar Srivastava

A. Civil Law - Constitution of India,1950-Article 226-Uttar Pradesh Imposition of Ceiling on Land Holdings Act,1960-Section 11(2)- dispute over the inclusion of land in surplus land-The petitioner purchased Khasra no. 53 via a sale deed dated 8.10.1971, and his name was recorded in revenue records for 1378-1380 fasli year-The prescribed authority declared 5.59 hectares, including khasara no. 53,as surplus land in 1974-the petitioner was unaware and filed objections in 1979-the appellate authority dismissed the petitioner claims in 2012-Held, the Sale deed executed before the Ceiling Act's cut-off date, was deemed valid-The authorities failed to serve notice to the petitioner violating procedural requirements-Thus, the inclusion of Khasara no. 53 in surplus land without

notice was illegal, and the appellate decisions lacked proper jurisdiction-The court quashed the orders excluding khashra no. 53 from the surplus proceedings.(Para 1 to 18)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Shantanu Kumar Vs St. of U.P. & ors. . (1979) All LJ 1174
2. A. Kumar Vs St. of U.P.(2011)112 RD 681
3. Ram Kripal Singh & anr. Vs Apar Ayukt & ors. (2010)111 RD 744
4. Gurumukh Singh & Vs St. of U.P. & ors. (1990) RD 95
5. Ram Chandra Singh thru LRs Vs St. of U.P & ors. .(1990)AIR Supreme Court 2186
6. Sonia Bhatia Vs St. of U.P. (1981) LawSuit SC 178

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Tripathi B.G. Bhai, learned counsel for the petitioner, Mr. Pankaj Kumar Gupta, learned counsel for the Gaon Sabha, Mr. Brijesh Kumar Srivastava, learned counsel for the respondent nos.5 to 15 and Mr. Dhananjay Singh, learned Standing Counsel for the State.
2. Brief facts of the case are that the khasara no.53 was owned by Beni Madhav son of Jagannath Prasad Dubey, who executed a sale deed on 8.10.1971 in favour of the petitioner- Mohd. Raza in respect to the khasara no.53 area 2-17-15 situated in Village- Hatwa, Tahsil- Dumeriyaganj, District-Basti now Siddharth Nagar. On the basis of aforementioned sale deed petitioner - Mohd. Raza came in possession

of the aforementioned khasara no.53 and the name was accordingly, recorded in khatauni of 1378 fasli-1380 fasli. The aforementioned Beni Madhav has expired later on and in his place the name of his three sons, namely, Harish Chandra, Girish Chandra and Krishna Chandra were recorded in the revenue records. The U.P. Act No.18 of 1973 had come into force w.e.f. 8.6.1973. Notice on C.L.H. Form No.4 had been issued to all the three legal heirs of Beni Madhav to show cause as to why the statement prepared in C.L.H. 3A, 3B & 3C should not be taken as correct. The legal heirs of deceased Beni Madhav filed their respecting objections before the prescribed authority and prescribed authority in the three cases registered against the three legal heirs of deceased Beni Madhav vide order dated 11.12.1974 declared 5.59 hectare land in irrigated terms as surplus and the plot which were declared surplus included khasara no.53. The proceeding for taking the possession was started by the State, accordingly, petitioner came to know about the order dated 11.12.1974 declaring the khasara no.53 surplus, filed an application dated 3.9.1979 / case before the ceiling authority under Section 11 (2) of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as "Ceiling Act") for recalling / setting aside the order dated 11.12.1974. In the application it was mentioned by the petitioner that petitioner is recorded in the revenue records over khasara no.53 but without notice and opportunity of hearing, khasara no.53 has been declared as surplus treating the khasara no.53 of the respondent nos.16 to 18 (legal heirs of Beni Madhav). Prescribed authority vide order dated 6.3.1982 rejected the case under Section 11 (2) of the Ceiling Act filed by the petitioner. Petitioner challenged the order

dated 6.3.1982 by way of three appeals before district judge, which were registered as Appeal No.20/1982, 21/1982, 22/1982. The aforementioned appeals were clubbed and decided together by the First Additional District Judge, Basti vide order dated 17.2.1984 whereby the appeals were allowed setting aside the order of prescribed authority dated 6.3.1982 and ordered that khasara no.53 shall be excluded from the holding of respondent nos.16 to 18. Surplus land under the order of prescribed authority dated 11.12.1974 alleged to be allotted to respondent nos.5 to 15. Respondent nos.5 to 15 (allottees) filed a Civil Misc. Writ Petition No.12319 of 1984 before this Court against the appellate order dated 17.2.1984, which was allowed vide order dated 3.12.2002 and matter was remanded back to the Commissioner to decide the matter afresh after notice and opportunity of hearing to the parties including allottees. Due to the amendment in the ceiling act, the jurisdiction to decide the appeal was vested with Commissioner in place of District Judge, accordingly, the appeal in pursuance of the remand order passed by this Court was heard by respondent no.2/ Commissioner, Basti Division, Basti, who vide order dated 19.1.2012 dismissed all the three appeals filed by the petitioner, hence this writ petition for the following reliefs:

"i. issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 11.12.1974, 6.3.1982 passed by the respondent no.3 and the order dated 19.1.2012 passed by respondent no.2 (Annexure No.6, 8 and 14).

ii. issue a writ, order or direction in the nature of mandamus directing the respondents to exclude the plot no.53 from

the ceiling area which has been purchased by the petitioner.

iii. issue such other and further writ, order or direction which this Hon'ble Court may deem fit and proper in the nature and circumstances of the present case.

iv. Award costs of the petitioner to the petitioner.

v. issue a writ, order or direction in the nature of mandamus commanding and directing the State Government to award Rs.13,00,000/- to the petitioner as the compensation of the land in dispute w.e.f. the year 1980 to December, 2012 and further 40,000/- per year till the date of delivery of possession to the petitioner."

3. This Court vide order dated 25.4.2012 entertained the matter, issued notice to respondent nos.16, 17 & 18 as well as directed all the respondents to file counter affidavit.

4. In pursuance of the order of this Court, parties have exchanged affidavit in the instant writ petition.

5. Learned counsel for the petitioner submitted that the impugned orders have been passed by ceiling authorities in illegal and arbitrary manner. He further submitted that U.P. Act No.18 of 1973 had already come into force on 8.6.1973 and petitioner had purchased the land in question vide sale deed dated 8.10.1971 as well as petitioner came in possession since the date of execution of the sale deed in his favour and the name was also recorded in the revenue record. He further submitted that prescribed authority has illegally included the khasara no.53 in the statement of respondent nos.16 to 18 and declared the same as surplus treating the same to be the land belonging to Beni Madhav father of respondent

nos.16 to 18. He further submitted that on the basis of sale deed dated 8.10.1971 khasara no.53 was vested with the petitioner, as such, the same could not be included in the statement of respondent nos.16 to 18 for the purposes of determination of the land as surplus. He further submitted that the prescribed authority as well as the appellate authority have failed to examine the provisions under the ceiling act regarding sale deed which has been executed before the relevant date. He further submitted that respondent no.2 has erred in holding that the sale deed executed in favour of the petitioner is benami transaction as petitioner and the erstwhile owner belong to different caste and religion so there is no question of benami transaction in the matter. He further submitted that the appellate Court vide order dated 17.2.1984 has allowed the appeal filed by the petitioner setting aside the order of prescribed authority declaring the khasara no.53 as surplus and there was no challenge by the State against the appellate order dated 17.2.1984, as such, no right will accrue to respondent nos.5 to 15 who are lease holders of the plot in question. In support of his argument, he placed reliance upon the following judgment of this Court, which are as follows:

"i. 1979 All L.J. 1174, Shantanu Kumar vs. State of U.P. and others.

ii. 2011 (112) RD 681, A. Kumar vs. State of U.P.

iii. 2010 (111) RD 744, Ram Kripal Singh and another vs. Apar Ayukt and others.

iv. 1990 RD 95, Gurumukh Singh and others vs. State of U.P. and Others."

6. On the other hand, Mr. Dhananjay Singh, learned Standing Counsel for the State submitted that khasara no.53 area 2-

17-15 was recorded in the name of Beni Madhav and Beni Madhav was recorded in the khatauni of 1378-1380 fasli. He further submitted that the sale deed alleged to be executed in favour of the petitioner by Beni Madhav cannot be relied upon. He further submitted that the notice was issued to the heirs of Beni Madhav under C.L.H. Form No.4 to show cause as to why the statement should not be taken as correct. He further submitted that the notice under Section 10 (2) of the Ceiling Act was issued on 14.3.1974. He further submitted that the prescribed authority has rightly declared 5.59 hectare land of respondent nos.16 to 18 as surplus. He next submitted that the petitioner had full knowledge about the ceiling proceeding but in order to delay the proceeding, recall application was filed later on which has been rightly rejected by the prescribed authority and appeal has also been dismissed in accordance with law. He further submitted that the cut-off date under the Ceiling Act is 24.1.1971, as such, petitioner is not entitled to rely upon the sale deed, which is alleged to be executed on 8.10.1971. He further submitted that there is no illegality in the impugned order and the writ petition filed by the petitioner is liable to be dismissed.

7. Mr. Brijesh Kumar Srivastava, learned counsel for the respondent nos.5 to 15 submitted that khasara no.53 area 0-15-18 was rightly declared surplus vide order dated 11.12.1974 and the same has been allotted to respondent nos.5 to 15. He next submitted that during consolidation operation, the name of respondent nos.5 to 15 has been recorded and C.H. Form 45 was also prepared in the name of respondent nos.5 to 15. He further submitted that respondent nos.5 to 15 has been accordingly recorded in the khatauni of 1412-1417 fasli as well as 1418-1423

fasli. He further submitted that respondent nos.5 to 15 have also filed an objection under Section 9 A (2) of U.P. Consolidation of Holdings Act, 1953 and Consolidation Officer vide order dated 2.1.1985 directed to expunge the name of the petitioner from the revenue records. He further submitted that the petitioner has challenged the order of the Consolidation Officer dated 2.1.1985 and the same has attained finality between the petitioner and respondent no.5. He next submitted that no cancellation proceeding has been initiated under Section 27 (4) of the Ceiling Act by anybody, as such, the lease executed in favour of respondent nos.5 to 15 in respect to the surplus land cannot be ignored or cancelled by any authority. In support of his argument, he placed reliance upon the judgments of Hon'ble Apex Court, which are as follows:

"i. AIR 1990 Supreme Court 2186, Ram Chandra Singh (dead) through legal heirs vs. State of U.P. and Others.

ii. 1981 LawSuit (SC) 178, Sonia Bhatia vs. State of Uttar Pradesh."

8. I have considered the argument advanced by learned counsel for the parties and perused the records.

9. There is no dispute about the fact that prescribed authority has declared 5.59 hectare land in irrigated terms as surplus including Khasara no.53 vide order dated 11.12.1974. There is also no dispute about the fact that prescribed authority vide order dated 6.3.1982 dismissed the case filed by petitioner under Section 11 (2) of the Ceiling Act but the appeal filed by the petitioner against the order dated 11.12.1974 was allowed by the appellate authority vide order dated 17.2.1984 but in writ petition filed by respondent nos.5 to

15, the appellate order dated 17.2.1984 was set aside and matter was remanded back before the appellate Court to decide the appeal afresh. There is also no dispute about the fact that after remand order passed by this Court, the appellate authority has dismissed the appeal filed by the petitioner vide order dated 19.1.2012.

10. In order to appreciate the controversy involved in the matter, perusal of Section 5 (6) of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 will be relevant for perusal, which is as under:

"(6) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth day of January, 1971 which but for the transfer would have been declared surplus land under this Act, shall be ignored and not taken into account ;

(a) a transfer in favour of any person (including Government) referred to in sub-section (2);

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a benami transaction or for the immediate or deferred benefit of the tenure-holder or other members of his family.

[Explanation I - For the purposes of this sub-section, the expression transfer of land made after the twenty-fourth day of January, 1971, includes -

[(a) a declaration of a person as a co-tenure-holder made after the twenty-fourth day of January, 1971, in a suit, or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971] ;

[(b) any admission, acknowledgment, relinquishment or declaration in favour of a person to the life effect, made in any other deed or instrument or in any other manner.

Explanation II The burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit."

11. Perusal of the record demonstrates that the petitioner is claiming right on the basis of sale deed executed in his favour on 8.10.1971 in respect to the khasara no.53 area 2-17-15 from its recorded tenure holder Beni Madhav and the name of the petitioner was ordered to be recorded in case no.329 passed by the Sub-Divisional Office, Dumeriyaganj. Entry has been made in the remark column of the khatauni of 1378-1380 fasli. Petitioner is claiming that after enforcement of Act No.18 of 1973 w.e.f. 8.6.1973, the sale deed executed on 8.10.1971 in favour of the petitioner is well protected. The record also demonstrates that the objection under Section 11 (2) of the Ceiling Act filed by the petitioner has been dismissed by the prescribed authority and the appeal has also been dismissed holding that transaction of the petitioner is benami and no reliance can be placed upon the same as the same has been executed after 24.1.1971. The reasoning given under the impugned order cannot be sustained as the sale deed has been executed before 8.6.1973, as such, the same is well protected.

12. In the instant matter petitioner is claiming right on the basis of sale deed executed on 8.10.1971 by recorded owner, which is well before the relevant date 8.6.1973 and notice was issued to respondent nos.16 to 18 on 14.3.1974 for show cause in C.L.H. Form- 3A, 3B & 3C,

as such, the sale deed executed on 8.10.1971 cannot be ignored by ceiling authorities coupled with the fact that name of the petitioner came in remark coloumn of Khatauni of 1378 fasli to 1380 fasli (1970-71 to 1972-73).

13. The Full Bench of this Court in the case of **Shantanu Kumar (supra)** has held that failure to serve notice of the ceiling proceeding on transferee from tenure-holder is illgal. Paragraph Nos.7 to 12 of the full Bench in **Shantanu Kumar (supra)** will be relevant for perusal, which are as under:

"7. Section 9 of the Act provides for a general notice to tenure-holders holding land in excess of ceiling area for submission of statement in the prescribed form within thirty days of the publication of the general notice in the official gazette. So every tenure-holder who holds land in excess of ceiling area is required to furnish a statement mentioned in Section 9 and every such tenure-holder who has failed to submit such statement has to be served with a notice under Section 10(2).

8. Rule 8 provides for service of notice on every tenure-holder to show cause within fifteen days why the aforesaid statement prepared by the prescribed Authority be not taken as correct. Proviso to this rule then provides:

Provided that where the statement in C.L.H. Form 3 also includes land ostensibly held in the name of any other person, the prescribed authority shall cause to be served upon such other person a notice in C.L.H. Form 4 together with a copy of the statement in C.L.H. Form 3 calling upon him to show cause within a period of 15 days from the date of service of the notice why the aforesaid statement be not taken as correct....

9. It is thus evident that the notice requiring the tenure-holder to show cause why the statement prepared by the Prescribed Authority be not taken as correct is to be issued to the tenure-holder in respect of whose holding the statement has been prepared. Under the proviso, the Prescribed Authority shall cause to be served a notice to the person in whose name the land included in C.L.H. Form 3 is ostensibly held. The Prescribed Authority prepares the statement on the basis of revenue records or other information, the Prescribed Authority comes to know that the land included in the statement in C.L.H. Form 3 includes land ostensibly held in the name of any other person, the Prescribed Authority is bound to serve notice on such person. The phrase used is 'shall cause to be served'.

10. The Petitioner claimed under a sale deed. It is not disputed that the Petitioner's name was recorded in the revenue papers over the land which was transferred to him. It is admitted that the statement in C.L.H. Form 3 included the land held by the Petitioner. He was hence a person in whose name some part of the land mentioned in the statement was believed by the Prescribed Authority to be ostensibly held. In this situation, it was incumbent upon the Prescribed Authority to serve upon the Petitioner the requisite notice together with a copy of the statement and call upon him to show cause why that statement be not taken as correct.

11. It is obvious that service of such a notice is preliminary to the acquisition of jurisdiction to proceed in the matter and decide whether the land ostensibly held in the name of the Petitioner could be declared as surplus land in the hands of Bhupendra Singh. In the premises, the proceedings were without

jurisdiction and void. Learned Standing Counsel submitted that the Petitioner had knowledge and he should have filed an objection under Section 11(2) of the Act as has been held by a Division Bench of this Court in **Dilbagh Singh v. The State of Uttar Pradesh 1978 AWC 393**. The existence of another remedy under the Act cannot validate the proceedings which are void for lack of jurisdiction and which have resulted in the declaration as surplus land of an area which a person other than the tenure holder who has been heard, claims. The fact that the Petitioner could have filed an objection under Section 11(2) will not breathe life into or validate these dead proceedings.

12. It was urged that since the Petitioner knew of these proceedings he kept silent all this while, this Court need not interfere in exercise of its discretionary jurisdiction under Article 226 of the Constitution. It is well settled that an objection to lack of jurisdiction can be taken at any stage of the proceedings and even in collateral proceedings (See **Kiran Singh v. Chaman Paswan : AIR 1954 SC 340**). Consent or waiver cannot be a ground for refusing to entertain such an objection. We hence cannot deny relief to the Petitioner on the ground of alternative remedy. It is equally settled that existence of jurisdiction cannot be conferred by consent or waiver. This plea is only relevant to the exercise of jurisdiction. Here there was lack of jurisdiction by reason of non-compliance of the first proviso to Rule 8."

14. This Court in the case of **A. Kumar (supra)** has held that ceiling limits are to be determined with reference to the relevant date i.e. 8.6.1973. Paragraph no.5 of the judgment of this Court in **A. Kumar**

(supra) will be relevant for perusal, which is as under:

"5. I am in agreement with the findings so recorded. If user of the land has been changed by the tenure holder subsequent to 8th June, 1973 then such land cannot be excluded from the tenure holding for the purpose of determination of ceiling limits. The Petitioners are not entitled to reduction in area because of such change in the user of land after 8th June, 1973. The ceiling limits are to be determined with reference to the relevant date i.e. 8th June, 1973 and the land held on the said date for the agricultural purposes. In absence of any evidence having been brought on record by the Petitioners to establish that the land was being so used prior to 08th June, 1973, the authorities are legally justified in rejecting the contention so raised."

15. This Court in the case of **Ram Kripal Singh (supra)** has held that any patta executed in respect to the land ceased to be surplus is illegal. Paragraph no.8 of the judgement rendered in **Ram Kripal Singh (supra)** will be relevant for perusal, which is as under:

"8. It is to be noted that any patta executed by the District Collector would be a nullity and void on account of the fact that the land in question has been restored back to the petitioners vide order dated 31.8.1984 and thereafter right to retain the land was vested with the petitioners. There was no right vested with the opposite parties to execute patta in respect of the land which was not surplus at any point of time. If any patta has been executed, then the same would be deemed to be a nullity. The proposition of law laid down by this Court in the case of **Brijendra Pratap**

Bahadur Singh (*supra*) goes to indicate that the identical controversy was involved in the said case and this Court observed that in view of the provisions of section 14 of the Act, the land was not surplus as the order stood modified.

Relevant para-8 of the aforesaid judgment is reproduced hereunder:

8. Section 14 of the Act provides that the land will be surplus only after the decision in appeal under section 13. The action of the Prescribed Authority in taking the possession of the surplus land was wholly illegal and against the provisions of the U.P. Imposition of Ceiling on Land Holdings Act. The Prescribed Authority even after the decision of the appeal failed to restore the possession of the land to the petitioners and rejected the application of the petitioners dated 28.1.1983 for restoration of possession in a most illegal manner by its order dated 1.3.1984 and again committed error while rejecting the review petition by order dated 6.3.1987. The petitioners have been deprived by the State in a most arbitrary manner. The arguments of the learned Counsel appearing on behalf of the State that the land has been allotted to the different persons and they are not party in the instant petition can not be accepted. It is the State who has taken over the possession of the land during the pendency of the appeal although the land was not declared as surplus in view of Section 14 of the Act. If any lease has been granted/issued by the Collector on behalf of State Government of the land in dispute that is null and void and lease holders have no title or interest over the land. The Board of Revenue has also issued Government Order dated 6.3.1981, a copy of which has been annexed along with the writ petition also provides that the Prescribed Authority is competent to dispossess the lease holders and restore the

possession to the original tenure holders whenever the order of the Prescribed Immaturity has been modified by any competent Court. In the instant case, the application was moved by the petitioners before the Prescribed Authority for restoration of the possession but the Prescribed Authority has failed to discharge his duty.”

16. So far as the execution of the lease in favour of respondent nos.5 to 15 is concerned, the same is always subject to the right & title of the State. Since, the Court is holding that the khasara no.53, which was purchased by the petitioner by way of sale deed executed on 8.10.1971 cannot be declared surplus without notice and opportunity of hearing to the petitioner, as such, respondent nos.5 to 15 cannot claim any right on the basis of lease deed. No useful purpose will be served by remanding the matter again before the prescribed authority or the appellate authority as earlier also the matter has been remanded by this Court to decide the appeal afresh. The litigation cannot be kept pending in Court for unlimited period rather to finalize the same on the basis of evidence on record as well as considering the ratio of law laid down by this Court as quoted above.

17. Considering the entire facts and circumstances of the case, the impugned order dated 6.3.1982 passed by respondent no.3 as well as order dated 19.1.2012 passed by respondent no.2 are liable to be set aside and the same are hereby set aside. The impugned order dated 11.12.1974 so far as it relates to Khasara No.53 is also set aside and Khasara No.53 is excluded from ceiling proceeding.

18. The writ petition stands **allowed**.

19. No order as to costs.

(2024) 9 ILRA 845

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.09.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 20839 of 2024

With

Writ C No. 20841 of 2024

Baroda U.P. Bank ...Petitioner

Versus

Komal Ram & Ors. ...Respondents

Counsel for the Petitioner:

Mr. Gyan Prakash Srivastava

Counsel for the Respondents:

Mr. Shubham Kumar, Mr. Anant Kumar Tiwari

A. Civil Law - Constitution of India, 1950- Article 226- Payment of Gratuity Act, 1972-Section 4(6)-The respondents were employees of Baroda U.P. bank-both were dismissed from service for financial irregularities-respondents filed claims under the Payment of Gratuity Act,1972 for gratuity payment for their years of service before dismissal-Held, gratuity is a statutory right under the Act,1972-respondents were entitled to gratuity as forfeiture provisions were not applied by the bank and gratuity cannot be withheld without following statutory forfeiture procedures as forfeiture provisions were not invoked by the bank during disciplinary proceedings-Orders of controlling and appellate authorities granting gratuity and interest were upheld.(Para 1 to 22)

The writ petitions are dismissed. (E-6)

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Gyan Prakash Srivastava, learned counsel for the petitioner, Mr. Shubham Kumar, learned counsel for respondent nos. 1/1 to 1/5, Mr. Anant Kumar Tiwari, learned counsel for respondent nos. 2 & 3 in the leading petition and Mr. Gyan Prakash Srivastava, learned counsel for the petitioner, Mr. Sri Narayan Mishra, learned counsel for respondent no.1, Mr. Anant Kumar Tiwari, learned counsel for respondent nos. 2 & 3 in the connected petition, i.e. Writ C No.20841 of 2024.

2. With the consent of learned counsel for the parties, both the aforesaid writ petitions are being heard finally without inviting counter affidavits in the matter.

3. Since common issues are involved in both the writ petitions, same are being disposed of by a common order. The facts stated in Writ C No.20839 of 2024 shall be treated as a leading petition.

4. Brief facts of the case stated in the leading petition are that erstwhile Purvanchal Bank, Kashi Gomti Samyut Gramin Bank are now amalgamated vide Government Notification No.3837 dated 26.11.2019 and assigned the new name "Baroda U.P. Bank". The Baroda U.P. Bank came into existence w.e.f. 1.4.2020. The employees who were working under erstwhile Kashi Gomti Samyut Gramin Bank, now Baroda U.P. Bank are governed by Baroda U.P. Bank (Officers and Employees) Service Regulations, 2020. In respect to payment of gratuity, there exists Regulation No.72 for payment of gratuity in the Purvanchal Gramin Bank (Officers & Employees), Service Regulations, 2010, now Baroda U.P. Bank (Officers & Employees) Service Regulations, 2020. Under Chapter 4 of Regulation, 2010, there

exist Regulations 16 to 51 which contains provision pertaining to conduct, discipline and appeals. Respondent no.1 joined in Kashi Gomti Samyut Gramin Bank and he was holding the post of Officer JMGS-1 at Nariaon Branch. At the time of aforementioned posting, in respect to certain financial irregularity, a charge-sheet dated 21.1.2020 was issued to respondent no.1. The aforesaid disciplinary proceedings, on the basis of the aforementioned charge-sheet, was concluded and vide order dated 7.9.2012, respondent no.1 was dismissed from services of the bank with immediate effect. Against the order dated 7.9.2012, an appeal was filed by respondent no.1 which was dismissed by the appellate authority on 1.2.2013. Respondent no.1 filed re-appeal against the order dated 7.9.2012 which was also dismissed on 18.11.2013 on the ground that there is no provision of review under Service Regulation, 2010. Respondent no.1 challenged the orders dated 7.9.2012 and 1.2.2013 before this Court by way of Writ A No.22630 of 2013 which was dismissed by this Court vide order dated 1.5.2013. Respondent no.1 filed an application on 22.2.2018 before the Assistant Labour Commissioner (Central)/Controlling Authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act") which was registered as Case No.A-48(9) of 2018, claiming gratuity for services rendered by him in bank for 32 years 11 months and 24 days, i.e. from 13.10.1979 to 7.9.2012. The notice was issued by the Controlling Authority to the bank, accordingly, the bank submitted his reply before the Controlling Authority on 12.10.2018. The Controlling Authority vide order dated 16/19.8.2021 has held that respondent no.1 is entitled for gratuity amount of Rs.4,68,213/- along with 7 % simple

interest, amounting to Rs.2,89,511/-, total amounting to Rs.7,57,724/-. Against the order of the Controlling Authority dated 16/19.8.2021, the petitioner-bank filed an appeal under sub-section 7 of Section 7 of the Act before the Deputy Chief Labour Commissioner (Central)/The Appellate Authority by depositing Rs.7,57,724/- vide D.D. No.371829 dated 29.11.2021. The aforementioned appeal was registered as Case No.K-36(69)/2021 C-1. The appellate authority vide order dated 27.3.2024 dismissed the appeal filed by the petitioner, hence, this writ petition for the following reliefs:-

(i) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 27.03.2024 which was sent on 08.04.2024 as passed by Deputy Chief Labour Commissioner (Central)/The Appellate Authority (Under Payment of Gratuity Act, 1972), Udyog Nagar, Kanpur, the same was received by the petitioner on 16.04.2024 in Case No. K.36 (69)/2021 C-1 (The Chairman, Baroda U.P. Bank Vs. Shri Komal Ram & Another) Annexure No.1 to this Writ Petition.

ii. Issue a writ, order or direction in the nature of Ceriorari quashing the impugned order dated 16/19.08.2021 as passed by the Assistant Labour Commissioner (Central), The Controlling Authority (Under Payment of Gratuity Act, 1972), Allahabad in Case No. A-48 (9) 2018 (Sri Komal Ram Vs The Chairman Kashi Gomti Samyut Gramin Bank.) Annexure No.2 to this Writ Petition.

iii. Issue a writ, order or direction in the nature of mandamus restraining the respondent nos. 2 & 3 for releasing the deposited amount Rs. 7,57,724/- as was deposited by the

petitioner-bank at the time of the filing of appeal.

iv. Issue a writ, order or direction in the nature of mandamus restraining the respondents from taking any coercive action pursuant to orders impugned.

5. This Court vide order dated 18.7.2024 entertained the matter and granted interim relief. The order dated 18.7.2024 runs as follows:-

“1. Heard Mr. Gyan Prakash Shrivastava, learned counsel for the petitioner, Mr. Shubham Kumar, learned counsel for respondent no.1 and Mr. Anant Kumar Tiwari, learned counsel for respondent nos.2 & 3.

2. Learned counsel for the petitioner submitted that the impugned order has been passed in arbitrary manner by the controlling authority under the Payment of Gratuity Act, 1972. He further submitted that the petitioner was dismissed from service and writ petition against the dismissal order has been dismissed by this Court, as such, in view of the ratio of law laid down by the Hon'ble Apex Court in the case of Chairman Cum Managing Director, Mahanadi Coalfields Limited Vs. Sri Rabindranath Choubey passed in Civil Appeal No.9693 of 2013, respondent no.1 is not entitled to claim gratuity as ordered under the impugned order. He further submitted that the appeal filed by the petitioner has also been dismissed in arbitrary manner.

3. On the other hand, learned counsel for respondent no.1 submitted that there is no illegality in the order of controlling authority as there was violation of the mandatory provisions

contained under the Payment of Gratuity Act, 1972.

4. Learned counsel for respondent no.1 shall address the Court about the ratio of law laid down by the Hon'ble Apex Court in the case of Chairman Cum Managing Director, Mahanadi Coalfields Limited (supra) on the next date fixed in the matter as well as place case law in support of his argument.

5. Put up this case as fresh on 31.7.2024.

6. Till the next date of listing, the amount deposited by the petitioner under the order of controlling authority shall not be released by respondent no.2.”

6. The brief facts of the case in connected petition is that respondent no.1 joined in the establishment of Purvanchal Bank and lastly he was also holding the post of JMGS-II at Kubersthan branch, Kushinagar and Jannipur branch, Gorakhpur. Respondent no.1 was dismissed from service vide order dated 13.12.2014 and appeal filed by respondent no.1 was dismissed by the appellate authority on 8.4.2015. Respondent no.1 challenged the dismissal order as well as appellate order before this Court by way of Writ A No.69162 of 2015 which was dismissed vide order dated 15.5.2018. Respondent no.1 initiated proceeding for payment of his due gratuity under the Payment of Gratuity Act, 1972 (hereinafter referred to as “the Act”) which was allowed by Controlling Authority vide order dated 16.10.2019 for gratuity amount of Rs.5,72,178/- and interest of Rs.100131/- total Rs.6,72,309/-. In appeal filed by petitioner, the order of controlling authority was modified by appellate authority vide order dated 1.4.2024 to the extent that respondent no.1

shall be entitled to total Rs.8,43,963/- in place of Rs.5,72,178/- as interest was not rightly calculated by the controlling authority, hence, this writ petition for following relief:-

(i) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 1.4.2024 which was sent on 09.04.2024 as passed by Deputy Chief Labour Commissioner (Central)/The Appellate Authority (Under Payment of Gratuity Act, 1972), Udyog Nagar, Kanpur, the same was received by the petitioner on 16.04.2024 in Case No. K.36 (12)/2020 C-1 (The Chairman, Baroda U.P. Bank vs. Shri Komal Ram & Another) Annexure No.1 to this Writ Petition.

ii. Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 16.10.2019 as passed by the Regional Labour Commissioner (Central), The Controlling Authority (Under Payment of Gratuity Act, 1972), Lucknow in Case No. LKO 36 (27) /2017 (Sri Santosh Kumar Pathak vs. The Chairman, Purvanchal Bank). Annexure No.2 to this Writ Petition.

iii. Issue a writ, order or direction in the nature of mandamus restraining the respondent nos. 2 & 3 for releasing the deposited amount of Rs. 5,72,178/- as was deposited by the petitioner-bank at the time of the filing of appeal.

iv. Issue a writ, order or direction in the nature of mandamus restraining the respondents from taking any coercive action pursuant to orders impugned.

7. This Court entertained the matter on 18.7.2024 and granted interim order on 18.7.2024.

8. Learned counsel for the petitioner submitted that in the disciplinary proceeding, initiated against respondent no.1, with respect to serious financial charges, respondent no.1 was held guilty and was dismissed from service of the bank with immediate effect, as such, respondent no.1 is not entitled to gratuity as claimed by him. He further submitted that appeal as well as re-appeal filed by respondent no.1 against his dismissal order, has also been dismissed by the appellate authority. He submitted that even the writ petition filed by respondent no.1 in respect to the dismissal order, has been dismissed by this Court, as such, respondent no.1 is not entitled to claim gratuity. He also submitted that respondent no.1 has not disclosed in his application for payment of gratuity regarding the disciplinary proceeding initiated against him, as such, the impugned order cannot be sustained in the eye of law. He also submitted that the Controlling Authority has failed to consider the material fact that petitioner-bank has its own rules governing the payment of gratuity to its officers and employees, as such, the Act shall not be applicable in the petitioner-bank. He submitted that appeal filed by the petitioner-bank has also been dismissed in arbitrary and casual manner, as such, the impugned order is liable to be set aside and the claim of respondent no.1 for payment of gratuity is liable to be rejected. He placed reliance upon the judgement of the Hon'ble Apex Court in **Civil Appeal No.9693 of 2013, Chairman-cum-Managing Director, Mahanadi Coalfields Limited vs. Sri Rabindranath Chaubey**, decided on 27.5.2020. He further placed the Service Regulation of the petitioner-bank which provides for payment of gratuity to its officers and employees.

9. On the other hand, learned counsel appearing for respondent no.1 in both the writ petitions submitted that respondent no.1 was regular employee of the petitioner-bank, as such, the claim for gratuity set up by respondent no.1, cannot be refused by the authority. He submitted that the respondent no.1 in both the writ petitions have claimed for gratuity for the period they were appointed in the bank and till the date they were dismissed from the service, as such, there was no question of any concealment on the part of respondent no.1 before the Controlling Authority or the appellate authority. They further submitted that so far as the delay in raising the claim is concerned, since the Controlling Authority had already condoned the delay in entertaining the application and, thereafter, passed an order on merit, as such, the argument advanced by learned counsel for the petitioner regarding delay in raising the claim, is misconceived. They further submitted that respondent no.1 have completed 32 years 11 months and 24 days service before his dismissal, as such, respondent no. 1 in both the petitions are eligible to receive the gratuity for the aforementioned service period. They also submitted that since respondent no.1 in both the petitions were denied for their legal claim regarding gratuity, as such, the interest has been rightly awarded by the Controlling Authority. They submitted that appeal filed by the petitioner-bank has been rightly dismissed, deciding each and every point raised by the petitioner, which requires no interference under Article 226 of the Constitution of India. They further submitted that in connected petition, the claim regarding interest was modified by appellate authority in proper manner. They further submitted that the judgement of Hon'ble Apex Court in **Chairman-cum-Managing Director,**

Mahanadi Coalfields Ltd. (supra) is not applicable in the present matter. He further placed the judgment of Hon'ble Apex Court reported in **1996 (4) Supreme 764, Pawan Kumar vs. State of Haryana and Another** and that of the Delhi High Court reported in **2024 DHC 5022, Punjab National Bank vs. Niraj Gupta and Another** in support of his argument. They finally submitted that the writ petition is liable to be dismissed.

10. I have considered the arguments advanced by learned counsel for the parties and perused the records.

11. There is no dispute about the fact that respondent no.1 in both the petitions were appointed in the erstwhile Kashi Gomti Samyut Gramin Bank and at the time of dismissal, they were holding the post of Officer JMGS-1 & JMGS-II. There is also no dispute about the fact that the respondent no.1 in both the petitions were dismissed from service and appeal, re-appeal as well as the writ petition filed by them were also dismissed. There is also no dispute about the fact that the claim of gratuity under the Act, filed by respondent no.1, was allowed and the appeal filed by petitioner under Section 7(7) of the Act has been dismissed under the impugned order.

12. In order to appreciate the controversy involved in the matter, perusal of Section 4(6) & 7 of the Payment of Gratuity Act, 1972 as well as Rule 8(1) of the Payment of Gratuity (Central) Rules, 1972 will be relevant for consideration which are as under:-

“Section 4(6) of the Payment of Gratuity Act, 1972:-Notwithstanding anything contained in sub-section (1)

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss, to or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited- (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or,

(ii) if the services of such employee have been terminated for any act which constitutes as offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.”

“Section 7 of the Payment of Gratuity Act, 1972:-(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."

"Rule- 8(1) of the Payment of Gratuity Central Rules, 1972:- Within fifteen days of the receipt of an application under Rule-7 for payment of gratuity, the employer shall-

(i) if the claim is found admissible on verification, issue a notice in Form-L to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof, or

(ii) if the claim for gratuity is not found admissible, issue a notice in Form-M to the applicant employee, nominee or legal heir, as the case may be specifying the reasons why the claim for gratuity is not considered admissible."

13. The perusal of Chapter VII of Section 72 of the Regulation 2010 will be relevant for perusal which is as under:-

72. Gratuity.-

(1) An officer or employee shall be eligible for payment of gratuity either as per the provisions of the Payment of Gratuity Act, 1972 (39 of 1972) or as per sub-regulation (2), whichever is higher.

(2) Every officer or employee shall be eligible for gratuity on, -

- a) retirement,
- b) death,
- c) disablement rendering him unfit for further service as certified by a medical officer approved by the Bank, or
- (d) resignation after completing 10 years of continuous service, or

(e) termination of service in any other way except by way of punishment after completion of 10 years of service:

Provide that in respect of an employee there shall be no forfeiture of gratuity for dismissal on account of misconduct except in cases where such misconduct causes financial loss to the bank and in that case to that extent only.

(3) The amount of gratuity payable to an officer or employee shall be one months pay for every completed year of service or part thereof in excess of six months subject to a maximum of 15 month's pay:

Provided that where an officer or employee has completed more than 30 years of service, he shall be eligible by way of gratuity for an additional amount at the rate of one half of a month's pay for each completed year of service beyond 30 years:

Provided further that in respect of an officer the gratuity is payable based on the last pay drawn:

Provided also that in respect of an employee pay for the purposes of calculation of the gratuity shall be the average of the basic pay (100%), dearness allowance and special

allowance and officiating allowance payable during the 12 months preceding death, disability, retirement, resignation or termination of service, as the case may be.

14. The perusal of operative portion of dismissal order dated 7.9.2012 passed against respondent no.1 in the leading petition will be necessary which is as under:-

Order

SHRI KOMAL RAM IS HEREBY DISMISSED FROM THE SERVICES OF THE BANK WITH IMMEDIATE EFFECT.

THE PERIOD OF SUSPENSION SHALL BE TREATED AS PERIOD NOT SPENT ON DUTY AND HENCE SRI KOMAL RAM SHALL NOT BE PAID ANY SALARY AND ALLOWANCES OTHER THAN SUBSISTENCE ALLOWANCE ALREADY PAID TO HIM.

15. The perusal of the dismissal order dated 13.12.2014 passed against the respondent no.1 in the connected petition will be necessary which is as under:-

एतद्द्वारा मैं सक्षम प्राधिकारी श्री सन्तोष कुमार पाठक पर अधिरोपण हेतु प्रस्तावित दण्ड की पुष्टि करते हुये पूर्वाचन ग्रामीण बैंक (अधिकारी और कर्मचारी) सेवा विनियम, 2010 के विनियम 39.1 (क) (iv) के अन्तर्गत बैंक को हुई सम्पूर्ण धनीय हानि रु० 03.81 लाख मात्र (रुपये तीन लाख इक्यासी हजार मात्र) की वसूली उनके समाप्त लाभों से करने (Recovery of Rs. 03.81 lac only i.e. Rs. Three lac eighty

one thousand only from his terminal benefits the whole pecuniary loss caused to the bank) एवं 39.1 (ख) (iv) के अन्तर्गत सेवा से हटाया जाना जो भावी नियोजन के लिये निरर्हता नहीं होगी (removal from service which shall not be a disqualification for future employment) का दण्ड देता हूँ।

इस आदेश की सूचना श्री सन्तोष कुमार पाठक को दे दी जाय एवं इसकी एक प्रति उनकी सेवा पंजिका/अभिलेख में संलग्न की जाय।

ह० अप०

(राकेश कुमार गुप्ता)

सक्षम प्राधिकारी

अध्यक्ष

पूर्वाचन बैंक

16. The perusal of the provision contained under the Act, regulation of the bank, dismissal order dated 7.9.2012, it is established that respondent no.1 who has expired during pendency of the instant writ petition now represented by his legal heirs in the leading petition and respondent no.1 in the connected petition, cannot be deprived from gratuity for the period from the date of appointment till the date of dismissal of service of respondent no.1, i.e. 32 years 11 months 24 days as there is no proceeding at the instance of the bank for forfeiture of gratuity as provided under Section 4(6) of the Act and Rule 8(1) of the Payment of Gratuity (Central) Rules, 1972.

17. Controlling Authority and appellate authority have considered the point relating to delay in filing the claim for gratuity, entitlement for gratuity as well

as interest on the amount of gratuity which requires no interference by this Court under Article 226 of the Constitution of India.

18. The payment of gratuity is not charity rather is a statutory right recognized by the Act.

19. The disciplinary proceeding initiated against the respondent no.1 who is no more, has resulted into dismissal of service as well as depriving them from salary and allowance during suspension except subsistence allowance, as such, further depriving the respondent no.1/his legal heirs after death of respondent no.1 in the leading petition and respondent no.1 in the connected petition from gratuity for the period before the date of dismissal of his service will be excessive punishment and cannot be permitted in view of the provisions contained under the Acts and Rules.

20. The case law cited by learned counsel for the petitioner in **Chairman-cum-Managing Director, Mahanadi Coalfields** (supra) has been taken into consideration by Delhi High Court in the case of Punjab National Bank (supra) as cited by learned counsel for respondents. Paragraph Nos. 90 to 101 of the judgment in **Punjab National Bank** (supra) will be relevant for perusal which are as under:-

“90. This Court is further of the view that the most essential element which is with regards to the act resulting in dismissal constituting an “offence” amounting to moral turpitude has not been proved against the respondent employee by a Court of competent jurisdiction and the same can be deduced from the fact that no criminal proceedings either by the complainant or

by the petitioner Bank has been initiated against the respondent employee let alone conviction.

91. Before concluding, this Court before, deems it necessary to shed some light on a specific averment advanced by the learned Counsel for the petitioner Bank i.e., the judgment passed in Jaswant Singh Gill (Supra), relied upon in Ajay Babu (Supra) has been overruled by a three Judges Bench of the Hon'ble Supreme Court in Mahanadi Coalfields (Supra).

92. Before clarifying the disputed position of law as averted by the learned counsel for the petitioner Bank this Court, deems it necessary to cull out the findings of the Hon'ble Supreme Court in Jaswant Singh Gill (Supra) wherein the discussion inter alia was majorly based on two aspects:

Firstly it was held that the provisions contained under Section 4(6) of the Payment of Gratuity Act, 1972 would prevail over the non-statutory rules (Rules 34.2 and 34.30 framed by Bharat Coking Coal Ltd. (a subsidiary of Coal India Ltd.)). Secondly, the Court analysed the provision contained under the Act especially Section 4(6) of the Payment of Gratuity Act, 1972 and observed that the Act provides for a close-knit scheme for payment of gratuity and contains detailed provisions which not only creates a right to payment of gratuity for the employees but also lay down the conditions in which the same may be forfeited. Furthermore, it was held that Section 4(6)(b) of the Act also provides for forfeiture of gratuity payable to an employee wholly or partly in the event his services have been terminated by the employer on account of his riotous or disorderly conduct or for any other act of violence on his part

or if he has been convicted for an offence involving moral turpitude.

93. The Hon'ble Supreme Court in the judgment of Mahanadi Coalfields (Supra) took an opposite view to the decision in Jaswant Singh Gill (Supra) wherein it was inter alia held that the Payment of Gratuity Act, 1972 would prevail over the non-statutory rules framed by the employer. The Hon'ble Court in Mahanadi Coalfields (Supra) found it difficult to agree with the decision in Jaswant Singh Gill (Supra) and observed that the Rules framed by the employer are applicable and are not repugnant to provisions of the Payment of Gratuity Act, 1972.

94. After having stated the ratio of Jaswant Singh Gill (Supra), it is appropriate to deal with the abovesaid contention. With regard to the averment made by the counsel for the petitioner Bank, this Court is of the view that although the judgment passed in Jaswant Singh Gill (Supra) has been overruled by a three-Judge Bench of the Hon'ble Supreme Court in Mahanadi Coalfields (Supra) however, a perusal and close understanding of the same depicts that nowhere has the aspect pertaining to „conviction“ being an essential element for forfeiture of gratuity under Section 4(6)(b) of the Act been overruled.

95. In fact, the said aspect has not been discussed or analysed at all by the Hon'ble Court thus, it is clarified that Jaswant Singh Gill (Supra) in its entirety has not been overruled and the reliance placed upon it by the Hon'ble Court in Ajay Babu (Supra) cannot be deemed redundant.

CONCLUSION

96. Resultantly, as far as the instant case is concerned, is that the

order for forfeiture of gratuity payable to the respondent employee was premature and could not have been taken until the respondent employee was convicted by a Court of competent jurisdiction for the act constituting an offence involving moral turpitude as per Section 4(6)(b)(ii) of the Act.

97. Considering the principles laid down by the Hon'ble Supreme Court, as well as the consistent view taken by various High Courts including this Court, the submission advanced by the petitioner Bank cannot be accepted.

98. For all the aforesaid reasons, this Court does not any merit in the instant petition and the same is, hereby, held to be misconceived and unnecessary. The petitioner Bank has not been able to make out a case which warrants the interference of this Court under the extraordinary writ jurisdiction.

99. In view of the foregoing discussions, this Court finds no infirmity in the impugned Order dated 7th April, 2022 passed by the learned Appellate Authority under the Payment of Gratuity Act, 1972 in Appeal No. 36(09)/2021 P.A.DYC and subsequent Notice dated 26th April, 2022 issued by the respondent no.2 bearing no. ALC-I/36(88)2018, accordingly, the same are upheld.

100. In light of the aforementioned observations, the instant writ petition is accordingly dismissed along with pending applications, if any.

101. The order be uploaded on the website forthwith.”

21. Considering the entire facts and circumstances of the case, no interference is required against the impugned orders.

22. The writ petitions are dismissed and interim orders granted on 18.7.2024 are vacated.

23. No order as to cost.

(2024) 9 ILRA 855

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.09.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ - C No. 22963 of 2024

With

Writ - C No. 20023 of 2024

Dynamic Infracon Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Shashi Nandan (Sr. Adv.), Sri Udayan Nandan

Counsel for the Respondents:

Sri Manish Goyal (Addl. A.G.), Ms. Akansha Sharma (S.C.), Sri Navin Sinha (Sr. Adv.), Sri Nikhil Agarwal, Sri Manmohan Singh, Sri R.P. Singh

A. Civil Law - Constitution of India, 1950- Article 226-The cases involved challenges to a tender process for the supply of Sal wood sleepers and edgings for the Maha Kumbh Mela 2025-a mandatory requirement that bidders or the lead member of a consortium hold at least 51% of 1,000 cubic meters of Sal wood stock-physical inspection of the stock as per clause 6(g) of the e-bid document was not conducted-the alleged violations rendered the selection process arbitrary and biased-Held, the court found no conclusive evidence that the lead member of the winning consortium failed to meet stock requirements-the decision-making

process was not found arbitrary or discriminatory-the requirement for physical inspection was discretionary, as stated in the tender document, and uniformly waived for all bidders-the court emphasized restraint in interfering with tender processes unless actions are proven arbitrary, discriminatory or mala fide.Hence, both petitions were dismissed as the court upheld the tender process's validity.(Para 1 to 21)

The writ petitions are dismissed. (E-6)

List of Cases cited:

1. B.S.N Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. (2006) 11 SCC 548
2. W.B. SEB Vs Patel Engg. Co. Ltd.(2001) 2 SCC 451
3. Tata Motors Ltd. Vs Brihan Mumbai Electric Supply & Trans. Undertaking (BESY½ (2023) SCC Online SC 671
4. Balaji Ventures (P) Ltd. Vs Mah. St. power Generation Co. Ltd. (2022) SCC Online SC 1967
Directorate of Edu. Vs Educomp Datamatics Ltd. (2004) 4 SCC 19
5. Jai Hanuman Cons. Jagdish Saran Vs St. of U.P. (2023) SCC Online All 2033
6. Tata Cellular Vs U.O.I. (1994) 6 SCC 651
7. Central Coalfields Ltd Vs SLL- SML (joint Venture Consortium) (2016) 8 SCC 622
8. Afcons Infra. Ltd. Vs Nagpur Metro Rail Corps Ltd.(2016) 16 SCC 818
9. Silppi Cons. Contractors Vs U.O.I. (2020) 16 SCC 489

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. The instant connected petitions have been filed under Article 226 of the Constitution of India by the Dynamic

Infracon Pvt. Ltd. (Petitioner in Writ-C No. 22963 of 2024) and M/s Bengal Wood & Allied Products (Petitioner in Writ-C No. 20023 of 2024) seeking quashing of the entire tender process held in pursuance of e-bid tender document dated May 28, 2024 issued by Superintending Engineer, PWD, Prayagraj Circle, Prayagraj (hereinafter referred to as respondent No.2). The Petitioners have further prayed for some other numerous reliefs in accordance with their satisfaction through their respective petitions.

FACTS

2. Factual matrix of the present case is delineated below:

(a) The petitioner is a Private Limited Company (in Writ-C No. 22963 of 2024) & Sole Proprietorship Firm (in Writ-C No. 20023 of 2024) engaged in the business of supply of Sal wood sleepers and edgings and have previous experience in the supply of said products at the earlier Kumbh Mela held in Prayagraj, Uttar Pradesh.

(b) On May 28, 2024, the Sal Sleeper Purchase Committee through the Office of the Chief Engineer, PWD, Prayagraj Zone, Prayagraj issued an e-bid document wherein it invited applications from interested Government institutions/ corporations/firms/contractors/business entities either individually or as joint venture/consortium for supply of sal wood sleeper and edgings for construction of Pontoon bridges in the Maha Kumbh Mela, 2025 that was to be held in the city of Prayagraj, Uttar Pradesh.

(c) As per the bid document, the process of selection consists of two stages namely, technical bid and financial bid.

The financial bids would be open at a subsequent stage for only those bidders, who were successful in the technical bid.

(d) The date of commencement of the bidding process was fixed as May 27, 2024 and the last date of submission of the bidding documents was fixed as June 11, 2024 and thereafter, the technical bids were to be opened on the same day itself. However, on May 27, 2024, the Competent Authority issued a corrigendum, whereby the last date for the opening of the technical bid was extended to June 12, 2024.

(e) The petitioner in Writ-C No. 22963 of 2024 submitted its technical as well as financial bid at the rate of Rs.2,26,900 per cubic meter for the supply of Sal wood sleeper and edgings on June 12, 2024 and was found eligible in the technical bid. Out of total 12 bidders who submitted their technical bids, 11 bidders (including petitioner) were found to be qualified for the financial bid which was opened on June 15, 2024 wherein the contract was granted in favor of 5 bidders at the rate of Rs.1,58,000/- per cubic meter who were designated as L-1 to L-5 because L-2 to L-5 agreed to supply the required product at the same rate quoted by the L-1 bidder (a consortium of 3 entities namely Dhoramnath Traders, Shraddha Timber Stores and Vasant Timber Mart) that is at the rate of Rs.1,58,000/-. The Petitioner was placed at L-10 in the bidding process.

(f) On June 28, 2024, after the completion of the bidding process, the Letter of Award ('LoA') was granted in favor of 5 bidders who were placed at L-1 to L-5 in the financial bids to supply Sal wood sleepers and edgings at Maha Kumbh Mela, 2025.

(g) Therefore, the petitioner being aggrieved by the conferring of LoA to the

L-1 to L-5 without allegedly following mandatory condition of the e-bid document dated May 28, 2024 has approached this Court seeking the aforementioned reliefs through the present Writ Petitions.

CONTENTIONS OF THE PETITIONER

3. Sri Shashi Nandan, learned senior counsel appearing on behalf of the petitioner has made the following submissions:

(i) According to clause 5(d) and 5(e) of the e-bid document issued by the respondent No. 2, the bidder must have at least 1000 cubic meters of Sal wood/Sal sleepers/Sal edgings at the time of bidding and in the case of a consortium, the lead member of the consortium must have 51% of the said quantity.

(ii) Dhoramnath Traders, the respondent No. 6, who is the lead member of the L-1 consortium gave an undertaking that it has more than 1000 cubic meters of Sal wood edgings available with it. However, a report dated June 24, 2024 of the Assistant Range Officer, Raipur, Chhattisgarh shows that the total stock available with the respondent No. 6 was only 386.878 cubic meters.

(iii) A letter dated July 10, 2024 was issued by the Range Officer, Forest Range, Raipur, Chhattisgarh that a further inspection for proper verification of the stock is needed to be carried out and on July 31, 2024, in pursuance of the same, the Principal Chief Conservator of Forest passed an order for the constitution of a committee headed by the Divisional Forest Officer, Raipur Chhattisgarh to conduct an inquiry into the matter and submit its report

within 7 days from the date of the constitution of the committee. However, the inquiry regarding stock of the respondent No. 6 is yet to be completed and in spite of this fact, the contract has been awarded in favor of the respondent Nos. 6 to 21.

(iv) The lead member of L-1 consortium was not qualified to participate in the bidding because it did not possess the required 51% of 1000 cubic meters of Sal wood edgings at the time of bidding as per the condition of the e-bid document.

(v) According to clause 6(g) of the e-bid document, the appropriate committee had to carry out a physical inspection of the stock of the bidders at the time of opening of the technical bid. However, no physical inspection was carried out by the committee either before, during or after opening of the technical bid and the quality and quantity of stock of the bidders was never inspected or verified.

(vi) Clause 6(g) of the bid document is an essential and mandatory condition which could not have been ignored by the concerned committee and without following the said condition, no contract could have been granted in favor of the respondents.

(vii) The petitioner had written two letters dated June 22, 2024 and June 24, 2024 asking for the physical verification of the stock. However, no reply was given to the said letters.

(x) Clauses 5(d), 5(e) and 6(g) of the e-bid document were essential conditions dealing with the eligibility of the bidders and they had to be meticulously followed.

(xi) The objection raised by the respondents with regard to the eligibility of the petitioner that it does not have the requisite qualification for succeeding in the e-bid process is totally misconceived as it is clear from the undertaking of the petitioner that at the time of bidding, the petitioner had a stock of 1,425.894 cubic meters of the Sal wood.

(xii) To buttress his arguments, counsel for the petitioner has relied upon the judgments of the Supreme Court in cases of B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. reported in (2006) 11 SCC 548 and W.B. SEB v. Patel Engg. Co. Ltd. reported in (2001) 2 SCC 451.

CONTENTIONS OF THE RESPONDENTS

4. Sri Manish Goyal, learned Additional Advocate General and Sri Navin Sinha, learned Senior Advocate appearing for the State and respondent Nos. 6 to 18 respectively have made the following submissions:

(i) According to clause 5(d) and clause 5(e) of the e-bid document the prospective bidder had to have at least a stock of 1000 cubic meters of Sal Wood/Sal sleepers/Sal edgings at the time of bidding and in case of a consortium the lead member should have at least 51% of the Sal Wood/Sal sleepers/Sal edgings. The cumulative requirement of 1000 cubic meters of the stock was in respect of the total stocks of all the members of the consortium.

(ii) Substantiating the aforementioned arguments, counsel for the respondents placed reliance on the record dated June 7, 2024 which shows that the

total stock available with the respondent No. 6 is 1,131.97 cubic meters which consists of 913.609 cubic meters of Sal wood logs and 218.361 cubic meters of Sal wood edgings and the said record had been duly certified by the Assistant Forest Range Officer, Raipur, Chattisgarh. Hence, the respondent No. 6 (lead member of the consortium) fulfilled the criteria of minimum 510 cubic meters which is equivalent to 51% of the total requirement of 1000 cubic meters at the time of bidding as per clause 5(d) and clause 5(e).

(iii) The inquiry report, certifying the stock as on June 24, 2024 was an ex-parte inspection and ex-parte report, pursuant to which a show cause notice dated June 25, 2024 was issued. Consequently, the Range Officer after duly verifying the stocks, the registers maintained as prescribed, purchases during the period as well as the sales, subsequently came to the conclusion that the stock of month of May as certified by the Assistant Range Officer on June 7, 2024 was correct and there was no discrepancy in the certificate issued by the Assistant Range Officer.

(iv) The petitioner had not approached this court with clean hands as it itself is not eligible to participate in the tender proceedings in view of the clause 5(d) of the qualification criteria for eligible bidders, which envisaged at least 1000 cubic meters of stock of Sal Wood at the time of bidding but as per the registration certificate dated January 4, 2024, the licensed capacity has been specified as 500 cubic meters only for the petitioner which had been issued by the Divisional Forest Officer, Raipur.

(v) The rate of Sal Wood quoted by the petitioner was at Rs.2,26,900/- per

cubic meter as against the rate quoted by L-1 which was Rs.1,58,000/- per cubic meter.

(vi) The condition of physical inspection of the stock stipulated in clause 6(g) of the e-bid document was only an auxiliary/ancillary/non-mandatory condition of the technical bidding process. As evident from a conjoint reading of clauses 6(g) and 6(h) of the said e-bid document particularly the contents of clause 6(h) that the physical inspection by the purchase committee or its representative was subject to if "purchase committee requires", it can be inferred that there was a discretion which was given to the purchase committee for the requirement of physical inspection.

(vii) The further reading of part 2 relating to financial bid would make it absolutely clear that the requirement of physical inspection is not a condition precedent for opening of the financial bids. The bidders were only required to furnish details as per the tender document.

(viii) A conjoint reading of clauses 6(g), 6(h) and 6(i) would clearly establish that the condition of physical inspection of the stock of Sal round logs was only an auxiliary and ancillary condition and not a mandatory condition and was left to the discretion of the Purchase Committee to conduct the physical inspection.

(ix) In the e-bid document it is stated that the "Purchase Committee" is the only authority created for the purposes of conducting the entire tendering process and there is no other authority constituted by the order of the Principal Secretary, PWD. As the Purchase Committee has uniformly dispensed with the requirement of carrying

out physical inspection in respect of all the bidders, it cannot be said that it had not fulfilled the requirements of various clauses of the technical as well as the financial bid. Hence, there was no arbitrariness on the part of the State.

(x) The Sal sleeper purchase committee had been given the exhaustive powers under the bid document to facilitate the entire tendering process including the firm right to change the terms and condition in the Request for Proposal(RFP).

(xi) To buttress the arguments, counsel for the respondents have placed reliance upon umpteen judgments of the Apex Court such as **Tata Motors Ltd. v. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) reported in 2023 SCC OnLine SC 671 ; Balaji Ventures (P) Ltd. v. Maharashtra State Power Generation Co. Ltd. reported in 2022 SCC OnLine SC 1967; Directorate of Education v. Educomp Datamatics Ltd. reported in (2004) 4 SCC 19; and the judgment of Allahabad High Court in Jai Hanuman Construction Jagdish Saran v. State of U.P. reported in 2023 SCC OnLine All 2033;**

ANALYSIS AND CONCLUSION

5. We have heard the counsel appearing for the parties and perused the material on record.

6. Before carrying out analysis, we are delineating the relevant clause of the e-bid document herein below:

“5. Qualification Criterion for Eligible Bidders

(d). The Bidder must have stock of at least 1000 (One Thousand) cubic meter of Sal wood / Sal Sleepers / Sal Edgings at the time of bidding. The Bidder shall have to provide the documentary evidence of invoice and GST payment. The source of timber has to be legal for which the Bidder will have to produce the relevant document to the Sal Sleeper Purchase Committee. The Bidder will have to produce undertaking/Affidavit about the stock.

(e). The Bidder can be a single entity or a consortium of not more than five member entities, where the Lead Member shall meet at least 51% requirement of the entire qualification criterion mentioned in this RFP. The nomination(s) by all other members of the Consortium / JV shall be supported by a Power of Attorney, as per the format at Appendix-XI, signed by all such other members. Other Member(s) shall meet at least 10% requirement of all the qualification criteria mentioned in this RFP and the Consortium / JV as a whole shall cumulatively / collectively fulfill the 100% requirement of the said qualification criteria.

6. Submission of Bids

(g) Technical bids upon opening will be evaluated and all documents/details furnished by the bidder will be scrutinized. The Bid Evaluation Committee or any of its representative will carry out physical inspection of stock of Sal round logs. The technical bids will be evaluated on the basis of scrutiny of submitted documents and physical inspection of the stock of the bidders.

(h) Only those bidders whose technical bids upon opening are found in

order with regard to correct documentation shall be subjected to physical inspection by the Purchase Committee or its representative, if Purchase Committee requires.”

7. The argument raised by Sri Shashi Nandan, Senior Advocate appearing on behalf of the petitioner stands on two foundational pillars. Firstly, his argument is that the applicants were required to have 1000 cubic meters of stock (Sal wood/Sal sleepers/Sal edgings), if the applicant was an individual, and in the case of consortium, atleast 51 % of the 1000 cubic meters of stock should have been possessed by the lead member. The second limb of his argument is that at the time of opening of the technical bid, physical inspection of stock was required to be carried out by the Bid Evaluation Committee as per clause 6(g) of the e-bid document. Once the said physical inspection of stock was carried out as per clause 6(g), the Bid Evaluation Committee was to look into the technical bid on the basis of scrutiny of documents and physical inspection of the stock of the bidders. Sri Shashi Nandan has relied on the report dated June 24, 2024 of the Assistant Range Officer, Raipur, Chattisgarh to indicate that the concerned respondent who has been chosen as L1 was not an eligible bidder as per clause 5(d). In fact, he submits that the stock maintained by the respondent No. 6 (Dhoramnath traders) is only 386.878 cubic meters as per the said report. Secondly, he has submitted that the petitioner had written two letters dated June 22, 2024 and June 24, 2024 to the State authorities requesting them to carry out a physical inspection of the stock as per clause 6(g) but the same was never done in contravention of the said clause of the tender document. He submitted that this was a mandatory requirement that had not

been fulfilled and accordingly, the entire process that has been initiated and carried out by the State authorities is arbitrary, capricious, whimsical and without any basis in law.

8. Per contra, Sri Manish Goyal, learned Additional Advocate General appearing on behalf of the State and Sri Navin Sinha, learned Senior Advocate appearing on behalf of the respondent Nos. 6 to 18 have debunked the entire argument made by the petitioner submitting that the petitioner is only trying to create a cloud over the entire matter without bringing on record any factual data that could indicate that the State authorities have acted in contravention of the terms and conditions in tender document. Sri Navin Sinha has placed on record a report dated June 7, 2024 which was duly certified by the Assistant Forest Range Officer, Raipur, Chattisgarh and also subsequently affirmed by Range officer, Forest division, Raipur vide letter dated July 4, 2024 showing that the total stock with the lead member of L-1 namely Dhoramnath Traders was 1,131.97 cubic meters consisting of 913.609 cubic meters of Sal Wood logs and 218.361 cubic meters of Sal wood edgings.

9. With regard to the objection raised by the senior counsel appearing on behalf of the petitioner that the inspection was not carried out as per clause 6(g), it is to be noted that the Purchase Committee (Bid Evaluation Committee) had uniformly waived off the requirement of carrying out the physical inspection in respect of all the bidders and not for some of the applicants. Ergo, no case has been made out regarding any arbitrary or malafide action on the part of the State authorities. The authorities, upon checking the documents submitted by the applicants and using their discretionary

power under clause 6(h) of the e-bid document did not carry out inspection of any of the applicants. In fact, vide letters dated June 19, 2024 and June 22, 2024 they had also written to the petitioner to bring down the rate to the rate quoted by the L-1 that is Rs.1,58,000/- per cubic meter.

10. Counsel appearing on behalf of the State submitted that the private respondents/applicants have brought down their rates to Rs.1,58,000/- per cubic meter as per the demand of the State authorities and in light of the terms and conditions, the allocation was made to all the applicants who have brought down their rate to Rs.1,58,000/-. They further submitted that there was no arbitrariness as the documents submitted by the applicants were found to be in order, and therefore, the Committee did not carry out any inspection.

11. Before concluding on the issue at hand, one may examine the law laid down by the Apex Court on the issue of interference by writ courts in tender matters. The Supreme Court in the case of *Directorate of Education v. Educomp Datamatics Ltd.* reported in (2004) 4 SCC 19, reiterating the view contemplated in **Tata Cellular v. Union of India reported in (1994) 6 SCC 651** has espoused on the scope of judicial review in terms of tender prescribing eligibility criteria and held that the interference by the writ courts is open only when the action of the State authorities is arbitrary, discriminatory or biased but not merely because the court feels that some other term would have been more preferable. Relevant paragraphs of the judgment are quoted herein below:

“9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its

agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India [(1994) 6 SCC 651]. After examining the entire case-law the following principles have been deduced:

“94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body

functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

(emphasis supplied)

13. Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/government-aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-03, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs. 100 crores, the competent authority took a decision after consulting the Technical Advisory Committee for finalisation of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs. 20 crores over the last three years. The hardware cost itself was to be Rs. 40-45 crores. The Government introduced the criterion of turnover of Rs. 20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender, particularly in

view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went up to Rs. 40-50 crores. The total cost of the project was more than Rs. 100 crores. A company having a turnover of Rs. 2 crores may not have the financial viability to implement such a project. As a matter of policy the Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.”

12. The Supreme Court in the case of **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)** reported in (2016) 8 SCC 622 has held that the issue of acceptance or rejection of a bid or a bidder should be looked at not only from the point

of view of the unsuccessful party but also from the point of view of the employer. The terms of Notice Inviting Tender (NIT) can not be ignored as being redundant or superfluous. Relevant paragraphs of the judgment are delineated below:

“47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with relevant law could have reached” as held in Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] followed in Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216].

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it

provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.”

13. The Supreme Court reiterated its view contemplated in Central Coalfields Ltd.(supra) in the case of **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.** reported in (2016)16 SCC 818 and held that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or intended to favor someone. Relevant paragraph thereof is delineated below:

“11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision

should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

14. In the case of **Silppi Constructions Contractors v. Union of India** reported in (2020) 16 SCC 489 the Apex Court further observed that the Courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. Relevant paragraph of the judgment is quoted herein below:

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to

justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

15. The Supreme Court in the case of **Tata Motors Ltd. v. Brihan Mumbai Electric Supply & Transport Undertaking (BEST)** reported in 2023 SCC OnLine SC 671 has again emphasised that the Courts should not ordinarily interfere in matters relating to tender or contract. The relevant paragraphs of the judgment are quoted herein below:

“48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is

made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

53. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.*, reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and

agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

54. As observed by this Court in *Jagdish Mandal v. State of Orissa*, reported in (2007) 14 SCC 517 that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

16. A coordinate bench of this Court in the case of **Jai Hanuman Construction Jagdish Saran v. State of U.P.** reported in **2023 SCC OnLine All 2033** also followed the views espoused by the Apex Court in the above cited judgments and held that the High Court should refrain from interfering in matters pertaining to tender matters unless the

approach of State authority is highly arbitrary and mala fide in the eyes of law. Relevant paragraphs of the said judgment are quoted below:

“29. The Hon'ble Supreme Court in the matter of Directorate of Education v. Educomp Datamatics Ltd. has held as under:—

“It is well settled now that the courts can scrutinise the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined by the Hon'ble Supreme Court in the number of decisions like Tata Cellular (supra).”

32. The Hon'ble Supreme Court in the matter of Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Limited, has held that the decision making process in accepting or rejecting the bid should not be interfered with unless it suffers from mala fide or is intended to favour someone, or there is perversity in the decision making process.

35. The Hon'ble Supreme Court in the matter of N.G. Projects Ltd. v. Vinod Kumar Jain [(2022) 6 SCC 127] has held that the construction of road is an infrastructure project and the court should not interfere unless the decision of the State was manifestly arbitrary or unjust. The Court does not have the expertise to examine the terms and conditions of the present day

economic activities of the State and this limitation should be kept in mind. Courts should be reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract.

36. The Hon'ble Supreme Court in a number of judgments has held that the Court would not normally interfere with the policy decision and in the matters challenging the award of contract by the State or public authorities unless the petitioner establishes that the action of the State Authorities was contrary to public interest and beyond the pale of discrimination or unreasonableness, the petition cannot be entertained. The Court further held that the Government or his undertaking shall have a free hand in setting up of the terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated with bias, the Court will interfere in the tender matters.

37. While considering the dispute wherein award of the tender has been challenged, the Court only has to see whether the decision making process had any error or the authorities have exceeded its jurisdiction or there was violation of rules of natural justice.”

17. On an examination of the factual matrix with regard to the first limb of the argument raised by Sri Shashi Nandan that the lead member of the consortium was required to have 51% of the 1000 cubic meters, we find that though doubt has been raised by the petitioner, the same has been countered by counsel appearing on behalf of the respondents. Documents have been produced that indicated that Dhoramnath Traders, the lead member of the consortium was having total 1,131.97 cubic meters of Sal wood logs and Sal wood edgings. These kinds of factual disputes cannot lead to interference by a writ Court as is clearly enunciated by the judgements cited above.

18. With regard to the second limb of argument that inspection was mandatory as per clauses 6(g) and 6(h) of the e-bid document, we are of the view that the document has to be read as a whole and the said clauses have to be read together. Upon a conjoint reading of said two clauses, we are of the view that there was discretion with the Sal Purchase Committee to carry out inspection which they chose not to do for any of the applicants. The fact that they did not carry out inspection for any of the applicants removes any claim that may be made by the petitioner with regard to any arbitrary or mala fide action on behalf of the respondents.

19. In light of the above factual matrix and after examining the judgments cited above, it is clear that the writ Court is not required to find fault of the authorities with a magnifying glass rather the Court should examine the decision making process and also leave room for interpretation of the contract by the authorities.

20. In the present case, the petitioner has failed to establish that the

action of the authorities was contrary to public interest and within the realm of discrimination and unreasonableness, and accordingly, the writ petition cannot be entertained. As this Court has found that the action of the authorities is not arbitrary, discriminatory, *mala fide* or actuated with any bias, the Court does not wish to intervene in the matter.

21. Accordingly, the writ petitions are dismissed. There shall be no order as to costs.

(2024) 9 ILRA 868
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Writ C No. 23248 of 2024

M/s Bir Hotels Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Aishwarya Pratap Singh

Counsel for the Respondents:
C.S.C., Harshit Pandey, Nipun Singh

**A. Civil Law - Constitution of India,1950-
Article 226-U.P. Avas Evam Vikas Parishad
Adhiniyam,1965 -Sections 28 & 32-Right
to Fair Compensation and Transparency in
Land Acquisition, Rehabilitation and
Resettlement Act,2013-Sections 24(2)-
applicability of section 24(2) of the 2013
Act to acquisitions under the
Adhiniyam,1965-quashing of notifications
issued u/s 28,32 of the Act,1965, alleging
delays in concluding acquisition
proceedings-The court held that the
acquisition proceedings under the**

Adhiniyam 1965 do not lapse due to delays in issuing the award as section 24(2) of the New Act 2013 does not apply to acquisitions under the adhiniyam-the provisions for determining compensation under the New Act,2013, including higher rates of compensation, solatium and interest apply to acquisitions under the Adhiniyam to avoid arbitrariness and discrimination-the compensation for the land acquisition will be determined as per new act,2013 with 01.01.2014(the commencement date of the New Act) as the reference date-Thus, the petition was dismissed on grounds that the acquisition was valid and did not lapse-the petitioner retains the right to claim compensation as per the provisions of the New Act,2013-(Para 1 to 21)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. U.P. Avas Evam Vikas Parishad Vs Jaimul Islam & anr..(1998) 2 SCC 467
2. Hem Chandra Vs St. of U.P. & ors. (2024) 7 ADJ 254 DB
3. Gauri Shankar Gaur Vs. St. of U.P.(1994) 1 SCC 92
4. Secy.of St. Vs Hindustan Co-op.Insu. Socy Ltd.(1931) AIR PC 149
5. Nagpur Improvement Trust Vs. Vasantrao & ors. (1962) AIR SC 955
6. Satya Pal & ors. .Vs. St. of U.P. & ors. (1997) AIR SC 2235
7. UP Avas Evam Vikas Parishad,Lko Vs. Pushpa Lata Awasthi (1995) 3 SCC 573
8. Ramesh Chandra Tiwari & ors. .Vs. UP Avas Evam Vikas Parishad, Lko.& ors. (1997) 9 SCC 116 (Civil appeal no. 1832 of 1986)
9. UP Avas Evam Vikas Parishad, Lko Vs. Chandra shekhar & ors. .(2024) 3 SCR 585 (Civil

appeal no. 3855 of 2024 arising out of SLP(C) no. 779 of 2016)

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

&

Hon'ble Manish Kumar Nigam, J.)

1. Heard learned counsel for the petitioner, Shri Harshit Pandey, learned counsel for respondent Nos. 2 & 5 and Shri Naman Agarwal, Advocate holding brief of Shri Nipun Singh, learned counsel for respondent Nos. 3 & 4.

2. The instant petition has been filed praying for quashing of the notifications dated 12.06.2004 and 24.06.2010 issued under Section 28 and Section 32 respectively of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 on the ground that the acquisition has lapsed being barred on account of delay in concluding the acquisition proceedings. The petitioner has also prayed for a writ of mandamus restraining the respondents from interfering in their possession and for a further direction to approve the building plan submitted by the petitioner for raising constructions over the said land and to decide the representation dated 25.05.2024 made in this behalf.

3. It is submitted by learned counsel for the petitioner that the award having not been declared so far, the acquisition proceedings should be declared to have lapsed by virtue of Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'the New Act, 2013').

4. Per contra, learned counsel for the respondent-U.P. Avas Evam Vikas

Parishad submits that in the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 (for short, 'the Adhiniyam') under which acquisition in question has been made, there is no provision for automatic lapsing on ground of delay in making award. He places reliance on the judgment of the Supreme Court in **U.P. Avas Evam Vikas Parishad v. Jainul Islam and another** in contending that amendment to the Land Acquisition Act, 1894 (for short 'LA Act') by the Land Acquisition (Amendment) Act, 1984, by which Section 11-A was introduced, was held to be inapplicable to acquisitions made under the Adhiniyam. Therefore, Section 11-A of LA Act would not apply and on the same analogy, Section 24(2) of the New Act, 2013 would also not apply. He also places reliance on a judgment of this Court in **Hem Chandra v. State of U.P. and others** wherein it was held that the acquisitions under the Adhiniyam would not lapse but the award shall have to be made by treating the reference date for determining the compensation as 01.01.2014, the date of enforcement of the New Act, 2013 and not the date of notification under Section 28 of the Adhiniyam.

5. The main issue which arises for consideration is whether the acquisition in question initiated under the Adhiniyam would lapse on account of award having not been declared so far.

6. Section 55 of the Adhiniyam makes applicable certain provisions of the LA Act, 1894, as amended in its application to the State of Uttar Pradesh, subject to the modifications specified in the Schedule to the Adhiniyam. For ready reference, Section 55 of the Adhiniyam is extracted below:

"55. Power to acquire land.-(1)
Any land or any interest therein required

by the Board for any of the purposes of this Act, may be acquired under the provisions of the Land Acquisition Act, 1894 (Act No. 1 of 1894), as amended in its application to Uttar Pradesh, which for this purpose shall be subject to the modification specified in the Schedule to this Act.

(2) If any land in respect of which betterment fee has been levied under this Act is subsequently required for any of the purposes of this Act, such levy shall not be deemed to prevent the acquisition of the land under the Land Acquisition Act, 1894 (Act No. 1 of 1894)."

7. By Act No. 68 of 1984, drastic amendments were made in the LA Act. The Statement of Objects and Reasons – emphasizes the need to balance individual interest with larger interest of the community. Two main features of the Amending Act, 1984 was to provide (i) timelines in initiating and concluding various stages of the proceedings so as to avoid delay of long periods which 'renders unrealistic the scale of compensation offered to the affected persons' and (ii) to provide adequate measures to compensate for the delay. To meet these concerns, main proposals for amendments, inter alia, are as follows:

"(iii) A time-limit of one year is proposed to be provided for completion of all formalities between the issue of the preliminary notification under Section 4(1) of the Act and the declaration for acquisition of specified land under Section 6(1) of the Act.

(v) It is proposed to provide for a period of two years from the date of publication of the declaration under Section 6 of the Act within which the Collector should make his award under the Act. If no award is made within that period,

the entire proceedings for the acquisition of the land would lapse. He has also been empowered to correct clerical or arithmetical mistakes in the award within a certain period from the date of the award.

(viii) Solatium now payable at the rate of fifteen per centum of the market value of the land acquired in consideration of the compulsory nature of the acquisition, is proposed to be increased to thirty per centum. Similarly, the rate of interest payable on the excess compensation awarded by the Court and on the compensation in cases where possession of land is taken before payment of compensation, are also proposed to be increased substantially.

(ix) Considering that the right of reference to the civil court under Section 18 of the Act is not usually taken advantage of by inarticulate and poor people and is usually exercised only by the comparatively affluent landowners and that this causes considerable inequality in the payment of compensation for the same or similar quality of land to different interested parties, it is proposed to provide an opportunity to all aggrieved parties whose land is covered under the same notification to seek re-determination of compensation, once any one of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act.

(x) As a large number of cases for the acquisition of land are pending before various authorities for a very long time and payment of the market value of the land obtaining on the date of the preliminary notification under Section 4 of the Act in respect of such land is likely to be unrealistic and iniquitous, it is proposed to provide for payment of simple interest at ten per centum per annum on the amount of compensation for the period commencing

from the date of issue of the notification under Section 4 of the Act to the date of tender of payment or deposit of compensation awarded by the Collector in respect of all pending proceedings on the 30th April, 1982, the date when the earlier Bill for the amendment of the Act was introduced in the House of the People."

(emphasis supplied)

8. After amendments in LA Act, question arose before the Supreme Court in **Gauri Shankar Gaur v. State of U.P.** whether the provisions of LA Act as amended by Amending Act, 1984 stood incorporated in the Adhiniyam by virtue of Section 55 read with the Schedule. There was difference of opinion in the Two Judges Bench and the matter was referred to Larger Bench of Three Judges. The issue came to be decided by Three Judges Bench in **U.P. Avas Evam Vikas Parishad v. Jainul Islam and Another** (supra). In paragraph 13 of the judgment, the point of cleavage in opinion was noted as follows:

"13. Ramaswamy, J. was of the view that Section 55 of the Adhiniyam read with the Schedule made an express incorporation of the provisions of Section 4(1) and Section 6 as modified and incorporated in the Schedule and that the Schedule effected necessary structural amendments to Sections 4, 5, 17 and 23 incorporating therein the procedure and principles with necessary modifications and that it is a complete code in itself. He, therefore, held that Section 55 and the Schedule adopted only by incorporation Sections 4(1) and 6(1) and the subsequent amendments to Section 6 did not become part of the Adhiniyam and they have no effect on the operation of the provisions of the Adhiniyam. Sahai, J. however, took a contrary view. He was of the opinion that

whether a legislation was by way of incorporation or by way of reference is more a matter of construction by the courts keeping in view the language employed by the enactment, the purpose of referring or incorporating provisions of an existing Act and the effect of it on the day-to-day working. According to the learned Judge such legislation by incorporation is subject to exceptions and that one such situation where legislation by incorporation is excluded is if it creates difficulty in day-to-day working. The learned Judge was of the view that in our constitutional set-up the exception can be extended further and the courts should lean against a construction which may result in discrimination. He, therefore, held that the amendments introduced in the LA Act by the 1984 Act would be applicable to acquisition of land for the purpose of the Adhiniyam and restriction of three years added by the first proviso to Section 6 of the LA Act was applicable to acquisition for the purposes of the Adhiniyam also. The learned Judge, however, took note of the fact that the Parishad had entered into possession and had constructed housing colonies as there was no interim order in favour of the landowners during pendency of the writ petitions in the High Court and observed that larger social interest requires this Court to mould the relief in such a manner that justice may not suffer. He, therefore, held that even though publication of declarations under the Act were beyond the period of three years it was not in the interest of justice to quash the proceedings but the landowners should be paid compensation of the land acquired on market value prevalent in the year in which the declaration analogous to Section 6 of the earlier Act was published/issued by fictionally assuming

that fresh notification under the Act analogous to Section 4 was issued in that year."

9. The Supreme Court in paragraph No. 17 of the Law Report discussed the principles for determining whether a legislation is by incorporation or by reference. In case of legislation by incorporation, rule of construction is that repeal of the earlier statute which is incorporated does not affect the operation of the subsequent statute in which it has been incorporated. So also any amendment in the statute which are made after incorporation would not affect the operation of the borrowing statute. On the other hand, if it is legislation by reference the subsequent amendments in the legislation from which the provision is borrowed would also apply to the subsequent legislation.

10. In paragraph No. 18 of the Law Report, the Supreme Court considered the interplay between the LA Act and the Adhiniyam, and observed as follows:

"Section 55 of the Adhiniyam makes a reference to the provisions of the L.A. Act, as amended in its application to Uttar Pradesh, and has laid down that any land or any interest therein required by the Parishad for any of the purposes of the Adhiniyam may be acquired under the provisions of the L.A. Act as amended in its application to Uttar Pradesh which for this purpose has to be subject to the modifications specified in the Schedule to the Adhiniyam. A number of modifications have been made in the various provisions of the L.A. Act that have been made applicable in respect of acquisition for the purposes of the Adhiniyam. The publication of the notification under Section 28(1) of

the Adhiniyam has been equated with a notice under sub-section (1) of Section 4 of the L.A. Act and the publication of a notification under Section 32(1) of the Adhiniyam has been equated with a declaration under Section 6 of the L.A. Act. As regards compensation modification has been made by inserting sub-section (2) in Section 23 of the L.A. Act, as it was applicable in the State of Uttar Pradesh. As pointed out earlier, in the L.A. Act, in its application to the State of Uttar Pradesh, in so far as it related to acquisitions of land except for the purposes of the Union, sub-section (2) was inserted in Section 23 of the L.A. Act in its application to acquisition for the purposes of the Adhiniyam."

11. The Supreme Court relied on Privy Council Judgement in **Secretary of State v. Hindustan Co-operative Insurance Society Ltd.**, and held that the effect of Section 59 of the Adhiniyam was to incorporate by reference into the Adhiniyam, the provisions of the Land Acquisition Act, as amended in its application to U.P. with the modification specified in the Schedule to the Adhiniyam. In other words, it would have the effect of actually writing the borrowed provisions, as existing at the relevant time, subject to modifications specified in the schedule, in the Adhiniyam and therefore, any subsequent amendment in the Act would not affect the provisions incorporated by reference into the Adhiniyam. We may usefully extract para-21 of the Law Report:

"The provisions of Section 55 read with the Schedule to the Adhiniyam are on the same lines as those contained in the Calcutta Improvement Act, 1911 and the principles laid down in Secretary of State v. Hindustan Co-operative Insurance Society Ltd. (supra) are equally

*applicable to the present case. The amendments introduced in the L.A. Act by the 1984 Act were not part of the L.A. Act, as applicable in the State of Uttar Pradesh, at the time of passing of the Adhiniyam. The provisions of the L.A. Act, as amended in its application to U.P., with the modifications specified in the Schedule to the Adhiniyam, have, therefore, to be treated to have been incorporated by reference into the Adhiniyam and became an integral part of the Adhiniyam and the said provisions would remain unaffected by any subsequent repeal or amendment in the L.A. Act unless any of the exceptional situations indicated in **State of Madhya Pradesh v. M.V. Narasimhan** can be attracted."*

12. The Supreme Court, thereafter, considered the issue as to whether the amendments made in the Land Acquisition Act, 1894 contemplating award of much higher compensation would apply to the acquisition made under the Adhiniyam in the context of the submission on behalf of the land owners that if not made applicable, it would result in the arbitrariness and discrimination and violation of Article 14 of the Constitution.

13. While answering the said issue, the Supreme Court held that in case the amended provisions relating to determination of compensation are not made applicable to the acquisitions made under the Adhiniyam, it would result in discrimination. Accordingly, relying on the earlier judgment in **Nagpur Improvement Trust vs Vasantrao And Others**, the Supreme Court observed as follows:

"Article 14 confers an individual right and in order to justify a classification there should be something which justifies a

different treatment to this individual right. It seems to us that ordinarily a classification based on the public purpose is not permissible under Article 14 for the purpose of determining compensation. The position is different when the owner of the land himself is the recipient of benefits from an improvement scheme, and the benefit to him is taken into consideration in fixing compensation. Can classification be made on the basis of the authority acquiring the land" In other words can different principles of compensation be laid if the land is acquired for or by an Improvement Trust or Municipal Corporation or the Government? It seems to us that the answer is in the negative because as far as the owner is concerned it does not matter to him whether the land is acquired by one authority or the other.

* * *

It is equally immaterial whether it is one Acquisition Act or another Acquisition Act under which the land is acquired. If the existence of two Acts enables the State to give one owner different treatment from another equally situated the owner who is discriminated against, can claim the protection of Article 14."

14. The Supreme Court after considering the rival contentions held that the provisions of the Amending Act in so far as it relates to determination of compensation, if not applied to acquisitions made under the Adhiniyam, "the consequence would be that the provisions of the LA Act, as applicable under the Adhiniyam, would suffer from the vice of arbitrary and hostile discrimination". Such a consequence could be avoided if the provisions of the Adhiniyam are construed to mean that the provisions of the LA Act, as amended by the 1984, Act, relating to

determination of compensation would apply to acquisitions of land for the purposes of the Adhiniyam. The relevant discussion is in paragraphs no.31 and 32 and the same is extracted below:-

"31. Since the present case involves acquisition of land under the provisions of the L.A. Act as applicable under the Adhiniyam, it is fully covered by the law laid down by this Court in Nagpur Improvement Trust Vs. Vithal Rao: (1973) 1 SCC 500. Keeping in view the principles laid down in the said decision of this Court, it has to be held that if the provisions of the Adhiniyam are so construed as to mean that the provisions of the L.A. Act, as they stood on the date of enactment of the Adhiniyam, would be applicable to acquisition of land for the purpose of the Adhiniyam and that the amendments introduced in the L.A. Act by the 1984 Act relating to determination and payment of compensation are not applicable, the consequence would be that the provisions of the L.A. Act, as applicable under the Adhiniyam, would suffer from the vice of arbitrary and hostile discrimination. Such a consequence would be avoided if the provisions of the Adhiniyam are construed to mean that the provisions of the L.A. Act, as amended by the 1984 Act, relating to determination and payment of compensation would apply to acquisition of land for the purposes of the Adhiniyam. There is nothing in the Adhiniyam which precludes adopting the latter construction. On the other hand, the provisions of the Adhiniyam show that the intention of the Legislature, while enacting the Adhiniyam, was to confer the benefit of solatium @ 15% by modifying Section 23(2) in the Schedule, which benefit was not available under the provisions of the L.A. Act as it was applicable in the State of Uttar

Pradesh at the time of enactment of the Adhiniyam. It cannot, therefore, be said that the intention of the Legislature, in enacting the Adhiniyam, was to deny to the landowners the benefits relating to determination and payment of compensation which would be available to them under any amendment made in the L.A. Act after the enactment of the Adhiniyam. We are, therefore, of the opinion that on a proper construction of Section 55 of the Adhiniyam it must be held that while incorporating the provisions of the L.A. Act in the Adhiniyam the intention of the legislature was that amendments in the L.A. Act relating to determination and payment of compensation would be applicable to acquisition of lands for the purposes of the Adhiniyam. This means that the amendments introduced in the L.A. Act by the 1984 Act relating to determination and payment of compensation, viz, Section 23(1-A) and Section 23(2) and 28 as amended by the 1984 Act would be applicable to acquisitions for the purpose of the Adhiniyam under Section 55 of the Adhiniyam.

32. In view of the construction placed by us on the provisions of Section 55 of the Adhiniyam that the provisions of the L.A. Act, as amended by the 1984 Act relating to determination and payment of compensation, would be applicable to acquisition of land for the purposes of the Adhiniyam, it is not necessary to deal with the submission that if the provisions of the 1984 Act are held to be not applicable in the matter of acquisition of land for the purposes of the Adhiniyam the provisions of the L.A. Act, as applicable under the Adhiniyam, would be void on the ground of repugnance under Article 254 of the Constitution.”

(emphasis supplied)

15. Thus, it was authoritatively held by the Supreme Court that the subsequent amendments made in the LA Act would not apply to the acquisitions made under the Adhiniyam, but in order to save the acquisitions made under the Adhiniyam from the vice of arbitrariness and discrimination, the provisions relating to determination and payment of compensation were made applicable. As a corollary, Section 11-A which was introduced in the LA Act by the amending Act, would not apply to the acquisitions made under the Adhiniyam. Even if award is not made within two years of the issuance of notification under Section 32 of the Adhiniyam (equivalent to Section 6 of the LA Act), the acquisition would not lapse. At the same time, the beneficial provisions relating to determination and payment of compensation introduced by amendment by the Act of 1984, would apply.

16. The aforesaid legal position was in fact clarified by Supreme Court even earlier in **Satya Pal and Others v State of U.P. and Others**, relying on two previous judgments in **U.P. Avas Evam Vikas Parishad, Lucknow v Pushpa Lata Awasthi** and judgment dated 8.1.1996 in **Civil Appeal No. 1832 of 1986 (Ramesh Chandra Tiwari and Others vs. U.P. Avas Evam Vikas Parishad, Lucknow and others)**. The relevant discussion in this regard is as follows: -

"4. The acquisition is under the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 (for short, 'Adhiniyam'). The controversy is whether the Land Acquisition (Amendment) Act 68 of 1984 would apply to the acquisition made under the Adhiniyam. In *Gaurishankar Gaur v. State of U.P.* (1994) (1) SCC 92: (1993 AIR

SCW 3029), a Bench of two-Judges of this Court, to which one of us, K. Ramaswamy, J., was a member, had considered the question. K. Ramaswamy, J. had held that this Adhiniyam and the procedure prescribed therein vis-a-vis the Land Acquisition Act, 1894 (1 of 1894) by incorporation and, therefore, the Amendment Act does not apply to the acquisition under the Adhiniyam. Hon'ble R.M. Sahai, J. had taken a different view on that matter. However, on merit both agreed for shifting of the date for payment of the compensation to the later date of declaration as under (Para 52 of AIR) :-

"Though for different reasons, we have come to the same conclusions that the civil appeals and writ petitions shall stand dismissed. But the appellants and petitioners shall be paid compensation on the market rate prevalent in the year the declarations analogous to Section 6 of the Land Acquisition Act, 1894 were issued. In view of the special facts and peculiar circumstances and not as of law, we have adapted this course.

5. Subsequently, the question was considered by another Bench of this Court in, *U.P. Avas Evam Vikas Parishad, Lucknow v. Pushpa Lata Awasthi*, (1995) 3 SCC 573, wherein it was held that the Amendment Act has no application since some of the provisions of the Land Acquisition Act, 1894 (1 of (1894) were incorporated into the Adhiniyam. The same view was reiterated in *Ramesh Chandra Tiwari v. U.P. Avas Evam Vikas Parishad, Lucknow* (C. A. No. 1832/86) decided on January 8, 1996 (reported in 1996 AIR SCW 2312) by another Bench. Under these circumstances, it is now settled law that the Land Acquisition Amendment Act 68 of 1984 has no application to the acquisition under the Adhiniyam. As a result, Section 11-A of the Land Acquisition Act, as

amended by Act 68 of 1984, has no application. The notification under Adhiniyam similar to Section 4(1) and the declaration similar to Section 6 do not stand lapsed after the expiry of two years from the date the Amendment Act has come into force. The High Court, therefore, was right in refusing to grant the relief."

(emphasis supplied)

17. Here, it is worthwhile to note some of the relevant provisions of the New Act, 2013. Section 24 of the Act contemplates lapsing of certain acquisition proceedings and also determination of compensation as per provisions of the New Act, 2013 in cases where no award had been made under Section 11 of the LA Act. For ready reference, Section 24 is extracted below:-

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases.(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894,--

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not

been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

18. Here we may also note Section 105 of the New Act, 2013 which stipulates that the New Act, 2013 would not apply in certain cases or would apply with certain modifications :-

"Provisions of this Act not to apply in certain cases or to apply with certain modifications.— (1) Subject to sub-section (3), the provisions of this Act shall not apply to the enactments relating to land acquisition specified in the Fourth Schedule.

(2) Subject to sub-section (2) of section 106, the Central Government may, by notification, omit or add to any of the enactments specified in the Fourth Schedule.

(3) The Central Government shall, by notification, within one year from the date of commencement of this Act, direct that any of the provisions of this Act relating to the determination of compensation in accordance with the First Schedule and rehabilitation and resettlement specified in the Second and Third Schedules, being beneficial to the

affected families, shall apply to the cases of land acquisition under the enactments specified in the Fourth Schedule or shall apply with such exceptions or modifications that do not reduce the compensation or dilute the provisions of this Act relating to compensation or rehabilitation and resettlement as may be specified in the notification, as the case may be.

(4) A copy of every notification proposed to be issued under sub-section (3), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses of Parliament."

19. The Adhiniyam is not a specified legislation under the Fourth Schedule and therefore, the provisions of the New Act, 2013 ipso facto, do not apply to the acquisitions made under the Adhiniyam. Consequently, Section 24(2) would also not get attracted. However, keeping in view the legislative mandate contained in the New Act, 2013 particularly provisions of Section 24(1)(a), Section 6 of the General Clauses Act, 1892 and Article 14 of the Constitution of India, a Division Bench in **Hem Chandra**, consisting of one of us namely, Manoj Kumar Gupta, J. and Kshitij Shailendra, J. extended the beneficial provisions relating to determination and payment of compensation to the Adhiniyam and held that the relevant date in reference

to which compensation in such cases would be determined, would be 01.01.2014, the date of commencement of the Act and not the date of notification under Section 28 of the Adhiniyam or Section 4 of the LA Act. The said case was also concerning an acquisition made under the provisions of the Adhiniyam and while arriving at the said conclusion, the judgment of Supreme Court in **U.P. Avas Evam Vikas Parishad v. Jainul Islam and another** and **U.P. Avas Evam Vikas Parishad v. Chandra Shekhar and others (Civil Appeal No.3855 of 2024 arising out of SLP (C) No.779 of 2016, decided on 05.03.2024)** were relied upon. The relevant discussion from the said judgment is extracted below:

"24. This controversy has now been settled by the Supreme Court in **Chandra Shekhar** (supra). The said case also arose out of the acquisition made under the Adhiniyam. The notification under Section 28 was issued on 17.07.2004. It also appears that the subsequent action of the Parishad was subjected to challenge and it was held that the same was not valid as proper opportunity, as contemplated under Section 5-A of the Land Acquisition Act 1894, was not given. The Supreme Court upheld the judgment of the High Court quashing the subsequent action of Parishad on the ground of non compliance of the procedure. The Supreme Court, however, held that since substantial development had already taken place, therefore, it would not be proper to quash the acquisition but the land holder should be substantially compensated. It specifically considered the impact of Section 55 of Adhiniyam and held that the New Act shall be deemed to be read in place of Old Act, 1894 on the ground that the acquisition had not attained finality before

01.01.2014. The relevant observations in this regard are as follows:-

"18. Having held so, the question that falls for further consideration is as to what should be the future course of action for the appellant-Board, so that neither the public interest to utilize the subject-land for the Scheme that has been substantially developed is frustrated nor the true tenure holders are deprived of the adequate compensation for their land. It may be seen from Section 55 of the 1965 Act that the compensation for the acquired land was required to be assessed in accordance with the provisions of the Land Acquisition Act 1894, which stood repealed w.e.f. 01.01.2014 by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the 2013 Act"). Section 55 of the 1965 Act cannot be given effect unless it is declared by way of a deeming fiction that instead of 1894 Act which now stands repealed, the compensation shall be assessed in accordance with the provisions of the 2013 Act. We hold accordingly. Since the acquisition could not attain finality before 01.01.2014, we are of the considered opinion that the Acquiring Authority/Board are obligated to pay compensation to the ex-propriated owners, as is to be assessed in accordance with Section 24(1) of the 2013 Act.

19. Consequently, we hold that the tenure-holders/owners of Khasra No.673, which was still under the acquisition process when 2013 Act came into force, shall be entitled to be paid compensation in accordance with Section 24(1) of the 2013 Act."

27. In **Jainul Islam** (supra), the Larger Bench of Supreme Court has held that the beneficial provisions of the Amending Act, 1984 relating to

determination of compensation would apply to the acquisitions made under the Adhiniyam to save it from arbitrariness and discrimination. As the Act, 1894, as amended from time to time, stands replaced by the New Act, 2013, we are of the considered opinion that the affected persons would be entitled to compensation as per the New Act, 2013, again to save Section 55 of the Adhiniyam from being rendered unconstitutional on the touchstone of Article 14 of the Constitution."

20. In view of the legal position noted above, we are of the opinion that while Section 24(2) of the New Act, 2013 would not apply and the acquisition would not lapse but the petitioner would be entitled to compensation as per the provisions of the New Act, 2013 and the date of reference for determining the compensation would be 01.01.2014 on which the New Act, 2013 was enforced. Thus, the challenge advanced to the notifications fail and accordingly, consequential relief for a direction to sanction the building plan also cannot be granted.

21. The petition lacks merit and is dismissed. This is without prejudice to claim compensation as per discussion made in the foregoing paragraphs.

22. No order as to costs.

(2024) 9 ILRA 879
ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.09.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ C No. 23612 of 2024

M/s Khandelwal Brothers ...Petitioner
Versus
Joint Chief Controller of Explosives
(Madhyanchal), Agra, PESO & Ors.
...Respondents

Counsel for the Petitioner:

Sri Rama Goel Bansal, Ms. Shalini Goel

Counsel for the Respondents:

C.S.C. Sri Gaurav Kumar Chand, Sri Namit Srivastava, Sri Radha Krishan, Sri Rakesh Kumar

A. Civil Law - Constitution of India,1950-Article 226-The petitioner, operating a retail outlet since 1988 was affected by the cancellation of a petroleum storage license granted to respondent no.2-the cancellation was related to a title dispute concerning the land used for the business-Held, in a situation where no opportunity of hearing is granted to the affected parties there is obviously a breach of natural justice, in the present case, the violation of principle of natural justice has directly resulted in prejudice to the petitioner accordingly the action taken by the respondent no.1 is not correct-A catena of Hon'ble supreme court judgments held that even though the statute/rule do not provide for a specific opportunity of hearing to be granted, when there are civil consequences affecting a party,the right approach is to grant an opportunity of hearing to him-Thus, the court quashed the impugned orders due to the breach of natural justice-liberty was granted to respondent no. 1 to issue a fresh show cause notice to all relevant parties, conduct hearings and pass a reasoned order within four weeks.(Para 1 to 11)

The writ petition is disposed of. (E-6)

(Delivered by Hon'ble Shekhar B. Saraf, J.
&
Hon'ble Manjive Shukla, J.)

1. Heard learned counsel appearing for the petitioner, learned A.S.G.I. with Sri

Gaurav Kumar Chand, learned counsel appearing for Respondent No.1, Sri Rakesh Kumar, learned counsel appearing for Respondents No.2 & 3 and Sri Namit Srivastava, learned counsel appearing for Respondent No.5.

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the orders dated 26.2.2024, 21.5.2024 and the consequential order dated 15.3.2024 passed by the Respondent No.1.

3. These orders have been passed against the Respondent No.2 cancelling the licence for storage of petroleum products in the premises of the petitioner who is running a retail outlet. Owing to the above orders, the petitioner's business has been directly impacted.

4. Mrs. Shalini Goel, learned counsel appearing on behalf of the petitioner submits that the entire process of issuance of notice, hearing and thereafter the orders being passed has been done after granting opportunity of hearing to Respondent No.2 and without affording an opportunity of hearing to the petitioner. Learned counsel appearing for the petitioner further submits that the reason for cancellation of licence of Respondent No.2 in the above impugned orders is the dispute with regard to the title of the petitioner, and accordingly, the petitioner should have been called upon to explain the said defects in the title.

5. Learned counsel appearing on behalf of Respondent No.5 being a private respondent, who is the complainant in the said matter and allegedly related to the petitioner, submits that the title of the land belongs to him.

6. Learned A.S.G.I. appearing on behalf of the Respondent No.1 has

submitted that there is a provision for appeal under Rule 154 of the Petroleum Rules, 2002. However, in his usual fairness, learned A.S.G.I. has agreed that no hearing was granted to the petitioner. He, however, submits that since the licence was granted to the Respondent No.2, there is really no requirement to grant any opportunity of hearing to the petitioner, who is only acting as the dealer.

7. Upon perusal of the documents, we find that the petitioner has been carrying out his retail outlet since 1988 and there have been no complaints against the petitioner. The drastic action that has been taken by the Respondent No.1 in cancellation of licence of Respondent No.2 has resulted in the loss of the business of the petitioner without the petitioner having been granted the chance to explain the inconsistencies and dispute with regard to the title which was the subject matter that has resulted in the said cancellation.

8. In our view, the principle of audi alteram partem has been bedrocked in the quasi judicial decision taken by the State and/or its instrumentalities acting on behalf of the State. In a situation wherein no opportunity of hearing is granted to the affected parties, there is obviously a breach of principles of natural justice and prejudice is caused to the party who has not been heard. In the present case, the violation of principles of natural justice has directly resulted in prejudice to the petitioner, and accordingly, we are of the view that the action taken by the Respondent No.1 is not correct. A catena of Hon'ble Supreme Court judgments and judgments of this High Court have held that even though the statute/rule do not provide for a specific opportunity of hearing to be granted, when there are civil consequences

affecting a party, the right approach is to grant an opportunity of hearing to him.

9. In view of the above discussion, we are of the view that the impugned orders are required to be quashed and set aside with liberty granted to the Respondent No.1 to issue a show cause notice upon the Respondent No.2 and to the petitioner along with the private respondent being Respondent No.5, grant personal hearing to the parties and thereafter to pass a reasoned order.

10. Accordingly, the impugned orders dated 26.2.2024, 21.5.2024 and 15.3.2024 are quashed and set aside with liberty granted to the Respondent No.1 to issue a show cause notice to Respondent No.2 and to the petitioner along with the private respondent being Respondent No.5 and thereafter to pass a reasoned order within a period of four weeks from date of service of certified copy of this order, after granting opportunity of personal hearing to the parties concerned.

11. With the above direction the writ petition is disposed of.

(2024) 9 ILRA 881

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 09.09.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 27117 of 2022

Smt. Mamta (Elected Pradhan)

...Petitioner

Versus

Krishna Devi & Ors.

...Respondents

Counsel for the Petitioner:

Sri Chandan Kumar, Sri Narendra Kumar Pandey

Counsel for the Respondents:

Sri Ashish Mishra, Sri Awadhesh Kumar Mishra, C.S.C., Sri Sanjay Kumar

A. Civil Law - Constitution of India,1950- Article 226- UP Panchayat Raj Act,1947-Section 12-C-The petitioner was elected as Pradhan-respondent no.1 filed an election petition in 2021 challenging the election u/s 12-C of the Act,1947 citing corrupt practices, bribery, undue influence and irregularities-Petitioner raised objections-Held, the court relied on the Full bench decision in Sumitra Devi Case, which mandates the personal presence of the election petitioner or their advocate/clerk in their presence at the time of filing the election petition-the court found no record or order sheet confirming the presence of Krishna devi at the time of filing the petition-This non-compliance rendered the petition invalid and incurable-The court observed that the limitation for filing a fresh petition had expired-The court set aside the orders issued by the prescribed authority-objection raised by the petitioner regarding non-compliance of mandatory provisions was upheld.(Para 1 to 23)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Sumitra Devi VS Special Judge/Addl Distt & Sessions Judge E.C. Act, Hardoi & ors. (2020)6 ADJ 134
2. Devendra Yadav Vs Distt Election Offcer/D.M. Mau(2011)9 RD 219
3. Viresh Kumar Tiwari Vs ADJ, Ballia & ors. .(2014)1 ADJ 486

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Narendra Kumar Pandey, learned counsel for the petitioner, Mr. Awadhesh Kumar Mishra, learned counsel for respondent No.1 and Mr. Krishna Mohan Mishra, learned Additional Chief Standing Counsel for the State-respondents.

2. Brief facts of the case are that petitioner was elected as Pradhan of Gram Panchayat-Khutaha, Block-Haliya, Tehsil Lalganj, District-Mirzapur on the basis of election held on 26.04.2021. In respect to the aforementioned election of Gram Pradhan, respondent No. 1 filed an Election Petition on 30.06.2021 under Section 12-C of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as 'the Act of 1947') read with Rule 3 (1) of U.P. Panchayat Raj (Settlement of Election Dispute) Rules 1994 (hereinafter referred to as 'the Rule of 1994') which was registered as Election Petition No. 1576 of 2021, Computerized Case No.202116530201576. The summon/notice in the aforementioned election petition was issued accordingly petitioner put in her appearance through counsel on 23-07-2021 and filed her objection dated 08-07-2022 with regard to the maintainability of the election petition as the election petition was not filed in presence of election petitioner. Respondent No.1 filed her cross-objection dated 13-07-2022 to the petitioner's application dated 8-07-2022. Prescribed authority vide order dated 5-08-2022 rejected the objection raised by petitioner with regard to maintainability of the election petition, hence, this writ petition for the following relief.

"(1). Issue order/s or direction/s calling for the record of the case and set aside the orders dated 2-07-2021 and 05-08-2022 (annexure No. 1 to this application) passed in Election Petition

No. 1576 of 2021, (Computerized Petition No. T202116530201576) Krishna Devi Vs. Mamata Vs. and others, preferred by the Respondent No.1.

(2). Issue order/s or direction/s to dismiss the Election Petition No. 1576 of 2021, (Computerized Petition No. T202116530201576) Krishna Devi Vs. Mamta and others, preferred by the Respondent No.1".

3. This Court on 09.11.2022 passed the following order:

"Counter affidavit has been filed on behalf of respondent no.1 in the Court today, the same is taken on record.

It is argued by the counsel for the petitioner that on 30.06.2021 the presiding officer was not present in the Court. The pleadings in this regard has been made in paragraph-25 of the writ petition.

In response to the same, a counter affidavit has been filed on behalf of respondent no.1. In paragraph-2 it is stated that on 30.06.2021 itself the various orders were passed by the same presiding officer and certified copies of the same are appended along-with counter affidavit.

In this view of the matter, the Court is of the opinion that Shri Ashish Mishra, learned Counsel appearing on behalf of High Court of Judicature at Allahabad will seek instructions from the said Prescribed Authority under Section 12(C) of the U.P. Panchayat Raj Act & Rules 1994 /Sub Divisional Officer, Lalganj, District - Mirzapur within a week.

Shri N.K. Pandey, learned counsel for the petitioner will supply copy of the present writ petition to Shri Ashish Mishra, learned counsel within 24 hours.

Put up this matter as fresh on 21.11.2022, showing the name of Shri Ashish Mishra A/R-1303/2012 as counsel for the High Court of Judicature at Allahabad/respondent"

4. On 21.11.2022 following order was passed by this Court:

"Pursuant to the order passed by this Court, instructions received from the office of Sub Divisional Magistrate, Lalganj Mirzapur dated 14.11.2022 placed before the Court by Sri Ashish Mishra, learned counsel for the respondent, the same is taken on record. He is directed to provide a copy of the instructions to Sri Narendra Kumar Pandey learned counsel for the petitioner.

As prayed by Sri Narendra Kumar Pandey learned counsel for the petitioner, two weeks time is granted to seek further instructions in the matter from his client.

Put up as fresh on 12.12.2022."

5. Learned Counsel for the petitioner submitted that Election Petition has not been filed by Respondent No.1 on 30-06-2021 as per provision of Section 12-C of the Act of 1947 read with Rules of 1994, as such, the Election Petition filed by Respondent No. 1 is liable to be rejected. He further submitted that from perusal of first page of the Election Petition, it is fully demonstrated that respondent No.1/ Election Petitioner was not present at the time of filing of Election Petition as well as the Election Petition was not accompanied by treasury challan which is contravention of the provisions of the Act of 1947 read with Rule 3(1) of Rules of 1994 as such, the impugned order dated 05.08.2022 passed by Prescribed Authority is wholly illegal. He further submitted that order

sheet of the other two cases fully demonstrate that concern Presiding Officer was not holding the court on 30-06-2021. He further submitted that perusal of the contents of Election Petition fully established that the Election Petition has been filed on a bald and vague allegations of corrupt practice of bribery, undue influence and irregularities committed by the counting staff during counting of votes. He submitted that non-compliance of the mandatory provision of the Act and Rules regarding the presentation of election petition is not a curable defect as such, the objection filed raised by the petitioner before the prescribed authority cannot be rejected. He further submitted that in view of the decision of full Bench of this court reported in **2020 (6) ADJ 134, Sumitra Devi vs. Special Judge/Addl. District & Sessions Judge, E.C. Act, Hardoi and Others** the non-presentation of the election petition by the election petitioner himself/ herself personally will result in dismissal of the petition by the prescribed authority. He further placed reliance upon the following judgments of this Court in support of his arguments:

(i) 2011 (9) ADJ 219 Devendra Yadav Vs. District Election Officer/ District Magistrate, Mau.

(ii) 2014 (1) ADJ 486 Viresh Kumar Tiwari Vs. Additional District Judge, Ballia and others.

He further submitted that impugned order is liable to be set aside and election petition filed by the petitioner is liable to be rejected as not maintainable.

6. On the other hand, Mr. Awdhesh Kumar Mishra, learned counsel appearing for respondent No.1 submitted that instant writ petition is not maintainable as the order impugned is interlocutory order and

election petition is pending before the prescribed authority where trial is under progress. He submitted that election petition has been rightly presented by respondent No.1 complying the provision of the Act of 1947 and Rules of 1994. He submitted that there is no provision in the U.P. Panchayat Raj Act for filing Election Petition by election petitioner personally. He submitted that inspite of the aforementioned fact, respondent No.1/ Election Petitioner was present along with her advocate Sri Visheshwar Prasad Gupta at the time of the presentation of the election petition on 30.06.2021 before the prescribed authority and has also deposited requisite fee of Rs. 50/- in the head of Gram Sabha through challan. He submitted that all the provision of the Act of 1947 and the Rules of 1994 has been complied with as such argument advanced by learned counsel for the petitioner cannot be accepted. He further submitted that allegations made in the election petition for declaring election of petitioner as null & void will be examined by prescribed authority on the basis of the evidence on record. He submitted that no interference is required in the matter and writ petition is liable to be dismissed.

7. I have considered argument advanced by learned counsel for the parties and perused the record.

8. There is no dispute about the fact that petitioner was elected as Gram Pradhan of the Gram Panchayat concern on the basis of election held on 26.04.2021. There is also no dispute about the fact that election petition under Section 12-C of the Act of 1947 has been filed respondent No. 1 which is pending before prescribed authority. There is also no dispute about the fact that application/ objection filed by

petitioner regarding maintainability/ presentation of the election petition has been rejected by the prescribed authority under the impugned order dated 05.08.2022.

9. In order to appreciate the controversy involved in the matter, the perusal of Section 12-C of the Act of 1947 and Section 81 of the Representation of People Act 1951 will be relevant for perusal which are as under:

12-C. Application for questioning the elections –

(1) The election of a person as Pradhan or as member of a Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that –

(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or

(b) that the result of the election has been materially affected – i- by the improper acceptance or rejection of any nomination or; ii- by gross failure to comply with the provisions of this Act or the rules framed thereunder.

(2) The following shall be deemed to be corrupt practices of bribery or undue influence for the purposes of this Act.

(A) Bribery, that is to say, any gift, offer or promise by a candidate or by any other person with the connivance of a candidate of any gratification of any person whomsoever, with the object, directly, or indirectly of including –

(a) a person to stand or not to stand as, or withdraw from being, a candidate at any election; or

(b) an elector to vote or refrain from voting at an election; or as a reward to – (i) a person for having so stood or not stood or having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting.

(B) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or of any other person with the connivance of the candidate with the free exercise of any electoral right;

Provided that without prejudice to the generality of the provisions of this clause any such person as is referred to therein who

(i) threatens any candidate, or any elector, or any person in whom a candidate or any elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause.

(3) This application under sub-section (1) may be presented by any candidate at the election or any elector and shall contain such particulars as may be prescribed.

Explanation – Any person who filed a nomination paper at the election whether such nomination paper was

accepted or rejected, shall be deemed to be a candidates at the election.

(4) The authority to whom the application under sub-section (1) is made shall in the matter of -

(i) hearing of the application and the procedure to be followed at such hearing;

(ii) setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner, have such powers and authority as may be prescribed.

(5) Without prejudice to generality of the powers to be prescribed under subsection (4) the rules may provide for summary hearing and disposal of an application under sub-section (1).

[(6) Any party aggrieved by an order of the prescribed authority upon an application under sub-section

(1) may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more the following grounds, namely –

(a) that the prescribed authority has exercised a jurisdiction not vested in it by law;

(b) that the prescribed authority has failed to exercise a jurisdiction so vested;

(c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity.

(7) The District Judge may dispose of the application for revision himself or may assign it for disposal to any Additional District Judge, Civil Judge or Additional Civil Judge under his administrative control and may recall it from any such officer or transfer it to any other such officer.

(8) *The revising authority mentioned in sub-section (7) shall follow such procedure as may be prescribed, and may confirm, vary or rescind the order of the prescribed authority or remand the case to the prescribed authority for re-hearing and pending its decision pass such interim orders as may appear to it to be just and convenient.*

(9) *The decision of the prescribed authority, subject to any order passed by the revising authority under this section, and every decision of the revising authority passed under this section, shall be final.]*

Section 81. Presentation of petitions.—(1) *An election petition calling in question any election may be presented on one or more of the grounds specified in [sub-section (1)] of section 100 and section 101 to the [High Court] by any candidate at such election or any elector [within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates].*

Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]"

10. Perusal of Rule 3 and 4 of Uttar Pradesh Panchayat Raj (Settlement of

Election Disputes) Rules, 1994 will be also relevant which is as under:

3. Election Petition.-

(1) *An application under sub-section (1) of Section 12-C of the Act shall be presented before the Sub-Division Officer, within whose jurisdiction the concerned Gram Panchayat lies, within ninety days after the day on which the result of the election questioned is announced and shall specify the ground or grounds on which the election of the respondent is questioned and contain a summary of the circumstances alleged to justify the election being questioned on such ground:*

Provided that no such application shall be entertained unless it is accompanied by a treasury challan to show that the amount of rupees fifty has been deposited in the Personal Ledger Account of the Gram Panchayat concerned as security.

(2) *The person whose election is questioned and where the petition claims that the petitioner or any other candidates shall be declared elected in place of such person, every unsuccessful candidate shall be made a respondent to the application.*

(3) *Every respondent may give evidence to prove that any person in respect of whom a claim is made that such person be declared elected, should not be declared so elected on the same ground or ground on which his election could have been questioned if he had been elected.*

4. Hearing of the petition. (1) *Subject to the provisions of the Act and these rules, every election petition shall be tried by the Sub-Divisional Officer, as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, for the trial file*

Provided that

(i) the Sub-Divisional Officer may hear the petitioner or his counsel and if he finds that the petition has no substance, reject the same without the issue of any notice to the opposite parties;

(ii) it shall not be necessary for the Sub-Divisional Officer to record the evidence in full and he may maintain only a memorandum of evidence produced by the parties before him;

(iii) if there is a sole petitioner and he dies, or there is a sole respondent and he dies, the petition shall abate;

(iv) the Sub-Divisional Officer may allow only such evidence to be produced as he deems relevant for the purpose of deciding the petition;

(v) the District Magistrate may at any stage, on sufficient cause being shown, transfer and application made under sub-section (1) of Section 12-C for hearing to another Sub-Divisional officer;

(vi) an application not presented within time or unaccompanied by a treasure challan as required under sub-rule (1) of Rule 3 may at any time be dismissed by the Sub-Divisional Officer; and

(vii) the Sub-Divisional Officer may, on an application of either party made within five days after the date of his decision, review his order.

11. Perusal of the first page of the election petition will be necessary which is as under:

न्यायालय नियत प्राधिकारी/सब डिविजनल

अधिकारी, लालगंज मीरजापुर

चुनाव याचिका

संख्या 02/T2021116530201576/02.7.2021

**याचिका द्वारा-कृष्णा देवी उम्र लग० 48
साल पत्नी शिवप्रसाद नि०ग्राम-गलरा, न्याय
पंचायत-खुटहां, विकास खण्ड-हलिया, तह०-
लालगंज, जिला-मीरजापुर।**

बनाम

**प्रस्तुतकर्ता 1- ममता उम्र लग० 33 साल
कृष्णा देवी पत्नी अरूण कुमार
याचिनी 2- प्रभावती देवी उम्र लग०
स्वयं 53 साल पत्नी दीनानाथ
दिनांक 30-6- 3- अशफाक अहमद उम्र
2021 ई. लग० 40 साल पुत्र
सुकुरुल्ला**

&

**विश्वेश्वर समस्त नि०ग्राम- गलरा,
प्रसाद न्याय पंचायत-खुटहां,
एडवोकेट विकास खण्ड- हलिया,
30/6/2021 तह०-लालगंज, जिला-
मीरजापुर।**

**पेशकार 4- जिला निर्वाचन
02/07/2021 अधिकारी (पंचायत एवं
वाद दर्ज कर नगरीय / निकाय),
आ० कार्यवाही मीरजापुर
करे। 5- सहायक निर्वाचन
हा० अधिकारी (पंचायत एवं
02/07/2021 नगरीय निकाय)
SDO(c) मीरजापुर।**

**6- रिटर्निंग ऑफिसर
(आर०ओ०) विकास खण्ड-
हलिया, मीरजापुर।**

**7- सहायक रिटर्निंग
ऑफिसर (ए०आर०ओ०)**

न्याय पंचायत- खुटहां,
विकास खण्ड-हलिया,
मीरजापुर।

----- विपक्षीगण

रा-12 ग उ० प्र० पंचायत
राज अधि० 1947 सपठित
नियम 3(1) उ० प्र० पंचायत
राज (निर्वाचन विवादों का
निपटारा) नियमावली
1994 बाबत प्रधान पद के
पंचायत निर्वाचन मौजा-
गलरा, वि० ख०-हलिया,
जनपद-मीरजापुर।

एवं 15 अप्रैल 2021 को पूर्वाहन 8 बजे से
अपराहन 5 बजे तक नामांकन दाखिल
करने दिनांक 16 एवं 17 अप्रैल 2021 को
पूर्वाहन 8 बजे से नामांकन पत्रों की
समीक्षा/जाँच व दिनांक 18 अप्रैल 2021 को
पूर्वाहन 8 बजे से अपराहन 3 बजे तक
उम्मीदवारी वापस लेने व उसी दिन 3 बजे
से प्रतीक आवंटन तथा दिनांक 26 अप्रैल
2021 ई० को पूर्वाहन 8 बजे से कार्य की
समाप्ति तक मतगणना कराने की
तिथि/कार्यक्रम नियत किया गया।"

12. Perusal of first order sheet dated
02.07.2021 of the election petition will be
relevant which is as under:

याचिनी निम्न निवेदन करती है:-

दफा-1- यह कि राज्य निर्वाचन
आयोग (पंचायत) उ० प्र० लखनऊ द्वारा
जारी अधिसूचना संख्या
709/रा० नि० आ० अनु०-3/पं० नि०/20-21/2021
लखनऊ दिनांक 26 मार्च 2021 ई० के क्रम
में जिला निर्वाचन अधिकारी (पंचायत)
मीरजापुर ने दिनांक 27 मार्च 2021 ई० को
अधिसूचना जारी कर पंचायत निर्वाचन के
तृतीय चरण में जनपद मीरजापुर में
त्रिस्तरीय पंचायत निर्वाचन के कार्यक्रम की
अधिसूचना जारी किया जिसके द्वारा
जनपद मीरजापुर के समस्त विकास खण्डों
के ग्राम पंचायत सदस्य, प्रधान ग्राम
पंचायत, सदस्य क्षेत्र पंचायत एवं सदस्य
जिला पंचायत के निर्वाचन हेतु दिनांक 13

"आदेश पत्रांक

न्यायालय: उपजिलाधिकारी

मण्डल: विन्ध्याचल, जनपद: मिर्जापुर,

तहसील: लालगंज

वाद संख्या: 1576/2021

कंप्यूटरीकृत वाद संख्या:

T2021116530201576

कृष्णा देवी बनाम ममता वगै०

अंतर्गत धारा:- 12 ग,

अधिनियम:- उ० प्र० पंचायती राज
अधिनियम, 1947

02.07.2021

आज पत्रावली प्राप्त होकर पेश
हुई। वाद दर्ज रजिस्टर किया गया।
नियमानुसार समन/नोटिस जारी हो।

अतः

**पत्रावली वास्ते इन्तजार समन
दिनांक 23.07.2021 को पेश हो।**

**उप जिलाधिकारी,
लालगंज।"**

13. The perusal of the question answer supplied by office of respondent No.2/ Sub Divisional Officer will be necessary which is as under:

**मूल वाद -न्यायालय उपजिलाधिकारी/नियत
प्राधिकारी महोदय लालगंज
मीरजापुर
चूनाव याचिका नं०-1576-सन 2021
कम्प्यूटराइज नं० 202116530201576**

**धारा - 12 सी पं०राजेश्वर
कृष्णादेवी बनाम ममता आदि**

प्रश्न	उत्तर
क्या आपके न्यायालय में चुनाव याचिका सं० 1576/- सन् 2021 कृष्णादेवी Vs ममता ग्राम पंचायत गलरा में याचिका में दिनांक 30/6/2021 को न्यायालय में सुनवाई की गयी थी, यदि हाँ तो आर्डरसीट पत्रावली पर उपलब्ध है?	महोदय, जी नहीं। ह०अ० 18/11/2022 पेशकार न्या० S.D.O.(L)

14. The perusal of the instruction dated 14.11.2022 sent by respondent No.2/Sub Divisional Officer will be also relevant which is as under:

"निर्देश 14/11/22

**मा० उच्च न्यायालय इलाहाबाद में योजित
रिट याचिका सं० 27117 सन् 2022श्रीमती
ममता बनाम कृष्णा देवी व 5 अन्य में
अनुदेश आख्या।**

मा० उच्च न्यायालय में योजित उपर्युक्त रिट याचिका सं० 27117 सन् 2022 श्रीमती ममता बनाम कृष्णा देवी व 5 अन्य में पारित आदेश दिनांक 09.11.2022 के अनुपालन में वांछित अनुदेश आख्या निम्नवत है-

1- दिनांक 30.06.2021 दिन बुधवार को न्यायालय उप जिलाधिकारी लालगंज मीरजापुर में कुल 82 वाद पत्रावलियाँ सुनवाई हेतु सूचीबद्ध थी।

2- दिनांक 30.06.2021 को तत्कालीन पीठासीन अधिकारी द्वारा न्यायालय में बैठकर न्यायिक कार्य किया गया था क्रम सं० 01 से 09 तक की वाद पत्रावली में सुनवाई हुई तथा आदेश पारित हुआ।

3- न्यायालय के अभिलेख देखने से विदित होता है कि क्रमांक 09 के बाद नियत वाद पत्रावलियों में पुकार एवं सुनवाई नहीं हुई तथा आदेश पत्रक में पेशकार द्वारा यह अंकित किया गया है कि

पीठासीन अधिकारी महोदय अन्य प्रशासनिक कार्य में व्यस्त हैं तथा सुनवाई हेतु अग्रिम तिथि नियत की गयी है।

4- इस प्रकार दिनांक 30.06.2021 को तत्कालीन पीठासीन अधिकारी न्यायालय में उपस्थित थे तथा उनके द्वारा वाद पत्रावलियों में न्यायिक कार्य किया गया किन्तु बाद में अन्य प्रशासनिक कार्य में व्यस्त हो जाने के कारण शेष वाद पत्रावलियों में अग्रिम तिथि अंकित की गयी।

उप जिलाधिकारी, लालगंज,
मीरजापुर।
14/11/22”

15. The perusal of the aforementioned record as quoted above demonstrate that there is no record/ order sheet which demonstrate that election petitioner was present on the date of presentation of election petition.

16. The ratio of law laid down by the full bench of this Court in **Sumitra Devi (Supra)** will be also relevant which is as under:

81. Based on the discussion made, and subject to it, we summaries our answers to the questions referred to us (as rephrased by us), as under:-

1. (a) An Election Petition under Section 12-C(1) and (3) of the Act, 1947 has to be necessarily and mandatorily presented by the candidate/ Election petitioner himself, personally, if it is in his name. However, if it is presented by the Advocate or his clerk,

in the presence of the candidate/ Election Petitioner before the Prescribed Authority, it would be sufficient compliance of Section 12-C(3) .

(b) In the event an election petition is not presented as aforesaid then it would be fatal and an incurable defect which has to result in dismissal of the petition by the Prescribed authority with liberty however, to the candidate to file a fresh petition, if the limitation is still available and before it expires, in accordance with Section 12-C(3), personally, or by his Advocate or Clerk in his presence. He can not adjourn the matter to some other date for rectification of the incurable defect in those proceedings.

2. The decision in Lal Bahadur Singh's case (supra) does not lay down the law correctly as regards Question No.1. The decision in Viresh Kumar Tiwari's case (supra) lays down the law correctly subject to the proposition that an election petition filed by the Advocate or his Clerk in presence of the candidate before the Prescribed Authority is also in accordance with section 12-C (3) of the Act 1947. In Urmila's case (supra) Question No.1 has not been decided.

17. The perusal of the issue answered by the Full Bench in **Sumitra Devi (supra)** as quoted above fully demonstrates that the election petition under Section 12-C (1) & (3) of the Act has to be necessarily and mandatorily presented by the candidate/election petitioner himself/herself personally if it is in his/her name. However, if it is presented by advocate or his clerk in presence of the candidate/election petitioner before the Prescribed Authority which would be sufficient compliance of Section 12-C(3) of the Act. The answer as quoted above

further demonstrates that if the election petition is not presented as aforesaid, then it would be fatal and incurable defect which has to result in dismissal of the petition by the Prescribed Authority with liberty to the candidate to file fresh petition if the limitation is still available before it expires in accordance with the provisions of Section 12-C(3) of the Act personally or by his advocate or clerk in his presence.

18. In paragraph no.74 of the judgment of the Full Bench in **Sumitra Devi (supra)**, it has been held that any objection regarding non-presentation of the election petition by a candidate as aforesaid should be raised at the earliest when the trial is pending before the Prescribed Authority and not after disposal of the election petition, such as, at the revisional stage or before the High Court as if the objection is not raised during trial, a specific issue cannot be framed in this regard and the parties would not be able to lead evidence in respect to it as well as if the objection is raised at a later stage, evidence may not be available by then or the officer before whom the petition was presented. It has been also held by the Full Bench in the same paragraph that once there is adjudication of election petition on merit, then it would be highly inequitable to allow such a plea or objection to be raised at the revisional level or before the High Court under Article 226 of the Constitution when the election petition has succeeded and it will be treated that objection regarding presentation of the election petition has been waived by the party concerned. The paragraph no.74 & 75 of the judgment rendered in **Sumitra Devi (supra)** is as under:-

"74. We are also of the view that any objection regarding non-presentation

of an Election Petition by a candidate as aforesaid should be raised at the earliest when the trial is still pending before the Prescribed Authority and not after disposal of the Election Petition such as at the Revisional stage or before the High Court. This is for the reason firstly, if not raised during trial a specific issue can not be framed in this regard and the parties would not be able to lead evidence in respect to it, secondly, if raised at a later stage evidence may not be available by then or the Officer before whom the petition was presented may himself not be available. Thirdly, once there is an adjudication of the Election petition on merits, then, it will be highly inequitable to allow such a plea or objection to be raised at the Revisional level or before the High Court under Section 226 of the Constitution, especially when, the Election Petition has succeeded. It will therefore have to be treated as waived, as has been held in Devendra Yadav's case (supra)."

75. We are also of the view that Prescribed Authorities should specifically and mandatorily record in the order sheet as to whether the Election Petition has been presented by the candidate personally or, by his Advocate or clerk in the presence of the candidate, or not ? The consequences will follow accordingly as discussed above. This will avoid unnecessary litigation based on such pleas and save a lot of time and energy of all the stakeholders. The Prescribed Authorities and Revisional Authorities under Section 12-C(1) and 12-C(6) of the Act, 1947 are directed to strictly comply with these observations/directions.

19. In the instant matter the specific objection/ application dated 08.07.2022 has been filed by the petitioner regarding non-presentation of the election petition filed by

election petitioner herself but the same has been rejected in arbitrary manner under the impugned order.

20. Mere signature of the election petitioner on the election petition, photograph of election petitioner on the election petition and affidavit in support of election petition will not amount to presence of the election petitioner at the time of presentation unless there is specific order sheet regarding presence of election petitioner at the time of presentation. In the instant matter, there is no order sheet or any other record to the effect that the election petitioner was present at the time of presentation. In the full bench decision of **Sumitra Devi (Supra)** which was passed on 12.06.2020 there was specific direction in paragraph No.75 of the full bench to the prescribed authorities who were exercising jurisdiction under Section 12-C of U.P. Panchayat Raj Act, 1947 to maintain proper order sheet of the election petition regarding presentation of election petition as such non mentioning of the presence of the election petitioner will result into dismissal of the election petition as the same is incurable defect. The limitation for filing fresh election petition has already expired as such further trial of election petition for adjudication of election petition on merit is abuse of process of law.

21. No useful purpose will be served by remanding the matter again before prescribed authority to examine the issue of presentation of election petition as under the impugned order issue regarding presentation of election petition has been considered accordingly this court has examined the issue of presentation of election petition in the light of evidence brought on record by both parties. The issue relating to mandatory deposit of Rs.50/- along with election petition is not required to

be adjudicated in view of the adjudication of the issue regarding presentation of the election petitioner by election petitioner.

22. Considering the entire facts and circumstances of the case, the impugned order dated 05.08.2022 rejecting the petitioner's objection dated 08.07.2022 regarding non-presentation of election petition by election petitioner herself as well as order dated 02.07.2021 entertaining the election petition are liable to be set aside and the same are hereby set aside. The objection dated 08.07.2022 filed by petitioner is allowed and election petition filed by respondent no.1 is hereby dismissed.

23. **Writ petition stands allowed.**

24. No order as to costs.

(2024) 9 ILRA 892

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 10.09.2024

BEFORE

**THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE MANJIVE SHUKLA, J.**

Writ C No. 27976 of 2024

Mehmood Pracha	...Petitioner
Versus	
E.C.I. & Ors.	...Respondents

Counsel for the Petitioner:
Sri Omar Zamin

Counsel for the Respondents:
C.S.C., Sri Jitendra Ojha

**Civil Law-The Constitution of India, 1950-
Article 226 - The Advocates Act-1961-**
Petitioner appeared wearing his coat and band and argued the matter without informing the Court that he is appearing in person- Petitioner

had not removed his band before arguing the matter- This behaviour is not expected of a Senior member of the Bar who is expected to be aware of the basic etiquette to be followed while addressing the Bench in person-Petitioner directed to be cautious in the future and ensure that he maintains the decorum and dignity of the Court- The petitioner had filed this writ petition through an Advocate Having done so he could not have appeared in person without removing his Advocate or having taken leave of the Court- The methodology followed by the petitioner was not only incorrect but also mischievous and a breach of protocol. **(Para 13)**

Petition is dismissed with cost payable for the sum of Rs. 1,00,000/- (E-15)

(Delivered by Hon'ble Shekhar B. Saraf, J.
&
Hon'ble Manjive Shukla, J.)

1. Heard Sri Mehmood Pracha, petitioner appearing in person through Video Conferencing and Sri Jitendra Ojha, learned counsel appearing for the Respondent No. 1.

2. This is a writ petition filed under Article 226 of the Constitution of India whereby the writ petitioner has approached the Court with the following prayers:

"A. Issue a Writ of Mandamus or any other Writ in the nature of Mandamus directing the Respondents to directing the Respondents ensure that there is some method for ensuring the authentication, integrity, security, verifiability, of the videography pertaining to the electoral process, recorded and conducted in accordance with the applicable guidelines, handbooks, manuals, and instructions, is supplied to the Petitioner.

B. Pass any other or further orders as this Hon'ble Court deems fit and

proper in the facts and circumstances of the case.

C. To award the cost of the petition in favour of the petitioner."

3. It is to be noted that the writ petitioner earlier had approached the Delhi High Court with regard to the election of 7-Rampur Lok Sabha Constituency, Uttar Pradesh with regard to safeguarding and protection of all videography and CCTV coverage as noticed in the order dated May 16, 2024 passed by the Delhi High Court.

4. The prayer-A in that writ petition was as follows:

"a) Issue a Writ of Mandamus or any other Writ in the nature of Mandamus directing the Election Commission of India to ensure the safeguarding and protection of all the videography and CCTV coverage regarding elections in 7- Rampur Lok Sabha constituency, Uttar Pradesh, including such footage recorded as per clauses 1.3.2., 1.3.4, 2.6, 2.10, 2.12, 2.13, 6.1, 6.1.3, 6.1.4, 8.2, 8.4.8, 9.5 of the Manual on Electronic Voting Machine (Edition 8 August 2023), for 45 days from the date of the election of the returned candidate;"

5. The Court after considering the submission of the petitioner passed the following order:

"3. In view of the aforesaid affidavit filed by the respondent/ECI, the petitioner confines himself to seeking that the aforementioned procedure(s)/ protocol(s) for preserving the videography/CCTV footage as per the Manual on Electronic Voting Machine (Edition 8) August 2023 be followed in

respect of the 7 Rampur Lok Sabha Constituency in UP as well.

4. Learned counsel for the respondent does not oppose the aforesaid submission of the petitioner. He submits that in any event, the respondent/ ECI is bound to follow the aforesaid protocol in respect of the electoral process in every Lok Sabha constituency. The above statement is taken on record.

5. In view thereof, no further relief is pressed for by the petitioner.

6. The present petition is accordingly disposed of in the above terms."

6. The writ petitioner once again filed another writ petition bearing W.P. (C) 8710/2024 before the Delhi High Court seeking issuance of a writ in the nature of mandamus or any other appropriate writ for a direction to the respondent/Election Commission of India to supply them with the entire videography and CCTV footage pertaining to the conduct of elections at 7-Rampur Lok Sabha Constituency, State of Uttar Pradesh.

7. The Court vide order dated July 16, 2024 passed the following order:

"1. It is seen that this Court on 26.06.2024 has passed certain directions:-

"6. At the outset, the petitioner acknowledges that he has been supplied certain data in a hard disk at the behest of the respondent after instituting the present petition.

7. However, it is pointed out that in the covering letter dated 22.06.2024 issued by the Election Officer, by which the hard disk has been supplied after filing of the present petition, there are no details provided as to the number of nature and details of the data viz., the CCTV

footages/videos, time duration, and in fact as to the contents of the hard disk.

8. It is further pointed out that hard disk is not encrypted protected with any hash values besides the fact that there is no indication that the data has been supplied to the petitioner by the respondent pursuant to his request. In other words, the covering letter lacks relevant particulars as to its content, source and authenticity?

2. The petitioner appears in person and submits that as of now his prayer stands satisfied.

3. He, therefore, does not press the instant petition.

4. He seeks to withdraw the petition with liberty to take necessary steps with respect to grievance, if any. Reserving all rights and contentions to be raised in accordance with law, the petition stands disposed of as withdrawn."

8. From the aforesaid orders passed, it appears that orders were passed to the satisfaction of the petitioner and he had withdrawn the writ petition bearing W.P. (C) 8710/2024 filed before the Delhi High Court. Surprisingly, the writ petitioner has now chosen to file a third writ petition before this High Court seeking authentication, integrity, security, verifiability of the videography pertaining to the electoral process.

9. This Court is unable to understand as to why this writ petition is now being filed in the State of Uttar Pradesh before the Allahabad High Court when the petitioner has chosen to file the first two writ petitions with regard to the same subject matter (elections of 7-Rampur Lok Sabha Constituency in U.P. for the year 2024) before the Delhi High Court.

10. This Court is unable to understand this shift being made by the petitioner when

the petitioner had gone on record before the Delhi High Court stating that his prayer stands satisfied.

11. The petitioner cannot jump or shift mid way and choose the forum he prefers. He could have approached the Delhi High Court once again as the cause of action remains the same and appears to be only incidental to the earlier prayers granted by the Delhi High Court.

12. Precious time of this Court has been wasted in relation to this matter as the petitioner insisted on having this matter heard before this Court without taking into consideration the fact that he has filed two similar writ petitions in the Delhi High Court in relation to the same subject matter.

13. Another aspect is required to be noted by us as the same relates to decorum to be maintained before the High Court. When this matter was called on Mr. Omar Zamin, Advocate appeared in Court and submitted that his Senior who is on virtual mode shall argue the matter. Mr. Mehmood Pracha appeared wearing his coat and band and argued the matter without informing the Court that he is appearing in person. It was only after the present order was dictated wherein we had proposed to impose costs on the petitioner that Mr. Omar Zamin pointed out to this Court that Mr. Mehmood Pracha was appearing in person. We were taken aback as Mr. Pracha had not removed his band before arguing the matter before us. This behaviour is not expected of a Senior member of the Bar who is expected to be aware of the basic etiquette to be followed while addressing the Bench in person. Mr. Pracha is directed to be cautious in the future and ensure that he maintains the decorum and dignity of the Court. Another aspect to be noted is

that the petitioner had filed this writ petition through an Advocate (Mr. Omar Zamin). Having done so he could not have appeared in person without removing his Advocate or having taken leave of the Court. As is clear from the facts, none of the above was done and accordingly the methodology followed by the petitioner was not only incorrect but also mischievous and a breach of protocol.

14. In light of the fact that this writ petition has been wrongly filed and has resulted in loss of precious time of this Court coupled with the inappropriate methodology adopted by the petitioner appearing in person, this writ petition is **dismissed** with cost payable for the sum of Rs. 1,00,000/-.

15. This cost shall be paid to the Uttar Pradesh State Legal Services Authority within a period of 30 days from the date.

16. In the event the cost is not paid, Registrar General is directed to take necessary action for recovery of the same in accordance with law.

(2024) 9 ILRA 895

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 18.09.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 28525 of 2024

Priyanka

...Petitioner

Versus

Smt. Madhuri & Ors.

...Respondents

Counsel for the Petitioner:

Mr. Rakesh Pande, Senior Counsel, Mr. Shailesh Upadhyay

Counsel for the Respondents:

C.S.C., Mr. G.K. Singh, Senior Counsel, Mr. Awanish Kumar Rai

Civil Law - U.P. Panchayat Raj Act, 1947- Section 12-C - Election of Gram Pradhan of Gram Panchayat - Election Petition - Sub-Divisional Magistrate by the impugned order allowed the election petition and order for recounting as well as fixed date for further proceeding. Held : Election Tribunal cannot pass the order for allowing the election petition as well as for recounting together. Impugned Order set aside. Matter remitted back before Sub Divisional Magistrate/ Prescribed Authority with a direction to decide the election petition afresh on the basis of evidence already adduced by the parties (Para 16, 20)

Allowed. (E-5)

List of Cases cited:

1. Parshuram Vs St.of U.P. & ors. Matters Under Article 227 No. 31424 of 2024 dt 23.12.2022
2. Smt. Asha Devi Vs Prescribed Authority/Sub Divisional Magistrate & ors. Writ C No.14461 of 2024 dt 8.7.2024
3. Athar Hussain Vs Smt. Razda Begum & ors.2017(135) RD 128
4. Smt. Maneeta Devi Vs St. of U.P. & ors. Writ C No.10442 of 2022 dt 13.4.2022;
5. Nirdosh Tyagi Vs St. of U.P. & ors. 2017(136) RD 136,
6. Smt. Jahida Begam Vs St. of U.P. & ors. Writ C No.2432 of 2023 dt 29.3.2023
7. Committee of 11 Management & anr. Vs Vice-Chancellor & ors. reported in 2009(1) AWC 437 (SC)

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Rakesh Pande, learned Senior Counsel assisted by Sri Shailesh Upadhyay, learned counsel for the petitioner, Sri G.K. Singh, learned Senior Counsel assisted by Sri Awanish Kumar Rai, learned counsel for respondent no.1 and the learned standing counsel for the state-respondents.

2. Brief facts of the case are that petitioner was elected as Gram Pradhan of Gram Panchayat Shivhad, Pargana & Tehsil- Atarra, Block- Mahuwa, District Banda in the election held in the year 2021. Respondent no.1 had contested the election and stood 2nd, filed the election petition under Section-12-C of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as "the Act") before respondent no.2 which was registered as Election Petition No.2 of 2021. By way of amendment in the aforementioned election petition, the relief for cancelling the result of the counting and for recounting was added vide order dated 7.6.2024. Against the order dated 7.6.2024, the revision was filed by the petitioner before the District Judge, Banda which is pending as Revision No. 1 of 2024. In the aforementioned election petition, written statement was filed by the petitioner on 23.12.2021. Respondent no.2 vide order dated 2.2.2022 proceeded to order for recounting. The order dated 2.2.2022 was challenged in revision by the petitioner and the revision was allowed vide order dated 23.3.2022, setting aside the order dated 2.2.2022. The issues were framed and parties have adduced evidence in support of their cases. Respondent no.2 vide impugned order dated 28.8.2024 has allowed the election petition and order for recounting as well as fixed 30th August, 2024 for further proceeding. Hence, this writ petition for the following relief:-

“(i) Kindly, set aside/quash to stay the effect and operation of the impugned order dated 21.8.2024 (Annexure No.1 to this writ petition) passed by the Sub Divisional Magistrate/Competent Authority, Atarra, District – Banda, i.e. the respondent no.2 in Case No.RST/761/2022 (Computerized Case No.T-202207110300761) (Madhuri vs. Priyanka and Others)”

3. This Court on 30.8.2024 passed the following order:-

“1. Heard Mr. Rakesh Pandey, learned Senior Counsel assisted by Mr. Shailesh Upadhyay, learned counsel for the petitioner, Mr. G.K. Singh, learned Senior Counsel assisted by Mr. Birendra Singh, learned counsel for the respondent no.1 and learned Standing Counsel for the State-respondents.

2. Learned Senior Counsel for the petitioner submitted that in view of the ratio of law laid down by Lucknow Bench in the Matters Under Article 227 No.31424 of 2021, Parshuram vs. State of U.P., the impugned judgment passed by the prescribed authority cannot be sustained in the eye of law.

3. On the other hand, Mr. G.K. Singh, learned Senior Counsel for respondent no.1 submitted that the writ petition is not maintainable against the order passed by the prescribed authority if the argument of the petitioner is accepted that order of the prescribed authority is final order. He further submitted that against the final order, the revision will lie under Section 12 (C) (6) of the Panchayat Raj Act, 1947.

4. Put up this case as fresh on 2.9.2024 at 2:00 P.M. and learned counsel for the parties shall address the

Court as to whether revision will lie against the impugned order of prescribed authority dated 21.8.2024.”

4. On 2.9.2024, following order was passed by this Court:-

“1. Heard Sri Rakesh Pande, learned Senior Counsel assisted by Sri Shailesh Upadhyay, learned counsel for the petitioner, Sri G.K. Singh, learned Senior Counsel assisted by Sri Awanish Kumar Rai, learned counsel for the respondent no.1 and the learned standing counsel for respondent nos. 2 & 3.

2. Judgment reserved.

3. Put up for delivery of judgment on 18.9.2024.

4. Till the date of delivery of judgment, the effect and operation of the order dated 21.8.2024, passed by respondent no.2 shall remain stayed.”

5. Learned counsel for the petitioner submitted that the impugned order dated 21.8.2024 has been passed in illegal and arbitrary manner. He further submitted that the impugned order is without jurisdiction coupled with the fact that the impugned order is self-contradictory. He submitted that the election petition has been allowed and recounting is yet to take place, indicating that the election petition and the issues involved, have been pre-judged without there being any material on record. He further submitted that the order for recounting cannot be passed unless there is any evidence which requires recounting. He also submitted that the order for recounting has been passed on conjecture and surmises, as such, the impugned order for recounting cannot be sustained. He submitted that respondent no.2 has failed to consider paragraph no.12 of the election

petition which was added by an amendment dated 25.4.2022. He submitted that after passing the impugned order, allowing the election petition, respondent no.2/Prescribed Authority became functus officio, as such, the recounting is only a formality as after passing the impugned order, the Prescribed Authority cannot pass any order further. He submitted that order of recounting has been done even without ballot paper having been produced or seen by the Court. He placed reliance on the decisions of this Court in **Matters Under Article 227 No. 31424 of 2024 (Parshuram vs. State of U.P. and Others)**, decided on 23.12.2022; in **Writ C No.14461 of 2024 (Smt. Asha Devi vs. Prescribed Authority/Sub Divisional Magistrate and Others)**, decided on 8.7.2024 and the case reported in 2017(135) RD 128, **Athar Hussain vs. Smt. Razda Begum and Others** in support of his argument.

6. On the other hand, learned Senior Counsel appearing for respondent no.1 submitted that there is no illegality in the impugned order, as such, the writ petition filed by the petitioner is not maintainable. He also submitted that if the argument of learned counsel for the petitioner is accepted that order impugned is a final order, then the remedy against the same will lie under Section 12-C(6) of the Act, rather the writ petition before this Court. He submitted that in view of the provisions contained under Section 12-C(6) of the Act, the writ petition is liable to be dismissed on the ground of alternative remedy. He submitted that the case for recounting has been made out under the impugned order, as such, the argument on merit advanced by learned Senior Counsel for the petitioner cannot be entertained. He placed reliance upon the judgments of this Court in **Writ C**

No.10442 of 2022 (Smt. Maneeta Devi vs. State of U.P. and 8 Others), decided on 13.4.2022; in the case reported in 2017(136) RD 136, **Nirdosh Tyagi vs. State of U.P. and Others** and in **Writ C No.2432 of 2023 (Smt. Jahida Begam vs. State of U.P. and Others)**, decided on 29.3.2023 in order to demonstrate that the remedy against the final order of the election tribunal will lie in revision under Section 12-C(6) of the Act. He submitted that no interference is required against the impugned order and the writ petition is liable to be dismissed.

7. I have considered the arguments advanced by learned counsel for the parties and perused the records.

8. There is no dispute about the fact that petitioner is an elected Pradhan of the gram panchayat concerned and the election petition filed by respondent no.1, has been decided under the impugned order, allowing the election petition as well as for recounting of the votes.

9. In order to appreciate the controversy involved in the matter, the perusal of Section 12-C of the Act will be relevant which is quoted hereunder:-

“12-C. Application for questioning the elections –

(1)

(2)

(3) This application under sub-section (1) may be presented by any candidate at the election or any elector and shall contain such particulars as may be prescribed.

Explanation – Any person who filed a nomination paper at the election whether such nomination paper was

accepted or rejected, shall be deemed to be a candidates at the election.

(4) The authority to whom the application under sub-section (1) is made shall in the matter of –

i- hearing of the application and the procedure to be followed at such hearing;

ii- setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner, have such powers and authority as may be prescribed.

(5) Without prejudice to generality of the powers to be prescribed under subsection (4) the rules may provide for summary hearing and disposal of an application under sub-section (1).

(6) Any party aggrieved by an order of the prescribed authority upon an application under sub-section (1) may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more the following grounds, namely – (a) that the prescribed authority has exercised a jurisdiction not vested in it by law; (b) that the prescribed authority has failed to exercise a jurisdiction so vested; (c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity.”

10. The perusal of operative portion of the impugned order dated 21.8.2024, allowing the election petition & ordering for recounting will be necessary which is as under :-

आदेश पत्रक

न्यायालय : उपजिलाधिकारी

मण्डल : चित्रकूट धाम, जनपद : बांदा,

तहसील: अतर्रा

वाद संख्या : RST/761/2022

कंप्यूटरीकृत वाद संख्या :

T202207110300761

माधुरी बनाम प्रियंका आदि

अंतर्गत धारा :- 12 ग, अधिनियम: ३०प्र०

पंचायती राज अधिनियम, 1947

आदेश

याचिकाकर्तिया द्वारा माधुरी पत्नी कुलदीप निवासी ग्राम शिवहद परगना व तहसील अतर्रा जिला बांदा प्रस्तुत याचिका स्वीकार करते हुए पुर्नमतगणना कराये जाने का आदेश दिया जाता है। ग्राम पंचायत शिवहद में प्रधान पद के निर्वाचन से सम्बन्धित मतगणना दिनांक 28.8.2024 को पूर्वान्ह 10.00 बजे से तहसीलदार अतर्रा के न्यायालय में सम्पन्न कराई जायेगी। जिला पंचायत राज अधिकारी बांदा को निर्देशित किया जाता है कि मतगणना से सम्बन्धित समस्त आवश्यक प्रपत्रों / अधीनस्थ कर्मचारियों / वीडियोग्राफर आदि की व्यवस्था करते हुए नियत तिथि को निर्धारित समय उपस्थित होकर मतगणना सुनिश्चित कराये। आदेश की एक प्रति जिला पंचायत राज अधिकारी, बांदा को भेजी जाए। सहायक जिला निर्वाचन अधिकारी (पंचायत) मतपत्र के बक्से सील स्थिति में उपलब्ध कराये। पत्रावली दिनांक 30.8.2024 को अग्रिम कार्यवाही हेतु पेश हो।

दिनांक - 21.8.24

21.8.24

ह० अपठित

(रावेन्द्र सिंह)

नियत प्राधिकारी / उपजिलाधिकारी, अतर्रा

आज यह आदेश, मेरे द्वारा खुले न्यायालय में हस्ताक्षरित दिनांकित कर उद्घोषित किया गया।

दिनांक - 21.8.24

ह० अपठित

21.8.24

(रावेन्द्र सिंह)

नियत प्राधिकारी / उपजिलाधिकारी, अतर्रा

11. This Court in the case of **Parshuram** (supra) as well as **Smt. Asha Devi** (supra) has held that after passing the final order in the election petition, the Prescribed Authority/Election Tribunal will become *functus officio* in the matter. Paragraph Nos. 24, 25, 26 & 27 of the judgment rendered in **Parshuram** (supra) will be relevant for perusal which is quoted hereunder:-

“24. From perusal of the aforesaid judgment it emerges that the Division Bench, upon a reference, did not agree with the view of the Single Judge of this Court in the case of **Abrar v. State of U.P.** - (2004) 5 AWC 4088 wherein it had been held that as an election petition had been finally decided as such a revision would lie under sub-section (6) of Section 12-C of the Act, 1947. The Division Bench, after considering the judgment in the case of **Abrar** (supra) was of the view that a mere order for recount does not finally alter the status of the contesting parties and it does not in any way finally

determine the status of an elected candidate inasmuch as the finality would only come after the disposal of the election application as the relief of setting aside an election or dismissing an election application comes at a final stage and not by mere disposal of an application of recount or ordering recount on deciding the issue framed for this purpose.

25. However, the legal issue which arises in the instant case is that when the Prescribed Authority has finally allowed the election petition by means of impugned order dated 21.12.2021 and has directed for recounting then after disposal of the election petition, the Election Tribunal would become 'functus officio' and no subsequent order can be passed in this regard by the Election Tribunal.

26. This aspect of the matter has been considered by a seven Judges Constitution Bench of Hon'ble Supreme Court in the case of **Hari Vishnu Kamath vs. Syed Ahmad Ishaque and others** - AIR 1955 SC 233 wherein the Constitution Bench has held as under:-

"19. Looking at the substance of the matter, when once, it is held that the intention of the Constitution was to vest in the High Court a power to supervise decisions of Tribunals by the issue of appropriate writ and directions, the exercise of that power cannot be defeated by technical -considerations of form and procedure. In **P. C. Basappa v. T. Nagappa** -AIR 1954 SC 440, this Court observed:

"In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion

expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law"

It will be in consonance with these principles to hold that the High Courts have power under article 226 to issue writs of certiorari for quashing the decisions of Election Tribunals, notwithstanding that they become functus officio after pronouncing the decisions."

(emphasis by the Court)

27. From a perusal of the aforesaid judgment, it is apparent that after the Election Tribunal pronounces its decision, it becomes 'functus officio'."

12. In **Smt. Asha Devi** (supra) also, this Court has held in paragraph no.16 that there is no provision under the Act authorizing the Prescribed Authority to re-entertain the election petition, which has already been decided and modify the previous order passed by him or to pass subsequent order in furtherance of the previous order. Paragraph No.16 of the judgment rendered in **Smt. Asha Devi** (supra) is extracted hereunder:-

"16. In this conspectus, as above, I found substance in the submissions advanced by the learned counsel for the petitioner that in view of allowing the election petition partly, vide order dated 2.3.2024, that too, without fixing any date for the further proceedings in the election petition intending to decide any issue or to take final decision on said election petition, the Prescribed Authority became functus

officio and he has an inherent lack of jurisdiction to entertain such election petition again and allowed the same second time declaring respondent No. 3 as a returned candidate. It appears, prima facie, that learned Prescribed Authority has passed order dated 21.3.2024 in zeal, while the revision dated 12.3.2024 was seized with the revisional court to examine the legality and validity of the order dated 2.3.2024. Even assuming that no interim order was passed by the revisional court, the Prescribed Authority has not justified in passing the order dated 21.3.2024 while he had already laid his hands off from the election petition by terminating its proceeding finally vide order dated 2.3.2024. There is no provision under the Act, 1947 authorizing the Prescribed Authority to re-entertain the election petition, which has already been decided, and modify the previous order dated 2.3.2024 passed by him or to pass subsequent fresh order in furtherance of the previous order. The order under challenge, passed by the Prescribed Authority, is patently erroneous and perverse to the provisions of the Act, 1947 and same is liable to be quashed being illegal, unwarranted under the law, cryptic and suffers from infirmity warranting the indulgence of this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. The existence of such order beget prejudice and miscarriage of justice to the present petitioner, who is an elected representative in the democratic setup."

13. The ratio of law laid down by this Court in **Parshuram** (supra) and **Smt. Asha Devi** (supra), as quoted above, fully demonstrate that the Election

Tribunal/Prescribed Authority under Section 12-C of the Act cannot pass the order for finally allowing the election petition as well as for recounting.

14. In view of the aforementioned facts and circumstances, the impugned order dated 21.8.2024 cannot be sustained in the eye of law.

15. So far as the availability of alternative remedy of revision against the order impugned under Section 12-C(6) of the Act is concerned, the Hon'ble Apex Court in the case of **Committee of Management and Another Vs. Vice-Chancellor and Others reported in 2009(1) AWC 437 (SC)**, has held that the alternative remedy will not be bar if the impugned order has been passed in violation of principal of natural justice or the order impugned is without jurisdiction. Paragraph No.21 of the Committee of Management (supra) will be relevant for perusal which is quoted hereunder:-

"21. Furthermore, when an order has been passed by an authority without jurisdiction or in violation of the principles of natural justice, the superior courts shall not refuse to exercise their jurisdiction although there exists an alternative remedy. In this context, it is appropriate to refer to the observations made by this Court in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors. (1998) 8 SCC 1:

"15. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a

violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

[See also Guruvayoor Devaswom Managing Committee & Anr. v. C.K. Rajan & Ors. (2003) 7 SCC 546]

In this case, albeit, before us for the first time, the vires of the proviso appended to Section 16 of the Act is in question, besides other points noticed by us hereinbefore."

16. This Court has repeatedly held that the Election Tribunal cannot pass the order for allowing the election petition as well as for recounting together but in spite of that the impugned order has been passed which cannot be sustained at any ground, as such, in place of relegating the petitioner to file the revision, it will be just and proper to set aside the order of Prescribed Authority dated 21.8.2024 and direct the Election Tribunal/Prescribed Authority to proceed afresh in accordance with law.

17. Considering the entire facts and circumstances as well as the ratio of law laid down by this Court as well as by Hon'ble the Apex Court, the impugned order dated 21.8.2024 is liable to be set aside and the same is hereby set aside.

18. This Court has found that Election Tribunal/Prescribed Authority is passing similar type of orders without considering the ratio of law laid down by this Court in Parshuram (Supra) & Smt Asha Devi (Supra) as three writ-petitions came before this Court within period of one week which is not proper on the part of Election Tribunal/Prescribed Authority of the State who are exercising power under Section 12-C of the Act.

19. The notice has not been issued to respondent Nos. 4 to 10 before setting aside the impugned order as the election-petition filed by respondent No.1 has been allowed under the impugned order and respondent No.1 is represented by learned counsel as well as this Court is remitting back the matter before Election Tribunal/Prescribed Authority where everybody will be heard.

20. **The writ petition stands allowed** and the matter is remitted back before respondent no.2/ Sub Divisional Magistrate/ Prescribed Authority with a direction to register the election petition on its original number and decide the same afresh on the basis of evidence already adduced by the parties, considering the law laid down by this Court in **Parshuram** (supra) and **Smt. Asha Devi** (supra), expeditiously, preferably within a period of 3 months from the date of production of the certified copy of the order.

(2024) 9 ILRA 903
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 29191 of 2024

Dayanand **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Mr. H.N. Singh, Senior Counsel, Mr. Ashok Kumar Yadav

Counsel for the Respondents:

Mr. Prabhakar Tripathi, S.C., Mr. Anuruddh Chaturvedi

A. Local Law – UP Panchayat Raj Act, 1947 – Section 12-C – Gram Pradhan – Election petition – Re-counting of the votes –

Permissibility – How far Prescribed Authority has jurisdiction – Held, Election Tribunal/ Prescribed Authority u/s 12-C of the Act cannot pass the order for finally allowing the election petition as well as for recounting. (Para 12)

B. Constitution of India – Article 226 – Writ – Scope of interference – Alternative remedy – When not amount to bar – Apex Court's decision passed in *Committee of Management's case* relied upon – Held, alternative remedy will not be bar if the impugned order has been passed in violation of principal of natural justice or the order impugned is without jurisdiction. (Para 14)

Writ allowed. (E-1)

List of Cases cited:

1. Kusum Mishra Vs St. of U.P. & ors.; 2023 8 ADJ 215
2. Writ C No. 6852 of 2023; Ram Kali Vs District Judge, Hardoi & ors. decided on 09.08.2023
3. Parshuram Vs St. of U.P.; 2023 (1) ADJ 693
4. Committee of Management & anr. Vs Vice-Chancellor & ors.; 2009(1) AWC 437 (SC)

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. H.N. Singh, learned Senior Counsel assisted by Mr. Ashok Kumar Yadav, learned counsel for the petitioner, Mr. Prabhakar Tripathi, learned standing counsel for the state-respondents and Mr. Anuruddha Chaturvedi, learned counsel for respondent no.3.

2. Brief facts of the case are that petitioner was elected as Gram Pradhan of Gram Panchayat- Malahpurwa, Block Rudrapur, Tehsil- Rudrapur, District Deoria in the election held on 26.4.2021. Petitioner has secured 166 votes.

Respondent no.3 filed one election petition under Section 12-C of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as “the Act”) which was registered as Election Petition No.2716 of 2021 (Computerised Case No.T202105200302716). Another election petition was filed by respondent no.4 which was registered as Election Petition No.2645 of 2021 (Computerised Case No. T202105200302645). Petitioner filed his written statement in both the election petitions. Issues were framed in both the election petitions. Respondent no.2 vide impugned order dated 21.8.2024, allowed the election petition and order for recounting. Hence, this writ petition for following relief:-

“(i) Issue a suitable writ, order or direction in the nature of certiorari, quashing the impugned order dated 21.8.2024 passed by the Prescribed Authority/Sub Divisional Officer, Tehsil Rudrapur, Deoria in Election Petition No.2716 of 2021 (Computerized Case No.T202105200302716) (Ayush Yadav vs. Dayanand and Others) and another by Harendra Kumar being Election Petition No.2645 of 2021 (Computerized Case No.T202105200302645) (Harendra Kumar vs. Dayanand and Others) (Annexure No.6 to the writ petition)

3. This Court on 12.9.2024 passed the following order:-

“1. Heard Mr. H.N. Singh, learned Senior Counsel assisted by Mr. Ashok Kumar Yadav, learned counsel for the petitioner, Mr. Prabhakar Tripathi, learned Standing Counsel for the State-respondents and Mr. Anuruddh Chaturvedi for respondent no.3.

2. Judgement reserved.

3. List/put up this case for delivery of judgment on 18.09.2024.

4.Till the date of delivery of judgment of this Court, effect and operation of the order dated 21.08.2024, passed by the Prescribed Authority, respondent no.2, shall remain stayed.”

4. Learned counsel for the petitioner submitted that the impugned order dated 21.8.2024 has been passed in illegal and arbitrary manner. He further submitted that the impugned order is without jurisdiction coupled with the fact that the impugned order is self-contradictory. He submitted that the election petition has been allowed and recounting is yet to take place, indicating that the election petition and the issues involved, have been pre-judged without there being any material on record. He further submitted that the order for recounting cannot be passed unless there is any evidence which requires recounting. He also submitted that the order for recounting has been passed on conjecture and surmises, as such, the impugned order for recounting cannot be sustained. He submitted that after passing the impugned order, allowing the election petition, respondent no.2/Prescribed Authority became functus officio, as such, the recounting is only a formality as after passing the impugned order, the Prescribed Authority cannot pass any order further. He submitted that order of recounting has been done even without ballot paper having been produced or seen by the Court. He placed reliance on the decisions of this Court in **Matters Under Article 227 No. 31424 of 2024 (Parshuram vs. State of U.P. and Others)**, decided on 23.12.2022; in **Writ C No.14461 of 2024 (Smt. Asha Devi vs. Prescribed Authority/Sub Divisional Magistrate and Others)**, decided on 8.7.2024 and the case reported in

2017(135) RD 128, Athar Hussain vs. Smt. Razda Begum and Others in support of his argument.

5. On the other hand, learned counsel appearing for respondent no.3 submitted that there is no illegality in the impugned order, as such, the writ petition filed by the petitioner is not maintainable. He also submitted that if the argument of learned counsel for the petitioner is accepted that order impugned is a final order, then the remedy against the same will lie under Section 12-C(6) of the Act rather the writ petition before this Court. He submitted that in view of the provisions contained under Section 12-C(6) of the Act, the writ petition is liable to be dismissed on the ground of alternative remedy. He submitted that the case for recounting has been made out under the impugned order, as such, the argument on merit advanced by learned Senior Counsel for the petitioner cannot be entertained. He placed reliance upon the judgments of this Court reported in **2023 8 ADJ 215, Kusum Mishra vs. State of U.P. and Others**; in **Writ C No.6852 of 2023 (Ram Kali vs. District Judge, Hardoi and Others)** decided on 9.8.2023 and in the case reported in **2023 (1) ADJ 693, Parshuram vs. State of U.P.** in order to demonstrate that the remedy against the final order of the election tribunal will lie in revision under Section 12-C(6) of the Act. He submitted that no interference is required against the impugned order and the writ petition is liable to be dismissed.

6. I have considered the arguments advanced by learned counsel for the parties and perused the records.

7. There is no dispute about the fact that petitioner is an elected Pradhan of the gram panchayat concerned and the election

petition filed by respondent no.3, has been decided under the impugned order, allowing the election petition as well as for recounting of the votes.

8. In order to appreciate the controversy involved in the matter, the perusal of Section 12-C of the Act will be relevant which is quoted hereunder:-

“12-C. Application for questioning the elections –

(1)

(2)

(3) This application under sub-section (1) may be presented by any candidate at the election or any elector and shall contain such particulars as may be prescribed.

Explanation – Any person who filed a nomination paper at the election whether such nomination paper was accepted or rejected, shall be deemed to be a candidates at the election.

(4) The authority to whom the application under sub-section (1) is made shall in the matter of –

i- hearing of the application and the procedure to be followed at such hearing;

ii- setting aside the election, or declaring the election to be void or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner, have such powers and authority as may be prescribed.

(5) Without prejudice to generality of the powers to be prescribed under subsection (4) the rules may provide for summary hearing and disposal of an application under sub-section (1).

(6) Any party aggrieved by an order of the prescribed authority upon an application under sub-section (1)

may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more the following grounds, namely – (a) that the prescribed authority has exercised a jurisdiction not vested in it by law; (b) that the prescribed authority has failed to exercise a jurisdiction so vested; (c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity.”

9. The perusal of operative portion of the impugned order dated 21.8.2024, allowing the election petition & ordering for recounting will be necessary which is as under :-

आदेश पत्रक
न्यायालय : उपजिलाधिकारी
मण्डल: गोरखपुर, जनपद: देवरिया, तहसील:
रुद्रपुर
वाद संख्या:-2716/2021
कंप्यूटरीकृत वाद संख्या:-
T202105200302716
आयुक्त यादव बनाम दयानन्द आदि
अंतर्गत धारा:- 12ग, अधिनियम:-उ०प्र०
पंचायती राज अधिनियम,1947

आदेश

अतः उपरोक्त विवेचना के आधार पर याची आयुष व हरेन्द्र कुमार यादव की याचिका स्वीकार करते हुए पुर्नमतगणना का आदेश दिया जाता है। पुर्नमतगणना दिनांक 17.09.2024 को समय प्रातः 10.00 बजे नियत की जाती है। पुर्नमतगणना की कार्यवाही न्यायालय तहसीलदार रुद्रपुर

स्थान रुद्रपुर जनपद देवरिया में तहसीलदार रुद्रपुर व खण्ड विकास अधिकारी रुद्रपुर की उपस्थिति में कराये जाने एवं इसकी विडियोग्राफी कराये जाने हेतु आदेशित किया जाता है। पुर्नमतगणना के समय प्रत्याशी अथवा उनका गणना अभिकर्ता दोनों में से एक उपस्थित रहकर पुर्नमतगणना प्रक्रिया का निरीक्षण कर सकते हैं। आदेश की प्रति सहायक जिला निर्वाचन अधिकारी (पंचा०स्था०) देवरिया को इस आशय से भेजा जाय कि वह ग्राम पंचायत महलपुरवा विकास खण्ड रुद्रपुर के प्रधान पद के निर्वाचन से संबंधित मतगणना प्रपत्रों, मतपत्रों का शील्ड पैकेट/बाक्स व अन्य संबंधित अभिलेख को लेकर नियत तिथि दिनांक 17.09.2024 व नियत स्थान व समय के आधे घण्टा पूर्व उपस्थित हो। आदेश की एक प्रति खण्ड विकास अधिकारी रुद्रपुर, जिला पंचायत राज अधिकारी/ जिला निर्वाचन अधिकारी (पंचा०स्था०) देवरिया तथा क्षेत्राधिकारी रुद्रपुर को प्रेषित किया जाय। क्षेत्राधिकारी रुद्रपुर पुर्नमतगणना हेतु नियत स्थान, तिथि व समय से एक घण्टा पूर्व प्रभारी निरीक्षक रुद्रपुर को पर्याप्त पुलिस बल के साथ पुनर्मतगणना की सम्पूर्ण प्रक्रिया समाप्त होने तक उपस्थित रहकर शान्ति व्यवस्था सुनिश्चित करने हेतु निर्देशित किया जाय। इस आदेश की एक प्रति याचिका सं० टी202105200302645 प्रति हरेन्द्र बनाम दयानन्द की पत्रावली पर भी

रखी जाय। बाद अनुपालन पत्रावली दाखिल दफ्तर हो।

दिनांक: 21.08.2024

ह० अप०
(रत्नेश तिवारी)
नियत प्राधिकारी/
उप जिलाधिकारी
रूद्रपुर।

आज यह आदेश मेरे द्वारा खुले न्यायालय में हस्ताक्षरित, दिनांकित एवं उद्धोषित किया गया।

ह० अप०
(रत्नेश तिवारी)
नियत प्राधिकारी/
उप जिलाधिकारी
रूद्रपुर।

10. This Court in the case of **Parshuram** (supra) as well as **Smt. Asha Devi** (supra) has held that after passing the final order in the election petition, the Prescribed Authority/Election Tribunal will become *functus officio* in the matter. Paragraph Nos. 24, 25, 26 & 27 of the judgment rendered in **Parshuram** (supra) will be relevant for perusal which is quoted hereunder:-

“24. From perusal of the aforesaid judgment it emerges that the Division Bench, upon a reference, did not agree with the view of the Single Judge of this Court in the case of **Abrar v. State of U.P.** - (2004) 5 AWC 4088 wherein it had been held that as an election petition had been finally decided as such a revision would lie under sub-section (6) of Section 12-C of the Act,

1947. The Division Bench, after considering the judgment in the case of **Abrar** (supra) was of the view that a mere order for recount does not finally alter the status of the contesting parties and it does not in any way finally determine the status of an elected candidate inasmuch as the finality would only come after the disposal of the election application as the relief of setting aside an election or dismissing an election application comes at a final stage and not by mere disposal of an application of recount or ordering recount on deciding the issue framed for this purpose.

25. However, the legal issue which arises in the instant case is that when the Prescribed Authority has finally allowed the election petition by means of impugned order dated 21.12.2021 and has directed for recounting then after disposal of the election petition, the Election Tribunal would become 'functus officio' and no subsequent order can be passed in this regard by the Election Tribunal.

26. This aspect of the matter has been considered by a seven Judges Constitution Bench of Hon'ble Supreme Court in the case of **Hari Vishnu Kamath vs. Syed Ahmad Ishaque and others** - AIR 1955 SC 233 wherein the Constitution Bench has held as under:-

"19. Looking at the substance of the matter, when once, it is held that the intention of the Constitution was to vest in the High Court a power to supervise decisions of Tribunals by the issue of appropriate writ and directions, the exercise of that power cannot be defeated by technical -considerations of form and procedure. In **P. C. Basappa v. T. Nagappa** -AIR 1954 SC 440, this Court observed:

"In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law"

It will be in consonance with these principles to hold that the High Courts have power under article 226 to issue writs of certiorari for quashing the decisions of Election Tribunals, notwithstanding that they become *functus officio* after pronouncing the decisions."

(emphasis by the Court)

27. From a perusal of the aforesaid judgment, it is apparent that after the Election Tribunal pronounces its decision, it becomes '*functus officio*'."

11. In *Smt. Asha Devi* (supra) also, this Court has held in paragraph no.16 that there is no provision under the Act authorizing the Prescribed Authority to re-entertain the election petition, which has already been decided and modify the previous order passed by him or to pass subsequent order in furtherance of the previous order. Paragraph No.16 of the judgment rendered in *Smt. Asha Devi* (supra) is extracted hereunder:-

"16. In this conspectus, as above, I found substance in the submissions advanced by the learned counsel for the petitioner that in view of

allowing the election petition partly, vide order dated 2.3.2024, that too, without fixing any date for the further proceedings in the election petition intending to decide any issue or to take final decision on said election petition, the Prescribed Authority became *functus officio* and he has an inherent lack of jurisdiction to entertain such election petition again and allowed the same second time declaring respondent No. 3 as a returned candidate. It appears, *prima facie*, that learned Prescribed Authority has passed order dated 21.3.2024 in zeal, while the revision dated 12.3.2024 was seized with the revisional court to examine the legality and validity of the order dated 2.3.2024. Even assuming that no interim order was passed by the revisional court, the Prescribed Authority has not justified in passing the order dated 21.3.2024 while he had already laid his hands off from the election petition by terminating its proceeding finally vide order dated 2.3.2024. There is no provision under the Act, 1947 authorizing the Prescribed Authority to re-entertain the election petition, which has already been decided, and modify the previous order dated 2.3.2024 passed by him or to pass subsequent fresh order in furtherance of the previous order. The order under challenge, passed by the Prescribed Authority, is patently erroneous and perverse to the provisions of the Act, 1947 and same is liable to be quashed being illegal, unwarranted under the law, cryptic and suffers from infirmity warranting the indulgence of this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. The existence of such order beget prejudice and miscarriage of justice to the present

petitioner, who is an elected representative in the democratic setup."

12. The ratio of law laid down by this Court in **Parshuram** (supra) and **Smt. Asha Devi** (supra), as quoted above, fully demonstrate that the Election Tribunal/Prescribed Authority under Section 12-C of the Act cannot pass the order for finally allowing the election petition as well as for recounting.

13. In view of the aforementioned facts and circumstances, the impugned order dated 21.8.2024 cannot be sustained in the eye of law.

14. So far as the availability of alternative remedy of revision against the order impugned under Section 12-C(6) of the Act is concerned, the Hon'ble Apex Court in the case of **Committee of Management and Another Vs. Vice-Chancellor and Others reported in 2009(1) AWC 437 (SC)**, has held that the alternative remedy will not be bar if the impugned order has been passed in violation of principal of natural justice or the order impugned is without jurisdiction. Paragraph No.21 of the Committee of Management (supra) will be relevant for perusal which is quoted hereunder:-

"21. Furthermore, when an order has been passed by an authority without jurisdiction or in violation of the principles of natural justice, the superior courts shall not refuse to exercise their jurisdiction although there exists an alternative remedy. In this context, it is appropriate to refer to the observations made by this Court in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors. (1998) 8 SCC 1:

"15. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

[See also Guruvayoor Devaswom Managing Committee & Anr. v. C.K. Rajan & Ors. (2003) 7 SCC 546]

In this case, albeit, before us for the first time, the vires of the proviso appended to Section 16 of the Act is in question, besides other points noticed by us hereinbefore."

15. This Court has repeatedly held that the Election Tribunal cannot pass the order for allowing the election petition as well as for recounting together but in spite of that the impugned order has been passed which cannot be sustained at any ground, as such, in place of relegating the petitioner to file the revision, it will be just and proper to set aside the order of Prescribed Authority dated 21.8.2024 and direct the Election Tribunal/Prescribed Authority to proceed afresh in accordance with law.

16. Considering the entire facts and circumstances as well as the ratio of law laid down by this Court as well as by Hon'ble the Apex Court, the impugned order dated 21.8.2024 is liable to be set aside and the same is hereby set aside.

17. This Court has found that Election Tribunal/Prescribed Authority is passing similar type of orders without considering the ratio of law laid down by this Court in

Parshuram (Supra) & **Smt Asha Devi** (Supra) as three writ-petitions came before this Court within period of one week which is not proper on the part of Election Tribunal/Prescribed Authority of the State who are exercising power under Section 12-C of the Act.

18. The notice has not been issued to respondent Nos. 4 to 17 before setting aside the impugned order as the election-petition filed by respondent No.3 has been allowed under the impugned order and respondent No.3 is represented by learned counsel as well as this Court is remitting back the matter before Election Tribunal/Prescribed Authority where everybody will be heard.

19. The writ petition stands allowed and the matter is remitted back before respondent no.2/ Sub Divisional Magistrate/ Prescribed Authority with a direction to register the election petition on its original number and decide the same afresh on the basis of evidence already adduced by the parties, considering the law laid down by this Court in **Parshuram** (supra) and **Smt. Asha Devi** (supra), expeditiously, preferably within a period of 3 months from the date of production of the certified copy of the order.

(2024) 9 ILRA 910

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 12.09.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ C No. 36646 of 2009

Ranvijay Singh

Versus

State of U.P. & Ors.

...Petitioner

...Respondents

Counsel for the Petitioner:

Sunil Singh, Ch. N.A. Khan, Haridwar Singh, J.N. Mishra, S.K. Singh

Counsel for the Respondents:

C.S.C.

The Arms Act, 1959 - Section 17 - Suspension and revocation of licences - A criminal case was registered in which the petitioner was not named. Petitioner was implicated during the investigation. The licence of the petitioner was cancelled merely on the ground of the pendency of the criminal case. Subsequently, the criminal case was finally decided, acquitting the petitioner of the charges leveled against him. Held: Mere pendency of a criminal case cannot be a ground to cancel the firearm licence of the licence holder. In the instant matter, the Criminal Court honorably acquitted the petitioner in the aforementioned criminal case based on the evidence adduced by the parties. There was no allegation of the petitioner using the firearm. As such, the firearm licence of the petitioner cannot be cancelled on the ground of the pendency of the criminal case. Impugned orders were set aside. The District Magistrate was directed to restore the firearm licence of the petitioner. (Para 19)

Allowed. (E-5)

List of Cases cited:

1. Prem Vs St. of Uttaranchal & anr. 2002 (2) J.Cr.C. 32
2. Indrajeet Singh Vs St. of U.P. & 4 Ors 2021 0 Supreme (All) 840
3. Dr. Ram Manohar Lohia Vs St. of Bihar AIR 1966 SC 740
4. Sheo Prasad Mishra Vs District Magistrate, Basti & ors. 1978 AWC 122

5. Channga Prasad Sahu Vs St. of U. P. 1984 (10) AIR 223

6. Kailash Nath & ors. Vs St. of U.P. & ors. 1985 (22) ACC 353

7. Rana Pratap Singh Vs St. of U.P. 1985 (Supp) ACC 235

8. Sadri Ram Vs District Magistrate Azamgarh & ors. 1998 (37) ACC 830

9. Vishal Varshney Vs St. of U.P. & ors. 2009 (75) ALR 593

10. Suneel Vs St. of U.P. & ors. 2020 (113) ACC 1

11. Ram Prasad Vs Commissioner & ors. 2020 (113) 571

12. Ashiq Hussain Vs Commissioner, Moradabad & ors. in 2009 (10) ADJ 635

13. Mohd. Haroon Vs The District Magistrate, Siddharth Nagar 2003 (1) ACJ 124

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Sunil Kumar Singh, learned counsel for the petitioner, Mr. Prabhakar Tripathi, learned Standing Counsel for the State-respondents and perused the record.

2. Brief facts of the case are that petitioner was granted license No. 982/PII for DBBL Gun (12 Bore) No.9854/03 in the year 2003. In the year 2008, a criminal case was registered under Section 302 IPC, in which, petitioner was not named. The aforementioned criminal case was proceeded and petitioner was implicated during investigation. On the basis of aforementioned criminal case u/s 302 IPC, a show cause notice dated 26.04.2008 was

issued in the name of petitioner and on the basis of ex-parte order dated 26.12.2008, licence of the petitioner was cancelled. Petitioner filed an appeal under Section 18 of the Arms Act before the Commissioner, Varanasi Division Varanasi, and the Commissioner, vide order dated 03.06.2009, dismissed the appeal, hence, this writ petition for the following reliefs :-

"I) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 26.12.2008 and 3.6.2009 passed by the respondent no.2 and 3 (Annexure-2 & 3) to this writ petition.

II) Issue a writ, order or direction in the nature of mandamus commanding respondent no.2 to grant renewal of the License no.982/P II DBBL Gun No.12 No.9854/03 of the petitioner for DBBL Gun for which renewal fee has already been deposit through treasury challan.

III) Issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. This Court vide order dated 24.7.2009 directed the Standing Counsel to file counter affidavit accordingly, affidavits are exchanged between the parties.

4. A supplementary affidavit, dated 13.12.2022, has been filed on behalf of the petitioner annexing the copy of the judgement of Criminal Court dated 1.12.2021 passed in S.T. No.272/2008, under Section 302/34 IPC, by which, the petitioner has been acquitted in the aforementioned criminal case.

5. Counsel for the petitioner submitted that petitioner was granted arms licence according to the procedure prescribed

under the Arms Act and Rules framed thereunder. He further submitted that licence of the petitioner has been cancelled, merely on the ground of pendency of criminal case, which is also illegal. He submitted that the aforementioned criminal case has been finally decided by the Additional Sessions Judge acquitting the petitioner from the charges leveled against him. He further submitted that considering the evidence adduced in the criminal case as well as the final judgment passed by the court concerned it is fully demonstrated that the petitioner has not used his firearm in the aforementioned criminal case as such the ground for cancellation is wholly illegal. He further submitted that the statement recorded in the aforementioned criminal case as well as the final judgment passed in Criminal Case fully demonstrate that petitioner was falsely implicated in the aforementioned criminal case. He placed reliance upon the judgment reported in **2002 (2) J.Cr.C. 32, Prem vs. State of Uttaranchal and another** in support of his argument.

6. On the other hand, Mr. Prabhakar Tripathi, learned Standing Counsel for the State-respondents, submitted that the firearm license of the petitioner was rightly cancelled on the ground of pendency of criminal case under Section 302 IPC. He further submitted that mere acquittal in the aforementioned criminal case will not amount to restore the firearm licence of the petitioner. He further submitted that no interference is required against the impugned orders and the writ petition is liable to be dismissed. He placed reliance upon the judgement of this Court reported in **2021 0 Supreme (All) 840 Indrajeet Singh Vs. State of U.P. & 4 Ors** in support of his argument.

7. I have considered the arguments advanced by learned counsel for the parties and perused the record.

8. There is no dispute about the facts that the petitioner was granted firearm licence in the year 2003. There is also no dispute about the fact that under the order of Licensing Authority dated 26.12.2008, petitioner's arms licence has been cancelled and the appeal filed by the petitioner has also been dismissed, vide order dated 03.06.2009. There is also no dispute about the fact that petitioner has been acquitted in the Criminal Case vide judgement dated 1.12.2021.

9. In order to appreciate the controversy involved in the matter, the perusal of Section 17 of the Arms Act will be relevant, which is as under :-

"17. Variation, suspension and revocation of licences.

(1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence holder by notice in writing to deliver-up the licence to it within such time as may be specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence,-

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) if the licensing authority deems it necessary for the security of the

public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A Court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence: Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also

be made by an Appellate Court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation."

10. A perusal of sub-section (3) of Section 17 of the Act would show that firearm could be suspended or revoked by the licensing authority on the ground that it was necessary for public peace or for the public safety and if any of the condition of the licence has been contravened.

11. Now it will be appropriate to refer to the law bearing on the matter.

12. In **Dr. Ram Manohar Lohia Vs. State of Bihar AIR 1966 SC 740**, it was observed that the contravention of law always affects order but before it could be said to affect "public order" it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing "law and order", the next representing "public orders" and the smallest representing "security of state". An act may affect "law and order" but not "public order", just as an act may affect "public order" but not "security of state".

13. In **Sheo Prasad Mishra Vs. District Magistrate, Basti & Others**

reported in **1978 AWC 122**, a Division Bench of this Hon'ble Court relaying upon the earlier decision in **Masiuddin Vs. Commissioner Allahabad** reported in **1972 AIR Allahabad 510** held that mere involvement in criminal case cannot in any way affect the public security or public interest and hence an order cancelling or revoking a firearm licence only on the ground of licensee's involvement in a criminal case cannot be sustained.

14. In the matter of **Harprasad Vs. State of U.P. and Others** reported in **2005 (52) ACC 226 (Alld)** this Court after considering the law already pronounced on this point has finally allowed the petition and quashed the impugned order passed by the appellate Authority. Relevant paragraph of this judgment are being quoted here :-

"In full Bench decision of this Court rendered in **Channga Prasad Sahu Vs. State of Uttar Pradesh 1984 (10) AIR 223** and **Kailash Nath and Others Vs. State of U.P. and Others 1985 (22) ACC 353** and in the case of **Rana Pratap Singh Vs. State of U.P. 1985 (Supp) ACC 235**, it has been held that mere pendency of the Criminal case(s) is no ground for cancellation of arms licence. The full Bench decision of Channga Prasad Sahu was also considered in **Sadri Ram Vs. District Magistrate Azamgarh and Others 1998 (37) ACC 830**".

15. In **Vishal Varshney Vs. State of U.P. and Others** reported in **2009 (75) ALR 593**, this Court held that cancellation of the firearm licence only on the ground of apprehension or likelihood of misuse of firearm by the licensee is illegal.

16. In a recent decision which was cited by counsel for the petitioner in the

case of **Suneel Vs. State of U.P. and Others** reported in **2020 (113) ACC 1** and **Ram Prasad Vs. Commissioner and Others** reported in **2020 (113) 571**, this Court held that mere involvement in criminal case is no ground for cancellation of licensee's firearm as well as apprehension of abuse of arms is not a sufficient ground for passing of an order of cancellation of licence under Section 17 of the Act. It has also been held that in a pending criminal case against the licensee if acquittal has been ordered by criminal Court then the very basis of the cancellation of arm licence will vanish.

17. In **Ashiq Hussain Vs. Commissioner, Moradabad & Others** reported in **2009 (10) ADJ 635**, this Court has held as under:

"6. The mere involvement in a solitary criminal case cannot be a ground for cancellation of a firearm license as held by this Court in case of **Mohd. Haroon Vs. The District Magistrate, Siddharth Nagar** reported in **2003 (1) ACJ 124**, unless and until it is shown on the basis of material on record that there was grave danger to public law and order. In the instant case it is only a solitary incident, which was not arising out of any disturbance of law and order, that has been made the basis for ordering cancellation."

18. The perusal of relevant portion of the judgement of Criminal Court will be necessary which is as under:-

न्यायालय अपर सत्र न्यायाधीश
फास्ट ट्रैक कोर्ट-II, गाजीपुर।
उपस्थित: श्री दुर्गेश, (एच.जे.एस)
(निर्णय का दिनांक: 01.12.2021)

(सत्र परीक्षण संख्या 272/2008) सी.एन.आर.नं. यू.पी. जी.एच.-01-000630-2008 एवं (सत्र परीक्षण संख्या 162/2011)	
सी.एन.आर.नं. यू.पी. जी.एच.-01-001421-2011 (अपराध संख्या-12/2008, धारा- 302/34 भा०दंज०सं०, थाना-करण्डा, जनपद- गाजीपुर)	
परिवादी	उत्तर प्रदेश राज्य
प्रतिनिधित्व	श्री अखिलेश कुमार सिंह, सहायक जिला शासकीय अधिवक्ता (दाण्डिक)
अभियुक्तगण	1. विशाल यादव पुत्र विनोद यादव, 2. बट्टन उर्फ रण विजय सिंह पुत्र स्व० महेन्द्र प्रताप सिंह, निवासीगण ग्राम करण्डा, थाना करण्डा, जनपद गाजीपुर।
घटना की तिथि	15.01.2008 से 17.01.2008 के मध्य
प्रथम सूचना अंकित किये जाने की तिथि	17.01.2008

आरोप पत्र प्रेषित किये जाने की तिथि	02.04.2008
आरोप विरचित किये जाने की तिथि	05.08.2008 (अभियुक्त विशाल यादव) 30.01.2013 (अभियुक्त बट्टन उर्फ रण विजय सिंह)
साक्ष्य प्रस्तुत करने की तिथि	29.08.2012
निर्णय की तिथि	01.12.2021
दण्डादेश की तिथि (यदि कोई हो)	01.12.2021

च. जहाँ तक अन्य अभियुक्त बट्टन उर्फ रण विजय सिंह की भूमिका का प्रश्न है, उसके संबंध में पत्रावली पर ऐसा कोई निर्णायक साक्ष्य उपलब्ध नहीं है। पी.डब्लू. 2 श्री अमरनाथ दूबे एवं पीडब्लू. 5 श्रीमती सविता दूबे द्वारा अपने परिसाक्ष्य में यह अभिकथन किया गया है कि उसके पुत्र की दोस्ती बट्टन उर्फ रण विजय सिंह से नहीं थी। इसी प्रकार स्वयं विशाल यादव का भी अपने बयान अंतर्गत धारा 313 दं०प्र०सं० में यह अभिकथन है कि वह बट्टन सिंह को नहीं जानता था। पत्रावली पर अभियुक्त बट्टन उर्फ रण विजय सिंह के विरुद्ध प्रत्यक्ष अथवा अप्रत्यक्ष साक्ष्य उपलब्ध नहीं है। विवेचक द्वारा भी स्पष्ट

नहीं किया गया है कि किन साक्ष्यों के आधार पर उसके विरुद्ध आरोपत्र प्रेषित किया गया है।

अपर सत्र न्यायाधीश/
एफ.टी.सी.- II, गाजीपुर।

आदेश

44. अभियुक्त बट्टन उर्फ रण विजय सिंह को भा०दं०सं० की धारा 302/34 के अंतर्गत लगाये गये आरोप से दोष-मुक्त किया जाता है। अभियुक्त जमानत पर है। उसके जमानत प्रपत्र निरस्त किये जाते हैं तथा प्रतिभूओं को उसके दायित्व से उन्मोचित किया जाता है। अभियुक्त एक सप्ताह के अन्दर दं०प्र०सं० की धारा 437ए का अनुपालन सुनिश्चित करे।

45. अभियुक्त विशाल यादव को भा०दं०सं० की धारा 302 के अंतर्गत लगाये गये आरोप से दोष-सिद्ध किया जाता है। अभियुक्त जमानत पर है। उसके जमानत प्रपत्र निरस्त किये जाते हैं तथा प्रतिभूओं को उसके दायित्व से उन्मोचित किया जाता है।

46. दोष-सिद्ध विशाल यादव को न्यायिक अभिरक्षा में लिया जाये। पत्रावली मध्यान्तर दण्ड के प्रश्न पर सुनवाई हेतु प्रस्तुत हो।

दिनांकित 01.12.2021

(दुर्गेश),

जे.ओ.कोड यू.पी. 1626,

19. This Court has held from time to time that mere pendency of criminal case cannot be a ground to cancel the firearm licence of the licence holder. In the instant matter, the Criminal Court has fully acquitted the petitioner in the aforementioned criminal case on the basis of evidence adduced by the parties. The perusal of the judgment and evidence adduced in the criminal case fully demonstrate that there is no allegation of using the firearm by the petitioner as such the firearm licence of the petitioner cannot be cancelled on the ground of pendency of criminal case, in which, the criminal court has found that the allegation against the petitioner is not proved.

20. The caselaw cited by learned Counsel for the state shall not be applicable in the instant matter as the acquittal of petitioner in criminal case is honorable acquittal.

21. Considering the facts and circumstances of the case, the impugned orders dated 26.12.2008 and 03.06.2009 are liable to be set aside and the same are hereby set aside.

22. Writ petition stands **allowed** and respondent no.2/District Magistrate, Ghazipur, is directed to restore the firearm licence of the petitioner after calling the necessary report from the authorities concerned within a period of two months from the date of production of a certified copy of this order before him.

23. No order as to Costs.

(2024) 9 ILRA 917
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ C No. 1000219 of 2006

Ram Lakhan Harshit ...Petitioner
Versus
D.M. Lucknow & Ors. ...Respondents

Counsel for the Petitioner:

B.R. Singh, Devashish Bhatt, Mukesh Kumar, Rakshit Raj Singh

Counsel for the Respondents:
C.S.C.

A. Uttar Pradesh Panchayat Raj Act, 1947 – Surcharge - Sections 27 - U. P. Panchayat Raj Rules, 1947- Rule 256 - Inquiry - Rule 256 of the Rules of 1947 provides that the Chief Audit Officer, Cooperative Societies and Panchayats will be the competent authority for making an inquiry. The inquiry committee consisting of Chief Development Officer, Executive Engineer, Rural Engineering Service and District Panchayat Raj Officer had no jurisdiction to hold an inquiry. The entire proceedings was initiated by an authority, which had no jurisdiction as per the provisions contained in the U.P. Panchayat Raj Rules. Surcharge can only be fixed in accordance with the procedure prescribed and not otherwise. It is well settled law that where the law prescribes a procedure for doing a thing, the thing has to be done in that manner alone and other modes of doing the thing are necessarily forbidden. (Para 24, 25)

B. Uttar Pradesh Panchayat Raj Act, 1947 - U. P. Panchayat Raj Rules, 1947- Rule 256 - Surcharge- Section 27- Rule 256 of the Rules of 1947- *Samagra Gram* - procedure for holding an inquiry in respect of any illegality committed by a Pradhan of a

Samagra Gram is provided in Government Order dated 22.12.2004. Held : Procedure prescribed by the Rules 256 and 257 of the Panchayat Raj Rules cannot be superseded by the provisions of any Government Order. Section 2 (p) of the U.P. Panchayat Raj Act, 1947 does not include the procedure prescribed by any Government Order and in the hierarchy of laws, the Government Orders stand much below the Rules and the provisions contained in a Government Order cannot override the provisions contained in any Rule (Para 20)

C. By the impugned order the District Magistrate ordered Rs.2,55,106/- to be recovered from the petitioner/Pradhan . *Held : District Magistrate has not referred that the petitioner had demanded copies of the relevant documents to enable him to submit his explanation. District Magistrate held the petitioner guilty merely because the petitioner failed to give a satisfactory explanation of the allegations against him, without even referring to the material to hold the petitioner guilty. It is settled law that an authority proposing to take an adverse action against any person has to record a satisfaction regarding his guilt in accordance with the procedure prescribed law and the person cannot be penalized merely for the reason that he failed to defend himself.* In the present case the impugned order was passed without jurisdiction and in violation of the principles of natural justice. Order passed by the District Magistrate, directing recovery from the petitioner u/s 27 (2) of the U.P. Panchayat Raj Act quashed (Para 27, 28)

Allowed. (E-5)

List of Cases cited:

1. Dinesh Kumar Vs St. of U.P., 2022 SCC OnLine All 861 = AIR 2023 All 26
2. Ram Vilas Vs. Commissioner, Devi Patan Mandal, Gonda & ors.: 2022 (1) ADJ 1.

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

1. Heard Sri Rakshit Raj Singh, the learned counsel for the petitioner and Sri Hemant Kumar Pandey, the learned Standing Counsel representing the State - respondents.

2. By means of the instant petition filed under Article 226 of the Constitution of India, the petitioner has sought quashing of a recovery notice dated 06.12.2005 issued by the District Magistrate, Lucknow and recovery citation dated 07.01.2006 issued by the Tahsildar, Mohanlalganj, as also a notice dated 08.09.2005 issued by the District Magistrate, along with the entire proceedings initiated on the basis of an inquiry report dated 25.04.2005 submitted by an inquiry committee consisting of Chief Development Officer, Unnao, Executive Engineer, Rural Engineering Service, Unnao and District Panchayat Raj Officer, Unnao.

3. On 08.09.2005, the District Magistrate, Lucknow had issued a notice under Rule 256 of the U. P. Panchayat Raj Rules, 1947 stating that the Government had constituted a three member inquiry committee consisting of the Chief Development Officer, Unnao, District Panchayat Raj Officer, Unnao and Executive Engineer, Rural Engineering Service, Unnao to inquire into the works conducted in village Panchayat Samesi during the year 2003-04 and 2004-05.

4. The inquiry committee submitted a report stating that the petitioner was guilty of misappropriation of Rs.5,10,212/-, half of which amounting to Rs.2,55,106/- was to be recovered from the petitioner. The petitioner was directed to submit his explanation in this regard, failing which an

ex parte order would be passed for recovery of the amount from the petitioner. This letter was accompanied by a copy of the inquiry report submitted by the three members committee. It mentions the date of inspection to be 25.04.2005 but the date of report is not mentioned therein. A perusal of the report indicates that it makes no mention that the inspection was carried out in presence of the petitioner or after giving any opportunity of hearing to the petitioner.

5. On 21.10.2005, the applicant gave a letter to the Block Development Officer stating that all the meetings of Gram Panchayat and its committee were conducted as per the Rules. The works had been conducted as per the resolutions passed by the Gram Panchayat. The entire records about the resolutions, the projects and the expenditures etc. are available in the office.

6. On 21.11.2005, the petitioner gave another letter to the Block Development Officer, Mohanlalganj stating that the entire relevant records were available with the Secretary of Gram Panchayat and he prayed for being permitted to inspect the records and for being provided a copy thereof to enable him to submit his reply. The petitioner stated that as the records were with Secretary of Village Panchayat and not with him, he could not submit a reply, unless he was provided a copy of the records.

7. On 06.12.2005, the District Magistrate, Lucknow passed the impugned order stating that the petitioner was given an opportunity to submit his explanation by means of a notice dated 08.09.2005. The petitioner submitted an undated explanation which has not been found to be

satisfactory, from which it appears that the petitioner has misappropriated an amount of Rs.5,10,212/- and half of it i.e. Rs.2,55,106/- was ordered to be recovered from the petitioner. Accordingly the Tahsildar has issued a recovery citation.

8. Sri. Rakshit Raj Singh, the learned counsel for the petitioner has submitted that the statutory provision regarding recovery of surcharge contained in Section 27 of the Uttar Pradesh Panchayat Raj Act, 1947 and the procedure therefor prescribed by Rules 256 and 257 of the 1947 Rules has not been followed in the present case, which vitiates the impugned recovery order and recovery citation.

9. The learned counsel for the petitioner has placed reliance a judgment rendered by a Division Bench of this Court in **Dinesh Kumar v. State of U.P.**, 2022 SCC OnLine All 861 = AIR 2023 All 26 wherein this Court has held that as per the provisions contained in Rules 256 and 257 of the 1947 Rules, an inquiry ought to have been conducted by the Chief Audit Officer and now as per the orders of delegation made by the Chief Audit Officer, by the District Audit Officer. The learned counsel for the petitioner has submitted that the inquiry committee consisting of Chief Development Officer, Executive Engineer, Rural Engineering Service and District Panchayat Raj Officer has no jurisdiction to hold an inquiry in accordance with the provisions contained in Rules 256 and 257 of the U.P. Panchayat Raj Rules, 1947.

10. The learned counsel for the petitioner has next submitted that the petitioner had submitted an application seeking permission to inspect the document and demanding copies of the documents, as all the documents were with Gram

Panchayat Secretary, but no document was provided to him, which has resulted in denial of a proper opportunity of hearing to the petitioner.

11. Sri. Hemant Kumar Pandey, the learned Standing Counsel has raised a preliminary objection that Section 27(3) of the Act of 1947 provides that any person aggrieved by the order of the Prescribed Authority fixing the amount of surcharge may, within 30 days of such order, appeal against the order to the State Government or such other appellate authority as may be prescribed. He has submitted that as the petitioner has got a statutory remedy, the writ petition is liable to be dismissed on this preliminary ground.

12. The learned Standing Counsel has further submitted that the village in question is a 'Samagra Gram' as per the provision contained in a Government Order dated 22.12.2004 and the procedure for holding an inquiry in respect of any illegality committed by a Pradhan of a Samagra Gram is provided in the aforesaid Government Order. The inquiry in the present case has been conducted in accordance with the provisions contained in the aforesaid Government Order dated 22.12.2004.

13. The learned Standing Counsel has relied upon a division bench's judgment of this Court in the case of **Ram Vilas versus Commissioner, Devi Patan Mandal, Gonda and others**: 2022 (1) ADJ 1.

14. Section 27 of the Uttar Pradesh Panchayat Raj Act, 1947 provides as follows:-

"27. Surcharge – (1) Every Pradhan or Up-Pradhan of a Gram

Panchayat every member of a Gram Panchayat or of a Joint Committee or any other committee constituted under this Act and every Sarpanch, Sahayak Sarpanch or Panch of a Nyaya Panchayat shall be liable to surcharge for the loss, waste or misapplication of money or property belonging to the Gram Panchayat or Nyaya Panchayat as the case may be, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan, Up-Pradhan, member, Sarpanch, Sahyak Sarpanch or Panch;

Provided that such liability shall cease to exist after the expiration of the years from the occurrence of such loss, waste or misapplication, or five years from the date on which the person liable ceases to hold his office, whichever is later.

(2) The prescribed authority shall fix the amount of the surcharge according to the procedure that may be prescribed and shall certify the amount to the Collector who shall, on being satisfied that the amount is due, realize it as if were an arrear of land revenue.

(3) Any person aggrieved by the order of the prescribed authority fixing the amount of surcharge may, within thirty days of such order, appeal against the order to the State Government or such other appellate authority as may be prescribed.

(4) Where no proceeding for fixation and realization of surcharge as specified in sub-section (2) is taken the State Government may institute a suit for compensation for such loss, waste or misapplication, against the person liable for the same."

15. The word 'prescribed' has been defined in Section 2(p) of the U.P. Panchayat Raj Act, 1947 as prescribed by

this Act or Rules made there under. The procedure referred to in Section 27 (2), has been prescribed in Chapter 13 of the U.P. Panchayat Raj Rules, 1947, which contains Rules 256 to 260. Rules 246 and 257 read thus:

"Rule 256(1) In any case where the Chief Audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gaon Sabha as a direct consequence of the negligence or misconduct of a Pradhan, he may call upon the Pradhan, Up-Pradhan, Member, Officer or servant, as the case may be, to explain in writing why such Pradhan, Up-Pradhan, Member, Officer, or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gaon Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned:

Provided that an explanation from the Pradhan, Up-Pradhan or member of the Gaon Panchayat shall be called for through the District Magistrate and from the officer or servant through the Panchayat Raj Officer.

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gaon Panchayats or any of its committee as having been absent from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

257. (1). After expiry of the period prescribed in sub-rule (1) or (3) of Rule 256, as the case may be, and after examining the explanation, if any, received within time, the Chief Audit Officer shall

submit the papers along with his recommendations to the District Magistrate of the district in which the Gram Sabha is situated in case of Pradhan, Up-Pradhan and Members and to the District Panchayat Raj Officer of the district in which the Gram Sabha is situated in case of Officers and servants.

(2) The District Magistrate or the District Panchayat Raj Officer, as the case may be, after examining and after considering the explanation, if any, shall require the Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat to pay the whole or part of the sum to which such Pradhan, Up-pradhan, Member, Officer or servant is found liable:

PROVIDED, firstly, that no Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat would be required to make good the loss, if from the explanation of the Pradhan, Up-Pradhan, Member, Officer or servant concerned or otherwise the District Magistrate or the District Panchayat Raj Officer, as the case may be, is satisfied that the loss was caused by an act of the Pradhan, Up-pradhan, Member, Officer or servant in the bonafide discharge of his duties:

PROVIDED secondly, that in the case of loss, waste or misuse occurring as a result of a resolution of the Gram Panchayat or any of its committees the amount of loss to be recovered shall be divided equally among all the members including Pradhan and Up-pradhan, who are reported in the minutes of the Gram Panchayat or any of its Committee as having voted for or who remained neutral in respect of such resolution:

PROVIDED thirdly, that no Pradhan, Up-Pradhan, Member, Officer or servant shall be liable for any loss, waste or misuse after the expiry of four years from the occurrence of such loss, waste or

misuse or after the expiry of three years from the date of his ceasing to be a Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat, which ever is later.”

16. In **Dinesh Kumar v. State of U.P.**, 2022 SCC OnLine All 861 = AIR 2023 All 26, a Division Bench of this Court has held that as per the provisions contained in Rules 256 and 257 of 1947 Rules, an inquiry ought to have been conducted by the Chief Audit Officer and now as per the orders of delegation made by the Chief Audit Officer, by the District Audit Officer. Therefore, the inquiry committee consisting of Chief Development Officer, Executive Engineer, Rural Engineering Service and District Panchayat Raj Officer had no jurisdiction to hold an inquiry in accordance with the provisions contained in Rules 256 and 257 of the U.P. Panchayat Raj Rules, 1947.

17. In **Ram Vilas versus Commissioner, Devi Patan Mandal, Gonda and others**: 2022 (1) ADJ 1, this Court held that: -

“13. Chapter-XIII was added in the Rules vide Notification dated May 22, 1969 published in Gazette on May 31, 1969. Rule 256 of the Rules provides different authorities for taking action in terms of Section 27 of the Act. A perusal of Rules 256 to 260 of Chapter XIII of the Rules show that complete procedure has been provided for fixation of the surcharge to be recovered from different officers in Gram Panchayat on account of loss, waste or misuse of any money/property belonging to the Gaon Sabha which is on account of a direct consequence of negligence or misconduct of the person concerned. **Chief Audit Officer, Cooperative Society and**

Panchayats is to consider the same and after examination of the explanation, if any, received from persons concerned, submit the papers along with recommendation to the District Magistrate of the District in which the Gaon Sabha is situated, in case of Pradhan, Up-Pradhan and Member. The report along with recommendation has to be sent by Chief Audit Officer to the District Panchayat Raj Officer of the District in which Gaon Sabha is situated, in case of Officers and servants. The District Magistrate or the District Panchayat Raj Officer, as the case may be, is to finally fix the amount, which is recoverable from the person concerned.

14. Rule 258 provides the appellate authority, in terms of Section 27 (3) of the Act. An order passed by the District Magistrate is appealable to the Commissioner of the Division, whereas an order passed by District Panchayat Raj Officer is appealable to the District Magistrate.

* * *

16. *The District Magistrate is the competent authority for fixation of amount of surcharge recoverable from Pradhan, Up-Pradhan and Member and the District Panchayat Raj Officer is competent authority for fixing the amount of surcharge in case of officers and servants."*

18. In the present case, the Chief Audit Officer, Cooperative Society and Panchayats has not made any consideration and he has not called for any explanation from the petitioner. Therefore, even as per the law laid down in **Ram Vilas** (Supra), reliance upon which has been placed by the learned Standing Counsel, the impugned order has been passed without jurisdiction.

19. The learned Standing Counsel has submitted that in **Dinesh Kumar** (Supra), it

is recorded that the powers conferred by Rule 256 upon the Chief Audit Officer have been delegated upon the District Audit Officer. Be that as it may, undisputedly, the District Audit Officer has also not passed any order in this case. Therefore, in spite of delegation of power by the Chief Audit Officer to the District Audit Officer, the order impugned remains without jurisdiction.

20. So far as the submission of the learned Standing Counsel that the order has been passed in accordance with the provisions of a Government Order dated 22.12.2004, which prescribes the procedure for holding an inquiry in respect of any illegality committed by a Pradhan of a Samagra Gram, suffice it to say that Section 2 (p) of the U.P. Panchayat Raj Act, 1947 defines the word 'prescribed' as prescribed by the Act or Rules made thereunder. The procedure has been prescribed by Rules 256 and 257 of the Panchayat Raj Rules. The procedure prescribed by the Rules cannot be superceded by the provisions of any Government Order for two reasons – Firstly, Section 2 (p) of the U.P. Panchayat Raj Act, 1947 does not include the procedure prescribed by any Government Order and Secondly, in the hierarchy of laws, the Government Orders stand much below the Rules and the provisions contained in a Government Order cannot override the provisions contained in any Rule.

21. Further, as the petitioner was not supplied copies of the material relied against him in spite of his demand and there is nothing on record to indicate that even a copy of the enquiry report was provided to him, it is established that the principles of natural justice have been

violated in the present case by denial of adequate opportunity of hearing to the petitioner, which vitiates the impugned orders.

22. Regarding the preliminary objection raised by the learned Standing Counsel against maintainability of the Writ Petition on the ground of availability of alternative remedy, it would be relevant to refer to the judgment of the Hon'ble Supreme Court in **Whirlpool Corpn. v. Registrar of Trade Marks**: (1998) 8 SCC 1, wherein the well established principles regarding the effect of existence of alternative remedy on maintainability of a Writ Petition were reiterated in the following words: -

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement

of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

23. Although normally this Court refrains from exercising its discretionary writ jurisdiction when an alternative remedy is available to the petitioner but in the present case the impugned order has been passed without jurisdiction and in violation of the principles of natural justice and in these circumstances, this Court would not be justified in declining to exercise its discretionary Writ jurisdiction, more particularly, when the petition was filed in the year 2006 and it has remained pending for about 18 years.

24. Having considered the aforesaid facts and circumstances of the case and the submissions made by the learned counsel for the parties, this Court is of the considered view that when Section 27 of the U.P. Panchayat Raj Act, 1947 provides for imposition of surcharge and for fixation of the amount of surcharge according to the procedure prescribed, surcharge can only be fixed in accordance with the procedure prescribed and not otherwise. It is well settled law that where the law prescribes a procedure for doing a thing, the thing has to be done in that manner alone and other modes of doing the thing are necessarily forbidden.

25. Rule 256 of the Rules of 1947 provides that the Chief Audit Officer,

Cooperative Societies and Panchayats will be the competent authority for making an inquiry, if he considers that there has been a loss, vested or misuse of any money or other property belonging to a Gram Sabha as a direct consequence of the negligence or misconduct of a Pradhan etc., he would call for an explanation from the Pradhan through the District Magistrate. In the present case, the Chief Audit Officer has not recorded any prima facie satisfaction that a loss has been occasioned because of a direct consequence of the negligence or misconduct of the petitioner while he was a Pradhan. Therefore, the entire proceedings have been initiated by an authority, which had no jurisdiction as per the provisions contained in the U.P. Panchayat Raj Rules.

26. The District Magistrate has not referred to the contentions of the petitioner made in his application that he did not have any record and, therefore, he was unable to submit his reply and that the petitioner had demanded copies of the relevant documents to enable him to submit his explanation.

27. The District Magistrate has blamed the petitioner for not mentioning any date on his application. Although the application submitted by the petitioner to the District Magistrate, Lucknow does not bear any date, it bears endorsements of acknowledgment of the application showing that the application has been served on 26.11.2005. It is interesting to observe that the enquiry report, which has been relied upon by the District Magistrate for penalizing the petitioner, itself does not bear any date, but the District Magistrate has not criticized the officers constituting the Enquiry Team for non-mention of the date of report. This difference in approach towards the enquiry officers and the petitioner shows that the District Magistrate

has acted with an apparent prejudice against the petitioner and his approach while passing the impugned order was not just and unbiased.

28. The District Magistrate has held the petitioner guilty merely because the petitioner failed to give a satisfactory explanation of the allegations against him, without even referring to the material to hold the petitioner guilty. It is settled law that an authority proposing to take an adverse action against any person has to record a satisfaction regarding his guilt in accordance with the procedure prescribed law and the person cannot be penalized merely for the reason that he failed to defend himself.

29. Accordingly, the writ petition is allowed. Order dated 06.12.2005 passed by the District Magistrate, Lucknow ordering recovery of Rs.2,55,106/- from the petitioner under Section 27 (2) of the U.P. Panchayat Raj Act is **quashed**. The parties shall bear their own costs of litigation.

30. The authorities shall be at liberty to initiate fresh proceedings against the petitioner in accordance with law.

(2024) 9 ILRA 924

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 02.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ C No. 1004625 of 2008

And

Writ C No. 1001062 of 2013

**Annavaram Concrete Pvt. Ltd. Barabanki
...Petitioner**

Versus

**Tehsildar Ramnagar Barabanki
...Respondent**

Counsel for the Petitioner:

R.K. Srivastava

Counsel for the Respondents:C.S.C., R.S. Tomar, Rana M.P. Singh,
Virendra Mishra

A. Code of Civil Procedure, 1973 - Order IX Rule 13, Setting Aside Ex-parte Decree - no ex-parte decree shall be set aside merely on the ground of irregularity in the service of summons if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing. In the instant case, petitioners contended that the notice issued by the registered post was not served upon it. **Held :** Notice was sent to the petitioner through registered post only once and a presumption was drawn regarding due service of notice as the unserved notice was not received back. The Industrial Tribunal did not issue a fresh notice through registered post or by any other mode and it did not adopt the procedure for substituted service of notice on the petitioner. Although, there is a legal presumption that the official acts were performed in a regular manner, this presumption is a rebuttable presumption. When there is nothing on record to indicate that the notice issued to the petitioner was actually served and it was stated on oath on behalf of the petitioner that the notice was not served, the petitioner has rebutted the presumption that the notice was served upon it. Keeping in view the past conduct of the petitioner in diligently participating in the proceedings, it cannot be presumed that the petitioner had deliberately avoided participation in the proceedings. Impugned order rejecting the petitioner's application for setting aside the ex-parte award was set aside (Para 12, 15)

B. Constitution of India, 1950 -Art. 227 - Appropriate Relief Not prayed for- While dealing with a petition under Article 227 of the Constitution of India, if the court is satisfied that an order would cause failure of justice to the parties the court is under

an obligation to mould the relief and pass appropriate orders in the interest of justice without a proper relief having been prayed for. In the present case, the opposite party contended that the petitioner had merely challenged the order rejecting its application for setting aside the ex-parte order but had not challenged the ex-parte award itself. Held : To secure the ends of justice and prevent further prejudice to either party, the Court set aside both the order rejecting the petitioner's application for setting aside the ex-parte award and the ex-parte award also. (Para 18, 19)

Allowed. (E-5)

List of Cases cited:

1. Block Development Officer Vs Radhey Shyam & ors.: 2017 (35) LCD 254
2. Ramesh Chandra Sankla Vs Vikram Cement: (2008) 14 SCC 58

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

1. Heard Dr. R.K. Srivastava and Sri Nishchal Jagdhari, the learned counsel for petitioner in Writ-C No.1004625 of 2008, Sri Satish Chandra Kashish, the learned counsel for the petitioner in Writ-C No.1001062 of 2013, Sri Hemant Kumar Pandey, the learned Standing Counsel appearing for the State and Sri Virendra Mishra, the learned counsel for the private opposite party Concrete Fabricators Karmchari Union, Burhwal, Barabanki in both the Writ Petitions and perused the records.

2. Writ-A No.1004625 of 2008 had been dismissed for want of prosecution by means of an order dated 08.04.2019. An application for recall (IA-No.7 of 2024) along with an application for condonation of delay (IA-No.6 of 2024) in filing recall application have been filed by the

petitioner. The applications are supported with duly sworn affidavits. Accordingly, the applications are allowed. Delay in filing recall application is hereby condoned and the order dated 08.04.2019 is hereby recalled. Writ-A No.1004625 of 2008 is restored to its original number.

3. Writ-C No.1004625 of 2008 has been filed challenging validity of an order dated 11.09.2008, passed by the Presiding Officer, Industrial Tribunal - 2, U.P. Lucknow rejecting an application dated 20.12.2007 filed by the petitioner for setting aside the ex-parte award dated 17.10.2007 on the ground that the same was passed without service of notice of proceedings on the petitioner after transfer of the same from Gorakhpur to Lucknow. Writ-C No.1001062 of 2013 has been filed challenging a recovery certificate dated 09.10.2012 sent by the Deputy Labour Commissioner, Faizabad to the Collector, Barabanki for recovery of an amount of Rs.2,70,000/- in furtherance of an ex-parte award dated 17.10.2007.

4. As the order under challenge in Writ-C No.1001062 of 2013 is consequential to the order dated 11.09.2008, both the petitions are being decided together.

5. A perusal of the order-sheet of the proceedings before the Industrial Tribunal indicates that the petitioners-employer was appearing in the proceedings when the same were pending initially before the Industrial Tribunal – 2 at Lucknow and it is recorded in the order sheet that on 18.01.2000 and the learned Tribunal had heard submissions on behalf the parties and had reserved the award. However, the Presiding Officer was changed before the award could be

delivered and the new incumbent of the office passed an order dated 25.07.2000 for rehearing the matter. On 14.02.2001 the matter was transferred to Industrial Tribunal-VI, Gorakhpur and it was re-transferred to Industrial Tribunal-2, Lucknow on 18.07.2006 where it was registered afresh as Award Case No.302 of 2006. The Industrial Tribunal had sent notice to the petitioner through registered post, which was not received back unserved and therefore the service of notice was held to be sufficient. The matter was heard ex-parte and an ex-parte award was passed on 17.07.2007. It was published on 14.11.2007.

6. On 20.12.2007 the petitioner filed an application for setting aside the ex-parte order dated 17.10.2007 stating that the notice sent to it after transfer of the case to Lucknow was not served upon it and, therefore, it could not appear in the proceedings. The award was ex-parte and it should be set aside.

7. The aforesaid application has been rejected by the Presiding Officer, Industrial Tribunal-2, Lucknow by the impugned order dated 11.09.2008 on the ground that the Industrial Tribunal has no authority to set aside an order which has been passed after taking into consideration the merits of the case.

8. The learned counsel for the petitioner has submitted that the petitioner was continuously participating in the proceedings and submissions had been advanced on its behalf and the award had been reserved. After the Presiding Officer was changed after hearing submissions again submissions were advanced on behalf of the petitioners. Thereafter, the case was transferred to Gorakhpur in the year 2001

and it was retransferred to Lucknow in the year 2006 and it was allotted a new number. Keeping in view the past conduct of the petitioner in diligently participating in the proceedings, it cannot be presumed that the petitioner had deliberately avoided participation in the proceedings and the only reason for its non-appearance was non-service of notice sent after transfer of the proceedings to Lucknow.

9. Opposing the writ petitions, Sri Virendra Mishra, the learned counsel for the private opposite party Concrete Fabricators Karmchari Union, Burhwal, Barabanki has submitted that the notice was sent to the petitioner at its correct address which was mentioned in its written statement and therefore the Industrial Tribunal has rightly raised a presumption regarding due service of notice sent at the petitioners' correct address. He has submitted that non-appearance of the petitioner in these circumstances was not for any sufficient reason. Sri Mishra has drawn attention of this court to the amendment made in Order IX, Rule 13 C.P.C. by this High Court so as to add a proviso, which reads as under:

“Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.”

10. Sri. Virendra Mishra has placed reliance on a judgment rendered by a coordinate bench of this Court in the case of

Block Development Officer Vs. Radhey Shyam and others: 2017 (35) LCD 254, wherein this court took into consideration the aforesaid proviso inserted in Order IX, Rule 13 C.P.C. by amendment made by this court. However, after taking into consideration peculiar facts of that case wherein the court was dealing with the third recall application whereas two earlier applications filed by the other respondents had already been rejected, this court did not find any infirmity or illegality in the findings recorded by the learned trial court.

11. In the present case, the petitioners are not alleging any irregularity in the issuance of summons. The petitioners simply contend that the notice issued by the registered post was not served upon it. Although, there is a legal presumption that the official acts were performed in a regular manner, this presumption is a rebuttable presumption. When there is nothing on record to indicate that the notice issued to the petitioner was actually served and it was stated on oath on behalf of the petitioner that the notice was not served, the petitioner has rebutted the presumption that the notice was served upon it.

12. The proceedings were going on since the year 1997 and the petitioners had participated in the proceedings till the final submissions were heard and the award was reserved. Thereafter it was transferred to Gorakhpur and again to Lucknow and after re-transfer of the matter to Lucknow, the notice was sent to the petitioner through registered post only once and a presumption was drawn regarding due service of notice as the unserved notice was not received back. The Industrial Tribunal did not issue a fresh notice through registered post or by any other mode and it did not adopt the procedure for substituted service of notice on the petitioner.

13. In these circumstances, this court finds no good ground to raise a presumption against the petitioner that it knew about the proceedings after transfer thereof to Lucknow and it deliberately avoided participation in the proceedings.

14. Therefore, the judgment rendered by the coordinate Bench in the case Block Development Officer (supra), which was given in the light of peculiar facts and circumstances of that case, does not apply to the facts and circumstances of the present case.

15. Keeping in view the aforesaid peculiar facts and circumstances of the case, it would be just and proper that the impugned order dated 11.09.2008 rejecting the petitioner's application for setting aside the ex-parte award dated 17.10.2007 be set aside and the application be allowed and the ex-parte award dated 17.10.2017 be set aside and the matter be directed to be decided afresh after giving an opportunity of hearing to the parties.

16. At this stage, the learned counsel for the opposite party-Union stated that the petitioner has merely challenged the order rejecting its application for setting aside the ex-parte order and it has not challenged the ex-parte award.

17. In **Ramesh Chandra Sankla v. Vikram Cement**: (2008) 14 SCC 58, the Hon'ble Supreme Court reiterated the well settled principle regarding the scope of power conferred by Article 227 of the Constitution of India in the following words: -

“91. The power of superintendence under Article 227 of the Constitution conferred on every High Court

over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised ex debito justitiae i.e. to meet the ends of justice. It is equitable in nature. While exercising supervisory jurisdiction, a High Court not only acts as a court of law but also as a court of equity. It is, therefore, power and also the duty of the Court to ensure that power of superintendence must “advance the ends of justice and uproot injustice”.

18. When this court has come to a conclusion that the Case was wrongly proceeded ex-parte and the order rejecting the application for setting aside the ex-parte order is not proper, relegating the parties to the stage where application for setting aside ex-parte award is to be decided afresh, will merely protract the proceedings and cause further delay in final disposal thereof. While dealing with a petition under Article 227 of the Constitution of India, if this court is satisfied that an order would cause failure of justice to the parties this court is under an obligation to mould the relief and pass appropriate orders in the interest of justice without a proper relief having been prayed for.

19. Therefore, the court deems it appropriate to secure the interest of justice and to avoid further prejudice being caused to either of the parties, to set aside the order dated 11.09.2008, passed by the Presiding Officer, Industrial Tribunal - 2, U.P. Lucknow rejecting an application dated 20.12.2007 filed by the petitioner for setting aside the ex-parte award dated 17.10.2007 and also to set aside the ex-parte award dated 11.09.2008 passed by the Presiding Officer, Industrial Tribunal-II, U.P. Lucknow in Award Case No.302 of 2006.

20. The learned counsel for the private opposite party next submitted that the private opposite party-Concrete Fabricators Karmchari Union is a Union of workmen, who have not been paid any wages since long and a huge sum of money is payable to them towards the arrears of wages. In the order dated 26.09.2008 passed in Writ-C No. 1004625 of 2008, this court had recorded the submission made on behalf of the petitioner that the petitioner was ready to pay 50% amount and furnish bank guarantee for the remaining amount before the Deputy Labour Commissioner. The learned counsel for the opposite party-Union states that the petitioner has complied with the aforesaid order in respect of merely 14 employees whereas 53 employees are members of the Union and all of them are entitled to get the amount.

21. The learned counsel for the petitioner state that the petitioner has made payment of the amount in respect of 27 more employees.

22. In these circumstances, it would be just and proper to make the order setting aside the ex-parte award subject to the condition that the petitioner shall pay a sum of Rs.10,000/- per member of the Concrete Fabricators Karmchari Union, Burhwal, Barabanki after adjusting the amount already paid in respect of some of the members of the Union. The amount lying in deposit, if any, in this court or before the Industrial Tribunal, should be released forthwith in favour of the opposite party-Concrete Fabricators Karmchari Union, Burhwal, Barabanki. The recovery certificate dated 09.10.2012 issued consequently for enforcing the ex-parte award dated 17.10.2007 is also liable to be set aside.

23. In view of the foregoing discussion, both the petitions are allowed. The order dated 11.09.2008, passed by the

Presiding Officer, Industrial Tribunal - 2, U.P. Lucknow rejecting an application dated 20.12.2007 filed by the petitioner for setting aside the ex-parte award dated 17.10.2007 as well as the ex-parte award dated 17.10.2007 passed by the Presiding Officer, Industrial Tribunal-II, U.P. Lucknow in Award Case No.302 of 2006 are set aside, subject to the condition that the petitioner shall pay a sum of Rs.10,000/- per member of the Concrete Fabricators Karmchari Union, Burhwal, Barabanki after adjusting the amount already paid in respect of some of the members of the Union. The recovery certificate dated 09.10.2012 sent by the Deputy Labour Commissioner, Faizabad to the Collector, Barabanki in furtherance of the ex-parte award dated 17.10.2007 is also set aside. The amount lying in deposit, if any, in this court or before the Industrial Tribunal, shall be released forthwith in favour of the opposite party-Concrete Fabricators Karmchari Union, Burhwal, Barabanki. The parties are directed the parties to appear before the Presiding Officer, Industrial Tribunal-II, U.P. Lucknow for hearing in the matter on 23.09.2024, on which date, the Presiding Officer, Industrial Tribunal-II, U.P. Lucknow shall hear the parties' submissions in respect of their respective claims and defence and pass a fresh award expeditiously, without granting any unnecessary adjournments to any of the parties.

(2024) 9 ILRA 929

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 23.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matter Under Article 227 No. 2509 of 2024

**Imperia Structures Ltd.
Versus
Ankur Sharma & Ors.**

**...Petitioner
...Respondents**

Counsel for the Petitioner:

Srajak Srivastava, Aishwarya Pratap Singh,
Nishant Mishra

Counsel for the Respondents:

Sanjay Kumar Srivastava, Akshat Kumar

Civil Law - The Constitution of India, 1950-Article 227 - Limitation Act, 1963 - Section 5-Condonation of delay of 558 days-

The resignation of a single employee given a month prior to passing of the order dated 07.09.2022 and the imposition of moratorium for a period of five months are being set up as excuse for the inordinate delay of 558 days in filing the appeal, rather than providing a sufficient cause for the delay-NCDRC has exercised its discretion in rejecting the application for condonation of delay of 558 days on sound reasons and the impugned order rejecting the application for condonation of delay in filing the First Appeal does not warrant any interference by this court. (Para 25 & 26)

Petition dismissed. (E-15)**List of Cases cited:**

1. Chandi Prasad Vs Jagdish Prasad: (2004) 8 SCC 724
2. Basawaraj Vs Land Acquisition Officer: (2013) 14 SCC 81
3. Esha Bhattacharjee Vs Managing Committee of Raghunathpur Nafar Academy: (2013) 12 SCC 649
4. Ajay Dabra Vs Pyare Ram, 2023 SCC OnLine SC 92
5. Sheo Raj Singh (Deceased) Through Lrs. Vs U.O.I., 2023 SCC OnLine SC 1278

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

1. Heard Sri Rishi Kapoor, the learned counsel for the petitioner, Sri Sanjay Kumar Srivastava, the learned counsel for the opposite parties no.1 and 2 and perused the records.

2. The opposite parties no.3 to 7 have been impleaded as proforma opposite parties and, therefore, there is no need to issue notice to them.

3. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioner has challenged the validity of an order dated 30.04.2024, passed by the National Consumer Disputes Redressal Commission, New Delhi in First Appeal No. 244 of 2024 whereby an application for condonation of delay of 558 days in filing the appeal has been rejected, and consequently the Appeal has also been dismissed.

4. The learned counsel for the opposite parties no.1 and 2 has raised the following preliminary objections, namely: -

(i) The petition has been filed by an authorized signatory of the petitioner-company and none of the Directors or other principal officers of the company has come forward to file the petition. On the contrary, the directors and other principal officers of the company have been arrayed as the opposite parties no.3 to 7 to the petitioner, which shows that the directors and other principal officers of the company are opposed to filing of the petition;

(ii) The petitioner has challenged the order dated 30.04.2024, passed by the National Consumer Disputes Redressal Commission, New Delhi in First Appeal No.244 of 2024, whereby the National Commission has rejected the prayer for condonation of delay in filing an appeal against an order dated 07.09.2022 passed

by the State Consumer Disputes Redressal Commission, U.P. in Complaint Case No.185 of 2019, but the validity of the order dated 07.09.2022, passed by the State Consumer Disputes Redressal Commission, which order was passed against the petitioner has not been challenged by the petitioner. Even if the petition is allowed, the order dated 07.09.2022, passed by the State Consumer Disputes Redressal Commission would remain in force and the order passed by this Court will be a futile order.

(iii) Without challenging the validity of the order dated 07.09.2022, passed by the State Consumer Disputes Redressal Commission, the petitioner has sought an interim relief for staying the execution of the order dated 07.09.2022, which interim relief, not being incidental to or in aid of any main relief, cannot be granted.

(iv) The petition was filed on 16.05.2024 and the petitioner has concealed the fact that on 09.05.2024 the counsel for the petitioner-judgment debtor in Execution Application No.93 of 2022 filed for execution of order dated 07.09.2022, had requested for grant of time for complying with the judgment and order dated 07.09.2022 by making payment of Rs.25,00,000/- on or before 17.05.2024, second installment of Rs.15,00,000/- by 27.05.2024 and the remaining amount on or before 15.06.2024. This request was accepted by the State Consumer Disputes Redressal Commission and accordingly time was granted

to the petitioner for depositing the entire amount in three installments as aforesaid. A petitioner approaching this court to invoke its discretionary power of superintendence under Article 227 of the Constitution of India should come with clean hands. The aforesaid concealment made by the petitioner renders the petition liable to be dismissed.

(v) The learned counsel for the opposite parties no.1 and 2 has further submitted that having requested for depositing the entire amount in installments which request has been accepted by the State Consumer Disputes Redressal Commission, the petitioner is estopped from challenging the validity of the execution proceedings against it.

5. Per contra, the learned counsel for the petitioner has submitted that the petitioner has been filed through an authorised signatory, who has been duly authorised through a resolution of the board of directors of the petitioner company, therefore the first preliminary objection is meritless. I also find that a person authorised by the board of resolution of a company can file a petition on behalf of the company. Therefore, the first preliminary objection raised by the learned Counsel for the opposite parties no. 1 and 2 is rejected.

6. The learned Counsel for the petitioner has submitted that the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission, U.P. in Complaint Case No.185 of 2019 stands merged in the order dated 30.04.2024, passed by the National Consumer Disputes Redressal Commission,

New Delhi in First Appeal No. 244 of 2024 and, therefore, there is no requirement to challenge the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission, U.P. separately. In case the petition is allowed and the order dated 30.04.2024, passed by the National Consumer Disputes Redressal Commission is set aside, the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission, U.P. would stand set aside automatically.

7. The principal of merger has been explained by the Hon'ble Supreme Court in **Chandi Prasad v. Jagdish Prasad**: (2004) 8 SCC 724, in the following words: -

“23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree

passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. (P) Ltd. v. CIT (2000) 5 SCC 373]

** * **

26. In Kunhayammed [(2000) 6 SCC 359] it was observed: (SCC p. 370, para 12)

“12. ... Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.”

27. The said decision has been followed by this Court in a large number of decisions including Union of India v. West Coast Paper Mills Ltd. [(2004) 2 SCC 747]

*28. However, **when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply.**”*

(Emphasis added)

8. In the present case, the petitioner had filed an appeal against the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission

with an enormous delay of 558 days and the National Commission has rejected the application for condonation of delay in filing the appeal. The appeal was not admitted and the merits of the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission were not examined. In these circumstances, the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission did not get merged into the order dated 30.04.2024, passed by the National Consumer Disputes Redressal Commission, New Delhi in First Appeal No. 244 of 2024.

9. The learned Counsel for the petitioner has submitted that the opposite parties no.1 and 2 are not 'consumers' as per the definition contained in Section 2-D of Consumer Protection Act, which excludes the persons who have obtained goods for resale or for any commercial purposes. He has submitted that the opposite parties no. 1 and 2 had purchased a commercial unit earmarked for establishing and running an ATM which is a commercial purpose and, therefore, they are not consumers and the Consumer Disputes Redressal Commission had no jurisdiction over the matter.

10. The order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission did not get merged in the order dated 30.04.2024 passed by the National Consumer Disputes Redressal Commission whereby the petitioner's application seeking condonation of delay in filing the appeal has been rejected and the petitioner has not challenged validity of the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission. Therefore, this Court need not examine the aforesaid submission made by the learned

Counsel for the petitioner regarding validity of the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission.

11. In absence of a final prayer having been made for setting aside the order dated 07.09.2022 passed by the State Consumer Disputes Redressal Commission, this Court cannot grant an interim relief staying operation of the aforesaid order, as the interim relief can only in incidental and ancillary to the final relief and its purpose is to protect the final relief from becoming infructuous. However, the issue of grant of interim relief is not of any significance, as the petition itself is being decided finally.

12. What is under challenge before this Court, is the order dated 30.04.2024 passed by the National Consumer Disputes Redressal Commission, whereby the petitioner's application seeking condonation of delay in filing the appeal, has been rejected.

13. The National Consumer Disputes Redressal Commission, New Delhi has recorded in the impugned order that in order to condone the delay the applicant has to satisfy the Commission that there was sufficient cause for preferring the first appeal after stipulated limitation period. The Commission has referred to the decisions of Hon'ble Supreme Court in the cases of Basawaraj and another Vs. Special Land Acquisition Officer: (2013) 14 SCC 81, Esha Bhattcharjee Vs. Raghunathpur Nafar Academy: (2013) 12 SCC 649 and Sridevi Datla Vs. Union of India and others: (2021) 5 SCC 321 and came to a conclusion that a first appeal under Consumer Protection Act has to be filed within 30 days. Although, the petitioner claimed that the order dated

07.09.2022 passed by the State Consumer Disputes Redressal Commission came to the petitioner's knowledge in August, 2023 when it was served with a notice of Execution Application No.93 of 2022, the petitioner was well represented before the State Commission and it was not an ex-parte order. Hence the plea of lack of knowledge of the order of the State Commission does not appear to be convincing. The petitioner had sought to explain the reason for delay by stating that due to Covid-19 pandemic some employees were changed, but the impugned order dated 07.09.2022 pertains to post Covid period. The petitioner had not brought on record any documents regarding this plea of change of employees in the legal department. Even if some employees of the company leave, the legal cases of the company cannot be left unattended for such a long period.

14. In view of the aforesaid discussion, the National Consumer Disputes Redressal Commission, New Delhi came to the conclusion that the reasons given for condonation of delay are not convincing.

15. Challenging the validity of the aforesaid order, the learned counsel for the petitioner has drawn attention of this court to an email communication dated 17.08.2022 sent by one Girish Chandra Upadhyay to the Managing Director of the petitioner-company tendering his resignation. This email communication does not make any mention to the post/designation held by the sender of the communication, whose email ID is advocategirish@gmail.com.

16. The learned counsel for the petitioner contends that the person who has

sent this email communication was holding the post of Assistant General Manager (Legal) in the company.

17. In **Basawaraj v. Land Acquisition Officer**: (2013) 14 SCC 81, the Hon'ble Supreme Court explained the law regarding condonation of delay by stating that: -

"12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become

stale. According to Halsbury's Laws of England, Vol. 28, p. 266:

“605. Policy of the Limitation Acts.—The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence.”

An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches.

14. In P. Ramachandra Rao v. State of Karnataka [(2002) 4 SCC 578] this Court held that judicially engrafting principles of limitation amounts to legislating and would fly in the face of law laid down by the Constitution Bench in Abdul Rehman Antulay v. R.S. Nayak [(1992) 1 SCC 225].

15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the “sufficient cause” which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in

the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature.”

18.

In Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy: (2013) 12 SCC 649, the Hon'ble Supreme Court discussed the law regarding condonation of delay as explained in various precedents and summarized the same as follows:—

“21. From the aforesaid authorities the principles that can broadly be culled out are:

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and

purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) **The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration.** It is so

as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) *An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.*

(c) *Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.*

(d) *The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.”*

(Emphasis supplied)

19. In **Ajay Dabra v. Pyare Ram**, 2023 SCC OnLine SC 92, the Hon'ble Supreme Court held that:—

*“5. What we have here is a pure civil matter. An appeal has to be filed within the stipulated period, prescribed under the law. Belated appeals can only be condoned, when sufficient reason is shown before the court for the delay. **The appellant who seeks condonation of delay therefore must explain the delay of each day. It is true that the courts should not be pedantic in their approach while condoning the delay, and explanation of each day's delay should not be taken literally, but the fact remains that there must be a reasonable explanation for the delay.**”*

(Emphasis supplied)

20. In **Sheo Raj Singh (Deceased) Through Lrs. v. Union of India**, 2023 SCC OnLine SC 1278, after discussing the various precedents on the issue, the Hon'ble Supreme Court summarized the principles regarding condonation of delay in the following words:—

*“29. Considering the aforementioned decisions, there cannot be any quarrel that this Court has stepped in to ensure that substantive rights of private parties and the State are not defeated at the threshold simply due to technical considerations of delay. However, these decisions notwithstanding, **we reiterate that condonation of delay being a discretionary power available to courts, exercise of discretion must necessarily depend upon the sufficiency of the cause shown and the degree of acceptability of the explanation**, the length of delay being immaterial. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of course, **the courts must distinguish between an ‘explanation’ and an ‘excuse’**. An ‘explanation’ is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must*

however be taken to distinguish an 'explanation' from an 'excuse'. Although people tend to see 'explanation' and 'excuse' as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real. An 'excuse' is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an 'excuse' would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. At this stage, we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher courts for adjudication.
(Emphasis supplied)

21. When we examine the facts of the present case in light of the law relating to condonation of delay in filing appeals as explained in the above mentioned cases, we find that the State Consumer Disputes Redressal Commission, U.P. had decided Complaint Case No.185 of 2019 by means of an order dated 07.09.2022.

22. It was stated in the application seeking condonation of delay of 558 days in filing the appeal that due to Covid-19 pandemic, there was change of employees.

The concerned authorized representative of the petitioner had also resigned and, therefore, the petitioner-company could not keep track of the judgment and order dated 07.09.2022, passed by the State Consumer Disputes Redressal Commission, which came to the knowledge in the month of August, 2023, when the petitioner was served with the notice of Execution Application No.93 of 2022. The Directors of the petitioner company were under corporate commitment due to which they could not appoint a new legal team and an Advocate. It was further stated in the application that in August, 2023, a new counsel and a new Legal Manager were appointed by the petitioner-company and they decided to file an appeal. The Corporate Insolvency Resolution Process was initiated and a moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 was imposed against the company by means of an order dated 31.08.2023 passed by the National Company Law Tribunal in Company Petition IB (IBC) No. 525 of 2022. The application does not make a mention of the date till when the moratorium remained in force and the learned counsel for the petitioner has orally informed the court that moratorium remained effective till 01.02.2024. The petitioner has stated that the delay in filing appeal is not intentional.

23. The petitioner contends that the Assistant General Manager (Legal) of the company had resigned on 07.08.2022, i.e. a month prior to decision of the complaint. No other specific fact has been pleaded so as to make out a sufficient cause for the delay of 558 days in filing the appeal. The petitioner company claims to have a team of officials looking after the legal matters. In these circumstances, the resignation tendered by a single employee a

month prior to decision of the complaint would not justify the delay of 558 days in filing the appeal.

24. The plea of moratorium imposed on 31.08.2023, which remained effective till 01.02.2024, i.e. for a period of five months, also does not sufficiently explain the delay of 558 days in filing the appeal.

25. It appears that the resignation of a single employee given a month prior to passing of the order dated 07.09.2022 and the imposition of moratorium for a period of five months are being set up as excuse for the inordinate delay of 558 days in filing the appeal, rather than providing a sufficient cause for the delay.

26. Therefore, this court finds that the National Consumer Disputes Redressal Commission, New Delhi has exercised its discretion in rejecting the application for condonation of delay of 558 days on sound reasons and the impugned order rejecting the application for condonation of delay in filing the First Appeal does not warrant any interference by this court in exercise of its discretionary power of superintendence under Article 227 of the Constitution of India.

27. The petition lacks merit and the same is **dismissed.**

(2024) 9 ILRA 939

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 23.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matter Under Article 227 No. 3801 of 2024

Akhtar Khan **...Petitioner**
Versus
D.J., Pratapgarh & Ors. ...Respondents

Counsel for the Petitioner:

Mohd. Aslam Khan

Counsel for the Respondents:

Sanjay Kumar Srivastava

Civil Law - Civil Procedure Code- Order XI Rules 12 and 14 -Application under Order XI Rules 12/14 of the Civil Procedure Code rejected-revision rejected at the admission stage-only prayer in Application Under Order XI Rule 12/14 C.P.C. that the plaintiff no.1/1 should be directed to file the original Will -this prayer is in the nature Rule 14 - no prayer under Rule 12- the trial Court can order a party to produce any document only when it is at least prima facie satisfied that the document is in possession or power of that party- defendant has not pleaded in the written St.ment that the Will is in possession or power of the plaintiff- filed at belated stage.

Petition dismissed. (E-9)

List of Cases cited:

1. Udit Narain Singh Malpaharia Vs Addl. Member Board of Revenue: AIR 1963 SC 786
2. Savitri Devi Vs D.J., Gorakhpur: (1999) 2 SCC 577
3. Jogendrasinhji Vijaysinghji Vs St. of Guj.: (2015) 9 SCC 1
4. Hari Vishnu Kamath [AIR 1955 SC 233]
5. Vinod Kumar Bajaj (Since Deceased) Vs Rajendri, 2018 SCC OnLine All 6489
6. Kamalia Brothers and Co. Vs St. of Guj.: AIR 1992 Guj 138 = 1991 SCC OnLine Guj 79
7. Rajkishore Prasad Vs St. of Orissa: AIR 1979 Ori 96 = 1979 SCC OnLine Ori 35
8. Ramlalsao Vs Tansingh Lalsingh: A.I.R. 1952 Nagpur 135

9. Jagmail Singh Vs Karamjit Singh: (2020) 5 SCC 178

10. Vee Excel Drugs & Pharmaceuticals (P) Ltd. Vs Union of India, 2014 SCC OnLine All 248 = (2014) 2 All.L.J. 226

11. St. of Jharkhand Vs Ambay Cements: (2005) 1 SCC 368

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

1. Heard Sri Mohd. Arif Khan Senior Advocate assisted by Sri Mohd. Aslam Khan Advocate, the learned counsel for the petitioner and Sri Sanjay Kumar Srivastava Advocate, the learned counsel for the opposite parties.

2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioner has challenged validity of an order dated 03.05.2024 passed by the Civil Judge (Senior Division)/FTC-II, Pratapgarh in Original Suit No.01 of 2016 titled Akhtar Khan versus Satya Prakash, rejecting the application (Paper No.95 Ga 2) filed by the petitioner under Order XI Rules 12/14 of the Civil Procedure Code (hereinafter referred to as 'C.P.C.'). The petitioner has also challenged validity of a judgment and order dated 30.05.2024 passed by the learned District Judge, Pratapgarh in Civil Miscellaneous Case No.117 of 2024 titled Akhtar Khan versus (1) Poornawati Sharma and (2) Mamta Sharma, whereby the Revision filed by the petitioner against the aforesaid order dated 03.05.2024 has been dismissed at the admission stage.

3. The petitioner has impleaded the District Judge, Pratapgarh and the Civil Judge (Senior Division)/FTC-II, Pratapgarh as opposite parties no.1 and 2 to the petition.

4. In **Udit Narain Singh Malpaharia v. Addl. Member Board of Revenue**: AIR 1963 SC 786, a Bench consisting of four Hon'ble Judges of the Hon'ble Supreme Court had held that in a writ of certiorari not only the tribunal or authority whose order is sought to be quashed but also parties in whose favour the said order is issued are necessary parties.

5. However, in **Savitri Devi vs. District Judge, Gorakhpur**: (1999) 2 SCC 577, a Bench consisting of two Hon'ble Judges of the Hon'ble Supreme Court had observed as follows: -

*“14. Before parting with this case, it is necessary for us to point out one aspect of the matter which is rather disturbing. In the writ petition filed in the High Court as well as the special leave petition filed in this Court, the District Judge, Gorakhpur and the 4th Additional Civil Judge (Junior Division), Gorakhpur are shown as respondents and in the special leave petition, they are shown as contesting respondents. **There was no necessity for impleading the judicial officers who disposed of the matter in a civil proceeding when the writ petition was filed in the High Court;** nor is there any justification for impleading them as parties in the special leave petition and describing them as contesting respondents. **We do not approve of the course adopted by the petitioner which would cause unnecessary disturbance to the functions of the judicial officers concerned. They cannot be in any way equated to the officials of the***

Government. It is high time that the practice of impleading judicial officers disposing of civil proceedings as parties to writ petitions under Article 226 of the Constitution of India or special leave petitions under Article 136 of the Constitution of India was stopped. We are strongly deprecating such a practice.”

(Emphasis added)

6. It is relevant to note that the aforesaid observations were made by the Bench consisting of two Hon'ble Judges of the Supreme Court in **Savitri Devi** (Supra) without referring to the earlier decision in **Udit Narain Singh Malpaharia** (Supra) given by a larger Bench consisting of four Hon'ble Judges of the Hon'ble Supreme Court.

7. In **Jogendrasinhji Vijaysinghji vs. State of Gujrat**: (2015) 9 SCC 1, another Bench consisting of two Hon'ble Judges of the Hon'ble Supreme Court discussed numerous precedents on the issue, including the judgments in the cases of **Udit Narain Singh Malpaharia and Savitri Devi** (Supra) and explained the law as follows: -

“43. As we notice, the decisions rendered in *Hari Vishnu Kamath* [AIR 1955 SC 233], *Udit Narain Singh* [AIR 1963 SC 786] and *Savitri Devi* [(1999) 2 SCC 577] have to be properly understood. In *Hari Vishnu Kamath*, the larger Bench was dealing with a case that arose from Election Tribunal which had ceased to exist and expressed the view how it is a proper party. In *Udit Narain Singh*, the Court was really

dwelling upon the controversy with regard to the impleadment of parties in whose favour orders had been passed and in that context observed that tribunal is a necessary party. In *Savitri Devi*, the Court took exception to courts and tribunals being made parties. **It is apposite to note here that propositions laid down in each case have to be understood in proper perspective. The civil courts, which decide matters, are courts in the strictest sense of the term. Neither the court nor the Presiding Officer defends the order before the superior court it does not contest.** If the High Court, in exercise of its writ jurisdiction or revisional jurisdiction, as the case may be, calls for the records, the same can always be called for by the High Court without the Court or the Presiding Officer being impleaded as a party. Similarly, with the passage of time there have been many a tribunal which only adjudicate and they have nothing to do with the lis. We may cite a few examples: the tribunals constituted under the Administrative Tribunals Act, 1985, the Customs, Excise and Service Tax Appellate Tribunal, the Income Tax Appellate Tribunal, the Sales Tax Tribunal and such others. Every adjudicating authority may be nomenclatured as a tribunal but the said authority(ies) are different from that pure and simple adjudicating authorities and that is why they are called the authorities. An Income Tax Commissioner, whatever rank he may be holding, when he adjudicates, he has to be made a party, for he can defend his

order. He is entitled to contest. There are many authorities under many a statute. Therefore, the proposition that can safely be culled out is that the authorities or the tribunals, who in law are entitled to defend the orders passed by them, are necessary parties and if they are not arrayed as parties, the writ petition can be treated to be not maintainable or the court may grant liberty to implead them as parties in exercise of its discretion. There are tribunals which are not at all required to defend their own order, and in that case such tribunals need not be arrayed as parties. To give another example: in certain enactments, the District Judges function as Election Tribunals from whose orders a revision or a writ may lie depending upon the provisions in the Act. In such a situation, the superior court, that is the High Court, even if required to call for the records, the District Judge need not be a party. Thus, in essence, when a tribunal or authority is required to defend its own order, it is to be made a party failing which the proceeding before the High Court would be regarded as not maintainable.

(Emphasis added)

8. The Civil Judge and the District Judge, who decide a matter, are not entitled to defend their order before this Court and, therefore, applying the law as it stands clarified by the Hon'ble Supreme Court in **Jogendrasinhji Vijaysinghji** (Supra), the Civil Courts should not be impleaded as opposite parties to a petition under Article 227 of the Constitution of India. Therefore,

this petition suffers from the defect of mis-joinder of parties.

9. This Court has already heard the submissions of the learned Counsel for the parties and the learned Counsel for the opposite party did not raise the objection of mis-joinder of parties. Had this objection been raised during submissions, the learned Counsel for the petitioner could have taken appropriate steps to cure the defect. In these circumstances, it would not be proper to pass any order adverse to the petition on this ground and the Court proceeds to examine the merits of the matter.

10. The petitioner had earlier filed Second Appeal No.338 of 2016 against Satya Prakash, the deceased father of the private opposite party. The Second Appeal was allowed by means of a judgment and order dated 09.05.2019 and the matter was remanded to the trial court for being decided afresh in light of the observations made in the judgment dated 09.05.2019.

11. The facts of the case, as evident from the aforesaid judgment dated 09.05.2019 are that Satya Prakash – the father and predecessor in interest of the opposite party no. 3, had filed Regular Suit No.1 of 2006 in the Court of Civil Judge (Senior Division), Pratapgarh, for a decree of permanent injunction, pleading that he was the owner in possession of the disputed property on the basis of a Will dated 24.01.1973 executed by Smt. Hardei – the Grand-mother of Satya Prakash. The plaintiff had got his name mutated in respect of the property in dispute as well as in respect of some other property which was also subject matter of the aforesaid Will. He further stated that his brothers Jai Prakash and Chandra Prakash were claiming right over the property in question

on the basis of a fictitious Will and they had sold the property in dispute in favour of the defendant – petitioner on the basis of the said fictitious Will. The defendant was attempting to create interference in the possession and rights of the plaintiff.

12. The petitioner - defendant filed his written statement pleading that Smt. Hardei had executed a Will dated 21.03.1952 in favour of Satya Prakash and his unborn brothers. After the Will was executed, Satya Prakash had two other brothers, namely, Jai Prakash and Chandra Prakash and, therefore, both Jai Prakash and Chandra Prakash had 2/3rd right in the property in question, which they had transferred in favour of the defendant through a sale-deed dated 06.09.2005. The defendant also stated that the Will of the plaintiff was fabricated. The first issue framed by the trial court was whether the plaintiff is the owner in possession of the disputed property and the second issue was whether the Will dated 21.03.1952 was validly executed.

13. After filing of the written statement, the defendant did not participate in the proceedings and the matter proceeded ex parte against him. The plaintiff examined himself and three other witnesses and he filed the original Will dated 24.01.1973, a certified copy of the mutation order passed by the Nayab Tahsildar, a copy of the assessment made by the Nagarpalika for water tax alongwith some other documents. The trial Court dismissed the suit by a judgment and decree dated 16.01.2012.

14. The plaintiff filed Regular Civil Appeal No.18 of 2012 under Section 96 C.P.C. before the District Judge, Pratapgarh. The defendant-petitioner filed

cross-objections. The first appellate court allowed the appeal and decreed the suit of the plaintiff by means of a judgment and decree dated 08.09.2016, against which Second Appeal No 338 of 2016 was filed in this Court.

15. In the judgment dated 09.05.2019 passed in the aforesaid Second Appeal, this Court has recorded a conclusion that on the date when the evidence was led, the original Will was not available on record of the trial Court. Therefore, the first appellate Court ought to have remanded the matter to the trial Court to enable the plaintiff to prove the original Will and returning its findings thereafter. Accordingly, this Court allowed the appeal and remanded the matter to the trial Court with a direction to permit the parties to the suit to lead evidence and to decide the Suit afresh after giving complete opportunity to the parties.

16. While remanding the matter, this Court had directed the trial Court to complete the entire exercise and decide the suit expeditiously as far as possible, say within a period of eight months from the date a certified copy of this Court's order was placed before the trial court. It was also made clear that no unnecessary adjournment should be granted to the parties and if grant of adjournment is inevitable then it should be visited with appropriate costs.

17. The trial Court could not decide the suit within the time granted by this Court and sought further time to decide the same, which request was accepted by means of an order dated 11.11.2021 and a further period of eight months was granted to the trial Court for complying with the

order dated 09.05.2019 and deciding the Suit.

18. After the parties had led their respective evidences, the trial Court started hearing submissions in support of the plaintiff's case on 12.03.2024, which were concluded on 15.03.2024. Thereafter the suit was fixed for hearing submissions of the defendant – petitioner.

19. On 22.03.2024, when the suit was fixed for hearing submissions on behalf of the defendant – petitioner, he filed an application under Order XI Rules 12/14 C.P.C. stating that the original Will dated 21.03.1952 executed by Hardei in favour of Satya Prakash and his unborn brother was lying with the original plaintiff Satya Prakash and after his death, the original Will was with his wife Smt. Poornawati, who should be directed to file the original Will dated 21.03.1952. It was also stated in the application that although some delay had occurred in filing the application due to inadvertence and ignorance of law, it was necessary for a just decision of the case that the original Will be summoned from the plaintiff no.1/1 Smt. Poornawati Sharma and that the defendant - petitioner should not be deprived of his legal and judicial rights.

20. The opposite party-plaintiff filed objections against the aforesaid application, denying that the original Will dated 21.03.1952 was with the original plaintiff Satya Prakash and after his death, it is with his heirs. The entire evidence had been recorded and the plaintiff's Advocate had concluded his submissions. It was not proper for the defendant to have filed the application at that stage and the application is not maintainable. It has come to light during recording of evidence of PW-1 –

Smt. Poornawati Sharma that she got married in the year 1968. She had no knowledge about the Will executed in the year 1952 and she has neither seen it nor has heard about it. There is no evidence to prove that the original Will dated 21.03.1952 is with the plaintiff. Therefore, the application for summoning the Will from the plaintiff was not maintainable. It has also come to light in the evidence that Chandra Prakash acquired knowledge of the Will through his father Lalit Rai in the year 1985-86. Lalit Rai has died. Therefore, this is no occasion for directing the plaintiff to produce the original Will dated 21.03.1952. The defendant had filed the application for filing up the lacuna in his case. The application was liable to be dismissed.

21. The trial Court rejected the application by means of the impugned order dated 03.05.2024 wherein it is recorded that the plaintiff has filed the suit for perpetual injunction and he has to lead evidence to prove his title and possession in respect of the property in dispute claiming that he is the owner and in possession of the property on the basis of a Will dated 24.11.1973. The defendant claims to be owner of 2/3rd share in the property on the basis of a Will dated 21.03.1952 and the burden of proving this fact lies on the defendant. As both the parties have already led their evidences and the submissions on behalf of the plaintiff have already been heard, the application moved when the suit was fixed for hearing submissions on behalf of the defendant, was merely an attempt to cause undue delay in disposal of the suit. The matter is very old and the High Court has issued a direction for its expeditious disposal. Therefore, there was no ground for directing the plaintiff to produce the document.

22. The petitioner filed a revision against the aforesaid order dated 03.05.2024 which has been dismissed at the admission stage by the impugned order dated 30.05.2024 after recording that the suit is pending since the year 2006. Initially, it had been dismissed by means of an ex parte order dated 16.01.2012. The plaintiff Satya Prakash had challenged the ex parte order dated 16.01.2012 by filing Civil Appeal No.18 of 2012, which was allowed by means of a judgment and order dated 08.09.2016 passed by the learned Additional District Judge, Court No.9, Pratapgarh and a decree of perpetual injunction was passed in favour of the plaintiff. The petitioner filed Second Appeal No. 338 of 2016, which was allowed by a judgment and order dated 09.05.2019 and the matter was remanded to the trial Court for being decided afresh after giving proper opportunity to the parties to lead evidence as well as opportunity of hearing.

23. The revisional Court held that the original plaintiff had filed the suit on the basis of the Will dated 24.01.1973 and he had filed this Will. The burden to prove this Will lies on the plaintiff. The revisionist/ defendant/petitioner claims title on the basis of a registered sale-deed dated 06.09.2005 and has filed the same as Paper No. 83 Ga 1/2 to 83 Ga 1/10. The aforesaid sale-deed has been executed by Jai Prakash and Chandra Prakash - sons of Late Lalit Rai, who claimed title on the basis of a Will dated 21.03.1952 executed by Smt. Hardei. The parties have already led their respective evidence and submissions on behalf of plaintiff have already been heard by the trial court. The revisionist/petitioner has filed a certified true copy of the registered Will dated 21.03.1952. The learned Civil Judge has not decided any

point finally by the impugned order dated 03.05.2024 and the order does not come within the term 'case decided'. Therefore, the revision was dismissed at the admission stage.

24. Challenging validity of the aforesaid orders, the learned counsel for the petitioner Sri Mohd. Arif Khan Senior Advocate has submitted that the plaintiff had not disclosed existence of the registered Will dated 21.03.1952 in the plaint and the suit was filed on the basis of an unregistered Will dated 21.03.1973 executed by Hardei. The unregistered Will dated 24.01.1973 contains no recital about the earlier Will dated 21.03.1952. In the judgment and order dated 09.05.2019 passed in Second Appeal No.338 of 2016, this Court had directed that the suit will be decided afresh after permitting the parties to the suit to lead the evidence. He has submitted that the certified copy of the Will dated 21.03.1952 is a secondary evidence and it is not admissible in evidence. The petitioner does not have the original Will in his possession and it is in possession of the opposite party and, therefore, the opposite party should be directed to produce the original Will dated 21.03.1952 before the trial Court.

25. The learned Counsel for the petitioner has relied upon the decisions in the cases of **Vinod Kumar Bajaj (Since Deceased) versus Rajendri**, 2018 SCC OnLine All 6489, **Kamalia Brothers and Co. versus State of Gujarat**: AIR 1992 Guj 138 = 1991 SCC OnLine Guj 79, **Rajkishore Prasad versus State of Orissa**: AIR 1979 Ori 96 = 1979 SCC OnLine Ori 35, **Ramlalsao versus Tansingh Lalsingh**: A.I.R. 1952 Nagpur 135 and **Jagmail Singh versus Karamjit Singh**: (2020) 5 SCC 178.

26. Per contra, Sri. Sanjay Kumar Srivastava Advocate, the learned counsel for the opposite party no. 3 has submitted that while remanding the matter by means of the judgment and order dated 09.05.2019 passed in Second Appeal No.338 of 2016, this Court had directed the trial Court to conclude the trial within eight months, but the trial Court could not decide the suit within the time granted by this Court. The suit could not be decided even in the further period of eight months granted by means of the order dated 11.11.2021 passed by this Court, which period expired on 10.07.2022. The petitioner filed the application under Order XI Rules 12/14 C.P.C. on 22.03.2024 i.e. long after even the extended time granted by this Court for decision of the suit and after the petitioner had availed the opportunity of leading evidence and had also availed the benefit of hearing the submissions advanced on behalf of the plaintiff-opposite parties. The application under Order XI Rules 12/14 C.P.C. was moved at this belated stage to cure the lacuna in the petitioner's case, which had been highlighted during submissions advanced on behalf of the opposite parties. In these circumstances, the trial Court has not committed any error or illegality in rejecting the application under Order XI Rules 12/14 C.P.C. and the revisional Court has not committed any error or illegality in dismissing the revision filed against the aforesaid order.

27. The learned Counsel for the opposite party has relied upon a judgment rendered by a coordinate Bench of this Court in **Vee Excel Drugs & Pharmaceuticals (P) Ltd. versus Union of India**, 2014 SCC OnLine All 248 = (2014) 2 All.L.J. 226, wherein a coordinate Bench of this Court referred to the decision of the Hon'ble Supreme Court in **State of**

Jharkhand v. Ambay Cements: (2005) 1 SCC 368, in which the Hon'ble Supreme Court reiterated the well established principle of law that where a statute provides that a particular thing should be done in a particular manner, it should be done in the manner prescribed and not in any other way.

28. Now I proceed to consider the case-laws paced by the learned Counsel for the petitioner. In **Vinod Kumar Bajaj** (Supra), a coordinate Bench of this Court held that: -

“under Order XI, Rule 14 when a document is summoned the Court can immediately proceed with the suit after dealing with it. Summoning of it would not mean that the Court had relied upon it or had admitted it as evidence. It is definitely lamentable that the plaintiff after all these years had moved the application so late in the day. The case, for one reason or the other has lingered for more than 22 years. However, only because the summoning of the documents has now been prayed for at this late stage, the Court cannot say that the document would now not be summoned.

* * *

The observation of the Court that the documents were public documents, and, therefore the plaintiff could have obtained the copies under the RTI also does not hold much water. In fact, had the Courts summoned the document at the very outset, then a lot of time would have been saved and the suit in all probability would have been decided a year back.”

29. In **Kamalia Brothers and Co. v. State of Gujarat**: AIR 1992 Guj 138 = 1991 SCC OnLine Guj 79, a Single Judge Bench of Gujarat High Court held that: -

“7. ...The requirements of this provision are limited only to the fact that the documents should be or should have been in the possession or power of a party to the suit, and that the same should relate to any matter in question in the suit.”

30. In **Rajkishore Prasad v. State of Orissa**: AIR 1979 Ori 96 = 1979 SCC OnLine Ori 35, a Single Judge Bench of Orissa High Court held that: -

“6. ...in M.L. Sethi v. R.P Kapur [(1972) 2 SCC 427] it has been held that the provisions of Order 11, rule 12, Civil Procedure Code mean that it is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence, yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trial of enquiry which may have either of these two consequences. It has also been held that generally speaking, a party is entitled to inspection of all documents which do not themselves

constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite party, he cannot inspect them unless the other party produces them. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party? In other words, unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, how is it possible for him to ask for discovery of specific documents? The aforesaid principle has been elaborately discussed in The Compagnie Financiere Et Commerciale Du Pacifique v. The Peruvian Guano Company [(1883) 11 Q B. D. 55.]. In that case, it has been observed that “a document relating to any matter in question in action” means that in order to determine whether certain documents are within that description, it is necessary to consider what are the questions in the action. The Court must look not only at the statement of claim of the plaintiff's case but also at the statement of the defence and the defendant's case.

7. In Attorney-General v. Gaskil [(1882) 20 Ch. D. 519.] , Cotton L.J. observed:

“The right to discovery remains the same, that is to say, a party has a right to interrogate

with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. It was said in argument that it is not discovery where the plaintiff himself already knows the fact. But that is a mere play on the word 'discovery'. Discovery is not limited to giving the plaintiff a knowledge of that which he does not know, but includes the getting an admission of anything which he is to prove on any issue which is raised between him and the defendant. To show that the pleadings have raised issues' and that therefore interrogatories should not be allowed is another fallacy. The object of the pleadings is to ascertain what issues are. "The object of the interrogatories is not to learn what the issues are but to see whether the party intelligently can obtain an admission from his opponent which makes the burden of proof easier than it otherwise would have been."

31. In **Ramlalsao versus Tansingh Lalsingh**: A.I.R. 1952 Nagpur 135, a Division Bench of Nagpur High Court held that: -

"The right of a party to deliver interrogatories to his opponent and get answers from him is a valuable one in conducting his cause and he should not lightly be deprived of it. It must be remembered that discovery of facts and documents often tends to shorten litigation and save expenses. The learned Judge had

not framed all the issues arising from the pleadings of the parties. If he had framed these issues and permitted the parties to make full use of Orders 11 and 12, Civil Procedure Code, the trial would have been shortened and he would have found ample material to decide the case correctly. Probably, the preliminary decree could have been passed even without going into oral evidence."

32. There can be no dispute to the propositions of law laid down in the cases cited by the learned Counsel for the parties, but none of the decisions would render any help in decision of this petition, as the factual background of this case gives rise to the questions, which have not been answered in any of the aforesaid judgments.

33. The defendant – petitioner has filed the application under Order XI, Rules 12/14 of C.P.C., which provide as follows: -

"12. Application for discovery of documents.—Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as

may, in its discretion, be thought fit:

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

* * *

14. Production of documents.—*It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.”*

34. Although the application is titled as an ‘Application Under Order XI Rule 12/14 C.P.C.’, the only prayer made in it is that the plaintiff no.1/1 Smt. Poornawati Sharma should be directed to file the original Will dated 21.03.1952 executed by Hardei in favour of Satya Prakash and his unborn brother. This prayer is in the nature of a prayer under Order XI Rule 14 and there is no prayer under Order XI Rule 12.

35. Order XI Rule 14 C.P.C. empowers the Court to order the production by any party thereto, of such of the documents in his possession or power, relating to any matter in question in such suit. The requirements for invoking this power are that – (1) the document must be in possession or power of a party to the suit and (2) the document must relate to any matter in question in the suit.

36. The trial Court can order a party to produce any document only when it is at least prima facie satisfied that the document is in possession or power of that party. In the present case, the defendant has not pleaded in the written statement that the Will dated 21.03.1952 allegedly executed by Smt. Hardei in favour of Satya Prakash and his unborn brothers is in possession or power of the plaintiff. PW-1 Smt. Poornawati Sharma has categorically denied that the original Will dated 21.03.1952 was with the original plaintiff Satya Prakash and after his death, it is with her. PW-1 Smt. Poornawati Sharma has stated that she got married in the year 1968, she had no knowledge about the Will executed in the year 1952 and she has neither seen it nor has heard about it. There is no evidence to prove that the original Will dated 21.03.1952 is with the plaintiff. Therefore, this is no material before the trial Court to come to a prima facie satisfaction that the original Will dated 21.03.1952 is in possession or power of the plaintiff. Therefore, no direction for production of the original Will dated 21.03.1952 can be issued to the plaintiff – opposite party no. 3.

37. There is another aspect of the matter which needs to be addressed. Although Rule 14 empowers the trial Court to summon the document at any stage of the suit, the application has to be filed with reasonable promptitude. In the present case, the suit was filed in the year 2006 and it is being re-tried after the matter having been remanded by this Court through the order dated 09.05.2019 passed in Second Appeal No.338 of 2016, which had directed the trial Court to conclude the trial expeditiously, preferably within a period of eight months. This period was extended by means of an order dated 11.11.2021 and a

further period of eight months was granted to the trial Court for complying with the order dated 09.05.2019. The extended period granted by this Court also expired on 10.07.2022, but the trial Court could not decide the suit even in the extended period. The petitioner filed the application under Order XI Rules 12/14 C.P.C. on 22.03.2024 i.e. long after even the extended time granted by this Court for decision of the suit and after he had availed the opportunity of leading evidence and had also availed the benefit of hearing the submissions advanced on behalf of the plaintiff-opposite parties.

38. There is force in the submission of the learned Counsel for the opposite party no. 3 that the application under Order XI Rules 12/14 C.P.C. has been moved at this belated stage to cure the lacuna in the petitioner's case, which has been highlighted during submissions advanced on behalf of the plaintiff. Allowing the application under Order XI Rules 12/14 C.P.C. in these circumstances would cause prejudice to the rights of the plaintiff – opposite party no. 3. In these circumstances, the trial court has not committed any error or illegality in rejecting the highly belated application under Order XI Rules 12/14 C.P.C. and the revisional court has not committed any error or illegality in dismissing the revision filed against the aforesaid order.

39. Sri. Mohd. Arif Khan Senior Advocate has also submitted that the petitioner has filed a certified copy of the Will dated 21.03.1952, but the certified copy being a secondary evidence, would not be admissible in evidence and, therefore, it is necessary that the opposite party no. 3 be directed to produce the original Will dated 21.03.1952. In support

of this submission, Sri. Khan has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Jagmail Singh versus Karamjit Singh**: (2020) 5 SCC 178, wherein the Hon'ble Supreme Court held that: -

“11. A perusal of Section 65 makes it clear that secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. It is a settled position of law that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished.

** * **

14. It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In H.

Siddiqui v. A. Ramalingam [(2011) 4 SCC 240], this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for

the court to allow a party to adduce secondary evidence.”

40. The aforesaid submission has been made in ignorance of the statutory provision contained in Section 57 of the Registration Act, 1908, which provides as follows: -

“57. Registering officers to allow inspection of certain books and indexes, and to give certified copies of entries.—(1) *Subject to the previous payment of the fees payable in that behalf, the Books Nos. 1 and 2 and the indexes relating to Book No. 1 shall be at all times open to inspection by any person applying to inspect the same; and, subject to the provisions of Section 62, copies of entries in such books shall be given to all persons applying for such copies.*

(2) *Subject to the same provisions, copies of entries in Book No. 3 and in the Index relating thereto shall be given to the persons executing the documents to which such entries relate, or to their agents, and after the death of the executants (but not before) to any person applying for such copies.*

(3) *Subject to the same provisions, copies of entries in Book No. 4 and in the Index relating thereto shall be given to any person executing or claiming under the documents to which such entries respectively refer, or to his agent or representative.*

(4) *The requisite search under this section for entries in Books Nos. 3 and 4 shall be made only by the registering officer.*

(5) All copies given under this section shall be signed and sealed by the registering officer, and shall be admissible for the purpose of proving the contents of the original documents.”

(Emphasis added)

41. Wills are registered in Book No. 3 and Section 57 (2) provides that after the death of the testator, any person can obtain a certified copy of any document registered in Book No. 3. The petitioner has already obtained a certified copy of the Will and has filed the same on record of the suit. Section 57 (5) of the Registration Act provides that a certified copy of the Will is admissible in evidence. Therefore, the self harming submission of the learned Counsel for the petitioner that the certified copy of the Will filed by the petitioner is not admissible, is not correct. However, admissibility of a document is distinct and different from the proof of the document.

42. In view of the foregoing discussion, I find no force in any of the submissions advanced by the learned Senior Advocate appearing for the petitioner. There is no illegality in the order dated 03.05.2024 passed by the Civil Judge (Senior Division)/FTC-II, Pratapgarh in Original Suit No.01 of 2016, rejecting the application filed by the petitioner under Order XI Rules 12/14 C.P.C., or in the judgment and order dated 30.05.2024 passed by learned District Judge, Pratapgarh in Civil Miscellaneous Case No.117 of 2024, whereby the Revision filed by the petitioner against the aforesaid order dated 03.05.2024 has been dismissed at the admission stage.

43. The petition lacks merits and the same is **dismissed**. The parties shall

bear their own costs of the instant litigation.

(2024) 9 ILRA 952

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 03.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matter Under Article 227 No. 4182 of 2024

The Oriental Insurance Co. Ltd.

...Petitioner

Versus

Smt. Preeti @ Preeti Devi & Ors.

...Respondents

Counsel for the Petitioner:

Vineet Singh Chauhan

Counsel for the Respondents:

Rinku Verma, Ajeet Kumar, Arvind Kumar, C.S.C.

Civil Law - The Constitution of India, 1950-Article 227-For rejecting the claim, the petitioner ought to have made verification of the income certificate of the deceased submitted by the opposite parties in a proper manner. The claim could only be rejected after coming to a conclusion that the certificate was forged or fictitious. The mere fact that the income certificate issued through offline mode could not be verified by online mode, cannot be a ground for rejection of the insurance claim- The court deprecates the conduct of the petitioner in filing this frivolous petition. **(Para 7 & 11)**

Petition dismissed. (E-15)

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

1. Heard Sri Vineet Singh Chauhan, the learned counsel for the petitioner, Sri Hemant Kumar Pandey, the learned Standing Counsel for the opposite parties no.4 and 5, Sri Rinku Verma and Sri Ajeet

Kumar, the learned counsel for the opposite parties no.1 to 3 and perused the records.

2. By means of the instant writ petition filed under Article 227 of the Constitution of India, the petitioner has challenged the validity of judgment and order dated 10.05.2024, passed by Permanent Lok Adalat, Lucknow in Permanent Lok Adalat Case No.428 of 2018: Smt. Preeti and others Vs. Oriental Insurance Company Limited, directing the petitioner to pay Rs.5,00,000/- to the opposite parties no.1 to 3 as death compensation claim amount under Group Accident Insurance Policy, consequent to death of husband of opposite party no.1, who died on 28.12.2016.

3. Briefly stated, the facts of the case are that the petitioner-Oriental Insurance Company Limited has entered into a contract with the State of U.P. under Mukhyamantri Kisan Evam Sarvhit Beema Yojna, which is a Group Accident Insurance Policy under which the petitioner is liable to pay claim amount in respect of injuries/death caused due to the accident of eligible persons.

4. The opposite parties no.1, 2 and 3 filed a claim stating that the husband of the opposite party no.1 and father of the opposite parties no.2 and 3 died on 28.12.2016 in a road accident, while he was aged merely 30 years. The insurance claim was supported by an income certificate dated 21.09.2024 of the deceased issued by the Tehsildar, Kulpahar, Mahoba. On 10.03.2017 the petitioner rejected the insurance claim for the reason that the income certificate could not be verified in its online verification. The opposite parties submitted a fresh income certificate dated 20.03.2017 issued by the Tehsildar,

Kulpahar, Mahoba. After rejection of the claim the opposite parties no.1, 2 and 3 filed P.L.A. Case No.428 of 2018 before the Permanent Lok Adalat which has been allowed by means of the impugned order.

5. While assailing the validity of the order passed by the Permanent Lok Adalat, the learned counsel for the petitioner has submitted that the income certificate dated 21.09.2014 that was initially submitted by the claimants along with their claim, could not be verified in online verification and the subsequent income certificate issued by the Tehsildar in the year 2017 cannot form the basis of a claim raised in the year 2014.

6. Replying to the aforesaid submission made by the learned counsel for the petitioner, the learned counsel for the opposite parties no.1, 2 and 3 as well as the learned Standing Counsel appearing for the State have submitted that the income certificate dated 21.09.2014 had not been issued through online method and, therefore, its validity could not be verified through online mode. It had been issued by the Tehsildar through offline mode and it ought to have been verified through offline mode only, but the petitioner-insurance company failed to do so and it wrongly repudiated the claim on the ground that the certificate issued through offline mode could not be verified through online mode.

7. For rejecting the claim, the petitioner ought to have made verification of the income certificate of the deceased submitted by the opposite parties in a proper manner. The claim could only be rejected after coming to a conclusion that the certificate was forged or fictitious. The mere fact that the income certificate issued through offline mode could not be verified

by online mode, cannot be a ground for rejection of the insurance claim.

8. The learned Standing Counsel has submitted that the fresh income certificate dated 20.03.2017 bears a QR code thereon and therefore its validity can be verified through online mode and the learned Standing Counsel has himself verified its validity and has submitted a printout taken from the relevant government web portal which verifies genuineness of the income certificate dated 20.03.2017.

9. From the aforesaid facts, it appears that the petitioner had wrongly rejected the claim of opposite parties no.1, 2 and 3 by stating that the income certificate issued in the year 2014 through offline mode could not be verified through online mode and the petitioner-insurance company has thereby avoided payment of insurance claim to the opposite parties no.1, 2 and 3, which is payable since the year 2016.

10. Sri Hemant Kumar Pandey, the learned Standing Counsel has placed before this court a judgment rendered by a Division Bench of this court in the case of ***Oriental Insurance Company Ltd. Vs. Uma Devi and others: AIR (2021) All 82***, wherein this court has strongly deprecated the conduct of the petitioner-company in filing frivolous litigation for avoiding its responsibility for payment of insurance claims under contracts of insurance entered by the petitioner, in the following words:-

"25. Thus, the petitioner insurance company not being an ordinary litigant and more particularly bound by the insurance contract (as briefly noted above)

should not have filed the present frivolous writ petition to challenge the impugned contractually "binding order". The conduct of the petitioner in filing the present writ petition deserves to be condemned inasmuch as a frivolous writ petition has been filed to drag in litigation the respondent No.1 who is a widow and belongs to economically weaker and socially and educationally disadvantageous section of the society."

11. Keeping in view the aforesaid facts and circumstances of the case this court finds no merit in the petition and the court deprecates the conduct of the petitioner in filing this frivolous petition.

12. The petition is accordingly dismissed.

(2024) 9 ILRA 954
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matter Under Article 227 No. 4226 of 2024

M/S Arun Entp. ...Petitioner
Versus
A.D.J., Court No. 9, Lko. & Ors.
...Respondents

Counsel for the Petitioner:
 Praveen Tripathi, Saud Rais

Counsel for the Respondents:
 Aakchad Nath, Nirmal Srivastava

Civil Law - The Constitution of India, 1950-Article 227 -Transfer of Property Act, 1882-Section 106- there was a lease

agreement dated 30.07.1980 between the parties in respect of a portion of tenanted premises measuring 530 Square Feet, which categorically St.s that the lease was a month to month lease-Subsequently a further portion of the property of the opposite parties was given on lease to the petitioner under an oral agreement, the entire leased premises was always treated as a single tenement and a single rent was payable for the entire tenanted premises- Petitioner has failed to discharge his burden to prove that his tenancy was an year to-year tenancy- Nothing on record to substantiate that the rent was payable in respect of the tenanted premises on an yearly basis. Even if rent was paid on yearly basis on some occasions, it would not make the lease an yearly lease. **(Para 23, 25 & 26)**

Petition dismissed. (E-15)

List of Cases cited:

1. Idandas Vs Anant Ramchandra Phadke (Dead) by Lrs.: (1982) 1 SCC 27

2. Paul Rubber Industries (P) Ltd. Vs Amit Chand Mitra: 2023 SCC OnLine SC 1216

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

1. Heard Sri Saud Rais, the learned counsel for the petitioner, Sri Nirmal Srivastava, the learned counsel for the opposite parties and perused the records.

2. By means of the instant petition, filed under Article 227 of the Constitution of India, the petitioner has challenged the validity of a judgment and order dated 08.08.2024 passed by learned Judge, Small Causes Court, Lucknow in S.C.C. Suit No. 48 of 2017 (old number 218 of 2014), whereby the Suit for ejectment and recovery of arrears of rent and damages filed by opposite parties against the petitioner was decreed. The petitioner has also challenged the judgment and order dated 08.08.2024 passed by the learned

Additional District Judge, Court no. 9, Lucknow whereby SCC Revision No. 41 of 2017, filed against the aforesaid order dated 08.08.2024, has been dismissed.

3. Briefly stated, facts of the case are that the opposite parties had filed the aforesaid S.C.C. Suit for ejectment and recovery of arrears of rent and damages pleading that they are co-owners/landlords of the land with building bearing municipal no. 352/2, Tulsidas Marg, Manjeet Singh Building Campus, New C-Block, Raja Ji Puram, Lucknow, having an area of 6390.65 Square Feet which is bounded as below:

East: Tulsidas Marg

West: Vacant land of the plaintiffs and thereafter warehouses

North: Land of the plaintiffs and thereafter Talkatora Power House

South: Office of Senior Marketing Inspector (Food Department) and vacant land of the plaintiffs. The petitioner was using the tenanted premises as a factory and Godown and the monthly rent payable by the petitioner was Rs 3,569/- per month.

4. It was further pleaded that initially the property in question was let out to the defendant as a single unit but on the request of the proprietor of the petitioner, the tenancy was bifurcated with one portion remained in the tenancy of M/s Arun Enterprises with its proprietor Sri Arun Mansukhani and the other portion fell in the tenancy of M/s. M.K. Enterprises with its new proprietor Smt. Meera Kumar (mother-in-law of Sri Arun Mansukhani). However, both the proprietorship concerns continued to be managed by Sri. Arun

Mansukhani and both the concerns carry on business as a single unit. It was alleged that the tenant defaulted in payment of rent since 01.07.2014. The plaintiffs sent a notice dated 09.10.2014 under Section 106 of the Transfer of Property Act stating that the tenancy would stand determined upon expiry of 30 days from the date of receipt of the notice.

5. The petitioner filed a written statement of its defence stating that the tenanted premises is being used for manufacturing goods. The petitioner denied having committed any default in payment of rent and stated that the entire rent had been paid to the landlords.

6. The plaintiffs has filed a supplementary affidavit annexing therewith a copy of a lease agreement dated 30.07.1980 executed between Satender Jeet Singh – the predecessor in interest of the opposite parties, and Sri Arun Mansukhani, proprietor of M/s Arun Enterprises, wherein it was written that the petitioner had taken a Godown measuring 530 Square Feet in premises No. 532/2, Talkatora Road, Lucknow for a period of 3 years, on a monthly rent of Rs 150/-. The tenant had a right of renewal of lease after every 3 years enhancing the rent upto 10%. Clause 2 of the aforesaid agreement provides that the tenancy shall begin from the first day of every month of the Gregorian calendar terminating with the last day of every month and the monthly rent shall fall due on the first day of each month. The petitioner had filed this lease agreement before the trial Court also.

7. The Judge Small Causes Court has decreed the Suit by the impugned judgment and order dated 08.08.2024

wherein the following four points for determination were framed: -

i. Whether the relationship of landlord and tenant exists between the plaintiff and the defendant.

ii. Whether the notice sent by the plaintiffs was duly served on the defendant.

iii. Whether the defendants made any default in paying the rent.

iv. To what relief the plaintiffs are entitled.

8. Point no. 1 was decided in the affirmative holding that the defendant is the plaintiffs' tenant and this finding has not been assailed before this Court.

9. While deciding point 2, the Judge Small Causes Court took into consideration the facts that the plaintiff has pleaded that he had sent a notice through registered post-acknowledgment due on 11.11.2014, through his advocate, whereby the defendant's tenancy was terminated. The notice was served on the defendant. The defendant had denied having received the notice in the written statement of his defence. The plaintiffs had filed a photocopy of the notice dated 09.10.2014 and the postal receipt of sending notice through registered post. The plaintiffs proved the aforesaid document by oral testimony.

10. DW-1 stated in his cross-examination that he had handed over the notice sent by the plaintiffs directing him to vacate the tenanted premises, to his counsel. He did not remember whether his counsel had sent any reply to this notice or not.

11. The learned trial Court held that from the aforesaid statement given by DW-1 in his cross examination, it was established that the notice sent by the plaintiffs was served on the defendant.

12. While deciding point no. 3, the Judge Small Causes Court has recorded that PW-1 has stated that the defendant has not paid rent since 01.07.2014. The defendant has disputed this fact. In his cross examination, DW-1 has stated that he used to pay rent of the premises through cheques. Sometimes the landlord issued receipts acknowledging payment of rent but at other times, no receipt was issued. Apparently, the defendant did not adduce any evidence regarding payment of rent for the period after 01.07.2014 and, therefore, the Judge Small Causes Court held that the defendant had not paid rent since 01.07.2014 and he was in arrears of rent amounting Rs.15,346/-.

13. In view of the aforesaid finding, the Judge Small Causes Court decreed the Suit filed by the opposite parties.

14. The petitioner filed Revision No. 41 of 2017 against the aforesaid order dated 08.08.2017 passed by the Small Causes Court, which has been dismissed by the learned Additional District Judge, Court no. 9, Lucknow by the impugned judgment and order dated 08.08.2024. the Revisional Court has framed the following points for determination:

(i) Whether the notice issued by the opposite parties/landlords to the revisionist/tenant was legal and was duly served on him?

(ii) Whether the revisionist/tenant was in default/arrears of rents

(iii) What relief, if any, is the revisionist/tenant entitled to?

15. On issue no. 1, the learned counsel for the revisionist/petitioner had submitted that the premises in question was a factory with a manufacturing unit installed therein and, therefore, the lease could have terminated only after giving a six months' notice as provided under Section 106 of the Transfer of Property Act.

16. The learned Revisional Court held that Clause 2 of the lease agreement executed between the parties specifically mentions that the lease was a month-to-month lease. Therefore, there was no need to issue a six months notice for terminating the lease.

17. On the second point regarding default in payment of rent, the learned counsel for the revisionist had drawn attention of the revisional Court towards a copy of Cheque No. 21078676 which was marked as Paper no. C-24/10 and a certificate dated 03.10.2014 issued by the Branch Manager of the Union Bank of India, Aishbagh Branch (Paper no. C-24/11), stating that the aforesaid cheque had been paid from the revisionist's account on 03.11.2014.

18. In response of the aforesaid contention, the learned counsel for the opposite parties had submitted that the aforesaid document itself established that the rent was paid on 03.11.2014 and, therefore, on the date of issuance of notice dated 09.10.2014, the revisionist was in default of payment of rent. Accordingly, the revisional court found that the revisionist

was not entitled to any relief and dismissed the revision.

19. While assailing the aforesaid order, Sri. Saud Rais, the learned counsel for the petitioner, has submitted that the lease was for manufacturing purposes and as per the provision contained in Section 106 of the Transfer of Property Act, it shall be deemed to be a lease from year to year, terminable on the part of either the lessor or the lessee, by six months' notice. As the notice of the present case was a notice of 30 days only, it was not a notice as contemplated by Section 106 of the Transfer of Property Act and, therefore, the petitioner's tenancy could not be terminated by this notice. The learned counsel for the petitioner has submitted that the lease agreement had been executed only in respect of a portion of the tenanted premises measuring 530 Square Feet whereas the Suit had been filed in respect of a premises measuring 6390.65 Square Feet and there was no written agreement regarding the remaining 5,860.65 square feet land. He has submitted that on several occasions, rent of the entire premises has been paid on yearly basis which establishes that the entire tenancy was an year-to-year tenancy.

20. Before proceeding to examine applicability of the aforesaid judgment to the facts of the present case, it would be appropriate to have a look at the provisions contained in Section 106 of the transfer of Property Act, which reads as follows: -

“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 immoveable

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 immoveable 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."*

21. Section 106 of the Transfer of Property Act provides that in the absence of any contract or local law or usage to the contrary, a lease for manufacturing purpose shall be deemed to be a lease from year to

year, terminable by six months' notice and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable by fifteen days' notice.

22. The learned counsel for the petitioner has relied upon a decision of Hon'ble Supreme Court in **Idandas Vs. Anant Ramchandra Phadke (Dead) by Lrs.**: (1982) 1 SCC 27. Para 5 of the aforesaid judgment records the admitted facts of the case, which is being reproduced below: -

"5. In the present case, the admitted facts are as under:

1. That to begin with the lease was given to the defendant in respect of an open piece of land;

2. That on the open piece of land the appellant installed a flour mill and that the defendant was not using the land for any other purpose except running a flour mill;

3. That the receipts filed by the tenant clearly show that the lease was doubtless a yearly one."

On the basis of aforesaid facts, the Hon'ble Supreme Court held that the lease was for manufacturing purposes, the notice of one month must be held to be invalid and the Suit for ejectment should have failed on that ground.

23. In the present case, there was a lease agreement dated 30.07.1980 between the parties in respect of a portion of tenanted premises measuring 530 Square Feet, which categorically states that the lease was a month to month lease. Although subsequently a further portion of the property of the opposite parties was

given on lease to the petitioner under an oral agreement, the entire leased premises was always treated as a single tenement and a single rent was payable for the entire tenanted premises. Therefore, the facts of the present case are entirely different from the facts of **Idandas** (Supra) and the principle laid down in Idandas case will not apply to the facts of the present case.

24. In **Paul Rubber Industries (P) Ltd. v. Amit Chand Mitra**: 2023 SCC OnLine SC 1216, the Hon'ble Supreme Court referred to a precedent on the point and held that: -

“In the case of G. Mackertich v. Steuart and Co. Ltd. [(1971) 3 SCC 39], it has been held that burden of proving that the lease was for manufacturing purpose lies on the party who claims it to be so. In the present appeal, it would have been for the defendant (appellant before us) to discharge this burden, as held by the High Court. In the case of Shivaji Balaram Haibatti v. Avinash Maruthi Pawar [(2018) 11 SCC 652] as also in a judgment of the Calcutta High Court in the case of Shree Nursing Timber Works and Shree Nursing Electric Stores v. Sm. Amala Bala Dassi [1973 CWN 522], it has been held that on this ground, there must be pleading supported by evidence to prove that the lease was for manufacturing purpose.”

25. There is neither any pleading nor any evidence in the present case that the terms or oral lease agreement were different from those of the lease agreement dated 30.07.1980. Therefore, the petitioner

has failed to discharge his burden to prove that his tenancy was an year-to-year tenancy.

26. There is nothing on record to substantiate the contentions of the learned counsel for the petitioner that the rent was payable in respect of the tenanted premises on an yearly basis. Even if rent was paid on yearly basis on some occasions, it would not make the lease an yearly lease.

27. In view of the foregoing discussions, this Court finds itself unable to accept the contention of learned counsel for the petitioner that the petitioner was holding the premises in question under an yearly lease and it could not have been terminated by a 30 days' notice.

28. There appears no illegality in the impugned orders passed by the Judge Small Causes Court and the Revisional Court warranting any interference by this Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.

29. Accordingly, the petition lacks merit and is **dismissed** at the admission stage.

(2024) 9 ILRA 959
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matter Under Article 227 No. 4278 of 2024

Ram Shiromani Pandey & Anr.

...Petitioners

Versus

Manoj Tiwari @ Manoj Brahmchari & Anr.

...Respondents

Counsel for the Petitioners:

Saurabh Srivastava, Girish Chandra Sinha

the learned Standing Counsel for the State of U.P.

Counsel for the Respondents:

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Civil Law - The Constitution of India, 1950-Article 227-The Code of Civil Procedure, 1908-Sections 91 & 92 - The Religious Endowments Act, 1863-Section 2-

Admission is a matter between the plaintiff and the Court and the defendants have no right to oppose admission of a suit- Suit under Section 92 C.P.C. can be filed in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature- Court cannot refuse to admit the suit only because of absence of a trust-deed- Suit under Section 92 C.P.C. and Section 2 of the Religious Endowments Act, 1863 in the St. of Uttar Pradesh can only be filed in the Court of the Principal Civil Court of original jurisdiction, that is the Court of the District Judge, and not in any other Court-Liberty granted to file a fresh suit in the Principal Civil Court of original jurisdiction in the District, i.e. the Court of the District Judge. **(Para 14, 16, 29 & 33)**

Petition allowed. (E-15)

List of Cases cited:

1. Janki Prasad Vs Kuber Singh: AIR 1963 All 187 = 1962 SCC OnLine All 174

2. Muhammad Ali Khan Vs Ahmad Ali Khan: AIR 1945 All 261

3. Vinod Kumar Vs DM, Mau: AIR 2023 SC 3335 = 2023 SCC OnLine SC 787

4. Gangadeen Vs Kanhaiya Lal, AIR 1972 All 355

5. Sita Ram Das & ors. Vs Ram Chandra Arora & ors.: 1988 (14) ALR 86 = 1988 AWC 124 All

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

1. Heard Sri Girish Chandra Sinha Advocate, the learned Counsel for the petitioner and Sri Hemant Kumar Pandey,

2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioners have challenged validity of an order dated 13.08.2024 passed by the learned Civil Judge (Senior Division), Pratapgarh in Miscellaneous Case No.160 of 2024, whereby a suit for declaration and perpetual injunction filed under Sections 91 and 92 CPC has been dismissed at the admission stage as not maintainable.

3. The plaintiffs – petitioners filed the aforesaid suit against (1) Manoj Tiwari and (2) 'The Public-at-Large', praying that 'Sachcha Baba Ashram' situated at village Barachha, Majra Ranjeetpur Chilibila, Tahsil Sadar, District Pratapgarh, be declared to be a Religious Public Endowment, a Committee be formed and Rules be framed for its management. The petitioners pleaded that Late Mahabir Pandey, the father of the plaintiff no. 1, was instrumental in setting up the Ashram, whose Grand-father Late Ganga Prasad Pandey had given his land for stay of saints and pilgrims. A saint who was commonly called as 'Mauni Baba' came around the year 1948 and stayed there for quite a long period. Mauni Baba had several disciples, including one Smt. Shanti Davi daughter of Ram Naresh Singh, who was a resident of a neighboring village Narayanpur. After death of Mauni Baba, his Samadhi was made near his Kuti (Hut), which is called Sachcha Baba Ashram. Accepting a request made by Smt. Shanti Devi, Sri. Mahabir Pandey had executed an Izazatnama (Licence deed) dated 24.05.1958 permitting use of his bhumidhari land bearing Gata No. 1330 measuring 11 Biswa, alongwith a well, kuti and other constructions. Smt.

Shanti Devi died in the year 1993 and the Ashram became uncared for and abandoned. After the plaintiff no. 1 retired from Government Service, he constructed a temple from the year 2003 to 2014 after donating his land adjacent to the land of Sachcha Ashram and he appointed the defendant no. 1 Manoj Tiwari as a salaried priest in the temple. Later on Manoj Tiwari unauthorizedly constructed a residence for himself and he indulges in activities not commensurate with the position of a priest.

4. Admission is a matter between the plaintiff and the Court and the defendants have no right to oppose admission of a suit, yet the Civil Judge entertained objections of the defendants at the admission stage of the suit.

5. The opposite party no.1 stated in his objections that the plaintiff is neither the trustee nor a beneficiary of the trust and, therefore, he cannot file a suit under Section 92 of the Civil Procedure Code as no cause of action has accrued to him and he has no locus standi. It was further stated in the objections that the Civil Court has no jurisdiction over the suit.

6. The defendant no.2 impleaded in the suit was 'The Public-at-Large', and a copy of the plaint was served to the District Government Counsel on behalf of the Public-at-Large. The learned District Government Counsel filed objections on behalf of the State government stating that the State Government and Nagarpalika, Belha had not been made parties to the suit and the suit suffered from non-joinder of necessary parties.

7. The trial Court recorded that the plaintiff has filed the suit for a decree of declaration and perpetual injunction but

neither he has filed any trust-deed nor does the plaint disclose the identity of the trustees or the Manager of the trust. No Bye-laws/Rules of the trust have been filed and there is no pleading regarding any public charities being administered by the property in dispute. Therefore, the Civil Judge came to a conclusion that the relief sought by the plaintiff does not fall within the purview of Sections 91 and 92 C.P.C. and dismissed the suit as not maintainable at the admission stage.

8. As the suit has been dismissed at the admission stage and the defendants have no right to be heard at this stage, this petition is being decided finally without issuing notice to the private opposite party, who has been arrayed as the defendant no. 1 in the plaint.

9. Assailing the validity of the aforesaid order, the learned counsel for the petitioner has submitted that a suit for administration of any temple/religious institution can be filed by any worshipper under Sections 14 and 15 of the Religious Endowments Act and existence of any trust-deed is not essential for admission of the suit.

10. The learned counsel for the petitioner has submitted that Sachcha Ashram exists on the land which had been donated by the petitioner's father and the petitioner being amongst the founders of the Ashram and its worshippers are entitled to file the suit.

11. Sub-sections (1) and (2) of Section 92 C.P.C., as it applies to the State of U.P., provide as follows :-

“92. Public charities.—(1)
In the case of any alleged breach of

any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the Court, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(a) removing any trustee;

(b) appointing a new trustee;

(bb) for delivery of possession of any trust property against a person who has ceased to be trustee or has been removed.

(c) vesting any property in a trustee;

(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (20 of 1863), or by any corresponding law in force in the territories which, immediately before the 1st November, 1956, were comprised in Part B States, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

(3)..."

(Emphasis added)

12. Section 2 of the Religious Endowments Act, 1863 contains the definition clause, which contains a solitary definition of the phrase 'Civil Court'. It provides that: -

"In this Act, the words "Civil Court" and "Court" shall save as provided in Section 10 mean the principal Court of original civil jurisdiction in the district in which or any other Court empowered in that behalf by the State Government within the local limits of the jurisdiction of which the mosque, temple or religious establishment is situate, relating to which, or to the endowment whereof, any suit shall be instituted or application made under the provisions of this Act."

13. The phrase 'Religious endowments' is not defined in the Religious

Endowments Act, 1863. Section 14, 15 and 18 of the Act of 1863 are also relevant for the present dispute, which provide that: -

“14. Persons interested may singly sue in case of breach of trust, etc.—Any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the trustee, manager or superintendent of such mosque, temple or religious establishment or the member of any committee appointed under this Act, for any misfeasance, breach of trust or neglect of duty, committed by such trustee, manager, superintendent or member of such committee, in respect of this trusts vested in, or confided to, them respectively;

Powers of Civil Court.—and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent or member of a committee,

and may decree damages and costs against such trustee, manager, superintendent or member of a committee,

and may also direct the removal of such trustee, manager, superintendent or member of a committee.

15. Nature of interest entitling person to sue.—The interest required in order to entitle a person to sue under the last preceding section need not be a

pecuniary, or a direct or immediate, interest or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts.

Any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section.

* * *

18. Application for leave to institute suits.—No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit.

The Court, on the perusal of the application, shall determine whether there are sufficient prima facie grounds for the institution of a suit, and, if in the judgment of the Court there are such grounds, leave shall be given for its institution.

Costs.—If the Court shall be of opinion that the suit has been for the benefit of the trust, and that no party to the suit is in fault, the Court may order the costs or such portion as it may consider just to be paid out of the estate.”

14. A combined reading of the aforesaid statutory provisions makes it manifest that a Suit under Section 92 C.P.C. can be filed in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable

or religious nature. The section includes constructive trusts created for public purposes of a religious nature also.

15. In **Janki Prasad v. Kuber Singh**: AIR 1963 All 187 = 1962 SCC OnLine All 174, this Court held that: -

“8. ...The mere absence of a written document or mere absence of the entries is not a conclusive proof of the non-existence of a trust. A valid trust may be created not only by means of a written document but also orally but what is required in the case of oral trust is that the property must have been treated to be an endowed property and it must have been used towards charitable and religious purposes for which the trust was created.”

16. Therefore, the Court cannot refuse to admit the suit only because of absence of a trust-deed. The section includes any alleged breach of any constructive trust created for public purposes of a religious nature and, therefore, admission of the suit cannot be denied on the ground of absence of charitable purpose, if the plaintiff claims that the constructive trust has been created for religious purposes.

17. Therefore, this Court is of the considered view that the learned trial Court has committed a patent illegality in dismissing the suit at the admission stage for the reasons that the plaintiff has not filed any trust-deed, the plaint does not disclose the identity of the trustees or the Manager of the trust, no Bye-laws/Rules of the trust have been filed and there is no pleading regarding public charities being

administered by the property in dispute and the relief sought by the plaintiff does not fall within the purview of Sections 91 and 92 C.P.C.

18. However, the suit could not have been admitted by the Civil Judge for a different reason. Section 92 C.P.C. and Section 2 of the Religious Endowments Act, 1863 provide that a suit under this provision can be filed “in the Principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government”, which phrase does not include a “Civil Judge”.

19. Section 3 (17) of the General Clauses Act provides as under:—

“District Judge” shall mean the Judge of a Principal Civil Court of Original Jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.”

20. Section 2 (4) of C.P.C. provides that: -

“(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”

21. Section 3 of the Bengal, Agra and Assam Civil Courts Act, 1887 provides for the following classes of Courts: -

“3. Classes of Courts.—
There shall be the following classes

of Civil Courts under this Act, namely:—

(1) the Court of the District Judge;

(2) the Court of the Additional Judge;

(3) the Court of the Subordinate Judge; and

(4) the Court of the Munsif.”

22. Section 18 of the aforesaid Act of 1887 provides that: -

“18. Extent of original jurisdiction of District or Subordinate Judge.—Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of Section 15 of the Code of Civil Procedure, to all original suits for the time being cognizable by Civil Courts.”

23. In **Muhammad Ali Khan versus Ahmad Ali Khan**: AIR 1945 All 261, a Full Bench of this Court had held that the decisions of various High Courts in India appear to establish that the District Judge as a principal civil court of original jurisdiction has power of nominating a *mutwalli* upon an application, in a summary manner, but the removal of a *mutwalli* can only be done by means of a suit properly instituted in the civil court. If the *waqf* be of a public, religious or charitable nature the suit would lie either under sections 14 and 18 of the Religious Endowments-Act of 1863 or under section 92 of the Civil Procedure Code. If, however, the *waqf* be of a private nature, e.g. a *waqf alal-aulad*, the proper remedy

would appear to be a regular civil suit under the general provisions of section 9 of the Civil Procedure Code.

24. In **Vinod Kumar versus DM, Mau**: AIR 2023 SC 3335 = 2023 SCC OnLine SC 787, while considering the provisions of Section 3-H (4) of the National Highways Authority Act, 1956 which provides that: “(4) If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the principal civil court of original jurisdiction within the limits of whose jurisdiction the land is situated.” The Hon’ble Supreme Court held that:

“We are of the view that when it comes to resolving the dispute relating to apportionment of the amount determined towards compensation, it is only the Principal Civil Court of original jurisdiction which can do so. Principal Civil Court means the Court of the District Judge.”

25. In **Gangadeen versus Kanhaiya Lal**, AIR 1972 All 355, this Court has held that the phrase “Principal Civil Court of original jurisdiction” used in Section 92 C.P.C. and Section 2 of the Religious Endowments Act, 1863, will include the District Judge and the Additional District Judges and the same view has been reiterated in **Ashok Kumar Jain versus Gaurav Jain**: (2018) 140 RD 579.

26. There is no room to doubt that the Court of the District Judge is the Principal Court in the District and it has

original jurisdiction. Therefore, the Court of District Judge is the Principal Civil Court of original jurisdiction. Judicial powers of an Additional District Judge are the same as that of a District Judge and, therefore, the District Judge can transfer a suit filed before him in the capacity of 'the Principal Civil Court of original jurisdiction' to an Additional District Judge. A Civil Judge is not the Principal Civil Court of original jurisdiction and has no jurisdiction to entertain a suit under Section 92 C.P.C. or Section 2 of the Religious Endowments Act, 1863 as 'the Principal Civil Court of original jurisdiction'.

27. Apart from 'the Principal Civil Court of original jurisdiction' a suit under Section 92 C.P.C. and Section 2 of the Religious Endowments Act, 1863 can also be filed 'in any other Court empowered in that behalf by the State Government'.

28. In spite of the hearing of the case having been adjourned to enable the learned Counsel for the petitioner and the learned Standing Counsel to inform the Court as to whether the State Government has empowered the Civil Judge or any other Court to entertain suits under Section 92 C.P.C. and Section 2 of the Religious Endowments Act, 1863, they could not place any material showing that any Court, other than the Principal Civil Court of original jurisdiction has been empowered by the State Government to entertain such suits.

29. Therefore, this Court is of considered view that a Suit under Section 92 C.P.C. and Section 2 of the Religious Endowments Act, 1863 in the State of Uttar Pradesh can only be filed in the Court of the Principal Civil Court of original jurisdiction, that is the Court of the District

Judge, and not in any other Court. The District Judge can decide the Suit himself or he may transfer it to an Additional District Judge.

30. As per the provisions contained in Section 92 C.P.C. and Section 18 of the Religious Endowments Act, 1863, a suit as aforesaid can only be filed in the Principal Civil Court of original jurisdiction after seeking leave of the Court.

31. In **Sita Ram Das and Ors. Vs. Ram Chandra Arora and Ors.**: 1988 (14) ALR 86 = 1988 AWC 124 All, this Court held that: -

"There can not be any doubt that when the court grants leave the same is in a judicial proceeding and the order passed by the District Judge is a judicial order. However, while granting leave the rights of the parties are not adjudicated and at this stage the court has merely to see whether there is a prima facie case that should be allowed to be filed. By giving consent the court does not affect the rights of the parties against whom the suit is filed as after granting of the leave the parties will have an opportunity to present their case before the Court in which the suit is filed. As at the time of granting the leave the District Judge will have to see only a prima facie case the conclusion of the District Judge will in no way affect or influence the final decision which will be given in the suit after the parties had led evidence. So far as Section 92 Code of Civil Procedure is concerned, it does not contemplate of giving any

notice to the proposed defendants before granting the leave.”I

32. In view of the foregoing discussion, this Court is of the considered view that the reasons given by the Civil Judge has no jurisdiction to entertain a suit filed under Section 92 C.P.C. or under the provisions of the Religious Endowment Act, 1863 and, therefore, the observations made by the Civil Judge in the impugned order dated 13.08.2024 are without jurisdiction.

33. Accordingly, the petition is allowed. The observations made by the Civil Judge regarding admissibility of the suit in the impugned order dated 13.08.2024 passed in Miscellaneous Case No.160 of 2024 having been made without jurisdiction, are set aside. The petitioner is granted a liberty to file a fresh suit in the Principal Civil Court of original jurisdiction in the District, i.e. the Court of the District Judge, Pratapgarh, after seeking leave of the Court and the District Judge shall proceed with the same in accordance with the law, keeping in view the observations made in this order. It is clarified that any observation made in this order will not affect the decision of the merits of the claims of rival parties.

(2024) 9 ILRA 967

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 20.09.2024

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Application U/S 482 No. 600 of 2020

**Dr. Rajesh Singh & Anr. ...Applicants
Versus**

State of U.P. & Anr.

...Respondents

Counsel for the Applicants:

Ajeet Kumar Singh, Vijendra Kumar Rai

Counsel for the Respondents:

Bhagwan Singh Yadav, G.A.

A. Criminal Law - Criminal Procedure Code, 1973 - Section 173 - Summoning - After receipt of the police report u/s 173, the Magistrate has three options: (1) he may decide that there are no sufficient grounds for proceeding further and drop action; (2) he may take cognizance of the offence u/s 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusions arrived at by the police in their report; (3) he may take cognizance of the offence u/s 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses U/s 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter, he may dismiss the complaint or issue process, as the case may be - Even in a case where the final report of the police U/s 173 is accepted and the accused persons are discharged, the Magistrate has the power to take cognizance of the offence on a complaint or a Protest Petition based on the same or similar allegations, even after the acceptance of the final report - Reasons: To take cognizance and summon after a final report requires reasons, either to accept it or reject it, and to take cognizance and summon, or instead to direct further investigation or treat it as a complainant case.

B. In this case, the Chief Judicial Magistrate has not provided substantial reasons for rejecting the outcome of the final report. The reasons for rejecting the entire investigation, which was conducted by the police and the Special Investigation Team, along with the Scientific Investigation, were missing in the impugned order. The Chief Judicial Magistrate pointed out various

shortcomings in the investigation. If he was not satisfied with the investigation, he should have either directed a further investigation or treated the protest petition as a complaint.

Allowed. (E-5)

List of Cases cited:

1. Rakesh & anr. Vs St. of U. P. & anr. (2014) 13 SCC 133;
2. Zunaid Vs St. of U.P. AIR 2023 SC 4550;
3. Selvi & ors. Vs St. of Karn., (2010) 7 SCC 263.

(Delivered by Hon'ble Saurabh Shyam
Shamshery, J.)

1. Heard Sri Ajeet Kumar Singh, learned counsel for Applicants, Sri Bhagwan Singh Yadav, learned counsel for Opposite Party No.2/Complainant/informant and Sri Om Prakash Mishra, learned Additional Government Advocate.

FACTUAL MATRIX

2. Applicants are Doctor Couple. Applicant no.1 is a Surgeon, whereas applicant no.2 is a Gynecologist. They are practising at their hospital namely Singh Life Care Hospital Ltd, Rajepur, District-Ghazipur.

3. Complainant (Anandi Singh Yadav) lodged an First Information Report on 19.4.2015 at 10.30 hours, under Sections 147, 302, 323, 395 and 504 I.P.C. alleging that an occurrence took place in the night of 18/19.4.2015 at said hospital wherein applicants along with unknown persons have allegedly caused death of his son. Contents of complaint mentioned in FIR is reproduced hereinafter:-

“प्रार्थी आनन्दी सिंह यादव पुत्र स्व० कान्ता सिंह यादव निवासी ग्रा०पो० पकड़ी थाना रेवतीपुर जिला गाजीपुर का मूल निवासी हूँ हम प्रार्थी ने अपनी पत्नी सुदामी देवी को दिनांक 14.04.2015 को शाम लगभग 4 बजे सिंह हास्पिटल जमानियों रोड गाजीपुर में भर्ती कराया था। लगभग करीब 8 बजे रात्री को मेरी पत्नी का आंत का आपरेशन हुआ उसके बाद उसका दवा इलाज चल रहा था और पानी चढ़ रहा था दिनांक 18.04.2015 को रात्रि में लगभग 12-1.00 बजे बोटल का पानी खत्म हो गया तो वहां बैठे मेरी पुत्री बसन्ती देवी मेरा भतीजा संदीप व मेरा पुत्र राजेश यादव उर्फ अनूप जो अपने माँ का देख भाल कर रहा था वह डा० राजेश सिंह को बुलाने गया। तब वही पर डा० राजेश सिंह व उनकी पत्नी डा० अनुपमा सिंह ने मेरे लड़के को गाली गलौज देते हुए जान से मारने की नीयत से उसे मारपीट रहे थे तब आवाज सुनकर मेरी पुत्री बसन्ती देवी व भतीजा संदीप दौड़ करके गये तो देखा कि डा० पति पत्नी व उनके तीन स्टाप कमरों के अन्दर मारपीट रहे थे इतना मारे कि उसकी मौके पर ही मृत्यु हो गयी उसके बाद मेरे भाई राजेश यादव के पास 50000 रु० था उसे भी छीन लिये है उसके बाद हमको भी मारे पीटे तथा गाली गलौज किये। “

4. Post mortem of deceased was conducted on 19.4.2015 at about 4.30 P.M. whereupon 24 Ante Mortem injuries were found and it was opined that cause of death was ‘Coma and Haemorrhagic shock as a result of Ante-Mortem Injuries’. For reference Ante-Mortem Injuries’ are mentioned hereinafter:

“Antemortem Injuries:-

1. LACERATED WOUND
4 CM X 1 CM X BONE DEEP
OVER RIGHT SIDE OF HEAD, 4
CM ABOVE RIGHT EAR
OPENING, AFTER DISSECTION
RIGHT FRONTAL & PARIETAL
BONE ARE FRACTURED.

2. LACERATED WOUND
9 CM X 5 CM X BONE DEEP
AROUND RIGHT EAR WITH

AVULSION OF RIGHT EAR
PINNA.

3. ABRADED
CONTUSION 16 CM X 5 CM
OVER RIGHT SIDE OF FACE,
EXTENDING FROM FORE-
HEAD TO FRONT OF RIGHT
EAR.

4. ABRASION 5 CM X 3
CM OVER NECK, JUST BELOW
INJURY NO.-2.

5. LACERATED WOUND
5 CM X 6 CM X BONE DEEP
AROUND LEFT EAR WITH
AVULSION OF LEFT EAR
PINNA.

6. ABRADED
CONTUSION 7.5CM X 3 CM
OVER JUST MEDIAL TO
INJURY NO-5.

7. ABRADED
CONTUSION 2 CM X 1 CM
OVER RIGHT SIDE OF CHIN.

8. ABRADED
CONTUSION 2.5 CM X 1 CM
OVER LEFT SIDE OF CHIN.

9. ABRADED
CONTUSION 9 CM X 4.6 CM
OVER FRONT OF RIGHT
SHOULDER AND ABRASION
2.4CM X 1 CM OVER BACK OF
RIGHT SHOULDER.

10. ABRADED
CONTUSION 3 CM X 1.5 CM AT
UPPER END OF
XIPHISTERNUM.

11. ABRADED
CONTUSION 6 CM X 2.3 CM
OVER TOP OF LEFT
SHOULDER.

12. MULTIPLE
ABRASIONS MARKS IN AREA
OF 8 CM X 6 CM OVER
DORSAL ASPECT OF LEFT
PALM.

13. ABRASION 6 CM X
4.5 CM OVER POSTERIOR
ASPECT OF LUMBER REGION.
11 CM BELOW LEFT LOWER
END OF SCAPULA.

14. ABRASION 5 CM X
4.2 CM OVER POSTERIOR
ASPECT OF RIGHT ELBOW
JOINT.

15. ABRASION 19.5 CM
X 9.3 CM OVER RIGHT
SCAPULAR REGION.

16. ABRASION 8 CM X 4
CM OVER RIGHT SIDE OF
BACK, 3 CM BELOW &
ANTERIOR TO INJURY NO.-15.

17. ABRASION 17 CM X
6.2 CM OVER RIGHT LOWER
BACK, 8 CM ABOVE &
POSTERIOR TO RIGHT
ANTERIOR SUPERIOR ILIAC
SPINE.

18. ABRADED
CONTUSION 8 CM X 5 CM
OVER DORSAL ASPECT OF
RIGHT PALM INCLUDING
RIGHT INDEX FINGER.

19. MULTIPLE
ABRADED CONTUSION IN
AREA OF 7 CM X 5 CM OVER
POSTERIOR ASPECT OF LEFT
ELBOW JOINT INCLUDING
UPPER END OF LEFT FORE-
ARM.

20. ABRASION 4 CM X
3.4 CM OVER POSTERIOR
ASPECT OF LEFT ELBOW
JOINT.

21. ABRASION 2.6 CM X
1.5 CM JUST BELOW RIGHT
PATELA.

22. LACERATED
WOUND 1.5 CM X 1 CM X
MUSCLE DEEP OVER LEFT

LEG, 4 CM BELOW LEFT PATELA.

23. CRUSHED INJURY 23 CM X 6.5 CM OVER MEDIAL ASPECT OF LEFT FOOT, UNDERLYING BONE EXPOSED.

24. ABRASION 2 CM X 1 CM OVER DORSAL ASPECT OF RIGHT FOOT, 1 CM BELOW SECOND TOE."

5. On basis of referred F.I.R., investigation was conducted. Investigating Officer recorded statement of the complainant (Anandi Singh Yadav) and alleged witnesses Basanti Devi (daughter of complainant) and Sandeep Yadav (nephew of complainant). Anandi Singh Yadav and Basanti Devi have recorded similar version as recorded in F.I.R. and claimed that they were eye witnesses to occurrence. Sandeep Yadav has also claimed to be an eye witness, but his version was different to other alleged eye witness (Anandi Singh Yadav and Basanti Devi) that there was a struggle between deceased and attendants of a patient who was being attended by Doctor and Hospital's staff at the hospital at relevant time. Staff of Hospital intervened and forced deceased to go outside the gate of hospital, where he met with a road accident near the hospital and died. His dead body was found on stretcher at hospital. Statement of Sandeep Yadav is reproduced hereinafter:

“बयान संदीप यादव पुत्र स्व० बच्चन निवासी पकड़ी थाना रेवतीपुर जनपद गाजीपुर से पूछने पर बता रहे हैं कि हमारी चाची सुदामी देवी दिनांक 14.4.15 को उपचार हेतु भर्ती हुई थी सिंह लाइफ केयर हास्पिटल जमनिया मोड़ में उसी दिन उसके आंत का आपरेशन हुआ था तथा हमारी बहन संगीता यादव भी अस्पताल में भर्ती थी हमारे चाची का दवा इलाज चल रहा था तथा पानी चढ़ रहा था दिनांक 18.4.15

की रात्रि हमारी चाची को चढ़ रहा पानी का बोतल समय करीब 1 बजे रात्रि खत्म हो गया हमारा चचेरा भाई राजेश यादव उर्फ अनूप डाक्टर को बुलाने गया तभी रात्रि में प्रमिला नामक रोगी अस्पताल में आई जिसे डाक्टर व अस्पताल के कर्मचारी मिलकर कमरा नं० 202 में शिफ्ट कराये तभी प्रमिला के परिजन से हमारे भाई का कहासुनी व लड़ाई झगड़ा व हाथापाई हो गई तथा अस्पताल के कर्मचारी (1) राम शक्ति प्रजापति पुत्र तेल्हू राम प्रजापति निवासी गौरा पी०एस० सुहवल जनपद गाजीपुर (2) शबिर जमील पुत्र अशिफ जमील निवासी अन्धऊ थाना कोतवाली गाजीपुर (3) अन्जुम अंसारी पुत्र मन्जूर अली निवासी गौरा बाजार थाना कोतवाली गाजीपुर स्थाई पता सुखपुरा थाना शेखपुरा जनपद बलिया मौजूद थे लड़ाई झगड़ा व शोर शराबा मैं तथा मेरी चचेरी बसन्ती देवी बाहर निकले तो देखा कि हमारे भाई राजेश यादव उर्फ अनूप को अस्पताल के तीनों कर्मचारी मिलकर गाली गलौज करते हुए धक्का देते हुए अस्पताल के गेट से बाहर कर दिये मैं तथा मेरी बहन बसन्ती माँ के पास ऊपर चले आये थोड़ी देर बाद समय करीब 2.30 बजे अस्पताल के नीचे से शोर हुआ कि एक आदमी का एक्सीडेंट हो गया है जिस पर मैं नीचे उतरकर देखा तो हमारे चचेरे भाई राजेश यादव उर्फ अनूप का शव सड़क की दूसरी पट्टी पर पड़ा था तथा काफी खून बहा था तभी हमारे भाई को स्ट्रेचर पर शव लादकर अस्पताल पर परिसर में लाया गया जहाँ अस्पताल के कर्मचारी ने देखकर बताया कि मृत्यु हो गई है। जिसकी सूचना हमारी बहन बसन्ती द्वारा जरिये मोबाइल चाच श्री आनन्दी सिंह यादव को दी गई थोड़ी देर बाद मौके पर पुलिस आ गई तथा शव को जिला अस्पताल अपने साथ ले गये।

6. During investigation, the Investigation Officer has also recorded statements of staff of the hospital. Statement of Smt. Chinta Devi, a cleaner working at the hospital was recorded. Statement of Gandhi Singh was also recorded, who was at hospital for treatment of his relative. Similarly, statement of Arvind Yadav was also recorded who was also present at the hospital for treatment of his wife. Their statements are reproduced hereafter:

"बयान गवाह श्रीमती चिन्ता देवी पत्नी गुड्डू निवासिनी कबुतरी पी०एस० नोनहरा जिला गाजीपुर से घटना के सम्बन्ध में पूछने पर बता रही है कि साहब मैं सिंह केयर हास्पिटल अस्पताल में झाड़ू पोछा का काम निरन्तर करती रहती हूँ शाम 7.00 से सुबह 8.00 बजे तक जब नया मरीज अस्पताल में रात्रि के समय आया जिनका नाम नहीं जानती हूँ उसके साथ दो आदमी थे मैंने बोला कि उसकी सहायता करके उसको ऊपर चढ़ा तो ऊपर जाने पर जैसे ही उसके रूम के अन्दर ले जाया गया वैसे मृतक राजेश यादव उर्फ अनूप यादव सामने वाला रूम से दौड़कर आया और मरीज और उसके परिजन मारपीट करने लगा तब मैंने नये मरीज के परिजन से कहा कि आप लोग कैसा मरीज लेकर आये है जिसमें झगड़ा झंझट हो रहा है इतने में मृतक राजेश यादव उर्फ अनूप यादव ने.....को लात से मार दिया और उसे लात से दबाने का प्रयास किया मैंने विरोध किया तो उसने मेरा भी झोटा (बाल) पकड़ लिया और थप्पड़ से मारा तब मैंने चिल्लाई मेरी आवाज सुनकर अस्पताल के स्टाफ आये और मृतक राजेश यादव उर्फ अनूप यादव को पकड़ कर नीचे हाल में टी०बी० वाला हाल में बैठा दिये वहाँ भी मृतक काफी हल्ला गुल्ला करने लगा जिसके कारण सभी लोग परेशान हो गये हास्पिटल के लोग कहने लगे कि वह परेशान कर रहा है इसे बाहर बैठाओ तभी अस्पताल के स्टाफ मृतक के परिजन के सहयोग से अस्पताल के बाहर कैन्टीन में तख्त पर बैठा दिये कुछ देर तक लेटा रहा फिर जगा बोला कि मेरी माँ से भेट करा दो मृतक की माँ का अस्पताल में आपरेशन हुआ था उस वक्त मृतक के साथ शायद उसकी भाभी व बहनोई थे जब भेट करने के लिए वहाँ उपस्थित लोग उसे ले गये तो मृतक अपने बहनोई को भी गाली गुप्ता देने लगा बहनोई उसके व्यवहार को देखकर डर गया और कुछ दूर पर खड़ा हो गया कुछ समय बाद मृतक शान्त हुआ और अचानक सबको झटकते हुए खड़ा होकर टहलने लगा और तेज गति से टहलते हुए अस्पताल के सामने स्थित मुख्य मार्ग पर घूमने लगा तभी उत्तर की दिशा से एक ट्रक वाला ट्रक लेकर आया और धक्का मार दिया ट्रक वाला मृतक को बचाने का काफी प्रयास किया धक्का मारते देख मौजूद लोग दौड़कर मृतक के पास पहुँचे जहाँ पर सड़क के पास मृतक मरा पड़ा था। उठाकर लेकर अस्पताल के ठीक सामने पेड़ के पास स्ट्रैचर पर लाकर मृतक को रखा गया जो बाते थी मैंने आपको साहब बता दिया यही मेरा बयान है।

प्रश्न- विवेचक क्या सिंह अस्पताल के डाक्टर व स्टाफ द्वारा राजेश यादव के पैसा छीना गया था।

उत्तर- गवाह — नहीं पैसा नहीं छीना गया था।

प्रश्न- विवेचक — क्या मृतक राजेश यादव उर्फ अनूप के साथ मारपीट करने में आरोपी डा० राजेश सिंह व डा० अनुपमा सिंह थी।

उत्तर- गवाह नहीं, नहीं साहब उस वक्त तो डाक्टर साहब लोग अपने कमरे में सो रहे थे।

प्रश्न- विवेचक- जब घटना प्रारम्भ हुआ उस समय क्या समय था।

उत्तर- गवाह- साहब दिनांक 18.04.15 की रात्रि की घटना है समय मैं नहीं देख पाई थी अन्दाजा लग रहा था कि 2.30 बज रहा होगा।

प्रश्न- विवेचक- जिस समय नया मरीज आया था और मृतक राजेश यादव उर्फ अनूप यादव झगड़ा कर रहा था उस वक्त आपने अस्पताल के स्टाफ के कौन कौन आये थे।

उत्तर- गवाह साहब जब मैं अस्पताल में चिल्लाई तो अस्पताल के स्टाफ राम शक्ति प्रजापति, शबीर जमील व अब्दुल अन्सारी आयी और मृतक के साथ अन्त तक रहे।"

"बयान गवाह-गाँधी सिंह पुत्र अजीब सिंह निवासी ताड़ीघाट थाना सुहवल जिला गाजीपुर उम्र 27 वर्ष से बदरियाप्त घटना का खुलासा करते हुए बता रहा है कि साहब मैं अपनी भाभी देवन्ती देवी को लेकर दि० 16.4.15 से सिंह अस्पताल गाजीपुर में भर्ती हूँ दिनांक 18.4.15 को रात्रि में मैं अस्पताल में मौजूद था अस्पताल में व अस्पताल के सामने प्रकाश की व्यवस्था काफी अच्छी थी रात्रि में करीब दो बजे के ऊपर अस्पताल में मृतक राजेश यादव उर्फ अनूप यादव काफी जोर-2 से शोर कर रहा था क्या बोल रहा था कि मेरा कोई नहीं है मेरा कोई नहीं है ऊपर से दौड़कर नीचे हाल में गया और पुनः हाल से ऊपर आया और तेज तेज आवाज में गाली गुप्ता किसी को दे रहा था तभी स्टाफ के कर्मचारी रामशक्ति प्रजापति, शब्बीर, जमील, अब्दुल अन्सारी व मृतक के परिवार के भाई बहनोई आकर मृतक के ऊपर से नीचे ले आये वहाँ कुर्सी पर बैठाया गया लेकिन मृतक वहाँ भी हल्ला गुल्ला कर रहा था जिसके कारण अस्पताल के लोग परेशान हो रहे थे तब मृतक को सभी लोग पकड़कर अस्पताल के

बाहर केन्टीन में ले गये जहाँ तख्ता पर बैठाया गया। मृतक कुछ देर तक शान्त रहा फिर अचानक उठकर झटके से अपने को छोड़कर अस्पताल के सामने तेज गति से टहलने लगा टहलते हुए अस्पताल के सामने मुख्य रोड पर चला गया। तभी उत्तर की तरफ से आ रही ट्रक ने धक्का मार दिया और मृतक सड़क की दूसरी पटरी पर गिर गया। सब लोग चिल्लाने लगे और हम लोग मृतक को उठाकर अस्पताल के सामने स्थित पेड़ के नीचे स्ट्रैचर पर रखे उस समय मृतक की मृत्यु हो चुकी थी मृतक को जिस ट्रक ने धक्का मारा वह काफी सामान लदा था और 10 टायरा ट्रक थी मैं शुरू से लेकर अन्त तक मौके पर रहा हूँ मैं घटना का चरमदीद गवाह हूँ, जो बाते थी मैंने आपको बता दिया यही मेरा बयान है।

प्रश्न- विवेचक-क्या मृतक राजेश यादव को विश्वस्वरूप लाल के डाक्टर राजेश सिंह व अनुपमा सिंह ने मारापीटा था।

उत्तर- गवाह, नहीं साहब ये लोग मौके पर नहीं थे इन लोगों द्वारा मारपीट की बात झूठी है।

प्रश्न- विवेचक-क्या अस्पताल के कर्मचारियों ने मृतक को मारा पीटा था।

उत्तर- गवाह- साहब रामशक्ति प्रजापति, शबीर जमील, अब्दुल अन्सारी ने मृतक को पकड़ा था मृतक को शान्त कराने के लिए इन लोगों ने डाटा फटकारा था।

प्रश्न- विवेचक-क्या डा० व स्टाफ द्वारा मृतक राजेश यादव से पैसा छीना गया था।

उत्तर- गवाह, नहीं पैसा नहीं छीना गया था।

बयान गवाह अरविन्द यादव पुत्र राजेन्द्र सिंह यादव निवासी खिदराबाद पी०एस० कोतवाली गाजीपुर से बदरियापुत करने पर बता रहे हैं कि साहब मेरी औरत मंजू यादव की तबियत खराब थी मैंने अपनी औरत को सिंह अस्पताल जमीनिया मोड़ पी०एस० कोतवाली गाजीपुर में भर्ती किया था मैं दि० 18.4.15 को रात्रि में अस्पताल में ही था तो मैंने देखा कि अस्पताल में चिल्लाहट हो रही थी मौके पर हाल में जाकर देखा तो मृतक राजेश यादव उर्फ अनूप यादव को अस्पताल के स्टाफ राम शक्ति प्रजापति, शबीर जमील, अब्दुल अन्सारी व मृतक के परिजन मृतक को कुर्सी पर बैठाये हैं। और मृतक जोर जोर से चिल्ला रहा था तभी सभी लोग मृतक को अस्पताल से बाहर केन्टीन में ले जाकर बैठाये कुछ देर में पता चला

कि मृतक राजेश यादव का एक्सीडेंट हो गया। जो बात थी मैंने आपको बता दिया, यही मेरा बयान है।

प्रश्न विवेचक- मृतक राजेश यादव उर्फ अनूप यादव का एक्सीडेंट कहाँ हुआ।

उत्तर गवाह- साहब सिंह अस्पताल के सामने मुख्य सड़क पर हुआ।

प्रश्न विवेचक- जब एक्सीडेंट की घटना हुई उस समय क्या समय रहा होगा।

उत्तर गवाह- करीब 3 बजे रात्रि का समय था।”

7. Investigating Officer also recorded statements of Doctors who have conducted postmortem of deceased and their statements are also reproduced hereinafter;

“बयान डाक्टर-डा० कमलेश कुमार भास्कर पुत्र श्री नन्द लाल राम निवासी बों पी०एस० फूलपुर जनपद वाराणसी हाल पता सदर अस्पताल गाजीपुर से पूछने पर बता रहे हैं कि दिनांक 19.4.15 को मृतक राजेश यादव उर्फ अनूप यादव पुत्र आनन्दी सिंह यादव निवासी पकड़ी पी०एस० रेवतीपुर गाजीपुर का पोस्टमार्टम का सदस्य था जो मृतक का पी०एम० नं० 176/15 है। मैंने तीन डाक्टर के पैनल से जो मेरे साथ डॉ० पंकज कुमार पी०एच०सी० सादात गाजीपुर व डा० उमेश कुमार पी०एच०सी० मोहम्मदाबाद गाजीपुर थे हम डाक्टरों के पैनल से मृतक उपरोक्त का पोस्टमार्टम दि० 19.4.15 को 15.50 पर प्रारम्भ किया गया और समाप्त 16.30 पर हुआ मृतक के शरीर पर कुल 24 चोटें पाई गई सभी चोटों Ante Mortem Injuries थी यह चोटों इस तरह की है वाहन दुर्घटना में ज्यादा सम्भावित है। मृत्यु का कारण Coma एवं रक्तस्राव पाया गया मृत्यु का समय पूछने पर बताया कि पोस्टमार्टम के समय शरीर पर अकडन मौजूद थी जो पूरे 12 घंटे में शरीर में होती है तथा अगले 12 घण्टे तक मौजूद रहती है। निश्चित समय नहीं बताया जा सकता है। मृत्यु करीब एक के अन्दर का था इस प्रकार डाक्टर कमलेश कुमार भास्कर ने अपना बयान दर्ज कराया जो अंकित किया गया।

बयान डाक्टर - उमेश कुमार चिकित्साधिकारी सा०स्वा० केन्द्र जनपद गाजीपुर पुल

श्री रामनन्द प्रसाद में दिनांक 19.4.15 को मेरी ड्यूटी सदर अस्पताल गाजीपुर में पी०एम० लगी थी तीन डाक्टरों के पैनल से मृतक राजेश यादव उर्फ अनूप यादव पुत्र आनन्दी सिंह यादव के पोस्टमार्टम में था। मृतक के शरीर पर कुल 24 चोटें थी जिसका पी०एम० नं० 176/15 मृतक के शरीर पर चोटें किसी दुर्घटना वाहन की सम्भावना है। शरीर पर लगी चोटें Ante-mortem थी मृत्यु का कारण कौमा और हेमरेजिक शोक था मौत का समय करीब एक दिन के अन्दर का था मैं तथा डाक्टर कमलेश कुमार भास्कर व डाक्टर पंकज कुमार मेडिकल आफिसर सादात सहित गये रिपोर्ट तैयार किया गया। यही मेरा बयान है।

बयान डाक्टर -पंकज कुमार मेडिकल आफिसर पी०एम० सादात जनपद गाजीपुर से पूछने पर बता रहे हैं कि दिनांक 19.4.15 को मेरी ड्यूटी डा० के०के० भास्कर व डा० उमेश कुमार के साथ मृतक राजेश यादव उर्फ अनूप यादव के पोस्टमार्टम हेतु ड्यूटी स्थ० थी हम तीनों डाक्टरों के पैनल से मृतक राजेश यादव उर्फ अनूप यादव का पी०एम० रिपोर्ट तैयार किया गया था। मृतक के शरीर पर कुल 24 चोटें थी जिसका पी०एम० नं० 176/15 मृतक के शरीर पर सभी चोटें Ante Mortem थी मौत का कारण कौमा हेमरेजिक शोक था मौत का समय करीब एक दिन के अन्दर का था। हम सभी डाक्टरों जिसकी पी०एम० रिपोर्ट तैयार किया गया है। पी०एम० रिपोर्ट पर मेरे हस्ताक्षर हैं यही मेरा बयान है।”

8. During investigation, a report of Sanyukt Nideshak Rajya Chikitsa Vidhi Visheshagya, Uttar Pradesh dated 24.4.2015 was also taken on record and same is reproduced hereinafter:

“कृपया अपने पत्र सं० वाचक/पु०अ०-10/2015 जिस पर आपके हस्ताक्षर के नीचे 21.04.15 तिथि अंकित है जबकि पत्र के ऊपर फरवरी 08 2015 लिखा हुआ है, का संदर्भ ग्रहण करें जिसमें मृतक राजेश यादव पुत्र आनन्दी यादव की मृत्यु के सम्बन्ध में बिन्दुवार विशेषज्ञ राय की अपेक्षा की गयी है। संलग्न प्रपत्रों तथा फोटोग्राफ का मेरे द्वारा सम्यक अध्ययन किया गया तथा प्रेषित वीडियो सी०डी० को बारीकी से देखा गया है।

पोस्टमार्टम रिपोर्ट में कुल 24 चोटें वर्णित हैं जिनमें से 19 चोटें Abrasion/Abraded contusion (रगड़ा एवं छिला हुआ घाव / नीलगू निशान के साथ रगड़ा एवं छिला हुआ घाव) है, कुल 04 Laceration (फटा हुआ घाव) है तथा 01 (चोट सं० 23) Crushed Injury (कुचला हुआ घाव) वर्णित है। सारी की सारी चोटें मृत्यु पूर्व की आयी हुई हैं। विधि विज्ञान प्रयोगशाला, महानगर, लखनऊ से वस्त्रों की जांच रिपोर्ट सं० 80-PHY-2015 दिनांकित: 23.04.2015 आज दिनांक 24.04.15 को पैरोकार सिपाही द्वारा उपलब्ध करा दिया गया है। विधि विज्ञान प्रयोगशाला द्वारा जांच रिपोर्ट में कुल 04 अदद वस्त्रों का विचरण है जबकि पोस्टमार्टम रिपोर्ट में केवल 03 वस्त्रों का ही बंडल बनाये जाने का उल्लेख है।

विधि विज्ञान प्रयोगशाला, महानगर, लखनऊ की जांच रिपोर्ट में प्रदर्श P-1 से चिह्नित वस्त्र जो कि मृतक की पैन्ट है पर पीछे के भाग पर तथा आगे दोनों पैरों वाले भागों पर घुटने के आस-पास मिट्टी जैसे रगड़ के चिन्हों की उपस्थिति का दृष्टिगोचर होना लिखा गया है।

आप द्वारा वांछित बिन्दुवार अभिमत निम्नवत है-

बिन्दु सं० 1- प्रथम दृष्टया पोस्टमार्टम रिपोर्ट में वर्णित चोटें किसी तेज गति वाहन की चपेट में आकर कुचले जाने एवं रगड़ खाने के फलस्वरूप आयी हुई प्रतीत होती है।

बिन्दु सं० 2- क्योंकि पोस्टमार्टम रिपोर्ट में वर्णित सारी चोटें antemortem है अतः मृत्यु के पश्चात सड़क पर फेंके जाने से उपरोक्त चोटें आने की संभावना नहीं है।

बिन्दु सं० 3- दुर्घटना के पूर्व मारे पीटे जाने के विषय में स्पष्ट अभिमत दे पाना संभव नहीं है उसके लिए परिस्थितिजन्य साक्ष्यों, गवाहों के बयानों इत्यादि के आधार पर विवेचना करना न्याय संगत होगा।”

9. During investigation, some orders were passed by learned Chief Judicial Magistrate, Ghazipur therefore, the Superintendent of Police, Ghazipur vide order dated 16.5.2015 constituted a

‘Special Investigation Team’ (SIT), comprising of four officers. Said order is reproduced hereinafter:

"आदेश

थाना कोतवाली पर पंजीकृत मु०अ०स०
429/15 धारा 147, 302, 323, 504, 395
भादवि की विवेचना हेतु जांच दल (एस०आई०टी०)
गठित की जाती है। जिसके सदस्य निम्नवत होंगे-

1- श्री श्रीप्रकाश दुबे प्रभारी निरीक्षक
कोतवाली गाजीपुर।

2- उ०नि० श्री राजेश त्रिपाठी थाना
कोतवाली गाजीपुर।

3- उ०नि० श्री प्रकाश त्रिपाठी थाना
कोतवाली गाजीपुर।

4- श्री विवेक कुमार वैज्ञानिक फील्ड
यूनिट पुलिस लाइन गाजीपुर।

प्रभारी निरीक्षक कोतवाली उपरोक्त
अभियोग के मुख्य विवेचक होंगे एवं अन्य 02
उपनिरीक्षक सहायक विवेचक होंगे। दोनो सहायक
विवेचक अपने अपने रोजनामचा खास किता कर मुख्य
विवेचक को प्रेषित करेंगे। मुख्य विवेचक अपने
रोजनामचा खास में सहायक विवेचक द्वारा किता किये
गये रोजनामचा खास का विवरण भी लिखेंगे। तत्पश्चात
रोजनामचा खास क्षेत्राधिकारी नगर को प्रेषित की
जायेगी। श्री विवेक कुमार वैज्ञानिक फील्ड युनिट
विवेचना में सहयोग प्रदान करेंगे।

पुलिस अधीक्षक
गाजीपुर। "

10. Subsequently, the Special Investigation Team took over the investigation and recorded mazid statement of above referred complainant and witnesses. During investigation, some questions were also asked from witnesses being loosely termed as cross-examination. Statements recorded by Special Investigation Team are as follows:-

मजीद बयान/पूछताछ वादी श्री आनन्दी
सिंह यादव पुत्र श्री कान्ता यादव:-

मैं गोरखपुर में जल निगम में फील्ड कर्मी हूँ मेरी पत्नी श्रीमती सुरामी देवी के आतों का आपरेशन होना था जिसको 14.4.15 में सिंह हास्पिटल जमानिया रोड आपरेशन पर भर्ती कराया मैं दिनांक 16.4.15 को अस्पताल आया था जहां बैंक आफ बड़ोदरा से निकाले गये 25 हजार रुपये व अपने पास से 15 हजार रूपया अर्थात कुल 40 हजार रुपये अपने लडके राजेश यादव को दिये जिसमें 14 हजार रुपये फीस के रूप में जमा किये लगभग एक से डेढ़ हजार रुपये प्रतिदिन का खर्चा था मेरी पुत्री बसन्ती ने 18/19.4.15 की रात साढ़े तीन चार बजे के आस पास बताया कि डा० राजेश व डा० अनुपमा और उनके स्टाफ द्वारा मेरे लडके राजेश यादव को ग्लूकोज की बोतल चढ़ाने के नाम पर गाली गलोज देकर मारपीट कर मार डाले यह घटना मेरी लडकी बसन्ती व भतीजा संदीप के सामने हुई और हमको भी मारे और लाश बाहर फेंक दी और उसके पास से 50 हजार रुपये छीन लिये इस सूचना पर मैं अपने गांव पकड़ी से कुछ लोगों के साथ एक चार पहिया गाड़ी से सिंह हास्पिटल के पास आया जहां मेरे लडके राजेश की लाश अस्पताल के बाहर स्ट्रेचर पर रखी थी यही मेरा बयान है।

पूछ तांछ - वादी मुकदमा से मुकदमें के विषय में निम्न प्रश्न किये जा रहे हैं-

प्रश्न- क्या घटना के समय आप स्वयं मौजूद थे?

उत्तर- नहीं मैं लडकी बसन्ती के फोन करने पर आया।

प्रश्न- क्या आपने अपने सामने मारपीट होते देखी या पैसा छीनने की घटना देखी?

उत्तर- नहीं मैं मोके पर था ही नहीं इसलिये मैंने कोई घटना नहीं देखी जैसा कि लडकी बसन्ती ने बताया वही लिखवाया।

प्रश्न' क्या आप अस्पताल में कही खून बिखरा हुआ देखे थे।

उत्तर- नहीं

प्रश्न- आप की लडकी बसन्ती ने यह सूचना किस प्रकार दी थी।

उत्तर- मेरी लडकी बसन्ती ने घटना की सूचना मुझे मोबाइल के माध्यम से दी थी।

प्रतिपरीक्षण (क्रास इक्जामिनेशन)

प्रश्न- प्रथम सूचना सूचना रिपोर्ट के अवलोकन से प्रतीत होता है कि आपके सामने यह घटना घटी है। मगर आप द्वारा यह बताया गया है कि आप मौके पर मौजूद नहीं थे फिर भी इतने स्पष्ट घटना का विवरण प्रथम सूचना रिपोर्ट में कैसे आया।

उत्तर- मेरी बड़की बसन्ती ने जो बताया वही मैंने लिखवा दिया।

प्रश्न- आप से किसी ने मारपीट की

उत्तर-नहीं मुझसे किसी ने मारपीट नहीं की।

प्रश्न- आप ने अपने बयान में कुल 40 हजार रूपयों का ब्यौरा दिया है जिसमें 14 हजार रूपये आपरेशन की फीस जमा हो गयी थी तथा प्रति दिन के एक से डेढ हजार रूपये खर्चा कुल पांच से सात हजार खर्च की बात बताई। इस प्रकार लगभग 20 हजार रूपया तो खर्च हो गया 20 हजार रूपया बचा फिर आपने प्रथम सूचना रिपोर्ट में 50 हजार रूपये छीनने की बात क्यों लिखा है।

उत्तर- लड़की की तलाशी लेने पर उसके पास पैसे नहीं थे इसलिये मुझको लगा कि इन लोगों ने पैसे छीन लिये होंगे इस आशंका पर मैंने पैसा छीनने वाली बात लिखाई थी।

प्रश्न- मगर आपने तो 50 हजार रूपये छीनने की बात बताई है जबकि 50 हजार रूपये थे ही नहीं जैसा आप ने बताया रूपये तो 40 हजार ही थे।

उत्तर- हाँ मैंने लिखवा दिया था।

प्रश्न- आपने बताया मौके पर आकर उपर अपनी पत्नी के कमरे तक गये थे और बसन्ती के अनुसार एक कमरे में बन्द करके राजेश यादव को मारपीट कर मार डाला तो फिर कहीं खून के निशान होने चाहिये मगर आप बता रहे है कि खून अस्पताल में कहीं नहीं दिखा ऐसा कैसे हुआ?

उत्तर- हाँ हमें खून कहीं नहीं दिखा।

प्रश्न- बसन्ती ने किस चीज से अभिगण द्वारा राजेश को मारपीट करना बताया।

उत्तर- राड और सरिया से मारना बताया।

मजीद बयान/पूछताछ चश्मदीद साक्षी

श्रीमती बसन्ती देवी:-

दिनांक 18.04.15 को रात्रि में अपनी माँ सुदामी देवी की देखभाल के लिए सिंह हास्पिटल में थी। मेरी चचेरी बहन संगीता देवी भी आपरेशन के लिए इसी अस्पताल में और उसकी कमरा नं० 210 में मौजूद थी

उस रात अपने कमरे में मैं स्वयं मेरा भाई राजेश यादव व संगीता का पति श्रीरामपाल, संगीता की माँ मंजू देवी व दोनों मरीज, सुदामी देवी व संगीता सो रहे थे, मेरा चचेरा भाई संदीप नीचे वाले तल्ले पर टी०वी० वाले हाल में बेंच पर सो रहा था, रात करीब 1 बजे मेरी माँ की ग्लूकोज की बोतल खत्म हो गयी थी, जिसको बदलवाने के लिए मैं वही नजदीक बैठे कम्पाउंडर से कहने गई थी, जब वह नहीं आया तो थोड़ी देर बाद मेरा भाई राजेश यादव उसे बुलाने गया, वहाँ राजेश से गाली गलौज व मारपीट होने लगा शोर सुनकर मैं बाहर गई तो डाक्टर राजेश व अनुपमा समेत 9 लोग मेरे भाई को हाँथ से मार पीट रहे थे, मेरे मना करने पर मुझे भी मारा व धक्का दे दिया, जिससे मैं सीढ़ियों से नीचे गिर गयी और गश खा गई। तब वह लोग राजेश को पकड़कर नीचे वाले कमरे में ले ग, और दरवाजा बन्द कर लिए मैं अपनी माँ के कमरे में चली आयी कुछ देर बाद मैं फिर नीचे गई तो गेट की तरफ से आते हुए एक स्टाफ ने बताया कि राजेश का एक्सीडेंट हो गया, मैंने देखा तो उसकी लाश बाहर स्ट्रेचर पर पेड़ के नीचे रखी थी।

पूँछ-ताछ :- चश्मदीद साक्षी से घटना के सम्बन्ध में निम्न प्रश्न पूछे जा रहे है।

प्रश्न- राजेश यादव को कितने लोग मारपीट कर रहे थे?

उत्तर- 9 लोग मारपीट रहे थे।

प्रश्न- जब आप ग्लूकोज की बोतल चढ़वाने के लिए कहने गयी थी तो वहाँ कितने लोग मौजूद थे?

उत्तर-देर रात्रि का समय था। अकेला कम्पाउंडर मौजूद था।

प्रश्न- राजेश यादव आपसे कितनी देर बाद बोतल बदलवाने की बात करने गया था?

उत्तर- बस थोड़ी ही देर बाद गया था।

प्रश्न- 9 लोगों में क्या डा० राजेश व डा० अनुपमा सिंह भी थी, तथा किस चीज से मारपीट हो रही थी?

उत्तर- डा० राजेश पति, पत्नी थे, व कुल मिलाकर 9 लोग थे जिसमें 06 लोग मुँह बाँधे हुए थे, फिर बताया कि डा० राजेश व अनुपमा को नहीं पहचानती हूँ। फिर बताया कि वह दोनों नहीं थे, यह भी बताया कि सब लोग हाँथों से मार रहे थे व गाली दे रहे थे।

प्रश्न- आपको धक्का देकर इन 9 लोगों ने सीढ़ी से नीचे गिरा दिया तो क्या आपको कोई चोट नहीं आयी ?

उत्तर- नहीं मुझे चोट नहीं आयी।

प्रश्न- क्या किसी को पैसे छीनते हुए जो राजेश के पास थे आपने देखा ?

उत्तर- मैंने नहीं देखा। चूँकि उनके पास पैसे नहीं मिले इसलिए बात बताई थी।

प्रश्न- जिस कमरे में राजेश को बन्द करके 9 लोगों द्वारा मारा जा रहा था, स्वयं आपके मुताबिक उसे वही पर मार दिया गया, तो क्या कमरे

से बाहर कोई शोर शराबा या आवाजे आ रही थी ?

उत्तर- नहीं कोई आवाज नहीं आ रही थी।

प्रश्न- आप का भाई संदीप यादव वही पास में लेटा था, उसको क्या आपने जगाया था, ऊपर जाकर अपने बहनोई राम पाल को ये बातें बताई थी ?

उत्तर-मैंने संदीप को नहीं जगाया। तथा, ऊपर जाकर राम पाल को बताया तो वो रो रहा था वो नीचे नहीं गया।

रश्न- जब आप दुबारा नीचे गयी तो क्या कहीं फर्श पर या कमरों में कोई खून के निशान या लाठी, सरिया, डंडा मौजूद मिले ?

उत्तर- नहीं कोई खून का निशान लाठी, डंडा या सरिया नहीं मिला।

प्रश्न- आपको किसने बताया कि राजेश का एक्सीडेंट हो गया ?

उत्तर- मुझे एक स्टाफ ने बताया था। मैं उसे जानती नहीं हूँ।

प्रश्न- क्या जहाँ एक्सीडेंट के बाद राजेश की लाश सड़क पर थी वह जगह आप ने देखी ?

उत्तर- हाँ वह जगह देखी।

प्रश्न- आपने अपने पिता को फोन कर क्या बताया ?

उत्तर-मैंने बताया था कि डाक्टर वगैरह ने राजेश यादव को कमरे में बन्द कर दिया था।

उपरोक्त प्रश्नोत्तर व बयानों में कुछ भिन्नता होने के कारण प्रति परीक्षण किया जा रहा है।

प्रतिपरीक्षण (Cross examination)

प्रश्न- जब आप कम्पाउन्डर को बोतल बदवाने के लिए बुलाने गई थी तब कम्पाउन्डर अकेला था, थोड़ी देर बाद जब राजेश यादव बोतल बदलने के लिए बुलाने गया तो वहाँ पर आपके मुताबिक 9 लोग मौजूद थे, अचानक और 8 लोग कहाँ से आ गये ?

उत्तर- मुझे नहीं पता मगर 9 लोग थे जिसमें 06 लोग मुँह बाँधे थे।

प्रश्न- रात्रि में 01 बजे कोई लोग मुँह क्यों बाँधे थे ?

उत्तर- मुझे नहीं पता, मगर 06 लोग मुँह बाँधे थे।

प्रश्न- आप ने बताया कि डा० राजेश सिंह वहाँ पर मारपीट में अपनी पत्नी के साथ मौजूद थे। फिर बताया कि पहचानती नहीं हूँ, फिर बताया कि वह दोनों पति-पत्नी नहीं थे। सही क्या है ?

उत्तर- सही यह है कि डा० राजेश व उनकी पत्नी वहाँ नहीं थे।

प्रश्न- आपने बताया कि मार पीट करने वालों ने आपको भी मारा पीटा व धक्का देकर सीढ़ी से नीचे गिरा दिया, फिर आपको चोट क्यों नहीं

आयी है ?

उत्तर- नहीं मालूम चुप रही।

प्रश्न- यदि 09 लोग किसी व्यक्ति को कमरे में बन्द कर मारे-पीटेगे तो अन्दर का शोर बाहर क्यों नहीं सुनाई देगा ?

उत्तर- मैं वहीं सीढ़ियों से ऊपर चली आयी थी, इसलिए शोर नहीं सुना।

प्रश्न- आपका भाई संदीप नीचे, राजेश यादव को बन्द किये जाने वाले कमरे के पास में सोया था, बताने के लिए उसे क्यों नहीं जगाया ?

उत्तर- खामोश रही।

प्रश्न- आप सीढ़ियों से ऊपर अपने कमरे में आयी, वहाँ आपका बहनोई राम पाल व उसकी चाची मंजू भी मौजूद थी उन्हें लेकर राजेश को बचाने क्यों नहीं गई ?

उत्तर- मैं उनको लेकर बचाने नहीं गई। राम पाल खुद रो रहा था।

प्रश्न- रामपाल क्यों रो रहा था ?

उत्तर- पता नहीं।

प्रश्न- आपने अपने पिता को कमरे में राजेश यादव को बन्द करने की बात बताई? जबकि आपके पिता का कथन है कि आपने उसको लाठी, सरिया व डंडा से मार मार कर मार डालने की बात बताई? सही क्या है?

उत्तर- मैंने अपने पिता को कमरे में बन्द करने की बात बताई थी वह पता नहीं कैसे कह रहे हैं कि सरिया लाठी डंडे से राजेश यादव को मार डालने की बात मैंने बताई है।

मजीद बयान/पूछताछ चश्मदीद साक्षी श्री संदीप कुमार यादव पुत्र स्व० शिववचन सिंह यादव:- मैं राजेश यादव के चाचा का लड़का हूँ मेरी सगी बहन संगीता पत्नी रामपाल निवासी मोहम्मदपुर लतीफ उर्फ उत्तमपुर थाना करीमुद्दीनपुर जनपद गाजीपुर का सिंह हास्पिटल में दिनांक 17.04.15 को ऑपरेशन से बच्चा पैदा हुआ था, तथा उसी कमरा नं० 210 में जहाँ पर मेरी चाची सुदामी देवी भर्ती थी, मेरी बहन भी उसी कमरे में मौजूद थी। 18/19.04.15 की रात में खाना-पीना के बाद राजेश, बसन्ती, मेरी माँ, मंजू देवी व बहनोई रामपाल, दोनों मरीजो सुदामी देवी व संगीता के साथ ऊपर कमरा नं० 210 में सोये थे मैं नीचे टी०वी० वाले हाल में बेंच पर सो गया था, रात में बसन्ती देवी के रोने की आवाज सुनकर मैं अचानक जगा तो सीधे ऊपर अपनी बहन के पास जाकर उसका हाल लिया तुरन्त नीचे आया तो गेट के सामने बसन्ती ने रोते-रोते बाहर की ओर इशारा किया तो मैंने देखा कि मेरे चचेरे भाई राजेश यादव का शव खून से लथपथ स्ट्रेचर पर रखा हुआ था, मैं देखकर बेहोश हो गया उसके बाद मुझे कुछ नहीं मालूम मुझे जब होश आया तब मैं अपने घर गाँव पकड़ी में था। मुझे घटना के बारे में कोई जानकारी नहीं है। मेरे सामने किसी तरह की कोई मारपीट गाली गलौज पैसा छीनने जैसी घटना नहीं हुई न ही कोई शोर शराबा नहीं सुना राजेश कैसे मारा यह मुझे नहीं पता राजेश यादव की लाश मैंने सड़क पर नहीं स्ट्रेचर पर देखा, डा० राजेश व अनुपमा सिंह को मैं नहीं जानता इसके अलावा मैंने कुछ भी नहीं देखा।

पूछ-ताछ :- प्रथम सूचना रिपोर्ट के अनुसार चश्मदीद साक्षी से निम्न प्रश्न पूछे जा रहे हैं।

प्रश्न- क्या आपने किसी को मारपीट करते देखा था?

उत्तर- नहीं मैंने किसी को मारपीट करते नहीं देखा था।

प्रश्न- क्या आपने राजेश यादव को किसी के द्वारा कमरे में बन्द कर मारपीट करते हुए देखा था?

उत्तर- नहीं, मैंने किसी को राजेश से मारपीट करते हुए नहीं देखा था क्योंकि मैं उस समय सो रहा था।

प्रश्न- जहाँ पर आप सोये थे उसी के सामने कमरे में राजेश को बन्द करके मारने पीटने एवं गाली गलौज करने की घटना बसन्ती द्वारा बतायी जा रही है? क्या आपने ऐसी घटना देखी या शोर सुना है?

उत्तर- नहीं, मैंने ऐसी कोई घटना, न तो देखी और न सुनी है।

प्रश्न- जब आपने राजेश यादव का शव देखा तो शव कहाँ था?

उत्तर- मैंने राजेश यादव का शव कैन्टीन के पास पेड़ के नीचे स्ट्रेचर पर देखा था। मैं शव देखते ही बेहोश हो गया था, इसके अलावा मैं कुछ नहीं जानता।

प्रति परीक्षण (Cross Examination)

प्रश्न- प्रथम सूचना रिपोर्ट के अवलोकन से यह प्रतीत होता है कि आपके सामने यह घटना हुई है? परन्तु आप द्वारा घटना की जानकारी होने से इंकार किया जा रहा है?

उत्तर- चूँकि मैं खाना खाने के बाद नीचे टी०वी० वाले हाल में आकर बेन्च पर लेटकर सो गया था, मुझे किसी प्रकार की मार-पीट, गाली-गलौज व शोर शराबा नहीं सुनाई पड़ा।

प्रश्न- क्या आप डा० राजेश सिंह व डा० अनुपमा सिंह को जानते पहचानते हैं। उनके द्वारा मारपीट करते हुए देखा है?

उत्तर- नहीं मैंने डाक्टर व डाक्टरनी को नहीं पहचानता न ही मैंने डा० राजेश व डा० अनुपमा सिंह को मारपीट गाली गलौज करते हुए देखा है।

प्रश्न- जहाँ आप सोये थे आपको किसी प्रकार के झगड़ा झंझट का आभास हुआ था।

उत्तर- नहीं मुझे इस प्रकार का कोई आभास नहीं हुआ था।

प्रश्न- आपको राजेश की मृत्यु के बारे में कब और कैसे जानकारी हुई?

उत्तर- बसन्ती के रोने की आवाज सुनकर मेरी नींद खुली उस समय रात के लगभग ढाई, तीन बजे थे, सबसे पहले मैं ऊपर जाकर अपनी बहन संगीता का हाल जाना वहाँ सब ठीक पाने पर सीढ़ियों से नीचे आया तो बसन्ती बाहर की ओर इशारा करके राजेश के शव को दिखाया था। मैं शव देखकर बेहोश हो गया, मैं कुछ नहीं जानता।

प्रश्न- जगने के बाद जब आप सीढ़ियों से ऊपर गये और अपनी बहन संगीता को देखने के उपरान्त वापस आये तो कहीं पर खून के निशान दिखाई पड़े।

उत्तर- नहीं।"

11. The SIT also recorded statements of Smt. Chinta Devi (Cleaner at hospital), Ram Dular (attendant of a patient), Ram Kumar Yadav (Guard at Hospital) and Dr. Majharuddin working at the Hospital. Their statements are mentioned hereinafter:-

"मजीद बयान साक्षी मौका- श्रीमती

चिन्ता देवी पत्नी गुड्डू नि० कहोतरी याना पिरनो जनपद गाजीपुर ने बदरियाफ्त मजीद पूछ तांछ में बताया कि मैं सिंह हास्पिटल में दायी का काम करती हूँ तथा झाड़ू पोंछा लगाती हूँ दिनांक 18.4.15 की रात्रि में इमर्जेंसी में एक मरीज आया था उसके साथ दो तीन आदमी और एक लेडीज थी उनको उपर 202 नम्बर के कमरे में शिफ्ट करना था कमरे में स्ट्रेचर से लाने के लिये गार्ड कुवर व मेरे साथ उसके घर के लोग थे जब उस मरीज को स्ट्रेचर से बेड पर शिफ्ट करना था तब राजेश अचानक अन्दर आ गया और उक्त मरीज के अटेन्डेन्ट को थप्पड़ मारे और मुझे भी मारा तब राजेश की बहन माँ और बहनोई उसको पकड़ कर कमरे के बाहर ले गये साथ में स्टाफ के लोग शाबिर भी ये नीचे तक ले गये वहाँ से फिर उनको झटक कर राजेश उपर आ गया और हमारे साथ कौन है कौन है बार बार चिल्ला रहा था शोर शराबा करने लगा व मारपीट पर आमादा था तब स्टाफ के अन्सारी शक्ति शाबिर व उसके घर वाले उसको पकड़ कर टी०वी० वाले हाल में ले गये वहाँ डाक्टर मजहर भी थे ज्यादा शोर करने के कारण उसको गेट के बाहर कैन्टीन पड़ी चौकी/तख्ता पर बैठा दिया उसने अपने बहनोई को भी एक आध थप्पड़ मारा था गेट के बाहर उसका बहनोई भाभी व चाची

तथा मैं मौजूद थी एक दो लोग और थे मैं नहीं जानती बार बार राजेश चिल्ला रहा था कौन है हमारे साथ हमारे साथ कोई नहीं है इसी दौरान उसका भाई पानी पीने चला गया था बहनोई थोड़ा दूर था राजेश उठकर टहलने लगा और गेट तक पहुंच गया वहाँ से तेजी से सड़क पर गया सोहवल के तरफ से एक ट्रक आ रहा था उसको देखकर राजेश हाथ उठा उठा कर साले रूक जाओ साले रूक जाओ की तब तक घर वाले या कोई पास में आये तब तक ट्रक से उसका एक्सीडेंट हो गया फिर उसको सभी लोग स्ट्रेचर पर लादकर अस्पताल के बाहर पेड़ के नीचे सड़क की तरफ सिर करके लिटा दिये। राजेश रोज रात को नहीं रूकता था। इतने दिनों में एक दिन और रूके हुए देखा था घटना वाली रात उसकी बहन बार बार कह रही थी कि मेरे भाई को क्या हो गया है जहाँ तक ग्लूकोज के बोतल भी खत्म होने की बात है तो वह नहीं हुई थी क्योंकि कुछ ही देर पहले मैंने मरीज से हाल चाल पूछा था और बोतल भरी देखी थी जब वह चिल्ला रहा था उसके मुँह से शराब की कुछ महक भी आ रही थी। डाक्टर राजेश व डा० अनुपमा सिंह एक्सीडेंट होने के बाद खबर देने पर नीचे आये अस्पताल के अन्दर किसी ने कोई मारपीट या लड़ाई झगड़ा नहीं किया।

पूछताछ- मौके की साक्षी से निम्न प्रश्न किये जा रहे हैं-

प्रश्न- मृतक की बहन बसन्ती यह कह रही है कि ग्लूकोज की बोतल बदलने को लेकर विवाद हुआ था और राजेश से अस्पताल के स्टाफ द्वारा मारपीट की गयी?

उत्तर- यह बात गलत है कि रात में अस्पताल में जिस स्टाफ की डियुटी लगती है ग्लूकोज का बोतल सही समय से बदलने की जिम्मेदारी होती है। मैंने देखा था ग्लूकोज की बोतल नहीं खाली हुआ था न ही किसी स्टाफ ने राजेश से मारपीट की थी।

प्रश्न- जब राजेश उपर जोर जोर से शोर मचा कर हल्ला कर रहा था तब अस्पताल के स्टाफ केबिन किन लोगों द्वारा उसे नीचे लाया गया था?

उत्तर- राजेश जब शोर शराबा व हंगामा कर रहा था तब उसकी बहन व परिवार के लोग यह कह रहे थे कि इसे बचा लो नहीं तो कूद जायेगा जिस पर उसका बहनोई भाई एवं अन्य मरीजों के साथ आये लोगों द्वारा अस्पताल के स्टाफ के अन्सारी शक्ति शाबिर द्वारा टी०वी० वाले हाल में ले जाया गया किन्तु वह मान नहीं रहा था बार बार चिल्ला कर शोर शराबा मचा रहा था जिस पर डाक्टर मजहर ने उसे गेट से बाहर करने को

कहा या जिस पर उसके भाई बहनोई चाची व एक दो लोग और ले जाकर कैटीन में चौकी पर बैठा दिये थे।

प्रश्न- क्या आपने राजेश का ट्रक से एक्सीडेंट होते हुये देखा था?

उत्तर- हां ट्रक सोहवल की तरफ से आ रहा था तथा सड़क की बायीं पटरी पर राजेश का टक्कर लगने से एक्सीडेंट हो गया था।

प्रश्न- क्या आपने ट्रक का नम्बर देखा था?

उत्तर- हम लोग दौड़े लेकिन नहीं देख पाये।

प्रश्न- क्या राजेश यादव के साथ अस्पताल स्टाफ द्वारा मारपीट व गाली गलौज की घटना की गयी थी।

उत्तर- नहीं राजेश के साथ आफिस अस्पताल स्टाफ द्वारा मारपीट गाली गलौज की घटना नहीं की गयी थी। डा० राजेश व अनुपमा सिंह एक्सीडेंट के बाद नीचे आये।

प्रश्न- मृतक राजेन्द्र यादव को पकड़कर कैन्टीन में ले जाने वाले कौन कौन थे?

उत्तर- मृतक की बहन के कहने पर उसका भाई चाची बहनोई एवं अस्पताल के आप मरीजों के अटेन्डेन्ट जिनमें गांधी एवं अन्य जनता के लोग थे।

प्रश्न- जब हाथा पाई हुई तो डाक्टर डाक्टरनी कहा थे?

उत्तर- जब हाथा पाई हुई तो डाक्टर डाक्टरनी उपर अपने आवास पर थे। उन्हें तीन बजे मालूम हुआ बनारस गये थे इसलिये सो गये कान्ड के बाद डाक्टर नीचे आये।

बयान साक्षी- श्री राम दुलार बिन्दु पुत्र केरा बिन्दु नि० ग्राम सकरा थाना कोतवाली गाजीपुर ने बदरियाफ्त पूछने पर बताया कि दिनांक 18.4.15 को रात्रि में अपने भाभी प्रमिला को सिंह हास्पिटल में दिखने ले गया था जहां उनको एडमिट कराया था कमरा में मरीज को लाने पर एक आदमी अन्दर आया था व धक्का मुक्की करने लगा जिसको उसके घर के लोग व एक दो और लोग ने पकड़ कर बाहर ले गये थे उसके बाद मैं अपने मरीज के पास ही रहा मैंने कोई घटना नहीं देखी। मैंने अपना कमरा बंद कर लिया था। मेरी मां प्यारी देवी भी मेरे साथ थी।

पूछताछ साक्षी राम दुलार से दिनांक 18/19.4.15 की रात के घटना के सम्बंध में निम्न प्रश्न किये जा रहे हैं-

प्रश्न- आप 18/19.4.15 की रात में अपनी भाभी को कितने बजे सिंह हास्पिटल भर्ती करने को लेकर आये थे?

उत्तर- मैं अपनी भाभी को रात 12 बजे रात के मध्य सिंह अस्पताल में इलाज हेतु लाया था।

प्रश्न- क्या आपने अस्पताल में शोर शराबा या मारपीट की घटना सुनी या देखी थी ?

उत्तर- मेरी भाभी परमिला को जब रूम में बेड पर लिटाया जा रहा था तभी एक आदमी कमरे के अन्दर आया था और धक्का मुक्की करने लगा था। जिसे उसके घर परिवार वालों ने एवं एक दो और लोग थे जो पकड़कर बाहर ले गये थे।

प्रश्न- क्या आप के सामने मारपीट या रूपये छीनने की घटना हुई थी?

उत्तर- नहीं यह बात गलत है।

प्रतिपरीक्षण (कास इक्जामिनेशन)-

प्रश्न- जब अपनी भाभी परमिला को हास्पिटल में भर्ती कराने ले आये थे तो उस समय आपकी मां कहा थी?

उत्तर- मेरी मां भी मेरे साथ ही मौजूद थी।

प्रश्न- क्या धक्का मुक्की आपकी मां के सामने हुआ था ?

उत्तर- हां जिस व्यक्ति ने धक्का मुक्की की थी उसे उसके परिवार वाले मेरी मां के सामने पकड़ कर बाहर ले गये थे।”

बयान साक्षी मौका- श्री राम कुवर

यादव पुत्र राम अधार यादव- निवासी ग्राम सोहवल थाना कोतवाली जनपद गाजीपुर मो० नं० 96716564340 ने बदरियाफ्त पूछ तांछ पर बताया रहे है कि मैं सिंह हास्पिटल में लगभग ढाई वर्ष से गार्ड की नौकरी करता हूं 3800 रुपये मुझे यहां से मिलता है घटना दिनांक 18/19.4.15 की रात्रि लगभग 2.00 बजे की है। इमरजेन्सी में एक मरीज आयी उसे 202 नं० कमरे में शिफ्ट करने हेतु चिन्ता देवी के साथ मैं भी गया था वह बेड मरीजों के लिये लगा रही थी इसी दौरान एक लड़का कौन हमारे साथ है बार बार बोल रहा था उसे पकड़ कर तमाम लोग जिनमें उसकी चाची बहन बहनोई भाई व अटेन्डेन्ट नीचे लाये जिनको झटका देकर वह फिर अन्दर तीसरी मंजिल पर चला गया फिर दूसरी मंजिल पर आया और शोर करने लगा उसके बहन व बहनोई कह रहे थे कि इसको पकड़ लो

दिमाग खराब हो गया है हम लोगों को भी मारा है बवाल कर देगा छत से कूद जायेगा तब उसको पकड़ कर शाबिर शक्ति अब्दुल अन्सारी मैं व उसके घर के लोग नीचे ले आये नीचे भी वहां शोर कर रहा था तो डाक्टर ने कहा इसे गेट के बाहर बैठा दो इस पर उसको गेट के बाहर कैन्टीन के पास पड़ी चौकी पर बैठा दिया गया। बाकी मरीजों के अटेन्डेन्ट बाहर आ गये थे वह चौकी पर बार बार हाथ मार रहा था और हमारे साथ कौन है हमारा कोई नहीं है यह कहकर चिल्ला रहा था। डाक्टर मजहर ने कहा कि सब लोग अन्दर आ जाओ तो राजेश के चाची बहनोई भाई चिन्ता देवी व ताड़ीघाट का एक अटेन्डेन्ट को छोड़कर बाकी सभी लोग अन्दर आ गये और दरवाजा बन्द कर लिये। कुछ देर बाद अब्दुल ने मुझे बताया कि चलो बाहर एक्सीडेंट हो गया है। उस समय हम टी०वी० वाले हाल में थे फिर बाहर आकर अब्दुल शक्ति व अन्य लोगों के साथ उसकी लाश को स्ट्रेचर पर सिंह हास्पिटल के सामने रख दिया। डा० राजेश सिंह के बुलाया तब वह नीचे आये मृतक के साथ मारपीट छिनैती या इस तरह की बात नहीं हुई थी। वह दिमागी रूप से कुछ पेशान था।।

पूछ तांछ- मौके के साक्षी से निम्नांकित

प्रश्न किये जा रहे हैं-

प्रश्न- जब आप इमरजेन्सी मरीज को लेकर शिफ्ट करने के लिये उपर कमरा नं० 202 में गये थे उस समय 202 के कमरे में कौन कौन लोग मौजूद थे?

उत्तर- उस समय उस कमरे में मरीज जो बेहोशी हालत में थी। उसका देवर उसकी सास चिन्ता देवी मैं गया कुछ मरीजों के अटेन्डेन्ट मौजूद थे।

प्रश्न- जब राजेश उस कमरे में आया तो उसकी मानसिक स्थिति कैसी लग रही थी तथा वह बार बार कह कर शोर मचा रहा था ?

उत्तर- जब वह कमरा सं० 202 में घुसा तथा लोगों से धक्का मुक्की करने लगा तथा तेजी से हाथ फेक रहा था तथा तेजी से शोर मचाते हुये बोल रहा था कि मेरे साथ कौन है मेरे साथ कोई नहीं है। उसकी मानसिक स्थिति ठीक नहीं लग रही थी वह असामान्य था।

प्रश्न- कमरे से पकड़ कर कौन कौन लोग उसे नीचे ले गये थे?

उत्तर- कमरे से उसके परिवार में उसकी चाची बहनोई उसकी बहन ताड़ी घाट का अटेन्डेन्ट जिसका नाम गांधी था व अस्पताल के स्टाफ शाबिर

शक्ति अन्सारी व अन्य लोग ले गये थे। मैं भी पीछे पीछे था।

प्रश्न- क्या नीचे टी० वी० वाले हाल में पहुंचने के बाद यह पुनः वापस उपर भाग आया था?

उत्तर हां वह फिर नीचे वाले हाल से मौका पाकर हो हल्ला करते हुये पुनः उपर भाग आया था जिसे सभी लोग मिलकर पुनः वापस नीचे ले आये तथा डा० मजहर अली के कहने पर उसे बाहर कैन्टीन में तख्त पर बैठा दिया गया। जहां पर उसकी चाची भाई बहनोई व ताड़ी घाट का अटेन्डेन्ट व अन्य लोग बाहर रह गये बाकी को अन्दर करके मैं भी अन्दर आ गया तथा अपने सामान्य काम में लग गया।

प्रश्न- क्या इस घटना की सूचना डाक्टर साहब को कब दी गयी। राजेश को डा० राजेश व डा० अनुपमा सिंह व अन्य स्टाफ द्वारा मारा पीटा गया था?

उत्तर- डा० राजेश डा० अनुपमा सिंह से या अस्पताल स्टाफ द्वारा राजेश सिंह से मारपीट व गाली गलौज की घटना नहीं की गयी थी।

प्रश्न- आपको राजेश की मृत्यु के बारे में कैसे जानकारी हुई?

उत्तर- करीब 3.00 बजे अब्दुल असारी ने मुझे बताया कि राजेश की अस्पताल के सामने एक्सीडेंट से मृत्यु हो गयी।

प्रतिपरीक्षण-कास इक्जामिनेशन-

प्रश्न- क्या राजेश यादव की शारीरिक व मानसिक स्थिति सामान्य प्रकृति की नहीं थी ?

उत्तर- नहीं वह रह रहकर आक्रमक एवं असामान्य व उत्तेजित हो जाता था।

प्रश्न- क्या राजेश के साथ अस्पताल स्टाफ द्वारा मारपीट या छिनोती की घटना की गयी थी ?

उत्तर- नहीं मैं पूरे हंगामा के दौरान साथ में राजेश के था। मारपीट व छिनैती की कोई घटना नहीं हुई थी।

प्रश्न- आप डाक्टर साहब को सूचना दिये थे या नहीं। क्या राजेश को उपर से नीचे आने में मदद की डाक्टर साहब कब नीचे आये थे।

उत्तर- डाक्टर साहब को सूचना डा० मजहर द्वारा दी गयी थी। राजेश को कोई चोट उपर से नीचे आने में नहीं आयी थी। डाक्टर साहब एक्सीडेंट की घटना के बाद नीचे आये थे। एक्सीडेंट ट्रक से होना बताया गया है।

प्रश्न- क्या जीने पर कही खून के निशान साक्ष्य दिखाई दिया ?

उत्तर- सीढ़ी या कही पर अस्पताल परिसर में कही खून या खून का धब्बा नहीं दिखाई पड़ा।

बयान गवाह- श्री मजहरूदददीन पुत्र मसीउद्दीन सिद्दीकी निवासी बरबरहना थाना कोतवाली जनपद गाजीपुर ने बदरियाफ्त पूछने पर बताया कि मैं बी०ए०एम०एस० डाक्टर हूँ वर्ष 2010 से सिंह हास्पिटल गाजीपुर में कार्यरत हूँ। दिनांक 18.4.15 की रात में 2.00, 2.30 बजे के बीच इमर्जेन्सी आयी थी उसका ट्रीटमेंट करके व भर्ती करके मैं इमरजेन्सी के बगल में कमरे में आराम कर रहा था कि अचानक बाहर शोर सुना और एक आदमी हमारे स्टाफ का है वह चिल्ला रहा था जिसको पकड़े हुये गार्ड क्वर, साबिर व उसके अभिभावक ला रहे थे। एक बार वह फिर छुड़ाकर उपर भाग गया पुनः जब उसे पकड़कर लाये तो मैंने कहा कि इसको बाहर के टीन में बैठा दो वहां सम्भवतः उसकी चाची थी जिसने उसके चेहरे पर पानी के छीटे मारे वह लड़का कुछ मेन्टल लग रहा था उसके साथ में उसका जीजा संदीप व कुछ और अटेन्डेन्ट थे जब वह उपर भागा था तो उसकी चाची कह रही थी कि भैया इसको पकड़ लो वरना यह उपर से नीचे कूद जायेगा। गांधी का नाम का एक अटेन्डेन्ट व पेट्रोल टैंकी सौरा बाजार में एक व्यक्ति पेट्रोल भरता है वह भी एक मरीज का अटेन्डेन्ट था ने भी पूरी घटना देखी है। संदीप ने उसे बताया कि डा० साहब राजेश चौकी पर बैठा था फिर कहने लगा और टहलते टहलते तेजी से सड़क की तरफ भागा और ट्रक से लड़ गया। यह लड़का प्रतिदिन अस्पताल में नहीं रुकता था जिसे नहीं लग रहा था बल्कि मेन्टल लग रहा था। रात में बोतल बंद करने का काम उपर फसीकर पर साकिर देख रहे थे तथा नीचे वाले पर शक्ति देख रहे थे। उसके साथ किसी के द्वारा कोई मारपीट या ऐसी घटना नहीं हुई। डा० राजेश सिंह को शक्ति प्रमिला सिंह कमरे से बुलाने गया था। एक्सीडेन्ट के बाद जब उसको स्ट्रेचर पर रख दिया गया था। तब डा० साहब नीचे आये।

पूछतांछ साक्षी से पूछ तांछ के क्रम में निम्न प्रश्न किये जाते हैं-

प्रश्न- जब राजेश यादव चिल्ला कर शोर मचा रहा था तो क्या आपके पास इस बात कोई प्रमाण है?

उत्तर-हां मैंने उस समय अपने मोबाइल से राजेश यादव के आवाज को आडियो रिकार्डिंग वीडियो रिकार्डिंग की थी।

प्रश्न- क्या राजेश यादव को अस्पताल स्टाफ द्वारा मारा पीटा गया था?

उत्तर- नहीं उसकी दिमागी हालत असामान्य थी कोई घटना अस्पताल में इलाज के दौरान मरीजों के साथ न कर दे इसलिये उसे अस्पताल के गेट के बाहर कराया गया था।

प्रश्न- राजेश की मृत्यु कैसे हुई थी?

उत्तर- लोगों के बताने के अनुसार राजेश की मृत्यु ट्रक से एक्सीडेन्ट में हुई थी।

प्रश्न- राजेश का शव स्ट्रेचर पर कैसे आया?

उत्तर- राजेश के परिजन व अटेन्डेन्ट द्वारा स्ट्रेचर पर रखकर कैन्टीन के बगल में पेड़ के नीचे रखा गया था। मुझे सूचना मिली तो मैंने देखा कि उसकी मृत्यु हो चुकी थी।

इसके पश्चात साक्षी से प्रतिपरीक्षण किया जा रहा है।

प्रतिपरीक्षण (कास इक्जामिनेशन)-

प्रश्न- जब राजेश को उपर के कमरे से पकड़कर नीचे लाया जा रहा था तो क्या उसके साथ मारपीट व गाली गलौज किया गया था।

उत्तर- नहीं

प्रश्न- क्या उक्त हंगामे के दौरान डा० राजेश सिंह या डा० अनुपमा सिंह भी मौजूद थे।

उत्तर- नहीं मैं रात्रि कालीन डियूटी में था। डा० राजेश के द्वारा हंगामा करने के दौरान डाक्टर व डाक्टरनी साहिबा नीचे नहीं आये थे। एक्सीडेन्ट में मृत्यु की सूचना के बाद डाक्टर साहब नीचे आये थे।

डा० मजहर के मोबाइल से फॉरेन्सिक एक्सपर्ट के माध्यम से आडियो वीडियो रिकार्ड की गयी उसका सी०डी० तैयार किये जाने हेतु निर्देशित किया गया। श्री विवेक कुमार द्वारा सी०डी० तैयार किया गया। जो कब्जा पुलिस में लिया गया। अस्पताल में भीड़ थी साक्षी/परिजनों के माध्यम से अकब से की जायेगी। साक्षीगणों को बाद हिदायत मुनासिब रूकसत किया गया।"

12. The SIT also recorded statements of Gandhi Singh (attendant of a patient), Mulayam Singh (a relative of deceased), Smt. Manju Devi, (a relative of deceased), Smt. Shakuntala (relative of a patient), Sri Pankaj Kumar (relative of a patient), Sri Arvind Singh (relative of a patient). Their statements are mentioned hereinafter:

“बयान साक्षी मौका- श्री गांधी सिंह

पुत्र श्री अजीत सिंह निवासी ग्राम ताड़ीघाट थाना सुहावल जनपद गाजीपुर मो० नं० 8423470471 बदरियाफ्त पूछताछ में बता रहे हैं कि मेरी मां के बच्चे दानी का आपरेशन था जो नीचे वाले फ्लोर पर एडमिट थी रात के लगभग दो ढाई बजे मैं डाक्टर को ग्लूकोज का बोतल चढ़वाने के लिये ले गया रात की डियुटी वाले डाक्टर आये तभी उपर शोर होने लगा तो डाक्टर ने कहा कि चलो चलकर देखते हैं। तब मैं साथ गया तो वह लड़का इमरजेन्सी के सामने एक मरीज व उसके घर वाली से मारपीट कर रहा था तथा मेरे साथ कौन है व मोदी को गन्दी गन्दी गालिया दे रहा था। वहां से उसको पकड़ कर मैं डाक्टर उसके घर वाले बहनोई बहन चाची नीचे लाये नीचे से झटका देकर चिल्लाता हुआ फिर भाग गया था तो डाक्टर ने कहा कि उसे बाहर चौकी पर बैठाइये दुबारा मैं उसकी बहन नहीं आयी थी उसका बहनोई भाई चाची व एक आध लोग बाहर थे बाकी लोग अन्दर चले गये वहां पर भी चौकी पर तेज हाथ मारकर चिल्ला रहा था बहनोई के साथ काफी गाली गलोज किया जिससे बहनोई भी दूर हट गया मैं उसका एक हाथ पकड़े था उसने कहा कि मुझे छोड़ो तो मैंने उसे छोड़ दिया फिर मैं पड़ोस में लगे नल पर मुह धोने लगा इतनी देर में यह तेज दौड़ता हुआ सड़क की तरफ गया उसकी चाची चिल्लाई कि कोई मेरे बच्चे को पकड़ लो तब तक सोरवल की तरफ से आने वाले ट्रक से जबरदस्ती टकरा गया ट्रक का एक चक्का उसके उपर चढ़ते हुये सड़क के नीचे उतर गया। उपर से नीचे आते समय चौकी पर बैठते समय तक उसके शरीर में की कोई चोट नहीं थी वह लड़का पूरी तरह से मेन्टल लग रहा था। हम लोग उसकी स्ट्रेचर पर सिंह हास्पिटल के बाहर पेड़ के नीचे लिटा दिये थे जो देखा था बता दिया।

इसके पश्चात घटना के चश्मदीद साक्षी से पूछ ताछ की जा रही है।

पूछताछ साक्षी से निम्न प्रश्न किये जा रहे

है-

प्रश्न- क्या जिस ट्रक ने राजेश को टक्कर मारा था आपने देखा है।

उत्तर- हां देखा था लेकिन नम्बर नहीं पढ़ पाया क्योंकि भोर में अंधेरा था यदि बाइक होती तो पीछा कर निश्चित पकड़ लेता।

प्रश्न- जब राजेश को ऊपर से नीचे लाया गया था तो क्या उसके शरीर में कोई चोट थी।

उत्तर- नहीं ऊपर से नीचे लाते समय चौकी पर बैठाते समय उसके शरीर में कोई चोट नहीं थी।

प्रश्न- क्या हंगामा और शोर शराबा के दौरान डाक्टर राजेश सिंह व डा० अनुपमा सिंह नीचे थे।

उत्तर- नहीं एक्सीडेंट के बाद डाक्टर नीचे आये थे।

प्रतिपरीक्षण-

प्रश्न- क्या राजेश को ऊपर से नीचे लाने में अस्पताल स्टाफ द्वारा मारपीट गाली गलौज की गयी थी तथा डाक्ट दम्पति भी शामिल थे।

उत्तर- नहीं राजेश को नीचे लाते समय मारपीट नहीं की गयी थी।

प्रश्न- क्या राजेश को सीढ़ी से ऊपर से नीचे लाते समय सीढ़ी पर या अस्पताल परिसर में खून के धब्बे पाये गये।

उत्तर- अस्पताल परिसर में कहीं खून का धब्बा मैंने नहीं देखा।

बादहू कार्यवाही उपरोक्त साक्षी रामपाल उर्फ मुलायम भी मौजूद है। बयान लिया जा रहा है।

बयान साक्षी मौका- मुलायम उर्फ रामपाल पुत्र श्री बहादुर सिंह यादव निवासी ग्राम मोहम्मदपुर लालीमय (अरायपुर) थाना करीमुद्दीनपुर जनपद गाजीपुर ने बदरियाफ्त पूछने पर बताया कि मैं मृतक राकेश का चचेरा बहनोई हूँ। संदीप मेरा साला है पत्नी संगीता को डिलवरी आपरेशन से सिंह हास्पिटल में हुई थी घटना के दिन उस कमरे में मैं राजेश बसन्ती सुदामी देवी संगीता व मंजू देवी (सास) और संदीप नीचे वाले हाल में सोये थे। अचानक ढाई बजे के आस पास बाहर शोर हुआ तो राजेश बाहर चिल्ला रहा था मेरा कोई नहीं है और साथ कौन है गाली गलोज व हल्ला गुल्ला कर रहा था। जो मेरे कमरे के सामने मरीज आयी थी उसी से कुछ झगड़ा हुआ या मेरी सास व संदीप और कुछ लोग उसको पकड़ कर नीचे ले गये। वहां से फिर

भागा दुबारा जब पकड़ कर ले गये तब मैं पीछे पीछे गया था अस्पताल के बाहर चौकी पर बैठा था वह मुझको भी गाली दिया तो मैं दूर हट गया एक लड़का जो उसका बाह पकड़े था वह भी दूर हट गया राजेश यादव बार बार मेरे साथ कौन है एवं मोदी को गाली दे रहा था और हाथ पटक रहा था जब वह चौकी पर बैठा था उस समय तक उसे कोई चोट नहीं आयी थी। अचानक वह उठा और सड़क की तरफ भागा मैं सड़क तक नहीं गया दो मिनट बाद पता चला वह ट्रक से टकरा गया ट्रक जाते हुये मैने देखा था। लेकिन नम्बर नहीं देख पाया अस्पताल या नीचे मैने डाक्टर राजेश डा० अनुपमा को नहीं देखा यह पूछने पर कि क्या ग्लूकोज की बोतल को बदलने को लेकर विवाद हुआ था तो बताया कि यह मेरी जानकारी में नहीं है। जो जनता था बता दिया इसके पश्चात वादी से निम्न प्रकार पूछ तांछ की जा रही है।

पूछतांछ-

प्रश्न- क्या राजेश ने तुम्हे भी गाली दिया था? हाथा पायी की थी?

उत्तर- हां मुझसे भी हाथा पाई व गाली गलोज किया था।

प्रश्न- राजेश क्यों शोर कर रहा था और क्या कह रहा था?

उत्तर-वह सनक गया था हमें लगता है तथा बार बार कह रहा था कि मेरा कोई नहीं है और कौन मेरे साथ है।

प्रश्न- क्या राजेश से हास्पिटल स्टाफ द्वारा मारपीट व पैसा छीना गया है। और आपकी जानकारी में है।

उत्तर- नहीं यह बात गलत है कि राजेश से असपताल स्टाफ द्वारा न तो मारपीट की थी न ही पैसा छीना गया है।

प्रतिपरीक्षण कास इक्जामिनेशन-

प्रश्न- डाक्टर जहरुद्दीन द्वारा दिनांक 18/19.4.15 की रात को राजेश यादव के साथ बतमौर वीडियो रिकार्ड किया गया था इसे एवं आई०डी० के माध्यम से लेकर साक्षी मुलायम उर्फ रामपाल घटना के चरमदीद साक्षी गांधी सिंह को सुनवाया व दिखाया गया तो और पूछा गया कि क्या यह आवाज राजेश यादव की है।

उत्तर- उक्त वीडियो आडियो रिकार्ड सुनने के बाद कहा गया कि यह आवाज राजेश यादव की है किन्तु चित्र इतना धुधला है कि समझ में नहीं आ रहा

है। तो इस रिकार्ड में यह आवाज साफ है कि कौन है मेरा, इस प्रकार की आवाज कई बार आयी है।

वास्ते बयान गवाह नंजु देवी मौजूद है महिला 3०नि० ममता के मौजूदगी में बयान लिया जा रहा है।

बयान गवाह- श्रीमती मंजू देवी पत्नी शिव वचन यादव निवासी ग्राम पकड़ी थाना रेवतीपुर जनपद गाजीपुर ने बदरियाप्त पूछने पर बताया कि दिनांक 18/19.4.15 को रात पुत्री संगीता के आपरेशन के कारण अस्पताल, सिंह हास्पिटल में रुकी थी वहां पर मेरे दामाद रामपाल लड़की संगीता भतीजा राजेश यादव थे तभी वसंती व सुदामी देवी अस्पताल के कमरा नं० 210 में थे। बसन्ती की बुआ उपर वाले कमरे में थे संदीप नीचे वाले तल पर लेटा था रात को अचानक आवाज सुनी राजेश तेज तेज चिल्ला रहा था कि मेरे साथ कौन है कौन है मेरे साथ तब मैने कहा कि बेटा हम है तेरे साथ फिर सभी लोग पकड़कर उसे नीचे ले गये नीचे मैने डाक्टर से कहा कि इसको सोने वाली सुई लगा दो सुई नहीं लगाई। राजेश को बाहर चौकी पर बैठा दिया हम चार पांच लोग बाहर थे चौकी पर बैठाते समय तक उसको कोई चोट नहीं थी वह बहुत तेज चिल्ला रहा था चौकी पर हाथ पटक रहा था मेरा दामाद मैं व एक लड़का और जिसे गांधी कहते है व मेरा लड़का संदीप व एक दो अन्य लोग भी नीचे मौजूद थे कि अचानक राजेश, तेजी से दौड़ता व चिल्लाता हुआ सड़क के तरफ भागा मैने कहा कोई मेरे बच्चे को पकड़ तो मगर तब तक वह गाड़ी से लड़ चुका था गाड़ी से लड़ते मैने नहीं देखा क्योंकि मैं थोड़ा पीछे था। फिर उसको उठाकर पेड़ के नीचे रखा। मैने डाक्टर राजेश को नहीं देखा इसके अलावा अन्य कोई उल्लेखनीय तथ्य नहीं बताया।

बयान साक्षी- श्रीमती शकुन्तला राय पत्नी लल्लन राय नि० हरपुर थाना मोहम्मदाबाद जनपद गाजीपुर ने बदरियाप्त पूछतांछ में बताया कि अपनी लड़की काजल को उल्टी दस्त हो रहे थे इसलिये दिनांक 18.4.15 को इलाज हेतु सिंह हास्पिटल में भर्ती कराया था जहां कई मरीज भर्ती हुई थी उसी के बगल वाला कमरा मेरा था उसके सामने वाले कमरे से एक लड़का निकल कर नये मरीज व उसके घर वालों से मारपीट करने लगा हमारे साथ कौन है बहुत तेज बोल रहा था फिर उसके बहन बहनोई चाची भाई व कम्पाउन्डर पकड़ कर नीचे ले गये वह लड़का एक बार

फिर चिल्लाता हुआ मोदी को गाली देता हुआ व मेरे साथ कौन है बोलता हुआ उपर आया ये लोग फिर पकड़ कर ले गये मेरी लड़की रह गयी थी इसलिये मैं नीचे नहीं गयी थी बाद में पता चला कि वह लड़का ट्रक से टकरा कर मर गया।

इसके अलावा अन्य कोई मुफीद बात नहीं बता पायी। बयान साक्षी अंकित किया गया।

बयान साक्षी- श्री पंकज कुमार गुप्ता पुत्र प्रेमचन्द्र गुप्ता नि० रुई मण्डी थाना कोतवाली गाजीपुर मो०नं० 8090280238 बदरियापत पूछ तांछ से बता रहे हैं कि सिंह अस्पताल के पास मेरा ढाबा है। उस रात देर होने की वजह से मैं वही था। लगभग 3.00, 3.30 बजे मैं बर्तन धोकर दुकान बन्द करने जा रहा था कि अस्पताल के तरफ से एक लड़का भागता हुआ और तेज तेज सड़क पर चिल्लाता हुआ आया और उसको एक बड़ी वाली डी०सी०एम० जो लकड़ी के कलर की थी और उस पर माल लदा था तथा टिन रबर पड़ा था से टकरा गया मैंने टकराते हुवे अपने आंखों से देखा फिर कुछ लोग पीछे से आये और बोलने लगे लड़का मर गया जो मुझे जानकारी थी आपको बता दिया ट्रक का नम्बर ट्रक के स्पीड ज्यादा होने के कारण नहीं देख पाया।

बयान गवाह- श्री अरविन्द सिंह यादव पुत्र श्री रमीन्द्र सिंह यादव नि० लोकपापुर थाना कोतवाली गाजीपुर मो०नं० 09598577754 बदरियापत पूछने पर कहा कि मेरी पत्नी मंजू देवी के ट्यूमर का आपरेशन सिंह हास्पिटल में हुआ था मैं अपनी पत्नी को कमरा नं० 102 में लेकर था 18/19.4.15 की रात समय करीब 3.00 बजे की बात है काफी शोर हो रहा था मैं उपर गया तो एक व्यक्ति को उसके घर वाले पकड़े थे वह उन्हें झटक रहा था उसको लेकर सब नीचे आये फिर झटका देकर वह उपर चला गया उपर से पकड़ कर फिर नीचे लाया गया वह चिल्लाता रहा था कि मेरे साथ कौन है कौन है मोदी की ऐसी की तैसी तेज तेज बोल रहा था। गालियां दे रहा था जिसे बाहर निकलवा कर कैन्टीन की चौकी पर बैठवा दिया चौकी पर हाथ मार रहा था बाहर इसके बहनोई भाभी व चाची एवं गांधी नाम का लड़का थे हम लोग अन्दर से दरवाजा बन्द किये व जीने पर खड़े हो गये तभी 5 मिनट बाद बाहर शोर हुआ कि वह ट्रक से लड़ कर मर गया हम लोग बाहर गये तथा डेड बाडी स्ट्रेचर पर लादकर पेड़ के नीचे रख दिये। पकड़ते समय व बाहर जाते समय उसने अपने बहनोई व अन्य लोगों

को झापड़ भी मारा था जब उसको अस्पताल के बाहर लाया गया था उस समय उसके चेहरे या शरीर पर कोई चोट नहीं था। डा० राजेश सिंह इस सारी घटना के बाद सूचना देने पर वापस आये।”

13. On basis of their investigation, the Special Investigation Team prepared a Report dated 18.5.2015, that investigation in regard to a vehicle allegedly involved in occurrence was required. The Special Investigation Team further submitted a Report dated 19.5.2015 that a Lie Detector Test of Sandeep Singh and Gandhi Singh and Narco Test of Basanti Devi and Chinta Devi was required and accordingly permission was sought. The report was submitted before the Chief Judicial Magistrate, Ghazipur under Section 169 Cr.P.C. to release co-accused from jail, since no offence was made out against them. Relevant part of said report is mentioned hereinafter:

“श्रीमान जी अब तक की विवेचना एवं संकलित साक्ष्य से अभियोग की प्रथम सूचना रिपोर्ट मात्र अनुमान एवं जोड़ तोड़ पर आधारित है जिसका वास्तविक घटना से कोई सम्बंध नहीं है प्रथम सूचना रिपोर्ट में वादी द्वारा घटना के सम्बंध में दो चश्मदीद साक्षी अंकित करायें हैं चश्मदीद साक्षी गणों के बयानों में प्रथम सूचना रिपोर्ट के अंकित तथ्यों से व परस्पर विरोधाभास एवं भिन्नता है वादी मुकदमा आनन्दी यादव द्वारा प्रथम सूचना रिपोर्ट में मोके पर मौजूद होना अंकित कराया है किन्तु अपने वीडियो ग्राफी बयान में यह बताया है कि मैंने घटना को अपनी पुत्री बसन्ती देवी के बताने के आधार पर लिखा हुआ है इस प्रकार अभियोग के वादी को कथित घटना स्थल पर मौजूदगी प्रमाणित नहीं हुई जिसकी पुष्टि उसकी पुत्री घटना के चश्मदीद साक्षी बसन्ती देवी द्वारा भी की गयी है, पथम सूचना रिपोर्ट में अंकित तथ्य डकैती हत्या का अपराध पर्व नं० 8 दिनांक 28 कृ० 4.15 में तस्मी अन्तर्गत धारा 147, 323, 504, 209, 279/304 ए भादवि के अपराध नव गठित विशेष जांच दल की गहन विवेचना से प्रमाणित नहीं होती है अपितु समस्त संकलित साक्ष्यों से जो घटना कम प्रमाणित होता है वह

इस प्रकार है। मृतक राजेश यादव घटना के दिन साक्षी गांधी मुलायम उर्फ रामपाल मंजू देवी एवं पंकज कुमार गुप्ता के बयानों के अनुसार काफी उत्तेजित था। श्रीमती परमिला एवं परमिला को मारपीट की जिसके अनुसार उसकी मानसिक स्थिति ठीक न होने की वजह से सड़क की ओर भागते हुये साखी चित्ता देवी एवं साक्षी गांधी सिंह द्वारा देखा गया तथा ट्रक से टकराते हुये स्वतंत्र साक्षी पंकज कुमार गुप्ता द्वारा देखा गया है।

अतः इस मुकदमें से अभी तक की विवेचना से किसी का संदोष भावना से (मेलाफाइड इन्टेंशन) से कम माना प्रमाणित नहीं होता है इस मुकदमें में ग्राम जेल में निरुद्ध रामशक्ति प्रजापति पुत्र टेलू राम प्रजापति नि०ग्राम गौरा थाना सोहवल गाजीपुर शाबिर जमील पुत्र आसिफ जमील नि० ग्राम अन्धऊ थाना कोतवाली अब्दुल अन्सारी पुत्र मंजूर अली नि० गौरा बाजार थाना कोतवाली गाजीपुर के विरुद्ध कोई साक्ष्य नहीं पाया गया गवाह आनन्दी सिंह व बसन्ती के द्वारा मृतक राजेश यादव को कमरा नं० 202 एवं 2010 के बाहर हुई मारपीट से सीडियो के द्वारा नीचे जाना प्रमाणित होता है एवं उसके बाद हाट में बैठाये जाने पर वहां पर भी मृतक के द्वारा शोर शराबा मचाये जाने पर कुछ लोगों द्वारा बाहर कैन्टील पर बैठाये जाने की बात प्रमाणित होती है अतः इन तीनों व्यक्तियों के नाम राम शक्ति प्रजापति शाबिर जमील व अब्दुल अन्सारी के द्वारा किसी संज्ञेय अपराध का कारित होना नहीं पाया जाता है अतः मा० न्या० में धारा 169 सी०आर०पी०सी० की रिपोर्ट आशय से प्रेषित की जा रही है उपरोक्त तीनों व्यक्तियों को रिहा करने सम्बन्धी आदेश पारित करने की कृपा करें।

वर्तमान विवेचना से अभी तक की विवेचना से एफ०आई०आर० वादी एफ०आई० आर के अनुसार घटना क्रम के चश्मदीद साक्षी सतोष संदीप के बयानों में रखे उसकी के बयानों में अत्यन्त प्रमुख विरोधाभास है जिसके की वीडियो रिकार्डिंग पर भी साक्ष्य उपलब्ध है चूँकि मुकदमा उपरोक्त हत्या एवं डकैती जैसे महत्वपूर्ण धाराओं में पंजीकृत कराया गया था एवं एफ०आई०आर० के अनुसार इस घटना क्रम के चश्मदीद साक्षी में उपलब्ध है परन्तु एस०आइ०टी० द्वारा निष्पादित की गई गहन विवेचना से सम्पूर्ण घटना द्वारा मात्र तथ्यों को तोड़ मरोड़ कर पेश किया जाना पाया गया एवं दुर्भाग्यवश किसी अपराध का किया जाना नहीं पाया गया अतः विवेचना को प्रचलित रखते हुये एफ०आई०आर० वादी आनन्दी यादव एफ०आई०आर० के अनुसार दो चश्मदीद साक्षी

बसतीक संदीप यादव लाई डिटेक्टर रखे एनालिसिस टेस्ट कराये जाने की प्रबल आवश्यकता है ताकि सरमाव्य प्रेषण को अन्तिम रूप दिया जा सके।

अभी तक की समस्त विवेचना से कुछ साक्षी ऐसी भी प्रकाश में आये है जिनके अनुसार उन्होंने समस्त घटना कम को देखा है इन साक्षियों के बयान आपस में मेल खाते हैं इनमें प्रमुख रूप से चित्ता देवी गांधी सिंह पुत्र अजीत सिंह नि० ताड़ी घाट थाना सोहवल गाजीपुर पंकज गुप्ता पुत्र रविन्द्र गुप्ता नि० रूई मण्डी थाना कोतवाली गाजीपुर 3- मंजू देवी पत्नी शिव वचन यादव निवासी पकड़ी थाना रेवतीपुर गाजीपुर 4- रामपाल यादव पुत्र बहादुर सिंह यादव निवासी मोहम्मदपुर थाना करीमुद्दीनपुर गाजीपुर 5'- राम कुमार यादव पुत्र राम अंधार यादव निवासी पी०एस० सोहवल गाजीपुर 6- अरविन्द यादव पुत्र रवीन्द्र यादव वि० लोकबाजुर थाना कोतवाली है इन साक्षियों में सबसे प्रमुख साक्षी चित्ता देवी पत्नी गुड्डू निवासी कठोतरी थाना नोलहरा गाजीपुर एवं गांधी सिंह की भी लाई डिटेक्टर टेस्ट एवं नार्को एनालिसिस टेस्ट कराये जाने की आवश्यकता प्रतीत होता है जिससे यह तसदीक हो सके क्या वास्तव में उपरोक्त घटना हत्या एवं डकैती जैसी संगीन घटना न होकर मात्र एक्सीडेंट की थी।

अतः मान० न्या० से निवेदन है कि मुकदमा वादी डाक्टरी-श्रीमती बसन्ती देवी संदीप यादव गांधी सिंह व चित्ता देवी की लाई डिटेक्टर रखे नार्को एनालिसिस टेस्ट कराये जाने की अनुमति दी जाये।
मुकदमें की विवेचना प्रचलित है।"

14. Vidhi Vigyan Prayogshsala, Uttar Pradesh Mahanagar, Lucknow submitted a report on 11.6.2015 in regard to Crime Scene Recreation, which is mentioned hereinafter:

“दिनांक 30.05.15 को उक्त विषयक संदर्भित मामले के घटनास्थल पुनर्संरचना के द्वारा घटनास्थल के निरीक्षण / परीक्षण के क्रम में निदेशक विधि विज्ञान प्रयोगशाला उ० प्र०, लखनऊ के आदेशानुसार दिनांक 27.05.15 के अनुपालन में विधि विज्ञान प्रयोगशाला उ० प्र० लखनऊ की टीम जिसमें डा० एस० के०रावत संयुक्त निदेशक श्री श्याम सुन्दर वैज्ञानिक अधिकारी, श्री अजय शुक्ला ज्येष्ठ वैज्ञानिक सहायक, श्री अरुण कुमार शुक्ला फोटोग्राफर

तथा प्रभारी फील्ड यूनिट वाराणसी श्री अवधेश कुमार तिवारी एवं प्रभारी फील्ड यूनिट गाजीपुर, श्री विवेक कुमार की संयुक्त टीम द्वारा उक्त घटनास्थल का निरीक्षण किया गया।

उक्त घटनास्थल की पहचान क्षेत्राधिकारी नगर श्री कमल किशोर विवेचक उ०नि० श्री श्रीप्रकाश दुबे निरीक्षक उ०नि० श्री राजेश त्रिपाठी एवं उ०नि० श्री प्रकाश त्रिपाठी द्वारा करायी गयी तथा आवश्यक फोटोग्राफ्स प्रयोगशाला के फोटोग्राफ द्वारा लिये गये।

इस घटना के अंतर्गत विवेचक द्वारा घटना के विषय में अवगत कराया गया कि उक्त घटना में दिनांक 18/19.05.2015 की रात्रि को तथाकथित मृतक राजेश यादव अपनी मां का इलाज उक्त हास्पिटल में करा रहा था जहां रात के समय उसकी मां को लगी ड्रिप की बोतल संभवतः समाप्ति पर थी जिसको बदलने के लिये राजेश यादव बार्ड ब्याय के पास गया था कि उसके एवं बार्ड ब्याय के बीच मारपीट होना बताया गया था कि तथा बार्ड ब्याय व अन्य के द्वारा मृतक को हास्पिटल के प्रथम तल से पकड़ कर हास्पिटल के गेट पर बनी कैटीन में लाया गया था जहां पर पुनः वाद विवाद हुआ और मृतक द्वारा हाथ छुड़ाकर अचानक सड़क की ओर भागना, एवं हाइवे पर गाजीपुर की ओर आ रहे ट्रक की ओर हाथ देना और इसके उपरान्त सामने से आ रहे तथाकथित ट्रक/बडा मेटाडोर जैसे वाहन से टकरा गया।

इस घटना के लिये कपडे की डमी ली गयी जिसमें भूसा भरा गया तथा इस घटना में संयुक्त टीम द्वारा विवेचक द्वारा बताये गये स्थानों का निरीक्षण / परीक्षण किया गया तथा हास्पिटल के कमरे एवं बरामदा आदि स्थानों की फोटोग्राफी करायी गयी तथा स्पार्ट टेस्ट किये गये थे तत्पश्चात टीम द्वारा हाइवे पर पुर्नसंरचना विधि से घटना को दोहराने का प्रयास किया गया।

इस घटना के विवेचक द्वारा उपलब्ध कराये गये फोटोग्राफ, नक्शानजरी, एफ०आई०आर०, पोस्टमार्टम की वीडियो, पोस्टमार्टम रिपोर्ट तथा इस घटना के पुर्नसंरचना के लिये गये फोटोग्राफस का अलग-अलग एवं संयुक्त रूप से (विभिन्न रिपोर्टों के सापेक्ष) तुलनात्मक अध्ययन वैज्ञानिक विधि से किया गया जिससे यह निष्कर्ष निकला कि मृतक की मृत्यु उक्त तथाकथित दुर्घटना के फलस्वरूप होने की सम्भावना प्रतीत होती है। ”

15. In pursuance of application, permission was granted and two witnesses namely Gandhi Singh and Chinta Devi were voluntarily subjected to Lie Detection Test as well as Narco Test, wherein some relevant questions were asked and their answers were also given other two witnesses did not respond to test. Relevant part of both reports i.e. LIE DETECTION (POLYGRAPH TEST) REPORT are mentioned hereinafter:

‘श्रीमती चिन्ता देवी का पालीग्राफ परीक्षण दि० 02.06.15 को किया गया। परीक्षण के दौरान केस से संबंधित प्रश्न पूछे गये। रेलीवेन्ट प्रश्न व उनके जवाब निम्न है:-

क्रम स०	विषय	उत्तर
1	क्या तुमने डा० राजेश सिंह को अपनी पत्नी व स्टाफ के साथ राजेश यादव को मारते देखा था?	नहीं
2	क्या राजेश यादव को स्वयं दौड़कर ट्रक से भिड़ते हुये तुमने देखा था?	हाँ
3	क्या राजेश के एक्सीडेंट के समय उसके परिवार वाले अस्पताल के बाहर मौजूद थे?	हाँ
4	क्या घटना की रात राजेश की माँ को ग्लूकोज चढ़ रहा था?	नहीं

निष्कर्ष- पालीग्राफ परीक्षण व पालीग्राफ विश्लेषण के उपरांत चश्मदीद साक्षी श्रीमती चिन्ता देवी के संबंध में निम्न विचार बनाये गये:-

पालीग्राफ टेस्ट के पीक्स का विश्लेषण व मूल्यांकन के आधार पर (i) से (iv) तक पूछे गये

प्रश्नों के उत्तर में चश्मदीद साक्षी श्रीमती चिन्ता देवी सच बोल रहीं है।

श्री गांधी सिंह का पालीग्राफ परीक्षण दि०

03.06.2015 को किया गया। परीक्षण के दौरान केस से संबंधित प्रश्न पूछे गये। रेलीवेन्ट प्रश्न व उनके जवाब निम्न है:-

क्रम स०	विषय	उत्तर
1	क्या तुमने डा० राजेश सिंह को अपनी पत्नी व स्टाफ के साथ राजेश यादव को मारते देखा था?	नहीं
2	क्या आपने उस रात राजेश यादव को रोड पर गाडी से टकराते देखा?	हाँ
3	क्या घटना वाले दिन राजेश यादव अस्पताल में कुछ लोगों के साथ लड़ाई कर शोर मचा रहा था?	हाँ
4	क्या किसी डर से तुम घटना से सम्बन्धित कुछ जानकारी छिपा रहे हो?	नहीं

निष्कर्ष- पालीग्राफ परीक्षण व पालीग्राफ विश्लेषण के उपरांत चश्मदीद साक्षी श्री गाँधी सिंह के संबंध में निम्न विचार बनाये गये:-

पालीग्राफ टेस्ट के पीक्स का विश्लेषण व मूल्यांकन के आधार पर (i) से (iv) तक पूछे गये प्रश्नों के उत्तर में चश्मदीद साक्षी श्री गाँधी सिंह सच बोल रहीं है।

16. Smt. Chinta Devi and Gandhi Singh have undergone NARCO Analysis Test. They were asked about 34 and 28 questions respectively. For reference, entire report are being mentioned hereinafter:

“चिन्ता देवी:-

प्रश्न 1-तुम्हारा नाम क्या है ?

उत्तर- चिन्ता देवी

प्रश्न 2-तुम कहाँ नौकरी करती हो ?

उत्तर-सिंह हास्पिटल, जामुनियों रोड

प्रश्न 3-तुम्हारी ड्यूटी कितने घन्टे की होती है ?

उत्तर-सुबह आठ बजे से रात आठ बजे तक कभी कभी नाइट ड्यूटी भी लगती है

प्रश्न 4-क्या तुम राजेश यादव को जानती हो ?

उत्तर- हाँ

प्रश्न 5 उसका कौन सा रिस्तेदार एडमिट था?

उत्तर-उसकी माँ का आपरेशन हुआ था

प्रश्न 6 वह क्या करने आता था ?

उत्तर-वह खाना देकर चला जाता था

प्रश्न - 7 तुम्हारे अलावा कितनी दाईयों और नर्सों है ?

उत्तर-तीन दाईया और पाँच छः नर्सों है

प्रश्न -8 जिस दिन यह घटना हुई थी तुम्हारी कहाँ ड्यूटी थी

उत्तर-रात में

प्रश्न-9 तुम्हे घटना की दिनांक याद है ?

उत्तर- जी नहीं

प्रश्न- क्या हुआ था ?

उत्तर- एक मरीज इमरजेन्सी में आयी थी हम उसको सुताने गयी थी तो वो उसको मारे पीटे लगा दो थप्पड़ हमको भी मारें हम डर के कोने सट गयी

प्रश्न -10 किसने ट्राली पर लात रखी ?

उत्तर- राजेश यादव ने

पालीगाफ टेस्ट प्रश्न- क्या राजेश के ऐक्सीडेंट के समय उसके परिवार वाले अस्पताल के बाहर मौजूद थे ?

उत्तर- हाँ

प्रश्न -11 फिर तुमने क्या किया ?

उत्तर- तब सब लोग आ गये बहन चाची भाई कहन लगे हमारा भाई है

प्रश्न 12 राजेश की माँ को उस दिन ग्लूकोज चढ़ रहा था

उत्तर- जी नहीं?

पालीगाफ टेस्ट प्रश्न - क्या घटना की रात राजेश की माँ को ग्लूकोस चढ़ रहा था।

उत्तर- नहीं।

प्रश्न -13 मारपीट के समय क्या चिल्ला रहा था

उत्तर- कुछ नहीं पकड़ कर ले जाया गया धक्का मारकर बहन को कुछ दूर पर खड़ा हो गया सब स्टाफ दुवारे जाकर बैठा दिया

प्रश्न -14 क्या डाक्टर राजेश सिंह ब्र स्टाफ के आदमियों ने राजेश को मारा पीटा था?

उत्तर- नहीं

पालीगाफ टेस्ट प्रश्न- क्या तुमने डा० राजेश सिंह को अपनी पत्नी व स्टाफ के साथ राजेश यादव को मारते हुये देखा था।

उत्तर- नहीं।

प्रश्न -15 बड़े डाक्टर और पत्नी तब कहाँ थे?

उत्तर - ऊपर

प्रश्न -16 डा० राजेश को नीचे कौन लाये ?

उत्तर- शक्ति मजहर फोन करके डाक्टर साहब को बुलवाये ।

प्रश्न-17 राजेश कैसे मरा ?

उत्तर- ट्रक से लडकर।

प्रश्न-18 तुम कहाँ थी ?

उत्तर- गेट पर फुलवारी में पानी दे रही थी।

प्रश्न-19 किसी ने धक्का दे दिया ?

पालीगाफ टेस्ट प्रश्न- क्या राजेश यादव को स्वयं दौड़ कर ट्रक से मिडते हुये तुमने देखा था।

उत्तर — हाँ

उत्तर19- नहीं खुद से जाकर ट्रक के आगे कूद गया ट्रक वाले बहुत बचाये पर वह कूद गया ट्रक मारकर चली गयी

प्रश्न20 उसको कोई चोट लगी थी ?

उत्तर- नहीं

प्रश्न 21 तुमने आँखों से देखा ?

उत्तर- हाँ सब कुछ देखा चाची बोल रही थी कि हमार बाबू को पकडो

प्रश्न 22 सब लोग के बाबू को दौड़ कर पकडा नहीं ?

उत्तर-पकडने गये थे, भाग कर लड गये।

प्रश्न 23 राजेश को सडक से उठाकर कौन लोग लाये थे?

उत्तर- सब लोग लाये थे कि दवा-दवा चला देंगे

प्रश्न 24 क्या स्टाफ के किसी कर्मचारी ने उसका कोई पैसा छीना था?

उत्तर- नहीं।

प्रश्न 25- डा० व उसकी पत्नी कब उतर कर आये?

उत्तर- 5 बजे

प्रश्न 26 राजेश कहाँ मरा?

उत्तर- रोड पर

प्रश्न 27 किसने बताया?

उत्तर- आँखो से देखा

प्रश्न 28 उसकी बहन कहाँ थी?

उत्तर- अपनी माँ के पास वह बाद में आयी। उसने एक्सीडेंट नहीं देखा।

प्रश्न 29- उसको किसने बताया।

उत्तर- चाचा का लडका संदीप ने।

प्रश्न 30- उस समय गांधी बाहर था, उसने देखा है?

उत्तर- हाँ

प्रश्न 31- बसंती देवी का अस्पताल वालों से कोई सम्बन्ध था?

उत्तर- नहीं।

प्रश्न 32- राजेश अंदर क्या शोर मचा रहा था?

उत्तर- हमारे साथ कोई नहीं है, कोई नहीं है।

प्रश्न 33- क्या वह नशे में था?

उत्तर- हमका नहीं मालूम।

प्रश्न 34- क्या बहन ग्लूकोस की बोतल बदलने के लिये स्टाफ को कहने आयी थी?

उत्तर- नहीं।

निष्कर्ष- पालीग्राफ टेस्ट व नारको परीक्षण के दौरान पूछे गये प्रश्नों के उत्तर में कोई भिन्नता नहीं पायी गयी।

गाँधी सिंह:-

प्रश्न 1- तुम्हारा नाम क्या है ?

उत्तर- गाँधी

प्रश्न 2-तुम्हारे पिता जी का क्या नाम है ?

उत्तर-अजीत सिंह

प्रश्न 3-तुम लोग कितने भाई बहन हो ?

उत्तर-3 भाई 1 बहन

प्रश्न 4-तुमने कितनी पढाई की है।'

उत्तर- हाईस्कूल पास

प्रश्न 5 इस समय तुम क्या काम कर रहे हो।

उत्तर-बड़े पापा के लडके भीम सिंह उनके साथ मिट्टी का काम कर रहे हैं गोमती नगर, लखनऊ में।

प्रश्न 6 तुम सिंह अस्पताल क्यों गये थे ?

उत्तर-मम्मी का बच्चेदानी का आप्रेशन हुआ था।

प्रश्न 7 कितने दिन अस्पताल में रहीं ?

उत्तर-करीब एक हफ्ता।

प्रश्न 8 किस रूम में थी ?

उत्तर-नीचे

प्रश्न-9 राजेश यादव कौन था, 18 तारीख की रात को क्या हुआ ?

उत्तर-मैंने उसे ढाई बजे उपर चिल्लाते हुये देखा उस समय शक्ति सर मेरी मम्मी को ग्लूकोज चढाने आये थे मैं और शक्ति सर उपर गये उस समय व चिल्ला रहा था उसको नीचे लाये वह फिर दूसरी तरफ से उपर चला गया उसको फिर उपर से नीचे लाये।

पालीग्राफ टेस्ट प्रश्न- क्या घटना वाले दिन राजेश यादव अस्पताल में कुछ लोगों के साथ लडाई कर शोर मचा रहा था.

उत्तर-हाँ

प्रश्न-10 नीचे किस-किसने उतारा ?

उत्तर- हम थे उसका जीजा उसका भाई डा० शक्ति और उसकी चाची फिर उसको कैन्टीन ले गये मैंने उसका हांथ पकडा हुआ था।

पालीग्राफ टेस्ट प्रश्न- क्या तुमने डा० राजेश सिंह को अपनी पत्नी व स्टाफ के साथ राजेश यादव को मारते हुये देखा था।

उत्तर- नहीं।

प्रश्न-11 उसका हाथ क्यों
पकड़ा था।

उत्तर-लग रहा था कि उसका
दिमाग डिस्टर्ब है उसकी मम्मी बोली कोई
मेरे बच्चे को पकड़ लो मैंने उसको कैन्टीन
में लिटाया वह अपने जीजा को गाली देने
लगा मैं मुह धोने चला गया वह अचानक
उठा और रोड की तरफ दौड़ कर चला गया
मोदी जी को गाली दे रहा था।

प्रश्न -12 और क्या बोल रहा
था।

उत्तर- मेरे साथ कौन है।

प्रश्न 13 कैन्टीन में क्या उसके
उपर पानी की छीटे भी डाली थी

उत्तर- नहीं कुछ नहीं वह अपने
आप शान्त हो गया वह दो तीन मिनट बैठा
फिर अचानक उठा और गाली देते हुये रोड
की तरफ दौड़ गया उधर से टुक आ गया
फिर वह जबरदस्ती टुक से एक्सीडेंट कर
गया।

पालीग्राफ टेस्ट प्रश्न-क्या तुमने
उस रात राजेश यादव को रोड पर गाडी से
टकराते देखा था।

उत्तर- हाँ

प्रश्न -14 क्या तुमने देखा

उत्तर- हाँ उसकी चाची कह रह
थी कि मेरे बच्चे को कोई बचा ले मैं दौड़
कर गया तब तक एक्सीडेंट हो चुका था
यह टुक से लड़ चुका था।

प्रश्न -15 कौन से रंग की टुक
थी

उत्तर - लाल रंग की बड़ी टुक
थी डेस्ट्रा रोड के उस तरफ थी।

प्रश्न 16 किसी ने उसे पकड़ा
नहीं।

उत्तर - वह टुक देखकर
जबरदस्ती दूसरे साइड चला गया उस समय
हम उसकी चाची, जीजा शक्ती सर को
बुला कर लाये फिर वह स्ट्रेचर मंगवाकर
उसपर लदवाये वह बाहर ही एक्सपायर कर
गया।

प्रश्न 17 क्या उस समय उसकी
बहन बंसती देवी वहाँ थी।

उत्तर- उस समय उसकी बहन
बंसती देवी वहाँ नहीं थी वह उपर थी बाद
में बाहर आयी बोलने लगी मैं ताला डलवा
दूगी।

प्रश्न18 क्या डा० सहाब व
उनकी वायफ नीचे उतर कर आये थे ?

उत्तर- हाँ डा० तब आये जब
प्रशासन आ गयी थी उनकी पत्नी नहीं आई
वह तो उस बच्चे का चेहरा भी नहीं देखी
थी।

प्रश्न19 रोड से उसको कौन
उठाकर लाया था ?

उत्तर- हम उसका जीजा उसका
भाई शक्ती सर और दो स्टाफ वाले ।

प्रश्न20 उसकी जेब में पैसे थे
?

उत्तर- एक भी नहीं जब हम
उपर गये थे तो देखा जो इमरजेन्सी में आये
थे उनसे लडाई कर रहा था मेरे साथ कौन है
यही बात चिल्ला रहा था, मोदी जी को
गाली दे रहा था।

प्रश्न 21 उसकी बहन कब
आई ?

उत्तर-जब उसकी मृत्यु हो गयी
तब आई थी।

प्रश्न 22 उसके पिता जी कब
आये ?

उत्तर- उस समय नहीं आये
उसके बाद आये होंगे मुझे पता नहीं।

प्रश्न 23 तुम किसी के कहने
पर तो ऐसा नहीं कह रहे हो

उत्तर-जी नहीं।

प्रश्न24 तुमने आँखों से देखा

उत्तर-मेरी आँखों के सामने ही
यह घटना घटी थी।

प्रश्न 25 क्या बहन को गलत
काम करते हुये देखकर उसको गुस्सा आया
था।

उत्तर-ऐसा तो कुछ नहीं था।

प्रश्न 26 तुमने टुक का नम्बर देखा था।

उत्तर-नाइट का समय था नम्बर नहीं देखा था।

प्रश्न 27 क्या टुक उस पर चढ़ गई थी।

उत्तर - चढ़ी तो नहीं थी पर उसको आगे वाले हिस्से से चोट लगी थी शायद उसको बम्पर बोलते हैं। जब पलटा तो उसका पिछला चक्का उसके कान पर चढ़ गया था फिर वह टुक निकल गया।

प्रश्न 28 यह तुमने देखा था।

उत्तर- बिल्कुल।

पालीग्राफ टेस्ट प्रश्न- क्या किसी डर से तुम घटना से सम्बंधित कोई जानकारी छिपा रहे हो,

उत्तर- नहीं।

निष्कर्ष- पालीग्राफ टेस्ट व नारको टेस्ट परीक्षण के दौरान पूछे गये प्रश्नों के उत्तर में कोई भिन्नता नहीं पायी गयी । ”

17. After above referred investigation was completed, the Investigating Officer submitted a Final Report on 16.5.2015 that it was not a case of culpable homicide, rather deceased died due to a road accident. Final Report in its entirety is reproduced hereinafter.

“निवेदन है कि मुकदमा उपरोक्त दिनांक 19.04.2015 को थाना स्थानीय पर पंजीकृत हुआ विवेचना मुझ प्रभारी निरीक्षक स्वयं ग्रहण किया धारा 161 सी०आर०पी०सी में वादी श्री आनन्दी सिंह यादव श्रीमती बसन्ती व संदीप यादव का बयान अंकित किया गया मृतक राजेश यादव की बाड़ी का पोस्ट मार्टम 3 डाक्टरों की टीम से मय वीडियो ग्राफी के द्वारा कराया गया तथा पोस्ट मार्टम से पूर्व मृतक के शरीर पर आयी चोटों का फोटो ग्राफ कराया गया जो संलग्न सी०डी० किये गये प्रथम दृष्टया 03 आरोपीगण राम शक्ति

प्रजापति, शाबिर जमील एवं अंसारी का नाम आया जिन्हें दिनांक 25.4.15 को गिरफ्तार किया गया घटना के सम्बंध में उसकी प्रमाणिकता हेतु अपर निदेशक चिकित्सा एवं विधि विशेषज्ञ ऐश बाग लखनऊ को मृतक के पी०एम०आर० पोस्ट मार्टम रिपोर्ट पंचायत नामा की प्रति और मृतक के कपड़ों की जांच की एफ०एस०एल० रिपोर्ट से मृतक की मृत्यु को किसी तेजगति के वाहन से टकराने के कारण आयी चोटों से मृत्यु होना पाया गया सभी चोटें एन्टीमार्टम इंजरी से आयी है। एफ०एस०एल० की दिनांक 28.4.15 को आयी रिपोर्ट के आधार पर अभियोग की धारा 147, 323, 504, 109, 279, 304 ए आई०पी०सी० में तरमीम किया गया। दिनांक 16.5.15 को अभियोग की गहन विवेचना एवं व्याख्या वेषण हेतु एस०आई०टी० टीम का गठन किया गया। दिनांक 16.5.15 को वादी श्री आनन्दी सिंह यादव का मजिद बयान, श्रीमती बसन्ती व संदीप यादव का मजिद बयान लिया गया। पूरे बयान की वीडियो ग्राफी व प्रतिपरीक्षण (क्रास इक्जामिनेशन) कराया गया एवं घटना के सम्बंध में मौके पर जाकर स्थलीय निरीक्षण कराया गया तथा स्वतंत्र साक्षियों का बयान 18.5.15 को लिया गया जिनमें श्रीमती चिन्ता देवी, राम कुमार, गांधी सिंह व अन्य के वीडियो ग्राफिक बयान कराये गये तथा घटना का स्थलीय निरीक्षण एवं क्रास इक्जामिनेशन किया गया उक्त बयानों एवं संकलित साक्ष्य के परिशीलन से अभियुक्तगणों के विरुद्ध कोई साक्ष्य नहीं पाया गया जिन्हें न्यायिक अभिरक्षा से अवमुक्त करने हेतु न्यायालय सी०जे०एम० को 169 सी०आर०पी०सी० की रिपोर्ट दी गई। तथा मा० न्यायालय से एफ०आई०आर० के साक्षी आनन्दी सिंह यादव व श्रीमती बसन्ती देवी व संदीप सिंह एवं घटना के स्वतंत्र एवं चश्मदीद साक्षी श्रीमती चिन्ता देवी व गांधी सिंह का सुसंगत साक्ष्य संकलन की कार्यवाही के दृष्टिकोण से लाईडिटेक्टर टेस्ट व नाको एनालिसिस परीक्षण हेतु प्रत्यावेदन किया गया था मा० न्यायालय से अनुमति प्राप्त कर व गवाहों की सहमति पर श्रीमती चिन्ता देवी व

गांधी सिंह का नार्को टेस्ट कराया गया एफ०आई०आर० के गवाह श्री आनन्दी सिंह यादव व श्रीमती बसन्ती देवी, विधि विज्ञान प्रयोगशाला की रिपोर्ट से भी घटना की पुष्टि नहीं होती है। मृतक के शरीर पर आयी चोट वाहन दुर्घटना में आना पाई गई है के बयान से हत्या व 50 हजार रुपये लूटे जाने के कोई साक्ष्य नहीं पाये गये हैं न ही घटना के संदर्भ में किसी के द्वारा दुष्प्रेरित किये जाने की बात पाई गई। अभियोग की विवेचना में अभियुक्त गणों के विरुद्ध कोई साक्ष्य न होने के कारण अन्तिम रिपोर्ट प्रेषित की जा रही है। स्वीकृत करने की कृपा करें। वाहन की तलाश सजारी है। तथा वाहन की तलाश की विवेचना जरिये एस०सी०डी० से प्रेषित होगी।”

18. The Complainant has filed a Protest Petition to oppose the final report. Learned Chief Judicial Magistrate, Ghazipur considered final report as well as protest petition and vide order dated 26.6.2015 rejected the outcome of final report and summoned the applicants and four other accused under Sections 147, 323, 504 and 302 I.P.C. Impugned order in its entirety is reproduced hereinafter.

“26.6.2015

थाना कोतवाली, गाजीपुर की तरफ से मु०अ०सं० 429 / 2015 में अन्तिम आख्या संख्या-72/ 2015 प्रेषित की गयी है।

दर्ज रजिस्टर हो।

अन्तिम रिपोर्ट के साथ संलग्न की गयी केस डायरी व उसके साथ संलग्न किये गये प्रपत्रों पोस्ट मार्टम रिपोर्ट व विधि विज्ञान प्रयोगशाला की रिपोर्ट आदि का अवलोकन किया गया।

प्रस्तुत प्रकरण में प्रथम सूचना रिपोर्ट दिनांक 19.4.2015 को अन्तर्गत धारा 147,302, 323, 395 व 504 भा०द०सं० के तहत अभियुक्तगण डॉ० राजेश सिंह व डॉ०

अनुपमा सिंह के विरुद्ध पंजीकृत की गयी। प्रथम सूचना रिपोर्ट के अनुसार मृतक राजेश यादव की मां का ईलाज सिंह हास्पिटल में चल रहा था। दिनांक 18.4.2015 को रात में करीब 12-01 बजे बोटल का पानी खत्म हो गया तो मृतक डॉक्टर को बुलाने गया। डॉ० राजेश सिंह व उनकी पत्नी डॉ० अनुपमा सिंह व तीन अन्य ने मृतक के साथ गाली गलौज करते हुये जान से मारने की नियत से उसे इतना मारे पीटे कि मौके पर ही उसकी मृत्यु हो गयी। डॉ० राजेश सिंह व डॉ० अनुपमा सिंह के अतिरिक्त तीन व्यक्तियों को अज्ञात के रूप में दिखाया गया। दौरान विवेचना अभियुक्तगण रामशक्ति प्रजापति, साबिर जमिल व अब्दुल अंसारी को प्रकाश में आना बताया गया तथा उन्हें उपरोक्त प्रकरण में गिरफ्तार कर जेल भेजा गया। तभी से ये तीनों अभियुक्तगण न्यायिक अभिरक्षा में हैं। दौरान विवेचना विवेचक द्वारा प्रस्तुत प्रकरण को हत्या न मानकर दुर्घटना होने की दिशा में विवेचना करते हुये कारागार में निरुद्ध उपरोक्त अभियुक्तगण का रिमाण्ड अन्तर्गत धारा 147, 323, 504, 109, 279 व 304ए. भा०द०सं० में तरमीम किये जाने हेतु प्रार्थनापत्र न्यायालय में प्रस्तुत किया गया। जिस पर न्यायालय द्वारा दिनांक 02.5.2015 को विवेचक द्वारा उस दिनांक तक की गयी विवेचना के आधार पर संकलित किये गये साक्ष्यों के आधार पर विवेचक का तरमीमी प्रार्थनापत्र निरस्त किया गया, क्योंकि विवेचक द्वारा प्रस्तुत प्रकरण में हत्या की जगह दुर्घटना से संबंधित कोई भी विश्वसनीय साक्ष्य संकलित नहीं किया गया था। तत्पश्चात् विवेचक द्वारा दिनांक 21.5.2015 को प्रार्थनापत्र अन्तर्गत धारा 169 द०प्र०सं० प्रस्तुत करते हुये कारागार में निरुद्ध अभियुक्तगण को रिहा किये जाने हेतु प्रस्तुत किया गया, लेकिन विवेचक द्वारा धारा 169द०प्र०सं० के प्रार्थनापत्र. के साथ प्रस्तुत की गयी केस डायरी एवं साक्षियों के बयान, रिकार्डिंग से संबंधित सी०डी० आदि के आधार पर प्रार्थनापत्र अन्तर्गत धारा 169द०प्र०सं० स्वीकार किये जाने योग्य न होने के कारण दिनांक 22.5.2015 को निरस्त

किया गया, आज पुनः विवेचक द्वारा इस प्रकरण में अन्तिम आख्या प्रस्तुत की गयी है। विवेचक द्वारा प्रस्तुत की गयी केस डायरी के साथ मृतक का पोस्टमार्टम रिपोर्ट दि० 19.4.2015 संलग्न है, जो मेडिकल आफिसर पोस्टमार्टम हाउस गाजीपुर के द्वारा हस्ताक्षरित है। पोस्टमार्टम रिपोर्ट में मृत्यु पूर्व की कुल 24 चोटें मृतक के शरीर पर आनी बतायी गयी हैं, जिनमें से 19 चोटें Abrasion बतायी गयी हैं तथा मात्र चोट संख्या 23 ही Crushed Injury (कुचला हुआ घाव) बतायी गयी है तथा मृतक को पसलियों तथा उसके उदर (Abdomin) में कोई भी आंतरिक चोट नहीं बतायी गयी है तथा चोट कारित करने की रीति निश्चित नहीं किये जाने का तथ्य अभिलिखित किया गया। सामान्यतः दुर्घटना होने पर 24 चोटों में से मात्र एक ही चोट कुचली हुयी (Crushed Injury) नहीं हो सकती बल्कि ज्यादातर चोटे कुचली हुयीं चोट होनी। इस चाहिये प्रकार पोस्टमार्टम रिपोर्ट प्रथम दृष्टया विवेचक द्वारा विवचनोपरान्त निकाले गये निष्कर्ष का समर्थन नहीं करती है, बल्कि प्रथम सूचना रिपोर्ट के कथानक की ओर इशारा करती है।

विवेचक द्वारा साक्षी चिंता देवी व गांधी सिंह का Lie Ditection परीक्षण कराया गया है, जब कि मुकदमा वादी व प्रत्यक्षदर्शी साक्षी बसन्ती देवी व संदीप का Lie Ditection/Narco Test नहीं कराया गया है। जिसका कारण उनके द्वारा परीक्षण हेतु उपस्थित न होने का आधार बताया गया है। जब कि उक्त साक्षीगण द्वारा अपनी बीमारी का आधार लिखते हुये विवेचक से समय लिये जाने के बावत प्रार्थनापत्र प्रस्तुत किया गया है। Lie Detection/Narco Test में पूछे जानेवाला विधि विज्ञान प्रयोगशाला को मुख्य प्रश्न यह बताया गया है कि क्या अभियुक्त उक्त संदर्भित अभियोग में शामिल था, जब कि विवेचना हेतु मुख्य प्रश्न यह था कि क्या प्रथम सूचना रिपोर्ट में किये गये कथन सत्य है या नहीं? इसके अतिरिक्त चिन्ता देवी ने

नाकों परीक्षण के प्रश्न संख्या 18 के उत्तर में कहा है कि वह गेट पर फूलवारी में पानी दे रही थी, जब कि घटना रात के 01-02 बजे के करीब की बतायी गयी है। सामान्यतः रात में फूलवारी में पानी देना स्वाभाविक नहीं लगता है। मृतक के सन्दर्भ में प्रश्न संख्या 20 यह पूछा गया है कि उसको कोई चोट लगी थी, जिसके जवाब में उसने उत्तर दिया है कि नहीं। यह जवाब भी सत्य प्रतीत नहीं होता है। यदि ट्रक से दुर्घटना होगी तो चोट निश्चित रूप से आयेगी।

इसके अतिरिक्त विधि विज्ञान प्रयोगशाला-लखनऊ की आख्या दि० 23.4.2015 के अनुसार पैण्ट कपड़ा प्रदर्श पी-1 के पीछे के भाग पर तथा आगे दोनों पैर वाले भाग पर घुटने के आसपास मिट्टी जैसे गड़ के चिन्हों की पुष्टि दृष्टिगोचर हुयी, परन्तु इन सभी कपड़ों पर अथवा इस पर कोई टायर जैसे चिन्ह / कांच जैसे टुकड़ों आदि की पुष्टि दृष्टिगोचर नहीं हुयी अंकित की गयी है। सामान्यतः सड़क पर मिट्टी नहीं होती बल्कि कंकरीट या तारकोल आदि के चिन्ह हो सकते हैं। कपड़ों पर टायर का कोई निशान न होने का भी इस रिपोर्ट में वर्णित किया गया है।

विवेचक द्वारा धारा 161 दं० प्र० सं० के तहत साक्षीगण से न केवल प्रश्नोत्तर के रूप में कथन पूछा गया है बल्कि उनसे Cross Examination (प्रति परीक्षण) भी किया गया है। प्रतिपरीक्षण का प्राविधान पैरा 161 दं० प्र० सं० या पैरा 109 पुलिस रेगुलेशन ऐक्ट में नहीं दिया गया है। विवेचक द्वारा विवेचना प्रथम सूचना रिपोर्ट में अंकित कथनों के आधार पर न करके प्रकरण में हत्या के स्थान पर दुर्घटना साबित करने की दिशा में की गयी है। जब कि पत्रावली पर उपलब्ध साक्ष्य के आधार पर प्रथम दृष्टया मामला दुर्घटना का प्रतीत नहीं होता है। धारा 161 दं० प्र० सं० के तहत विवेचक द्वारा मुकदमा वादी आनन्दी यादव का कथन तथा प्रत्यक्षदर्शी साक्षी बसन्ती देवी का कथन अभिलिखित किया गया है। बसन्ती देवी के कथन के अनुसार दिनांक 18.4.2015 को रात्रि

में करीब 01 बजे मां को चढ़ते पानी की बोटल खत्म हो रही थी। हमारे भाई राजेश यादव डाक्टर को बुलाने गये तो डाक्टर व उनके स्टाफ के लोगों से कहासुनी व हाथापायी होने लगी। लड़ाई झगड़े का शोरगुल सुनकर मैं कमरे से बाहर गयी तो देखा कि डाक्टर राजेश अपने स्टाफ के लोगों द्वारा हमारे भाई को गाली गुप्ता व मार पीट रहे हैं। मैं तथा मेरे भाई संदीप नीचे पहुँचे तो स्टाफ के लोग मेरे भाई को नीचे कमरे में बन्द कर दिये थे तब मैं व मेरा चचेरा भाई अपनी मां के पास चले आये। करीब एक-डेढ़ बजे राजेश यादव उर्फ अनूप की लाश सड़क के दूसरी पटरी पर पड़ी थी। इसीतरह का कथन इस साक्षी ने केस डायरी के पर्चा संख्या-9ब दि० 16.5.2015 पर भी किया है।

अन्तिम रिपोर्ट के साथ संलग्न केस डायरी एवं अन्य प्रपत्रों के अवलोकन से प्रथम दृष्टया यह स्पष्ट है कि अभियुक्तगण डॉ० राजेश सिंह, डॉ० अनुपमा सिंह, रामशक्ति प्रजापति, साविर जमील व अब्दुल अंसारी के विरुद्ध धारा 147, 323, 504, 302 भा०द०सं० के तहत विचारण किये जाने हेतु पर्याप्त सामग्री पत्रावली पर उपलब्ध है।

माननीय सर्वोच्च न्यायालय ने मै०इण्डिया कैरेट प्रा०लि० प्रति-कर्नाटक राज्य, ए०आई०आर० 1989 (एस०सी०) पेज-885 में व्यवस्था दी है कि :-

Criminal P.C. (1974), Ss. 190(1(b)) 173(2) 200, 202- Cognizance of offence Power of Magistrate-He can take cognizance of offence even if police report is to the effect that no case was made out-Need not follow procedure laid down in Ss. 200, 202.

ए०सी०अग्रवाल प्रति-मु० रामकली, ए०आई०आर० 1968, एस०सी० पेज-01 में माननीय सर्वोच्च न्यायालय ने यह व्यवस्था दी है कि धारा 190 (1 बी) द०प्र०सं० के तहत

मजिस्ट्रेट के समक्ष यदि संज्ञेय प्रकृति का अपराध लाया जाता है तो वह उस पर संज्ञान लेने के लिये बाध्य हैं।

ए०आई०आर०-2012, एस०सी०, पेज 1774, भूषण एवं अन्य प्रति-दिल्ली राज्य के मामले में माननीय सर्वोच्च न्यायालय ने यह व्यवस्था दी है कि धारा 190 द०प्र०सं० के तहत मजिस्ट्रेट को न्यायिक विवेक का प्रयोग करना होता है। इस स्तर पर मजिस्ट्रेट का यह समाधान होना चाहिये कि क्या विचारण के लिये पर्याप्त आधार है? इस स्तर पर इस बात की आवश्यकता नहीं होती है कि क्या दोषसिद्धि के लिये पर्याप्त आधार है। दोषसिद्धि के बावत पर्याप्त साक्ष्य का निर्धारण विचारण के समय किया जाना है।

ए०आई०आर०-2013, एस०सी०, पेज 1590, गंभीर सिंह आर. डेकर प्रति फाल्गुन भाई चीमन भाई पटेल व अन्य में माननीय सर्वोच्च न्यायालय ने यह व्यवस्था दी है कि संज्ञान के स्तर पर अपराध की सत्यता के बारे में विचार नहीं किया जाना है।

माननीय उच्चतम न्यायालय की उपरोक्त विधि व्यवस्थाओं के प्रकाश में अन्तिम आख्या के साथ संलग्न केस डायरी व अन्य प्रपत्रों के अवलोकन से प्रथम दृष्टया अभियुक्तगण के विरुद्ध विचारण हेतु पत्रावली पर पर्याप्त सामग्री उपलब्ध है, इसलिये पुलिस थाना कोतवाली, गाजीपुर की तरफ से प्रस्तुत की गयी अन्तिम रिपोर्ट संख्या 72/ 2015 निरस्त किये जाने योग्य है।

विवेचक द्वारा सभी स्वाभाविक तथ्यों को विवेचित नहीं किया गया, इसलिये विवेचक एवं उनके पर्यवेक्षण अधिकारी की भूमिका संदिग्ध प्रतीत होती है।

आदेश

थाना कोतवाली, गाजीपुर द्वारा उपरोक्त अपराध संख्या में प्रस्तुत अन्तिम रिपोर्ट संख्या- 72/ 2015 निरस्त की जाती है। अभियुक्तगण डॉ० राजेश सिंह, डॉ० अनुपमा सिंह, रामशक्ति प्रजापति, साविर जमील व अब्दुल अंसारी के

विरुद्ध अन्तर्गत धारा 147, 323, 504 व 302 भा०द०सं० विचारण किये जाने हेतु अपराध का संज्ञान अन्तर्गत धारा 190(1)(b) लिया जाता है। अभियुक्तगण रामशक्ति प्रजापति, साविर जमील व अब्दुल अंसारी कारागार में हैं, उनका वारण्ट अन्तर्गत धारा २०९ द०प्र०सं० परिवर्तित किया जाय तथा अभियुक्तगण डॉ० राजेश सिंह व डॉ० अनुपमा सिंह को विचारण हेतु समन किया जाता है।

पत्रावली दिनांक 22.7.2015 को पेश हो। सभी संबंधित तदनुसार सूचित हों। आदेश की प्रति प्रमुख सचिव (गृह) उ०प्र०शासन व डी०जी०पी० को सूचनार्थ व आवश्यक कार्यवाही हेतु प्रेषित हो।"

19. The applicants and other accused being aggrieved by aforesaid order, filed a Revision Petition.

20. Aforesaid Revision Petition was dismissed vide order dated 9.12.2019. Relevant part of same is reproduced hereinafter.

"8- पुनरीक्षणकर्ता के विद्वान अधिवक्ता द्वारा सर्व प्रथम यह तर्क प्रस्तुत किया गया कि विद्वान अवर न्यायालय द्वारा प्रश्रुत आदेश दिनांकित 26.06.2015 को पारित करने में गम्भीर रूप से विधिक त्रुटि कारित की गयी है तथा उन्हें संज्ञान लिये जाने का अधिकार प्राप्त नहीं है। इस सम्बन्ध में सर्व प्रथम इस विषय पर चर्चा किया जाना समीचीन प्रतीत होता है कि किसी भी प्रकरण में विवेचक द्वारा द० प्र० सं० की धारा 173 के अन्तर्गत अन्तिम आख्या प्रस्तुत किये जाने के उपरान्त मजिस्ट्रेट के पास क्या विकल्प उपलब्ध होता है? द० प्र० सं० की धारा 190 (1) (ख) में मजिस्ट्रेट द्वारा अपराधों का संज्ञान लिये जाने के सम्बन्ध में उनके अधिकार का उल्लेख किया गया है। उक्त प्रावधान के अनुसार

किसी भी प्रथम वर्ग के मजिस्ट्रेट को यह अधिकार प्राप्त है कि यह ऐसे तथ्यों के बारे में पुलिस रिपोर्ट के आधार पर अपराध का संज्ञान ले सकता है।

9- प्रस्तुत मामले में विवेचक द्वारा विवेचनोपरान्त यह अभिमत प्रकट किया गया था कि प्रस्तुत मामले में किसी भी अपराध का होना नहीं पाया जाता है परन्तु विद्वान अवर न्यायालय द्वारा विवेचक के अभिमत को निरस्त करते हुये न केवल प्रकरण का संज्ञान लिया गया बल्कि पुनरीक्षणकर्ता / अभियुक्तगण को विचारण हेतु आहूत भी किया गया। पखाण्डों एवं अन्य बानाम उत्तर प्रदेश राज्य एवं एक अन्य, 2002 (1) जे० आई० सी० 104 (इलाहाबाद) के वाद में माननीय उच्च न्यायालय, इलाहाबाद द्वारा यह अभिनिर्धारित किया गया कि अन्तिम रिपोर्ट प्राप्त होने पर, मजिस्ट्रेट के पास निम्नलिखित चार अनुक्रम उपलब्ध हैं-

1. He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant; or

2. He may take cognizance under Section 190 (1) (b) and issue process straight way to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

3. He may, order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

4. He may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1) (a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202, Cr.P.C. and there after decide whether complaint should be dismissed or process should be issued.

10. अतः उपरोक्त से यह स्पष्ट है कि मजिस्ट्रेट को यह पूर्ण अधिकार है कि किसी भी अन्तिम आख्या को स्वीकार करें अथवा नहीं। अतः जहां तक पुनरीक्षण कर्ता/अभियुक्तगण द्वारा प्रस्तुत उपरोक्त तर्क का सम्बन्ध है, यह स्वीकार किये जाने योग्य नहीं है। प्रस्तुत मामले में विद्वान मुख्य न्यायिक मजिस्ट्रेट द्वारा अपने क्षेत्राधिकार के अन्तर्गत ही अन्तिम आख्या संख्या 72/2015 को निरस्त कर प्रकरण का संज्ञान लिया गया है।

11- अग्रेतर न्यायालय के समक्ष विचाराणीय बिन्दु यह है कि क्या विद्वान अवर न्यायालय के समक्ष पुनरीक्षणकर्ता / अभियुक्तगण को विचारण हेतु आहुत किये जाने के

सम्बन्ध में पर्याप्त साक्ष्य उपलब्ध था अथवा नहीं? इस सम्बन्ध में विद्वान अवर न्यायालय द्वारा प्रश्नगत आदेश दिनांकित 26.06.2015 में प्रमुख रूप से इस तथ्य का उल्लेख किया गया है कि मृतक श्री राजेश यादव के शरीर पर कुल 24 चोटें आना दर्शित हैं, जिसमें से 19 चोटें अब्रेशन (Abrasion) बतायी गयी है तथा मात्र चोट संख्या 23 ही क्रशड (Crushed) इन्जरी (कुचला हुआ घाव) बताया गया है। इसी प्रकार इस तथ्य पर भी किसी भी प्रकार का कोई विवाद नहीं है कि मृतक राजेश यादव की मां व परिवादी श्री आनन्दी यादव की पत्नी श्रीमती सुदामी देवी का सिंह लाईफ केयर हास्पिटल में ईलाज चल रहा था तथा उनकी आंत का आपरेशन किया गया था। ऐसे में कथित घटना के समय मृतक की कथित घटना स्थल पर मौजूदगी से इन्कार नहीं किया जा सकता। इस सम्भावना से इन्कार नहीं किया जा सकता कि एक व्यक्ति की मां का ईलाज किसी अस्पताल में चल रहा हो तो उसका बेटा अपनी मां के पास मौजूद न हो। अतः पत्रावली पर ऐसा कोई साक्ष्य उपलब्ध नहीं है, जिसके आधार पर मृतक की मौजूदगी को कथित घटना स्थल के आस पास से खण्डित कर दिया जाय।

12- अग्रेतर

पुनरीक्षणकर्ता/अभियुक्तगण के विद्वान अधिवक्ता द्वारा यह तर्क भी प्रस्तुत किया गया कि प्रस्तुत मामले में साक्षियों का नाकॉइनेलिसिस टेस्ट भी कराया गया जिससे इस तथ्य की पुष्टि होती है कि पुनरीक्षणकर्ता/अभियुक्तगण द्वारा किसी भी प्रकार की कोई घटित घटना नहीं की गयी। इस सम्बन्ध में न्यायालय

का अभिमत है कि इस तथ्य का विश्लेषण साक्ष्योपरान्त ही सम्भव है कि किस साक्षी का साक्ष्य ग्राह्य है अथवा नहीं परन्तु इस सम्बन्ध में इस न्यायालय का अभिमत है कि सामान्य तौर पर नार्कोइनेलिसिस अभियुक्तगण का कराया जाता है परन्तु प्रथम दृष्टया ऐसा प्रतीत होता है कि प्रस्तुत मामले में नार्कोइनेलिसिस टेस्ट कुछ ऐसे साक्षियों का कराया गया, जो कि पुनरीक्षणकर्ता/अभियुक्तगण संख्या 01 व 02 के अस्पताल के कर्मचारी हैं तथा विद्वान अवर न्यायालय द्वारा यह उचित ही अभिमत प्रकट किया गया है कि जब कथित घटना अत्यन्त रात्रि की बतायी गयी है तो यह कहाँ सम्भव है कि कोई महिला रात्रि में फुलवारी में पानी दे रही हो। अतः पुनरीक्षणकर्ता/अभियुक्तगण के विद्वान अधिवक्ता द्वारा प्रस्तुत उपरोक्त तर्क भी स्वीकार किये जाने योग्य नहीं है।

13- पुनरीक्षण याचिका के माध्यम से पुनरीक्षणकर्ता/अभियुक्तगण के विद्वान अधिवक्ता द्वारा यह सुझाव दिये जाने का प्रयास किया गया कि मृतक राजेश यादव उर्फ अनूप यादव की मृत्यु किसी दुर्घटनावश हुई है तथा उनके द्वारा पुनरीक्षण याचिका के पैरा-07 में यह सुझाव दिया गया है कि मृतक की मृत्यु किसी तेज गति वाहन के चपेट में आने के कारण हो सकती है। परन्तु पुनरीक्षण याचिका के पैरा 5 लगायत 7 एवं 12 स्वयं में विरोधाभासी प्रतीत होते हैं, क्योंकि पैरा 12 में पुनरीक्षणकर्ता / अभियुक्तगण द्वारा यह अभिकथन किया गया है कि "सभी ने यह बताया कि मृतक राजेश यादव बहुत अधिक उत्तेजित (Hyper Active) था तथा जोरों से चिल्ला तथा भाग रहा

था तथा शोर मचा रहा था' परन्तु पुनरीक्षणकर्ता / अभियुक्तगण द्वारा यह नहीं बताया गया है कि मृतक राजेश यादव किस कारण से उत्तेजित (Hyper Active), तथा जोर से चिल्ला रहा था तथा उन्हें यह कैसे ज्ञात हुआ कि मृतक राजेश यादव उत्तेजित था?

14- दण्ड प्रक्रिया संहिता, 1973 की धारा 397 के अन्तर्गत पुनरीक्षण याचिका के निस्तारण के समय पुनरीक्षण न्यायालय को केवल प्रश्नगत आदेश की शुद्धता, वैधता एवं औचित्य के बारे में निर्धारण करना होता है। इसके अतिरिक्त पुनरीक्षण याचिका के निस्तारण के समय वाद के समस्त तथ्यों / साक्ष्यों के मूल्यांकन की अपेक्षा नहीं होती है। पुनरीक्षण याचिका के माध्यम से पुनरीक्षणकर्ता/अभियुक्तगण द्वारा अनेकानेक ऐसे तथ्य प्रस्तुत किये गये हैं, जिनके सम्बन्ध में अभिमत केवल साक्ष्योपरान्त ही प्रस्तुत किया जा सकता है। इस स्तर पर किसी भी साक्ष्य के मूल्यांकन किये जाने की अपेक्षा नहीं होती है।

15- अतः उपरोक्त विवेचना के आधार पर स्पष्ट है कि विद्वान अवर न्यायालय को यह अधिकार प्राप्त था कि वे विवेचक द्वारा प्रस्तुत किये गये अभिमत को न केवल अस्वीकार करें बल्कि उनके पास पूर्ण रूप से यह क्षेत्राधिकार भी प्राप्त था कि वे प्रकरण का संज्ञान लेवें। पत्रावली पर प्रथम दृष्टया इस सम्बन्ध में पर्याप्त साक्ष्य है कि पुनरीक्षणकर्ता/अभियुक्तगण को विचारण हेतु आहूत किया जाया मृतक राजेश यादव की मौके पर उपस्थिति से किसी भी पक्ष द्वारा इन्कार नहीं किया गया है। इसी प्रकार उसकी पोस्टमार्टम

आख्या में उसे कुल 24 चोटें आना दर्शित हैं। इस तथ्य का निर्धारण साक्ष्योपरान्त ही सम्भव है कि उसकी मृत्यु कैसे हुई ?

16- अतः उपरोक्त विवेचना के आधार पर पुनरीक्षणकर्ता/अभियुक्तगण इस तथ्य को सबित करने में पूर्णतया विफल रहे हैं कि विद्वान अवर न्यायालय द्वारा पारित केन्द्रीय आदेश दिनांक 26.06.2015 त्रुटिपूर्ण है। विवेचनोपरान्त न्यायालय का अभिमत है कि विद्वान अवर न्यायालय द्वारा पारित आदेश विधि सम्मत है, जिसमें किसी प्रकार से हस्तक्षेप किये जाने की आवश्यकता नहीं है। तदनुसार पुनरीक्षण याचिका निरस्त किये जाने योग्य है।

आदेश

17- पुनरीक्षण याचिका तदनुसार निरस्त की जाती है।

18- विद्वान मुख्य न्यायिक मजिस्ट्रेट, गाजीपुर द्वारा पारित प्रश्नगत् आदेश दिनांक 26.06.2015 की पुष्टि की जाती है। इस निर्णय की एक प्रति के साथ विद्वान अवर न्यायालय की मूल पत्रावली अविलम्ब वापस भेजी जाय।

19- पुनरीक्षणकर्ता/अभियुक्तगण को निर्देशित किया जाता है कि वे एक सप्ताह के अन्दर विद्वान अवर न्यायालय के समक्ष उपस्थित होंगे। उनके उपस्थित न होने की दशा में विद्वान अवर न्यायालय को यह पूर्ण अधिकार प्राप्त होगा कि वे अभियुक्तगण की उपस्थिति के सम्बन्ध में विधिक रूप से प्रोसेस जारी करें। ”

21. Above referred orders are impugned in the present application.

22. During investigation, the learned Chief Judicial Magistrate has passed few orders pointing out certain illegalities, rejected prayer to release co-accused under Section 169 Cr.P.C. and has passed some directions also. Orders dated 2.5.2015, 8.5.2015, 21.5.2015, 22.5.2015 and 4.6.2015 being relevant are reproduced hereinafter: The orders are part of counter affidavit.

“02.05.2015

विवेचक / प्रभारी निरीक्षक, कोतवाली, गाजीपुर श्री प्रकाश दूबे की तरफ से प्रार्थनापत्र इस कथन के साथ प्रस्तुत किया गया कि मु.अ.सं. 423/15 धारा 147, 302, 323, 395, व 504 भा.दं.सं. में अभियुक्तगण रामशक्ति प्रजापति, शाबिर जीमल व अब्दुल अंसारी जो न्यायिक अभिरक्षा में दिनांक 20.4.15 से जिला कारागार में निरुद्ध है। उक्त मुकदमे में धारा 147, 323, 504, 109ए 279 व 304 ए भा.दं.सं. में तरमीम किया गया है। उपरोक्त आधार पर प्रार्थना की गयी है कि अभियुक्तगण को धारा 147 323, 504, 109, 279, व 304ए. भा०दं०सं० में तलब कर रिमाण्ड बनाया जाय।

विवेचक के उपरोक्त प्रार्थनापत्र पर विवेचक व विद्वान अभियोजन अधिकारी को सुना गया एवं उसकी तरफ से प्रस्तुत की गयी केस डायरी, पोस्टमार्टम रिपोर्ट, प्रथम सूचना रिपोर्ट, धारा 174 दं०प्र०सं० के तहत की गयी कानूनी जांच की रिपोर्ट तथा राज्य चिकित्सा विधि विशेषज्ञ की आख्या आदि का अवलोकन किया गया।

प्रथम सूचना रिपोर्ट के अनुसार मृतक राजेश यादव उर्फ अनूप की मां का ईलाज सिंह हास्पिटल में चल रहा था। कि 13.4.15 को रात में करीब 12-01 बजे बोतल का पानी खत्म हो

गया तो मृतक डा० राजेश सिंह को बुलाने गया डाक्टर राजेश सिंह व उनकी पत्नी डॉ० अनुपमा सिंह व तीन अन्य ने मृतक के साथ गाली गलौज करते हुये जान से मारने की नियत से उसे मारा पीटा। उसे इतना मारे पीटे कि उसकी मौके पर ही मृत्यु हो गयी।

इस घटना की प्रत्यक्ष साक्षी मृतक की बहन बसन्ती देवी व चचेरा भाई संदीप बताये गये हैं। विवेचक द्वारा मुकदमा वादी आनन्दी यादव का कथन अन्तर्गत धारा 161 दं०प्र०सं० अभिलिखित किया गया, जिसके अनुसार पानी का बोतल लगाने की बात को लेकर राजेश यादव उर्फ अनूप को डॉ० राजेश सिंह व उनकी पत्नी अनुपमा सिंह व स्टाफ के लोग मेरे लड़के को गाली गुप्ता देते हुये मारने पीटने लगे। मार पीट की आवाज सुनकर हमारी लड़की बसन्ती देवी व भतीजा संदीप दौड़कर आये तो देखे कि डाक्टर, उनकी पत्नी व उनके तीन स्टाफ सभी मिलकर राजेश यादव को मार पीट रहे थे। उसे इतना मारे कि उसकी मौत हो गयी।

विवेचक द्वारा बसन्ती देवी का बयान भी अन्तर्गत धारा 161 दं०प्र०सं० अभिलिखित किया गया, जिसके अनुसार दिनांक 18.4.15 को रात्रि में करीब 01 बजे मां को चढ़ते पानी की बोतल खत्म हो रही थी। हमारे भाई राजेश यादव डाक्टर को बुलाने गये तो डाक्टर व उनके स्टाफ के लोगों से कहासुनी व हाथापायी होने लगी। लड़ाई झगडा का शोर गुल सुनकर मैं कमरे से बाहर गयी तो देखा कि डाक्टर राजेश अपने स्टाफ के लोगों द्वारा हमारे भाई को गाली गुप्ता व मारपीट रहे है। मैं तथा मेरे भाई संदीप नीचे पहुंचे तो स्टाफ के लोग मेरे भाई को नीचे कमरे मे बन्द कर दिये थे तब मैं मेरा चचेरा भाई अपनी मां के पास चले आये। करीब एक डेढ़ बजे राजेश यादव उर्फ अनूप की लाश सड़क के दूसरी पटरी पर पड़ी थी।

विवेचक का केस डायरी के पर्चा संख्या 02 के अनुसार कथन है कि मृतक अस्पताल के सामने टहलने लगा तभी एक ट्रक वाला ट्रक लेकर आया और धक्का मार दिया और मृतक की मृत्यु हो गयी लेकिन विवेचक द्वारा तथाकथित ट्रक / वाहन का कोई रजिस्ट्रेशन नम्बर नहीं बताया गया

है और न ही वाहन चालक या वाहन स्वामी का ही नाम बताया गया है। यहां तक कि घटना के दिनांक 18/19.4.15 से लेकर अबतक उनके द्वारा तथाकथित ट्रक या चालक या उसके स्वामी को बरामद / तलाश करने के संबंध में क्या कार्यवाही की गयी, केस डायरी के पर्चा संख्या 01 से लेकर 08 तक में इस बात का कोई जिक्र नहीं है। यहां यह भी उल्लेखनीय है कि इस प्रकरण में अभियुक्तगण राम शक्ति प्रजापति, साबिर जमील व अब्दुल अन्सारी जो कि कारागार में निरुद्ध हैं, अस्पताल के कर्मचारी बताये गये हैं। वे वाहन विशेष / ट्रक के स्वामी या चालक नहीं हैं, इसलिये उन पर धारा 304ए भा०दं०सं० के तहत विवेचक महोदय किस प्रकार अभियोग को तरमीम करना चाहते हैं, यह सामान्य प्रज्ञावान व्यक्ति के समझ से परे प्रतीत होता है।

विवेचक द्वारा विधि विशेषज्ञ की रिपोर्ट का हवाला दिया गया है, वह रिपोर्ट विचारण के दौरान साक्ष्य के स्तर पर विचारणीय होगी। विवेचक के उपरोक्त तरमीमी की प्रार्थना को देखकर ऐसा प्रतीत होता है कि विवेचक महोदय अभियुक्तगण को सदोष लाभ पहुँचाने के आशय से अभियोग को धारा 302 भा०दं०सं० से धारा 304ए भा०दं०सं० में तरमीम कराना चाहते हैं, जिसकी विधि अनुज्ञा नहीं देती है, इसलिये विवेचक का उपरोक्त तरमीमी प्रार्थनापत्र स्वीकार किये जाने योग्य नहीं है।

तदनुसार तरमीमी प्रार्थनापत्र निरस्त किया जाता है।

इस आदेश की एकप्रति पुलिस अधीक्षक गाजीपुर को इस आशय से प्रेषित की जाय कि वह प्रस्तुत प्रकरण की विवेचना वर्तमान विवेचक श्री प्रकाश दूबे के अलावा किसी अन्य विवेचक से कराया जाना सुनिश्चित करें, ताकि न्याय की मन्शा पूरी हो सके। अभियुक्तगण को पहले से ही दिनांक 08.5.2015 तक रिमाण्ड स्वीकृत है। अतः अभियुक्तगण दिनांक 08.5.2015 को जेल से पुनः तलब हों।

08.05.2015-

विवेचक श्री प्रकाश दुबे की तरफ से प्रार्थनापत्र इस अनुरोध के साथ दिया गया है कि अभियुक्तगण अब्दुल अंसारी, शाबिर जमील व रामशक्ति प्रजापति का रिमाण्ड अन्तर्गत धारा 147, 323, 504, 109, 279 व 304ए. भा०द०सं० में परिवर्तित करने की कृपा करें।

प्रार्थना पत्र पर विवेचक एवं विद्वान अभियोजन अधिकारी को सुना गया एवं पत्रावली पर उपलब्ध प्रपत्रों का अवलोकन किया गया।

पत्रावली के अवलोकन से विदित होता है कि इस न्यायालय द्वारा दिनांक 02.5.15 को विस्तृत आदेश पारित करते हुये अभियुक्तगण का रिमाण्ड अन्तर्गत धारा 147, 323, 504, 109, 279, व 304ए. भा०द०सं० में तरमीमी के बावत विवेचक का प्रार्थनापत्र निरस्त किया गया तथा अभियुक्तगण का रिमाण्ड अर्गत धारा 147, 302, 323, 395 व 504 भा०द०सं० में रखा गया। न्यायालय द्वारा पारित आदेश दि 2.5.15 को किसी भी वरिष्ठ न्यायालय द्वारा निरस्त या परिवर्तित नहीं किया गया है, साथ ही साथ विवेचक द्वारा भी तथाकथित ट्रक / वाहन को भी बरामद नहीं किया गया है और न ही तथाकथित वाहन के चालक या स्वामी आदि को ही गिरफ्तार किया गया है। न्यायालय के पूर्व में विस्तृत आदेश पारित किये जाने के बावजूद भी विवेचक द्वारा पुनः प्रार्थना पत्र बिना किन्हीं नयों तथ्यों के विस्तृत किया गया है, जो किसी भी प्रकार से उचित या विधिक नहीं है। दिनांक 02.05.2015 को इस न्यायालय द्वारा यह भी आदेश पारित किया गया था कि विवेचक अभियुक्तगण को सदोष लाभ पहुंचाने के आशय से अभियोग को धारा 302 भा०द०सं० से 304ए. भा०द०सं० में तरमीम करना चाहते हैं, जिसकी विधि अनुज्ञा नहीं देती है तथा उक्त आदेश की एक प्रति पुलिस अधीक्षक गाजीपुर को भी इस आशय से प्रेषित की गयी थी कि वह प्रस्तुत प्रकरण की विवेचना वर्तमान विवेचक श्री प्रकाश दुबे के अलावा किसी अन्य विवेचक से कराया जाना

सुनिश्चित करें, ताकि न्याय की मन्शा पूरी हो सके। बावजूद इसके वर्तमान विवेचक ही इस प्रकरण की विवेचना कर रहे हैं और उन्हीं की तरफ से आज पुनः प्रार्थना पत्र दिया गया है।

अतः आयुक्त वाराणसी पुलिस महानिदेशक वाराणसी एवं जिलाधिकारी गाजीपुर, को इस आदेश की एक एक प्रति अावश्यक कार्यवाही हेतु प्रेषित की जाय तथा उपरोक्त दोनों आदेश की एक-एक प्रति माननीय जनपद न्यायाधीश-गाजीपुर को सूचनार्थ प्रेषित की जाये तथा पुलिस अधीक्षक गाजीपुर को इस बावत लिखा जाय कि वह इस न्यायालय द्वारा दिनांक 02.05.2015 को पारित किये गये आदेश की प्रति प्रेषित की गयी थी, उसके संबंध में उनके द्वारा क्या कार्यवाही की गयी है? न्यायालय को आगामी नियत तिथि तक अवगत करावें तथा अभियुक्तगण रामशक्ति प्रजापति, शाबिर जमील व अब्दुल अंसारी का रिमाण्ड मु०अ०सं० 429/15, धारा 302, 323, 395, 504 व 147 भा०द०सं० को आगामी तिथि 21.05.15 तक स्वीकार किया जाता है। तदुसार विवेचक द्वारा प्रस्तुत प्रार्थनापत्र दि० 08.05.15 निरस्त किये जाते हैं।"

21.05.2015

विवेचक श्री प्रकाश दुबे कोतवाली गाजीपुर की तरफ से प्रार्थना पत्र अन्तर्गत धारा 169 द०प्र०सं०, मु०अ०सं० 429/15. धारा 147, 302 323, 395 में 504 भा०द०सं० में अभियुक्तगण रामशक्ति प्रजापति, शाबिर जमील व अब्दुल अन्सारी, जो जिला कारागार में निरुद्ध हैं को रिहा करने हेतु प्रस्तुत किया गया है। विवेचक की तरफ से केस डायरी के साथ बयान रिकार्ड करने की सी०डी०/डी०वी०डी० भी प्रस्तुत की गयी है तथा मुकादमा वादी की तरफ से प्रार्थना पत्र मय स्वयं का शपथपत्र एवं बसन्ती देवी व पंचरत्नी देवी का प्रस्तुत किया गया है। अतः केस डायरी में

अंकित किये गये बयानों की सी०डी०/डी०वी०डी० को भी देखा जाना न्यायोचित प्रतीत होता है।

अतः विवेचक को निर्देशित किया जाता है कि वह कल दिनांक 22.05.2015 को प्रातः बजे 11.00 बजे उक्त सी०डी०/डी०वी०डी० को प्ले कराकर दिखाया जाना सुनिश्चित करें ताकि विवेचक के प्रार्थना पत्र के सम्बन्ध में विधिनुसार आदेश पारित किया जा सके। अभियुक्तगण उपरोक्त का रिमाण्ड पूर्व की भांति ही कल दिनांक 22.05.2015 तक के लिये स्वीकृत किया जाता है। अतः अभियुक्तगण दिनांक 22.05.2015 को पुनः जेल से तलब हो।

22.05.2015

विवेचक श्री प्रकाश दूबे, कोतवाली गाजीपुर को तरफ से प्रार्थना पत्र अन्तर्गत धारा 169 दं०प्र०सं०, मु०अ०सं० 429/15. धारा 147, 302 323. 395 व 504 भा०दं०सं० से सम्बन्धित केस डायरी एवं मुकदमा वादी आनन्दी यादव की तरफ से प्रस्तुत किये गये प्रार्थना पत्र दिनांकित 21.05.2015, शपथपत्र, बसन्ती देवी पुत्र आनन्दी सिंह यादव का शपथ पत्र, पंचरत्नी देवी पत्नी श्यामलाल की तरफ से प्रस्तुत किये गये शपथपत्रों एवं विवेचक द्वारा आनन्दी सिंह यादव, बसन्ती देवी, सन्दीप यादव, चिन्ता देवी एवं गांधी सिंह के लाई डिटेक्टर व नारको इनलाइसिस टेस्ट कराये जाने के बाबत प्रस्तुत किये गये प्रार्थना पत्र व साक्षियों के बयान रिकार्डिंग से संबंधित सी०डी०/ डी०वी०डी० को प्ले कराकर अवलोकन किया गया।

केस डायरी के पर्चा नं० 9ब दिनांकित 16.05.2015 पर मुकदमा वादी आनन्दी सिंह यादव का कथन अंकित किया गया है, जिसमें अंकित है कि मेरी पुत्री बसन्ती ने दिनांक 18/19.04.2015 की रात 3:30 से 4:00 बजे के आस-पास बताया कि डा० राजेश व डा० अनुपमा व उनके स्टाफ द्वारा मेरे लड़के राजेश

यादव को ग्लूकोज की बोतल चढ़ाने के नाम पर गाली-गलौज देकर, मारपीट कर मार डाले। यह घटना मेरी लड़की बसन्ती व भतीजा सन्दीप के सामने हुई। इसी पर्व पर घटना की चश्मदीद साक्षी श्रीमती बसन्ती देवी का बयान अंकित किया गया है, कि थोड़ी देर बाद मेरा भाई राजेश यादव उसे बुलाने गया वहां राजेश से गाली-गलौज व मारपीट होने लगी। शोर सुनकर मैं बाहर गयी तो डा० राजेश व अनुपमा समेत 9 लोग मेरे भाई को हाथ से मारपीट रहे थे। मेरे मना करने पर मुझे भी मारा व धक्का दे दिया जिससे मैं सीढ़ियों से नीचे गिर गयी व गश खा गयी तब यह लोग राजेश को पकड़कर नीचे वाले कमरे में गये और दरवाजा बन्द कर लिये। मैं अपनी मा के कमरे में चली आयी। कुछ देर बाद मैं फिर नीचे गयी तो गेट की तरफ से आते हुए स्टाफ ने बताया कि राजेश का एक्सीडेंट हो गया मैंने देखा तो उसकी लाश बाहर स्ट्रैचर पर पेड़ के नीचे रखी थी।

मुकदमा वादी की तरफ से प्रार्थना पत्र दिनांकित 21.05.2015 प्रस्तुत करते हुए कथन किया गया है कि मेरे तथा मेरी लड़की बसन्ती देवी बहन पंचरत्नी देवी, सुदामा देवी के शपथपत्र पर विश्वास करते हुए मेरे लड़के राजेश यादव की हत्या से सम्बन्धित मुकदमें में नामित डा० दम्पति व घटना में शामिल सिंह लाइफ केयर हास्पिटल के आधा दर्जन कर्मचारियों की शिनाख्त कराकर दण्डित किया जाये। मुकदमा वादी की तरफ से प्रस्तुत किये गये स्वयं के शपथपत्र, घटना की प्रत्यक्ष साक्षी बसन्ती देवी व पंचरत्नी देवी पत्नी श्यामलाल ने अपने-अपने शपथपत्र में प्रथम सूचना रिपोर्ट में घटना के बाबत किये गये कथन का समर्थन किया है। यहा यह उल्लेखनीय है कि यदि साक्षीगण के धारा 161 दं०प्र०सं० के तहत लिये गये बयानों में विरोधाभास आता है तो सही निष्कर्ष पर पहुंचने के लिये विवेचक को धारा 164 दं०प्र०सं० के तहत आनन्दी सिंह यादव, बसन्ती देवी, सन्दीप यादव, पंचरत्नी देवी आदि के बयान कराने चाहिये थे लेकिन विवेचक के द्वारा धारा 164 दं०प्र०सं० के तहत बयान अभिलिखित नहीं

कराये गये हैं और न ही इस हेतु उनके द्वारा प्रार्थना पत्र प्रस्तुत करके इस दिशा में कोई प्रयास किया गया है, जबकि उनके द्वारा उक्त साक्षागण का लाई डिटेक्टर व नारको टेस्ट कराये जाने हेतु प्रार्थना पत्र प्रस्तुत किया गया है। यहां यह उल्लेखनीय है कि विवेचक, विवेचना से सम्बन्धित लाई डिटेक्टर/नारको टेस्ट आदि से सम्बन्धित समस्त कार्यवाही को विधिमुसार कराये जाने हेतु स्वतन्त्र है। अभी विवेचक अपनी उपरोक्त विवेचना के आधार पर कोई अन्तिम निष्कर्ष नहीं निकाल पाये हैं क्योंकि उनके द्वारा साक्षीगण के धारा 161 दं०प्र०सं० के बयानों में विरोधाभास होने के बावजूद धारा 164 दं०प्र०सं० के तहत बयान नहीं कराये गये हैं। साथ ही साथ अभी उन्हें लाई डिटेक्टर/नारको टेस्ट भी कराना है, इसलिये विवेचक की तरफ से प्रस्तुत किया गया प्रार्थना पत्र अन्तर्गत धारा 169 दं०प्र०सं० इस स्तर पर अभी पोषणीय नहीं है।

माननीय उच्चतम न्यायालय द्वारा शाकिरी बासु बनाम स्टेट आफ यू०पी० व अन्य 2008 (60) ए.सी.सी. पृष्ठ 689(एस०सी०) में यह सिद्धान्त प्रतिपादित किया गया है कि "Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter VII Cr.P.C. in cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same." if the Magistrate is satisfied that a proper investigation has not been done, or is not done by the police. Section 156(3) Cr.P.C. though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

यूनियन आफ इण्डिया बनाम प्रकाश पी०हिन्दूजा व अन्य 2003 (47) ए०सी०सी० पृष्ठ 433 (एस०सी०) में माननीय उच्चतम न्यायालय ने व्यवस्था दी है कि " if the Magistrate on an application under Section 156(3), Cr.P.C. is satisfied that proper investigation has not been done, or is not being done by the Officer-in-Charge of the concerned police station, he can certainly direct the officer in charge of the police station to make a proper investigation and can further monitor the same (though he should not himself investigate)."

इसी प्रकार का अभिमत माननीय उच्चतम न्यायालय ने अभिनन्दन झा बनाम दिनेश मिश्रा ए०आई०आर० 1968 पृष्ठ 117 एवं ललिता कुमार बनाम गवर्नमेण्ट ऑफ यू०पी० 2012 (1) ए०सी० Cr.R. पृष्ठ 575 एस०सी में भी व्यक्त किया गया है। माननीय उच्चतम न्यायालय की उपरोक्त विधिव्यवस्थाओं के आलोक में विवेचक द्वारा प्रस्तुत प्रकरण में दौरान विवेचना प्रस्तुत किया गया प्रार्थना पत्र अन्तर्गत धारा 169 दं०प्र०सं० स्वीकार किये जाने योग्य नहीं है, तद्वसार निरस्त किया जाता है तथा विवेचक से अपेक्षा की जाती है कि यह माननीय उच्चतम न्यायालय की उपरोक्त विधि व्यवस्था को दृष्टिगत रखते हुए विधिनुसार विवेचना करेंगे तथा नियमानुसार धारा 164 दं०प्र०सं० एवं लाईडिटेक्टर / नारको टेस्ट की कार्यवाही अमल में लायेंगे। कारागार में निरुद्ध अभियुक्तगण रामशक्ति प्रजापति, शाबिर जमील व अब्दुल अन्सारी का रिगाण्ड पूर्ववत दिनांक 04.06.2015 तक जारी रहेगा।

04.06.2015

विवेचक श्री प्रकाश दूबे, थाना कोतवाली, गाजीपुर द्वारा मु०अ०सं० 429/15. धारा 147, 302, 323, 395 व 504 भा०दं०सं० में प्रार्थना पत्र प्रस्तुत किया गया है कि

अब तक विवेचना से अभियुक्तराण रामशक्ति प्रजापति, शाबिर जमील व अब्दुल अंसारी के विरुद्ध कोई साक्ष्य नहीं पाया गया, विवेचना प्रचलित है। विवेचना में वैज्ञानिक विधि लाई डिटेक्टर व नारको एनालिसिस टेस्ट आदि कराये जा रहे हैं। साक्ष्य मिलने पर कार्यवाही की जायेगी। प्रार्थना पत्र के साथ मात्र पर्चा नं० 14 दिनांकित 04.06.2015 प्रस्तुत किया गया है। अन्य कोई पर्चा प्रस्तुत नहीं किया गया है, न ही स्वयं विवेचक उपस्थित हुए हैं। इस प्रकरण में दिनांकित 22.05.2015 को विस्तृत आदेश पारित करते हुए विवेचक द्वारा प्रस्तुत किया गया प्रार्थना पत्र अन्तर्गत 169 दं०प्र०स० निरस्त किया गया तथा अभियुक्तगण उपरोक्त का रिमाण्ड आज दिनांक 04.06.2015 तक स्वीकृत किया गया था। दिनांक 22.05.2015 से अब तक की गयी विवेचना से विवेचक द्वारा न्यायालय को अवगत नहीं कराया गया है।

अतः अभियुक्तगण रामशक्ति प्रजापति, शाबिर जमील व अब्दुल अंसारी का रिमाण्ड आदेश दिनांकित 22.05.2015 के अनुक्रम में ही दिनांक 17.06.2015 तक स्वीकृत किया जाता है।

23. Submissions on behalf of applicants.

(i) Sri. Ajeet Kumar Singh, learned Advocate for the applicants submitted that a detailed and fair investigation was conducted. Initially by the police and subsequently by a Special Investigation Team. In order to verify statements given by alleged eye witnesses, their Lie Detection Test as well as Narco Test was also conducted. During investigation, a crime scene was also recreated. One of the alleged eye witnesses

i.e. nephew of the complainant (Sandeep Yadav) has stated in his statement recorded under Section 161 Cr.P.C. and later on before Special Investigation Team that initially some dispute arose between deceased and attendants of other patients, which was intervened by staff of the hospital. Thereafter deceased was taken outside the hospital and left alone. Thereafter deceased died due to an accident.

(ii) During investigation, staff of the hospital and attendants of different patients have also narrated same version and report of their Lie Detection Test as well as Narco Test also verified their stand in respect of initial commotion and later on of an accidental death. Involvement of applicants (Doctor Couple) was absolutely denied, that they came to place of occurrence after deceased died due to an accident.

(iii) Learned counsel for the applicants further submitted that after a fair and detailed investigation, a final report was submitted. Learned Magistrate has not arrived at a conclusion that on the basis of evidence collected during investigation, there was a prima facie evidence against the present applicants and other accused that they have committed an offence of murder of son of complainant. No reference was made in regard to evidence about role of Doctor Couple. Learned Trial Court has pointed out various lacunas in the investigation as well as in contents of questions asked during lie detection test as well in

Narco Test whereas for making an opinion all questions and their respective replies were required to be considered and not a part of it.

(iv) Learned counsel for the applicants also referred expert opinion in regard to ante-mortem injuries suffered by deceased as well as he also referred statement of the Doctors, who have conducted postmortem that it could be a case of an accidental death and not a case of homicide.

(v) Learned counsel for the applicants further submitted that in case learned Magistrate was not satisfied by manner of investigation, instead of taking cognizance and summoning the applicants, other options available that he ought to have either pass a direction for further investigation or to treat the protest petition as a complaint and proceed to conduct an inquiry himself as provided under Sections 200 and 202 Cr.P.C.

(vi) Learned counsel for the applicants further submitted that learned Trial Court has picked few questions and answers of scientific investigation to arrive at a conclusion that it was case of homicide and not of an accidental death. Correct approach ought to be to have considered all questions and their answers. Presence of an eye witness (Smt. Chinta Devi) was disputed only on basis of a reply to question that she was giving water in garden, on ground that it was late night, without appreciating that she was on night duty and garden was inside the hospital as well as other replies could not be ignored specifically in regard to role of

applicants (Doctor Couples), that they came down from their residence after death on a phone call of a Doctor.

(vii) The learned Court also submitted that judgments relied by learned Chief Judicial Magistrate are distinguishable on facts and law that in present case a thorough investigation was conducted and a final report was submitted and in order to reject such nature of final report and to take cognizance could be done only after careful appreciation of entire material on record and with a reason as to why outcome of final report was liable to be rejected and on the basis of such material, there were sufficient grounds to proceed.

24. Submissions on behalf of A.G.A. and complainant.

(i) Learned A.G.A. has supported the impugned order that learned Chief Judicial Magistrate has not committed any error to exercise one of the options available in such circumstances. Reason has been assigned in the impugned order, which are legally justified to take cognizance and summon the applicants and other accused by rejecting conclusion of Final Report.

(ii) Learned counsel for the complainant has supported the impugned order and referred orders passed by the Chief Judicial Magistrate that during investigation police has not conducted fair investigation despite orders passed. Investigation conducted by Special Investigation Team was only an eye

wash. Questions were not asked properly during scientific tests. There was a repeated attempt to support accused persons. Deceased has suffered as many as 24 injuries and only on ground that injury no.23 was opined to be a crushed injury, it could not be said to be an accidental death, rather nature of other injuries are sufficient to opined that it was a case of homicide. All witnesses even staff of the hospital have stated that a struggle took place between deceased, staff members of the hospital and attendants of other patients. It was not clear that death was caused due to an accident otherwise, dead body of deceased could not be found on a stretcher inside the hospital. Learned counsel referred impugned order that there is no legal error.

25. Now Court proceeds to consider the above referred rival submissions on the basis of records available.

26. In above background, it would be apt to refer few paragraphs of judgments passed by Supreme Court in Rakesh & Anr Vs. State of Uttar Pradesh & Anr (2014) 13 SCC 133, Zunaid Vs. State of U.P. AIR 2023 SC 4550 and Selvi & Ors Vs. State of Karnataka, (2010) 7 SCC 263.

Rakesh (supra)

“6. If we are to go back to trace the genesis of the views expressed by this Court in Gopal Vijay Verma [Gopal Vijay Verma v. Bhuneshwar Prasad Sinha, (1982) 3 SCC 510 : 1983 SCC (Cri) 110] ,

notice must be had of the decision of this Court in H.S. Bains v. State (UT of Chandigarh) [(1980) 4 SCC 631 : 1981 SCC (Cri) 93 : 1980 Cri LJ 1308] wherein it was held that after receipt of the police report under Section 173, the Magistrate has three options: (H.S. Bains case [(1980) 4 SCC 631 : 1981 SCC (Cri) 93 : 1980 Cri LJ 1308] , SCC p. 635, para 6)

“6. ... (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.”

The second and third options available to the Magistrate as laid down in H.S. Bains [(1980) 4 SCC 631 : 1981 SCC (Cri) 93 : 1980 Cri LJ 1308] have been referred to and relied upon in subsequent decisions of this Court to approve the action of the Magistrate in accepting the final report and at the same time in proceeding to treat either the police report or the initial complaint as the basis for further action/enquiry

in the matter of the allegations levelled therein. Reference in this regard may be made to the decision of this Court in *Gangadhar Janardan Mhatre v. State of Maharashtra* [(2004) 7 SCC 768 : 2005 SCC (Cri) 404] . The following view may be specifically noted: (SCC pp. 773-74, para 9)

“9. ... The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See *India Carat (P) Ltd. v. State of Karnataka* [(1989) 2 SCC 132 : 1989 SCC (Cri) 306] (SCC p. 140, para 16).]”

7. The view expressed by this Court in *Gopal Vijay Verma* [*Gopal Vijay Verma v. Bhuneshwar Prasad Sinha*, (1982) 3 SCC 510 : 1983 SCC (Cri) 110] has been followed in *Mahesh Chand v. B. Janardhan Reddy* [(2003) 1 SCC 734 : 2003 SCC (Cri) 425] and also in a somewhat recent pronouncement in *Kishore Kumar Gyanchandani v. G.D. Mehrotra* [(2011) 15 SCC 513 : (2012) 4 SCC (Cri) 633] . The clear exposition of law in para 12 of *Mahesh Chand* [(2003) 1 SCC 734 : 2003 SCC (Cri) 425] which is

extracted below would leave no manner of doubt that the answer to the question posed by the High Court is correct.

“12. There cannot be any doubt or dispute that only because the Magistrate has accepted a final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition; but the question which is required to be posed and answered would be as to under what circumstances the said power can be exercised.”

Zunaid (supra)

“11. In view of the above, there remains no shadow of doubt that on the receipt of the police report under Section 173 Cr. P.C., the Magistrate can exercise three options. Firstly, he may decide that there is no sufficient ground for proceeding further and drop action. Secondly, he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; and thirdly, he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. It may be noted that even in a case where the final report of the police under Section 173 is accepted and the accused persons are discharged, the Magistrate has the power to take cognizance of the offence on a complaint or a Protest Petition on the same or similar allegations even after the acceptance of the final report. As held by this Court

in Gopal Vijay Verma v. Bhuneshwar Prasad Sinha², as followed in B. Chandrika v. Santhosh³, a Magistrate is not debarred from taking cognizance of a complaint merely on the ground that earlier he had declined to take cognizance of the police report. No doubt a Magistrate while exercising his judicial discretion has to apply his mind to the contents of the Protest Petition or the complaint as the case may be."

Selvi (supra)

"246. The respondents' position is that the compulsory administration of c the impugned techniques should be permitted at least for investigative purposes, and if the test results lead to the discovery of fresh evidence, then these fruits should be admissible. We have already explained in light of the conjunctive reading of Article 20(3) of the Constitution and Section 27 of the Evidence Act, that if the fact of compulsion is proved, the test results will not be admissible as evidence. However, for the sake of argument, if we were to d agree with the respondents and allow investigators to compel individuals to undergo these tests, it would also affect some of the key components of the "right to fair trial".

(Emphasis supplied)

27. Consideration and Conclusion:

(i) As referred above, after a final report is submitted by the Investigating Officer to a Magistrate, one of the alternatives available with the Magistrate is to

take cognizance on the basis of final report and accompanied material submitted by the Investigating Officer, which was adopted in the present case. Consequently, there is no illegality in the process adopted.

(ii) The issue left for consideration is whether on basis of material available with the Final Report, an opinion of the learned Chief Judicial Magistrate, if any, that there is sufficient ground for proceeding is justified or not?

(iii) The Court will also consider, if such material was not sufficient to form an opinion to take cognizance and to summon, the learned Chief Judicial Magistrate ought to have taken recourse of other alternatives i.e. either to pass a direction for further investigation or may treat the protest petition as a Complaint and proceed accordingly in terms of Sections 200 and 202 Cr.P.C.

(iv) On basis of above referred material on record, it is not much under dispute that a detailed investigation was conducted, initially by the police and subsequently by a Special Investigation Team. Scientific Tests i.e Lie Detection Test and Narcon Analysis Test were also conducted and a reasoned opinion was formed that it was not a case of homicide rather, deceased died due to a road accident. Deceased after initial commotion was left outside the hospital by the staff and attendants of patients, where after sometime he rushed to the road and met with an accident.

(v) In case in hand, there is no dispute that a voluntary Lie Detector Test and Narco Analysis was conducted on two witnesses namely (Smt. Chinta Devi and Gandhi Singh), essentially for verifying truth of their respective statements recorded by Investigating Officer and later on by the Special Investigation Team that it was a case of accidental death and not a case of homicide. As held in *Selvi* (supra), such voluntary tests are permissible during investigation to unearth truth, however, as such its result would not be admissible in evidence, still it has corroborative value for purpose of filing a Final Report.

(vi) Crux of the arguments of learned counsel for applicants was that material with the final report was not sufficient to reject its outcome and to take cognizance. The Chief Judicial Magistrate has not assigned substantial reasons to reject outcome of final report. Learned Chief Judicial Magistrate has pointed out various lacunas in the investigation, therefore, if he was not satisfied by the investigation, he ought to have adopted other remedies i.e. either to direct further investigation or to treat the protest petition as a complaint and by not adopting such alternatives remedies, impugned order becomes illegal. The evidence collected during detailed investigation has no other outcome, but to file a Final Report. Applicants have no role even in initial commotion and then came down after deceased has died.

(vii) Crux of the arguments of learned counsel for complainant was that since commencement of the investigation, prosecution has not conducted a fair investigation despite various orders were passed by the learned Chief Judicial Magistrate. Investigation was conducted only to make out a case of death by an accident and not to unearth truth, therefore, on basis of statements of witnesses (relatives of deceased) it was a case of homicide, wherein applicants were also involved. Learned Chief Judicial Magistrate has rightly pointed out reasons that investigation was not proper as well as reasons for rejecting outcome of the Final Report.

(viii) I have carefully perused impugned order passed by learned learned Chief Judicial Magistrate, wherein mainly it was observed that:-

(a) Learned Chief Judicial Magistrate took note of observations made in his order passed during investigation that not only an application for amendment in offence from under Section 302 IPC to Section 304-A was rejected but subsequent application under Section 169 Cr.P.C (release of accused when evidence deficient) was also rejected with adverse observations in regard to nature of investigation and conduct of Investigating Officer.

(b) Deceased has received 24 ante-mortem injuries (19 injuries were abrasion, 4 lacerated wounds and one crushed injury). Out of 24 injuries there was only one crushed injury, which could not

be possible in a case of accident, rather it indicates manner of occurrence as mentioned in FIR and statement of complainant and witnesses i.e. relatives of deceased.

(c) Complainant and other relatives of deceased were not gone through lie detection test and narco test on a ground that they remained unavailable for test whereas they have sought a next date that they were unwell.

(d) Presence of Smt. Chinta Devi, (a staff of the hospital) at garden (for watering) at late hours was considered to be doubtful as well as she has stated in reply to question number 20 in Narco Analysis Test that deceased has not received any injury, which could not be possible in a case of accident. No mark of tyre was found on clothes.

(e) Complainant and other relatives were consistent about manner of occurrence as narrated in FIR.

(f) In support of impugned order, the learned Chief Judicial Magistrate has placed reliance on **M/s India Carat Pvt. LTD. VS. State Of Karnataka And Another, (1989) 2 Supreme Court Cases; Sri A.C. Aggarwal, Sub-Divisional Magistrate, Delhi And Another VS. Mst. Ram Kali ETC 1967 SCC Online SC 79; Bhushan Kumar And Another Vs. State [NCT Delhi] And Another (2012) 5 SCC 424; Gambhir Singh R. Dekare VS. Falgun Bhai Chimanbhai Patel And Another (2013) 3 SCC 697.**

(ix) As referred above, learned Chief Judicial Magistrate has concentrated more on manner of investigation that relevant questions were not asked during Lie Detector Test or Narco Analysis Test. Learned Magistrate has doubted presence of staff of the hospital at garden in late night as well as that only one crushed injury (out of 24 antemortem injuries) could not be sufficient to rule out murder and to make it a case of death by an accident.

(x) The legal position to take cognizance and summoning after a final report, requires reasons either to accept it or reject and to take cognizance and summon or instead to direct for further investigation or treat it as a complainant case. Since in present case, learned Chief Judicial Magistrate while rejecting outcome of the Final Report has taken cognizance on basis of material available alongwith it that there are sufficient material to proceed, therefore, there must be reasons to support, though it may be in brief.

(xi) The Court also takes note of orders passed by learned Chief Judicial Magistrate during investigation that application for amendment of charges from Section 302 I.P.C. to Section 304 I.P.C. was rejected as well as application under Section 169 Cr.P.C. was also rejected, however, since at that stage investigation was still not concluded therefore, there was no error in rejecting an application for amendment of offence and application under Section 169 Cr.P.C. as well as

purport of said orders could not be considered to be that entire investigation was not correct nor that entire investigation was an eyewash. In case, investigation was not proper, appropriate direction ought to be passed for further investigation or to consider the protest petition as a complaint case, but same was not adopted.

(xii) I have carefully perused statements of witnesses recorded by the Investigating Officer, later on by the Special Investigation Team as well as questions and their answers in Lie Detector Test and Narco Test and its conclusions. It could be summarised as follows:

(a) Sandeep Yadav, a relative of deceased in his statement recorded under section 161 Cr.P.C has stated that after initial commotion, staff of the hospital accompanied deceased to outside hospital building and after sometime he came to know that deceased has met with an accident. No involvement of doctor couple was disclosed in entire occurrence (para 5 of present judgment). The witness has denied to be an eye witness of occurrence in his statement recorded by SIT. (Para 10 of present judgment).

(b) Gandhi Singh and Arvind Yadav, attendant to different patients have stated in their statements recorded under section 161 Cr.P.C which corroborates with above referred statement of Sandeep Yadav. They also stated that it was an accidental death. Gandhi Singh has witnessed accident also. He has specifically

denied involvement of doctor couple. (Para 6 of present judgment).

(c). Shrimati Chinta Devi, a worker of the hospital has narrated entire occurrence in her statement recorded under section 161 Cr.P.C that how it commenced and later on deceased met with an accident and died. She has also denied any role of doctor couple in the occurrence and that they were informed about the occurrence after it got over. (Para 6 of present judgment).

(d). Statements of Smt. Chinta Devi, Gandhi Singh and Arvind Yadav (above referred) were also recorded subsequently by SIT also. (Paras 11 and 12 of present judgement), wherein also they narrated similar version as stated in their respective earlier statements about earlier commotion and later on deceased died due to an accident. Presence and involvement of Doctor Couple was again denied in entire occurrence.

(e). During investigation, the Investigating Officer as well as SIT has recorded statement of other attendants also and they all stated that after initial commotion deceased went outside and met with an accident (para 11 and 12 of present judgment).

(f). Doctors who have conducted postmortem have also not ruled out accidental death in their statements recorded during investigation (para 7 of present judgment) which is also supported by an expert report from Sanyukt Nideshak Rajya Chikitsa Vidhi Visheshagya dated 24.4.2015 that

ante-mortem injuries could be received it deceased came in contact with a fast moving vehicle (para 8 of present judgment).

(g) The complainant, (Anandi Singh Yadav) has claimed himself to be an eye witness in FIR as well as in his statement recorded under section 161 Cr.PC (Paras 3 and 5 of present judgment), however in his statement recorded before SIT he has specifically denied to be an eye-witness and that he came to the place of occurrence after death of deceased on an information given by his daughter and stated as informed by her daughter (Basanti Devi) as a hearsay witness. (Para 10 of present judgment).

(h) Dr Zahruddin working at hospital has stated in his statement that he has recorded commotion and accordingly a video audio recording was taken on record and by Forensic Expert a CD was also prepared (Para 11 of present judgment). Said judgment clip was played before a witness Mulayam, (a relative of deceased) who stated that it was a voice of deceased, who repeatedly saying 'Kaun hai Mera' though visuals in video was not very clear (Para 12 of present judgment).

(i) Statements of witnesses also indicate that deceased was violent by his behaviour and was not in his complete sense. Witnesses have stated that his relatives were also requesting to stop him that otherwise he would cause injury to himself, though there is no material in charge-sheet

about mental condition of deceased.

(j). Two witnesses (Smt Chinta Devi and Gandhi Singh) have undergone Lie Detection/Polygraphic Test and Narco Analysis Test. (Paras 15 and 16 of present judgment). Both witnesses in their respective Lie Detection/Polygraphic Test Test have specifically stated that they have not seen the Doctor Couple being involved in occurrence as well as both witnesses have witnessed accident also.

(k) Both witnesses have also went through Narco Analysis Test wherein both remain consistent on their earlier statements and replied to specific questions that staff was not involved in commotion. They took deceased at a distance and after sometime deceased went outside and met with an accident. Both have stated that they were eye-witness to accident also. It was also specifically replied that doctor couple was not involved in any manner in entire occurrence.

(l) In aforesaid circumstances only witness who claimed herself as an eye-witness is Basanti Devi (daughter of complainant/sister of deceased). She has not come forward for Lie Detection/Polygraphic Test and for NARCO Analysis Test. Her statement before SIT would be relevant (Para 10 of the judgment). She reiterated that doctor couple and others (in all 9 persons) were assaulting his brother. They confined him in a room. Later on she came to know about death,

however, to a specific question whether doctor couple was present, she replied that she did not recognize the Doctor Couple. She also added that they were not present. Relevant question and its answer are mentioned hereinafter:-

"प्रश्न- 9 लोगों में क्या डा०

राजेश व डा० अनुपमा सिंह भी थी,
तथा किस चीज से मारपीट हो रही थी?

उत्तर- डा० राजेश पति,
पत्नी थे, व कुल मिलाकर 9 लोग थे
जिसमें 06 लोग मुँह बाँधे हुए थे, फिर
बताया कि डा० राजेश व अनुपमा को
नही पहचानती हूँ फिर बताया कि वह
दोनों नहीं थे, यह भी बताया कि सब
लोग हाँथों से मार रहे थे व गाली दे रहे
थे।"

(xiii) It appears to be a case that initially deceased had an altercation with attendant of a patient at Hospital. At relevant time, staff of hospital interfered and asked him to go out and after sometime he was found dead. During investigation, witnesses saw how death occurred, whereas staff of hospital and an attendant of patient has claimed themselves to be an eyewitness that they witnessed entire occurrence that after initial commotion, deceased went outside the hospital, where he died due to an accident with a vehicle. Despite efforts, vehicle was not recovered/identified.

(xiv) Learned Trial Court has pointed out few questions and answers given during Lie Detector Test and Narco Analysis Test to take a view that staff was not present at place of occurrence to witness that it was a case of accident, which was not a correct approach rather entire statement was required to be considered. Only that at late hour at hospital said witness was giving water at garden of hospital, her presence could not be considered to be doubtful. Their statements and answers to various questions asked during investigation including during tests could not be considered to be absolutely false. The Learned Magistrate ought to have considered reports of scientific tests also that they have concluded about truthiness of witnesses.

(xv) To summon is a serious affair and it becomes more serious when summon is issued after rejecting outcome of investigation i.e. a Final Report. The required reasons are missing in impugned order. Entire investigation i.e. by police, by Special Investigation Team along with Scientific Investigation could not be rejected merely for sake of it, rather there must be

reasons to reject it however, such reasons are missing in impugned order.

(xvi) In the impugned order, consideration of above referred analysis of statements recorded during investigation and expert reports and scientific investigation is absolutely missing. Summoning order was passed by referring few answers and by commenting on nature of investigation, which is not the required consideration.

(xvii) The Chief Judicial Magistrate has placed reliance on statements of complainant and his daughter however, failed to appreciate that complainant has denied himself to be an eyewitness and his daughter has denied involvement of Doctor Couple in occurrence. She even don't recognize them. On basis of such evidence, summoning order could not legally survive as other material such as evidence of relatives of deceased, staff of hospital, result of scientific test, doctor's statement, expert opinion are sufficient that it was a case of accident and not a case of homicide, such nature of evidence could not be ignored.

(xviii) In **A.C Aggarwal (supra)** question was to take cognizance on

investigation by appropriate persons. In **M/s India Carat (supra)** legal position as discussed above was approved that "the Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case" i.e. in such case there must be application of mind. In **Bhushan Kumar (supra)** explicit reasons were not required to mention that cognizance is taken on a charge-sheet, however, same is not applicable when after rejecting a final report, cognizance is taken and summon is issued. **Gambhir Singh (supra)** was in regard to a complaint case.

28. The outcome of above detailed analysis is that impugned orders are unreasoned for the purpose to take cognizance and to summon, after rejecting outcome of Final Report as well as Revisional Court has also failed to consider it therefore, they are liable to be set-aside.

29. The outcome of above discussion is that there are various legally sustainable evidence that applicants (i.e. a Doctor Couple) was not involved in the entire occurrence as well as it could not be ruled out that deceased died due to an accident, therefore, it is a fit case where inherent power could be invoked and thus

impugned orders could not survive qua to the applicants.

30. Now question left to consider whether other accused (Ramshakti Prajapati, Sabbir, Zamil and Abdul Ansari) who are not before this Court, would get benefit of this order or not. I am of opinion that since in this judgment entire investigation is being considered and an opinion is formed, therefore, in the interest of justice and to secure the ends of justice as well said accused are liable to get its benefit. Accordingly, impugned orders dated 9.12.2019 passed by Additional Sessions Judge/Fast Track Court No.1, Ghazipur in Criminal Revision No.193 of 2015 (Dr. Rajesh Singh and others Vs. State of U.P. and another) as well as the order taking cognizance and summoning order dated 26.06.2015 passed by Chief Judicial Magistrate, Ghazipur, in Misc. Criminal Case No. 2257 of 2015 (State Vs. Dr. Rajesh Singh and others) arising out of case crime no.429 of 2015, under Sections 147,323,504,302 I.P.C., Police Station-Kotwali, District Ghazipur as well as entire proceedings arising out of aforesaid case crime number are liable to be quashed and is hereby quashed.

31. The Court is also of considered opinion that by present judgment, the Court could not estop the complainant to pursue the Chief Judicial Magistrate, Ghazipur to choose among the other alternatives as discussed in Rakesh (supra) and Zunaid (supra) and for that the complainant will have liberty to proceed in accordance with law.

32. With aforesaid observation and direction, present application is disposed of.

(2024) 9 ILRA 1014
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2024

BEFORE

THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Application U/S 482 No. 4769 of 2024

Priyanka Gupta & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:

Sri Abhishek Kumar Saroj, Sri Arvind Kumar, Sri Siddharth, Sri Syed Shahnawaz Shah

Counsel for the Respondents:

G.A., Sri Vijit Saxena

Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 200, 202(1), 204 & 482 - Indian Penal Code, 1860 - Sections 120-(B), 323, 406, 420, 467, 468, 471, 498-A, 504 & 506 - The Dowry Prohibition Act, 1961 - Sections 3 & 4 -
 Application - for quashing the summoning order as well as order passed in revision petition - complaint with regards to Matrimonial dispute - FIR - investigation - Charge-sheet - another complaint - with allegation of conspiracy & committed cheating and withdrew money from the bank account of complainant - St.ment recorded by trial court as well as seeks hand writing Experts' report - summoning order - revision petition - dismissed - instant application - Evaluation of Evidence - court finds that, complainant & applicant no. 2 are wife & husband - employees of bank were not summoned - offence u/s 420 & 406 IPC may not be simultaneously make out - allegation u/s 406 IPC could not be made out, since ingredients thereof are absent - neither any 'entrustment' nor allegation of 'dishonest misappropriation' in violation of any 'direction of law' or 'any legal contract' - held - summoning order is interfered to the extent of summoning the applicants u/s 406 IPC - however, summoning u/s 420 and 120-B IPC is concerned, it remained un-

interfered - thus, impugned order is mundified, accordingly - Application is disposed of. (Para -13, 14, 15, 20)

Application u/s 482 Disposed of. (E-11)

List of Cases cited:

1. Deepak Gaba Vs St. of U.P. & anr.- 2023 vol. 3 SCC 423,
2. Delhi Race Club (1940) Ltd. & ors.Vs St. of U.P. & anr.- Criminal Appeal No. 3114/2024 Decided on Dt. 23.08.2024,
3. Lallan Kumar Singh & ors.Vs St. of Mah. - 2022 SCC online SC 1383,
4. Smar Bahadur Singh Vs St. of U.P. & ors.- 2011 vol. 9 SCC 94.

(Delivered by Hon'ble Saurabh Shyam Shamsbery, J.)

1. Heard Mr. Siddharth, learned counsel for the applicants, Mr. Vijit Saxena, learned counsel for opposite party No.2 and Mr. Rakesh Kumar Mishra, learned AGA for the State.

2. Instant application under Section 482 Cr.P.C. has been preferred by applicants with a prayer to quash the Summoning order dated 01.07.2023 passed in complaint case No. 215 of 2020 (Smt. Shweta Gupta Vs. Rahul Gupta and others) under Sections 420, 406, 120-B I.P.C., Police Station-Railway Road, District-Meerut and also to set aside order dated 16.01.2024 passed by Additional Sessions Judge/Special Judge, (Anti Corruption Act), Meerut in Criminal Revision No. 504 of 2023.

3. In the present case, applicant No.2 is husband of the complainant whereas applicant No.1 is sister of applicant No.2.

4. Earlier, the complainant has lodged an FIR dated 22.06.2019 against the applicants, their father and mother for offence under Section 498-A, 323, 504, 506 and 406 I.P.C. and Section 3/4 Dowry Prohibition Act, wherein after investigation, a charge-sheet was filed on 12.07.2019 against all named accused persons except, the applicant No.1 herein.

5. The complainant thereafter filed an application under Section 156(3) Cr.P.C. against present applicants and their father and mother on 15.11.2019 that they have committed an offence under Section 420, 467, 468, 471, 504, 506 and 120-B I.P.C.

6. It was alleged that they hatched a conspiracy, wherein the applicant No.1 committed cheating and thereby withdrew money from the bank account of the complainant from the bank, where applicant No.1 was working as a Manager in a different branch at Bijnor. In all, Rs. 1,18,000/- was withdrawn out of which Rs. 70,000/- was transferred to the bank account of the applicant No.1 at Saboon Godown, Branch at Meerut. It was also alleged that applicant No.2 (husband of complainant) has linked his bank account with his email and phone number so that she may not get alert messages. She came to know about cheating when she checked account details on 17.02.2019.

7. The said application was considered as a complaint and statement of the complainant and witnesses were recorded under Section 200 and 202 Cr.P.C. For reference, statement of complainant recorded under Section 200 Cr.P.C. on 13.09.2021 is reproduced hereinafter:-

“बयान अन्तर्गत धारा 200 सी०आर०पी०सी दिनांक 13.09.2021

मेरा नाम स्वेता गुप्ता आयु 35 वर्ष पुत्री श्री उमेश कुमार गोयल निवासी विजय मण्डह मुरादनगर सशपथ बयान करती हूँ कि -

मेरी शादी दिसम्बर 2015 में राहुल गुप्ता के साथ हुई थी मेरी ससुराल चन्द्रलोक साबुन गोदाम मेरठ में है मेरा मेरी ससुराल वालो के साथ वैवाहिक विवाद चल रहा है जिस वजह से मैं दिनांक 6.01.2019 से अपने पीहर मुरादनगर में रह रही हूँ मेरा एक खाता एस०बी०आई० साबुन गोदाम शाखा जिला मेरठ में है जिसमें मेरे काफी पैसे जमा है खाता सं० 35012436998 है इस खाते में फोन नं० और ई-मेल आईडी दोनों ही मेरे पति की दर्ज है इसलिए मुझे इस खाते में लेन देन की जानकारी नहीं हो पाती 17.02.2019 को जब मैंने उक्त खाता संख्या की बैंक स्टेटमेंट निकलवायी तब मुझे पता चला कि मेरी नन्द प्रियंका गुप्ता जो एस०बी०आई० बिजनौर शाखा में मैनेजर के पद पर कार्यरत है इन्होंने अपने भई राहुल गुप्ता अपनी माता कुसुम गुप्ता और अपने पिता राजकुमार गुप्ता और बैंक के अन्य लोगों के साथ साठ गांठ करके पहले मेरे फर्जी कागजात तैयार कराये उसके बाद फर्जी विदड्रावल फार्म भरे और उसके बाद फर्जी साइन करके 17.05.2016 को 20000 रुपये 03.06.2016 को 50000 रुपये अपने खाते में ट्रांसफर कर लिये इसके अलावा 12.11.2016 को ही 24000 रुपये और 02.12.2016 को 24000 रुपये भी नकद निकाल लिये इस सारे दिनों में मैं कम्पनी सतीन क्रेडिट केयर नेटवर्क लि० दिल्ली में कार्य कर रही थी जिसका कागज़ फाइल पर संलग्न है जब मैंने घर में जाकर इसकी शिकायत की तो वहां उन्होंने बहुत बत्तमीजी की गाली गलौज की ओर जान से मारने की धमकी दी मैंने इसकी शिकायत बैंक में थाना रेलवे रोड जिला मेरठ में एंव 04.11.2019 एस०एस०पी० मेरठ में शिकायत कराई पर कोई कार्यवाही नहीं हुई इस तरह मेरे खाते से कुल 1 लाख 18 हजार रुपये धोखाधड़ी से निकाले गये।”

(emphasis supplied)

8. The Learned Magistrate has summoned a police report under Section 202(1) Cr.P.C. and after considering statements as well as a hand writing expert's report also, summoned the applicants under Section 420, 406 and 120-B I.P.C. by the impugned summoning order dated 01.07.2023. For reference, same is reproduced hereinafter in its entirety:-

“01.07.2023

पत्रावली पेश हुयी। पत्रावली वास्ते आदेश हेतु नियत है। परिवादिनी के विद्वान अधिवक्ता को तलबी के बिन्दु पर पूर्व में सुना जा चुका है।

संक्षेप में तथ्य इस प्रकार है कि परिवादनी का वैवाहिक विवाद प्रार्थनी के ससुराल वालों से चल रहा है तथा प्रार्थनी दिनांक 06.01.2019 से अपने पीहर मुरादनगर में रह रही है। प्रार्थनी का एक खाता भारतीय स्टेट बैंक शाखा साबुन गोदाम, जिला मेरठ में था जिसका एकाउंट नं०-35012436998 है उक्त खाते में प्रार्थनी के रुपये जमा थे। प्रार्थनी ने अपने खाते की स्टेटमेंट निकलवाई तो प्रार्थनी को ज्ञात हुआ कि प्रार्थनी की नन्द प्रियंका गुप्ता जो भारतीय स्टेट बैंक शाखा बिजनौर में नौकरी करती है ने अपने भाई राहुल गुप्ता, माता कुसुम गुप्ता पिता राजकुमार निवासी गण 334/2 डी चन्द्रलोक साबुन गोदाम मेरठ ने बैंक के अन्य कर्मचारियों के साथ षडयन्त्र रचकर फर्जी कागजात तैयार कर प्रार्थनी के एकाउंट से फर्जी बिदड्रावल फार्म भर करके फर्जी हस्ताक्षर कर दिनांक 17.05.2016 को खाता सं०-0034240905479 में अंकन 20,000/ रुपये, दिनांक 03.06.2016 को 50,000/ पचास हजार रुपये ट्रांसफर कर लिये तथा दिनांक 18.11.2016 को 24,000/- रुपये व दिनांक 02.12.2016 को 24,000/- रु० प्रार्थनी के फर्जी हस्ताक्षर बनाकर विदड्रावल फार्म से नकद निकाल लिये गये। जबकि उक्त सभी दिनांक को प्रार्थनी SATIN CREDITCARE NETWORK LTD. DELHI में कार्य कर रही थी कम्पनी द्वारा जारी प्रमाण पत्र इस प्रार्थना पत्र के साथ संलग्न है। जब प्रार्थनी ने राहुल गुप्ता, प्रियंका गुप्ता, कुसुम गुप्ता व राजकुमार से उक्त फर्जीवाड़े का विरोध किया तो उक्त लोगों ने प्रार्थनी को जान से मारने की धमकी दी तथा प्रार्थनी से कहा कि यदि तुने पुलिस में हमारे खिलाफ शिकायत की तो तुझे व तेरे मां बाप को मरवा देंगे। उक्त लोगों द्वारा प्रार्थनी के फर्जी हस्ताक्षर कर फर्जी कागजात तैयार करके प्रार्थनी के खाते से 1,18,000/रु० धोखाधड़ी व बदनियती से निकाल लिये है। प्रार्थनी ने उक्त घटना की सूचना थाना रेलवे रोड जिला मेरठ को दिनांक 30.10.2019 को दी किन्तु प्रार्थनी की रिपोर्ट दर्ज नहीं की गयी। प्रार्थनी ने उक्त सम्बन्ध में एक प्रार्थना पत्र दिनांक 4.11.2019 को एस.एस.पी.

महोदय मेरठ को दिया गया किन्तु आज तक भी पुलिस ने प्रार्थनी की रिपोर्ट दर्ज नहीं की।

परिवाद के समर्थन में परिवादनी ने धारा 200 दं०प्र०सं० के अन्तर्गत स्वयं का बयान लेखबद्ध कराया है तथा धारा 202 दं०प्र०सं० के अन्तर्गत साक्षी पी०डब्ल्यू०-01 श्री किशन गुप्ता व पी० डब्ल्यू०- 2 के रूप में उमेश कुमार गर्ग के बयान लेखबद्ध कराए गए हैं। दस्तावेजी साक्ष्य के रूप में प्रार्थना पत्र वरिष्ठ पुलिस अधीक्षक, डाक रसीद, कम्पनी द्वारा जारी हाजिरी प्रमाण पत्र, बैंक स्टेटमेंट की चार अदद कॉपी को दाखिल किया गया है। न्यायालय द्वारा मामले में 202 (1) दं०प्र०सं० के अंतर्गत अन्वेषण कराया गया जिसके सम्बन्ध में पुलिस रिपोर्ट दिनांकित 25.06.2022 व पुलिस रिपोर्ट दिनांकित 29.09.2022 पत्रावली पर मौजूद हैं। वाद की कार्यवाही के दौरान परिवादी द्वारा हस्तलेख विशेषज्ञ 02.12.2020 की रिपोर्ट भी पत्रावली पर दाखिल की गयी है।

सुना व पत्रावली का अवलोकन किया। पत्रावली के अवलोकन से स्पष्ट है कि परिवादनी ने अपने परिवाद पत्र में कथन किया है कि वह 06.01.2019 से अपने पीहर मुरादनगर में रह रही है। उसका एक खाता स्टेट बैंक शाखा साबुन गोदाम, जिला मेरठ में था। जिसका खाता सं०-35012436998 है। प्रार्थनी ने जब अपने खाते स्टेटमेंट निकलवाई तो उसे ज्ञात हुआ कि उसकी गन्द प्रियंका गुप्ता जो भारतीय स्टेट बैंक शाखा बिजनौर में काम करती है, ने अपने भाई राहुल गुप्ता, माता कुसुम गुप्ता व पिता राजकुमार ने बैंक के अन्य कर्मचारियों के साथ षडयन्त्र रचकर प्रार्थनी के फर्जी हस्ताक्षर पर दिनांक 17.05.2016 को सं०-0034240905479 में अंकन 20,000/ रुपये, दिनांक 03.06.2016 को 50,000/ पचास हजार रुपये ट्रांसफर कर लिये तथा दिनांक 18.11.2016 को 24,000/- रुपये व दिनांक 02.12.2018 को 24,000/- रुपये प्रार्थनी के फर्जी हस्ताक्षर बनाकर विद्वद्वाल् फार्म से नकद निकाल लिये जबकि उक्त सभी दिनांक को प्रार्थनी SATIN CREDITCARE NETWORK LTD. DELHI में कार्य कर रही थी। जब प्रार्थनी ने उक्त फर्जीवाड़े का विरोध विपक्षीगण से किया तो उन्होंने

प्रार्थनी को जान से मारने की धमकी दी और कहा कि यदि तूने पुलिस से हमारे खिलाफ शिकायत की तो तुझे व तेरे मां बाप को मरवा देंगे। उक्त तथ्य का समर्थन प्रार्थनी द्वारा अपने बयान 200 दं०प्र०सं० के अन्तर्गत व साक्षी पी०डब्ल्यू०-01 व पी०डब्ल्यू०-02 द्वारा बयान 202 दं०प्र०सं० के अंतर्गत भी किया गया है। चूंकि विपक्षीगण 1 व 3 द्वारा प्रार्थनी के खाते से 1,18,000/- रुपये फर्जी हस्ताक्षर कर धोखाधड़ी व बदनियती से निकाल लिए गए हैं। पत्रावली पर मौजूद बैंक स्टेटमेंट से भी यह दर्शित होता है कि ऐसे प्रियंका गुप्ता के खाते में गए हैं। पत्रावली पर परिवादी द्वारा दाखिल हस्तलेख विशेषज्ञ की रिपोर्ट दिनांकित 02-12-2022 के द्वारा भी परिवादिनी के हस्ताक्षरों को दूसरे व्यक्तियों के द्वारा करना बताया गया है। परिवादिनी के द्वारा किए गए कथनों का समर्थन अन्वेषण आख्या अंतर्गत धाराएं 202 से भी होता है। जिसके अनुसार प्रियंका गुप्ता द्वारा परिवादिनी हस्ताक्षर शुदा सहित विद्वद्वाल् फार्म से बिना खाता धारक के ऐसा निकालना बताया तथा परिवादिनी की गैर मौजूदगी में पैसा ट्रांसफर किया गया तथा यह कथन भी किया गया है कि बैंकों के नियमानुसार बिना खाता धारक की मौजूदगी में विद्वद्वाल् फार्म से खाता धारक के हस्ताक्षर के उपरान्त भी उसके खाते से पैसा निकालना कानूनन जुर्म बनता है। चूंकि विपक्षी प्रियंका गुप्ता के द्वारा परिवादिनी के पूर्व रचित हस्ताक्षर पर उसके खाते से पैसा निकाला गया है तथा जिसकी सूचना परिवादिनी के पति को थी क्योंकि उसका ई-मेल व फोन नम्बर पर ही बैंक से सूचना आती थी। उपरोक्त तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए विपक्षी प्रियंका गुप्ता व राहुल गुप्ता को प्रथम दृष्टया अंतर्गत धार 420, 406, 120 बी भा०दं० सं०में तलब करने हेतु आधार पर्याप्त है। विपक्षी कुसुम गुप्ता व राजकुमार गुप्ता को तलब करने हेतु आधार पर्याप्त नहीं है।”

(emphasis supplied)

9. The aforesaid order was challenged at instance of the applicant by way of filing a Revision Petition, however, it got dismissed by another impugned order dated 16.01.2024. For reference, relevant part thereof is also reproduced hereinafter:-

“9 पत्रावली के अवलोकन से यह स्पष्ट होता है कि निगरानीकर्तागण की ओर से यह निगरानी

विद्वान मजिस्ट्रेट के द्वारा धारा 204 द०प्र०स० में पारित किये गये तलबी आदेश के विरुद्ध प्रस्तुत की गयी है। इस संबंध में यह उल्लेखनीय है कि परिवाद के आधार पर संज्ञान मामले में न्यायालय के द्वारा अपराध का संज्ञान लिये जाने के बाद परिवादी की साक्ष्य धारा 200 द०प्र०स० में अंकित करते हुए तथ्यों की जांच करने तथा धारा 202 द०प्र०स० में भी परिवादी के साक्षियों की जांच करने या पुलिस के द्वारा विवेचना कराये जाने का प्रावधान है। प्रस्तुत मामले में विद्वान मजिस्ट्रेट के द्वारा परिवादी का धारा 200 द०प्र०स० का बयान अंकित किया गया है तथा साक्षियों से धारा 202 द०प्र०स० में जांच भी गयी है। पुलिस से भी धारा 202 (1) द०प्र०स० में विवेचना की गयी है। परिवादी के द्वारा विवादित विदड़ाल फार्म पर अपने हस्ताक्षर की जांच हस्तलेख विशेषज्ञ से कराकर रिपोर्ट परिवाद में दाखिल की गयी है। पुलिस के द्वारा की गयी विवेचना में बैंक के प्रबंधक के द्वारा यह स्वीकार किया गया है कि विदड़ाल फार्म से रुपये निकालने पर केवल खाताधारक को ही रुपये दिये जायेंगे। इस प्रकार विद्वान मजिस्ट्रेट के द्वारा परिवाद के तथ्यों की प्रथम दृष्टया पुष्टि होने पर कार्यवाही किये जाने योग्य मामला पाते हुए प्रश्नगत आदेश पारित किया गया है। धारा 204 द०प्र०स० में भी यही प्रावधान किया गया है कि विद्वान मजिस्ट्रेट तलबी आदेश के समय यदि कार्यवाही योग्य मामला पाता है तो समुचित आदेश पारित कर सकते हैं। इसलिए प्रश्नगत आदेश में प्रथम दृष्टया कोई विधिक त्रुटि होना परिलक्षित नहीं होती है।

10. निगरानीकर्तागण के द्वारा निगरानी में मुख्य रूप से यह आधार लिया गया है कि परिवादी के द्वारा स्वयं धनराशि आहरित की गयी है, बैंक के द्वारा की गयी जांच में परिवादी के हस्ताक्षर विदड़ाल फार्म पर होना पाये गये हैं, पुलिस की जांच में कोई, धोखा धड़ी होना नहीं पायी गयी है, जिस दिन दिनांक की घटना है उस दिनांक को निगरानीकर्ता स०1 विदेश में था तथा परिवादी व निगरानकर्ता स०1 के मध्य विवाद पहले से चल रहा है। निगरानीकर्तागण के द्वारा इस संबंध में प्रपत्र भी पत्रावली पर दाखिल किये गये हैं। निगरानीकर्तागण के द्वारा लिये गये आधारों तथा दाखिल किये, गये प्रपत्रों के तथ्य प्रतिरक्षा की साक्ष्य की विषय वस्तु है जिनके संबंध में प्रतिरक्षा की स्तर पर ही विचार किया जा सकता है। तलबी आदेश या निगरानी में उनके संबंध में "विचारण" की तरह विचार नहीं किया जा सकता है।

मा० उच्चतम न्यायालय के द्वारा अपने निर्णय सोनू गुप्ता बनाम दीपक गुप्ता (2015) 3 एस.सी.सी. 424 में भी इसी प्रकार का मत व्यक्त किया गया है कि प्रतिरक्षा की साक्ष्य तथा प्रतिरक्षा के तर्कों के संबंध में सम्मनिंग आदेश के स्तर पर विचार नहीं किया जायेगा। गम्भरी सिंह आर. डाकरे बनाम फाल्गुनभाई चिमनभाई पटेल ए.आई.आर. 2013 एस.सी. 1590 में यह मत व्यक्त किया गया है कि संज्ञान के स्तर पर परिवाद के तथ्यों के सत्यता का परीक्षण नहीं किया जायेगा। इस प्रकार परिवादी की ओर से अपराध का संज्ञान लिये जाने के संबंध में प्रस्तुत की गयी पर्याप्त सामग्री के आधार पर ही विद्वान मजिस्ट्रेट के द्वारा प्रश्नगत आदेश पारित करके अपने निहित क्षेत्राधिकारिता का सही प्रयोग किया गया है। इसलिए प्रश्नगत आदेश में कोई विधिक त्रुटि या अनियमितता नहीं है। इस कारण उसमें हस्तक्षेप किये जाने की आवश्यकता नहीं है।

11. अतः उपरोक्त विश्लेषण के आधार पर प्रश्नगत दाण्डिक निगरानी निरस्त किये जाने तथा प्रश्नगत आदेश पुष्ट किये जाने योग्य है।”

(emphasis supplied)

10. The court has initially tried to mediate since complainant and applicant No.2 are wife and husband, but parties failed to arrive at any mutual agreement.

11. Mr. Siddharth, learned counsel for the applicants submitted that bank has conducted an internal inquiry on basis of a complaint filed by the complainant and by a reasoned report, all allegations were found false and no such offence was found to be committed by the applicant No.1 or applicant No.2. Learned counsel has referred contents of it as well as a Handwriting Expert's Report that signature on withdrawal form was of the complainant. It was also argued that on same set of facts, offence under Section 420 and 406 I.P.C. could not be simultaneously make out.

12. The above submissions are vehemently opposed by Mr. Vijit Saxena,

learned counsel for opposite party No.2. He has submitted that learned Magistrate has conducted an inquiry himself on basis of the statements recorded under Section 200 and 202 Cr.P.C. as well as he also took note of the police report dated 29.09.2022 summoned under Section 202(1) Cr.P.C. as well as a report of the Hand Writing Expert, dated 02.12.2022 that signature on withdrawal forms were not of the complainant i.e. account holder. The learned Magistrate also took note of statement of Manager of the Bank as mentioned in the police report under Section 202(1) Cr.P.C. that on basis of a withdrawal form, money could be given to account holder only. Though, he fairly submitted that in given set of circumstances, offence under Section 420 and 406 I.P.C. may not go simultaneously, however, in this regard he has submitted that allegation for cheating and conspiracy are prima facie made out against the applicants. Offence under Section 406 I.P.C. could be made out against employees of Bank, but they were not summoned.

13. This Court is of considered opinion that on same set of facts, offence under Section 420 and 406 I.P.C. may not be simultaneously make out and in this regard relevant paragraphs of a recent judgment delivered by Supreme Court on 23.08.2024 in the case of **Delhi Race Club (1940) Ltd. & Ors. Vs. State of Uttar Pradesh & Anr. in CRIMINAL APPEAL NO. 3114 OF 2024** being relevant are reproduced hereinafter:-

“41. Before we close this matter, we would like to say something as regards the casual approach of the courts below in cases like the one at hand. The Indian Penal Code (IPC) was the

*official Criminal Code in the Republic of India inherited from the British India after independence. The IPC came into force in the sub-continent during the British rule in 1862. The IPC remained in force for almost a period of 162 years until it was repealed and replaced by the Bharatiya Nyaya Sanhita (“BNS”) in December 2023 which came into effect on 1 st July 2024. **It is indeed very sad to note that even after these many years, the courts have not been able to understand the fine distinction between criminal breach of trust and cheating.***

***42. When dealing with a private complaint, the law enjoins upon the magistrate a duty to meticulously examine the contents of the complaint so as to determine whether the offence of cheating or criminal breach of trust as the case may be is made out from the averments made in the complaint. The magistrate must carefully apply its mind to ascertain whether the allegations, as stated, genuinely constitute these specific offences.** In contrast, when a case arises from a FIR, this responsibility is of the police – to thoroughly ascertain whether the allegations levelled by the informant indeed falls under the category of cheating or criminal breach of trust. Unfortunately, it has become a common practice for the police officers to routinely and mechanically proceed to register an FIR for both the offences i.e. criminal breach of trust and cheating on a mere allegation of*

some dishonesty or fraud, without any proper application of mind.”
(emphasis supplied)

14. The Court, in the aforesaid circumstances could remit the case to the learned Trial Court to decide afresh, however, considering statement of opposite party No.2 under Section 200 Cr.P.C., the Court proceeds to consider whether in given set of circumstances, on basis of material available, there are sufficient material to proceed against the applicants for offence under Section 420 or 406 read with 120-B I.P.C.

15. In above circumstances, it is not much under dispute that allegation under Section 406 I.P.C. (criminal breach of trust) could not be made out, since ingredients thereof are absent. There was neither any 'entrustment' nor allegation of 'dishonest misappropriation' in violation of any 'direction of law' or 'any legal contract'. (see *Deepak Gaba vs State Of Uttar Pradesh and Anr.* reported in 2023 (3) SCC 423)

16. It is well settled that outcome of an internal inquiry would not bar criminal proceedings on same allegations since nature of proof is different in both the proceedings. In departmental proceedings, it would be preponderance of probability whereas in criminal cases it would be to prove beyond reasonable doubt. The Hand Writing Expert's report relied during said inquiry could not be considered at this stage as the same would be a proposed defence (see **Samar Bahadur Singh Vs. State of U.P. and Ors. : (2011) 9 SCC 94**). Otherwise also, under Section 200 Cr.P.C., the Magistrate has to conduct an inquiry himself on basis of statements made on oath as well as considering other materials.

In the present case, the complainant has come up with a case that applicants have hatched a conspiracy and to execute it, applicant No.1 has committed cheating and by forging signature of the complainant on a withdrawal form to withdraw money from bank account of the complainant to transfer the same to her account. In this regard, statement of the Bank Manager recorded during police inquiry under Section 202(1) Cr.P.C. would be relevant and for reference, same is reproduced hereinafter:-

“बयान शाखा प्रबन्धक शाखा किरतपुर रोड बिजनौर जनपद बिजनौर- श्री नवनीत कुमार गौड़ पुत्र श्री राम निवास शर्मा निवासी ख 92 नवीन नगर एम० डी० ए० कालोनी थाना सिविल लाईन जनपद मुरादाबाद बता रहे है कि मैं 31 मई 2021 से शाखा प्रबन्धक के पद पर इस शाखा भारतीय स्टेट बैंक मुख्य शाखा किरतपुर रोड जिला बिजनौर में तैनात हूँ प्रियंका गुप्ता वाले मामले मे दिनांक 18.11.2016 व 2.12.2016 को विथड्रावल फार्म जिस पर खाता संख्या 35012436998 की खाता धारक श्वेता गुप्ता के हस्ताक्षर है दोनो बाउचर से 24000/- 24000/- रु० निकाले गये है तथा आहरित की गयी धनराशि हमारी शाखा में तैनात उप प्रबन्धक प्रियंका गुप्ता को दी गयी थीं जिसके बाउचर पर हस्ताक्षर बने है ये सब बाते मैने आपको बैंक के रिकार्ड व उस समय के बैंक कर्मचारियो से मालूम करवाई है बस यही मेरा बयान है तथा मै आपको इस मामले से संबंधित प्रपत्र उपलब्ध कराता हूँ।

प्रश्न- क्या बैंक द्वारा विथड्रावल फार्म पर हस्ताक्षर देखकर किसी अन्य व्यक्ति को उसकी धनराशि आहरित की जा सकती है।

उत्तर- नही बैंक के नियमो के अनुसार ऐसा नही किया जा सकता है परन्तु श्रीमती श्वेता गुप्ता जी चूकि प्रियंका गुप्ता जी की निकट संबंधित है व बाउचर्स पर उनके द्वारा नोन टू मी करके हस्ताक्षर किये गये है तथा प्रियंका गुप्ता बैंक की अधिकारी है इसलिए काउण्टर द्वारा उनको यह धनराशि दी गयी यहां यह भी ध्यान देने योग्य बात है कि दी गयी धनराशि नोटबन्दी के

समय दी गयी थी। जब समान्तः शाखा के अत्याधिक
भीड़ धनराशि करने वाले की रहती थी।”

17. The above statement is sufficient that applicant No.1 has withdrawn money from bank account of the complainant by misusing her position of Deputy Manager of the Bank. It would also be relevant to refer here the Handwriting Expert report submitted by the complainant before the Magistrate wherein it was opined that signature of the complainant on the withdrawal form were forged.

18. In the aforesaid circumstances there are sufficient evidence and grounds that an offence under Section 420 I.P.C. is prima facie made out against the applicant. So far as, allegation of conspiracy is concerned, it is on record that bank account of the complainant was linked with phone and email of the applicant No.2 i.e. husband of the complainant, therefore, alert messages were received by applicant No.2, however, with a dishonest intention and under a conspiracy, same were not communicated to his wife, therefore, at this stage, prima facie offence under Section 420 read with 120-B I.P.C. is also made out.

19. In the aforesaid circumstances, the Court is of a considered opinion that the learned Magistrate has not committed any manifest error in summoning the applicants under Section 420 and 120-B I.P.C. The learned Magistrate has assigned requisite reasons that there are sufficient grounds to proceed under Sections 204 Cr.P.C. (See **Lallan Kumar Singh and Ors. Vs. State of Maharashtra reported in (2022) SCC Online SC 1383**).

20. As observed above, since there is no allegation in regard to Section 406

I.P.C. against the applicants, therefore, summoning order dated 01.07.2023 is interfered to extent of summoning the applicants under Section 406 I.P.C., however, so far as summoning order to summon under Sections 420 and 120B I.P.C. is concerned, it remained uninterfered and the impugned order is modified to that extent only.

21. In view of the above, instant application is **disposed of**.

22. Registrar (Compliance) to take steps.

(2024) 9 ILRA 1021
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2024

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482 No. 4898 of 2019
Connected with
Application U/S 482 Nos. 4924 of 2019 & 4951
of 2019

Kishore Shankar Signapurkar ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Santosh Yadav

Counsel for the Respondents:
Anura Singh, G.A., Prateek Dwivedi

Criminal Law – Criminal Procedure Code, 1973 – Sections 63 & 482 –Negotiable Instruments Act, 1881 - Sections 138, 138 (2) (b), 139, 141, 141(1), 142 & 142(1)(b) –Indian Evidence Act, 1872 - Section 114 - General Clauses Act, 1977 - Section – 27 –Applications u/s 482 of Cr.P.C. – arising out of the summoning orders passed in the complaint cases u/s 138 of N.I. Act, - 12 cheques were issued in favour of complainant –

which were dishonoured for the reason 'stop payment' - demand notice - Trial court summoned the applicant alone, who had signed the cheques and did not summoned the company - plea has taken, that without summoning the company the proceedings u/s 138 cannot be proceeded only against the applicant - court finds that, company is a juristic person and such juristic person can be summoned only through the person who is in-charge of the affairs of company and if the person in-charge of the company is summoned, therefore, it can't be said that the company has not been summoned for the trial - held, company was also made an accused through the applicant who was director of the company as well as signatory of the cheque, therefore, by summoning the applicant herein the company is also deemed to have been summoned - consequently, no interference is called - instant application is dismissed - direction issued to trial court for conclude the proceedings within a period of six months. (Para - 29, 31, 32, 33, 34)

Applications Dismissed. (E-11)

List of Cases cited:

1. Shashibala Agrawal Vs St. of U.P. (2024 SCC Online All 1216),
2. S P Mani & Mohan Dairy Vs Snehalatha Elangovan (2023 Vol. 10 SCC 685),
3. Ashutosh Ashok Parasrampuriya Vs Gharrkul Industries (P) Ltd. (2021 SCC Online SC 915),
4. Sunita Palita Vs Panchami Stone Quarry (2022 vol. 10 SCC 152),
5. Aneeta Hada Vs Godfather Travels & Tours (P) Ltd. (2012 vol. 5 SCC 661),
6. National Small Industries Corpn. Ltd. Vs Harmet Singh Paintal (2010 vol. 3 SCC 330),
7. K K Ahuja Vs V K Vora (2009 Vol. 10 SCC 48),
8. S M S Pharmaceuticals Ltd. Vs Neeta Bhalla and another (2005 Vol. 8 SCC 89),
9. C.C. Alavi Haji Vs Palapetty Muhammed and Another (2007 vol. 6 SCC 555),

10. Modi Cements Ltd. Vs Kuchil Kumar Nandi (1998 vol. 3 SCC 249),

11. Electronics Trade and Technology Development Corpn. Ltd. Vs Indian Technologists and Engineers (Electronics) (P) Ltd. (1996 vol. 2 SCC 739),

12. Sarabjit Singh Vs St. of NCT Delhi & ors. (2018 SCC Online Del 12557),

13. Jang Singh Vs Brijlal (AIR 1996 SC 1631),

14. Anil Gupta Vs Star India Pvt. Ltd. (2014 vol. 10 SCC 373),

15. N. Harihara Krishnan Vs J Thomas (2018 vol. 13 SCC 663),

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Santosh Yadav, learned counsel for the applicant, Sri Prateek Dwivedi, learned counsel appearing on behalf of opposite party No.2 and Sri Prem Prakash Tiwari, learned AGA for the State.

2. The instant application under Section 482 Cr.P.C. No. 4898 of 2019 has been filed seeking quashing of summoning order dated 31.10.2015 as well as the entire criminal proceedings in Case No. 1723 of 2015 (M/s Indcoat Shoe Component Ltd. vs. M/s Signapurkar's Leather House Pvt. Ltd. and Others) under Section 138 of the Negotiable Instruments Act, 1881 (in short, 'the N.I. Act'), Police Station- Kakadev, District- Kanpur Nagar, pending before the Metropolitan Magistrate- III, District- Kanpur Nagar, the instant application under Section 482 Cr.P.C. No. 4924 of 2019 has been filed seeking quashing of summoning order dated 04.12.2015 as well as the entire criminal proceedings in Case No. 2342 of 2015 (M/s Indcoat Shoe Component Ltd. vs. M/s Signapurkar's Leather House Pvt. Ltd. and Others) under Section 138 of the

N.I. Act, Police Station- Kakadev, District- Kanpur Nagar, pending before the Metropolitan Magistrate- III, District- Kanpur Nagar, the instant application under Section 482 Cr.P.C. No. 4924 of 2019 has been filed seeking quashing of summoning order dated 04.12.2015 as well as the entire criminal proceedings in Case No. 2342 of 2015 (M/s Indcoat Shoe Component Ltd. vs. M/s Signapurkar's Leather House Pvt. Ltd. and Others) under Section 138 of the N.I. Act, Police Station- Kakadev, District- Kanpur Nagar, pending before the Metropolitan Magistrate- III, District- Kanpur Nagar and the instant application under Section 482 Cr.P.C. No. 4951 of 2019 has been filed seeking quashing of summoning order dated 31.10.2015 as well as the entire criminal proceedings in Case No. 1725 of 2015 (M/s Indcoat Shoe Component Ltd. vs. M/s Signapurkar's Leather House Pvt. Ltd. and Others) under Section 138 of the N.I. Act, Police Station- Kakadev, District- Kanpur Nagar, pending before the Metropolitan Magistrate- III, District- Kanpur Nagar and the instant application under Section 482 Cr.P.C. No. 4878 of 2019 has been filed seeking quashing of summoning order dated 08.09.2015 as well as the entire criminal proceedings in Case No. 1724 of 2015 (M/s Indcoat Shoe Component Ltd. vs. M/s Signapurkar's Leather House Pvt. Ltd. and Others) under Section 138 of the N.I. Act, Police Station- Kakadev, District- Kanpur Nagar, pending before the Metropolitan Magistrate- III, District- Kanpur Nagar.

3. All the aforesaid applications, are arising out of the summoning orders passed in the complaint cases under Section 138 of N.I. Act filed by opposite party No.2 whereby the trial court has summoned only the applicant herein and has not summoned

the Company, which is also made the accused No.1 in all the complaint cases.

4. Since the parties are same in all the applications, all these matters are taken up together and heard together.

5. Brief facts of the case are that the applicant herein is the Director of M/s Signapurkar's Leather House Pvt.Ltd. (herein after referred to as 'the company') along with other directors, who have been made party to the complaint case under Section 138 N.I. Act filed by the opposite party No.2 in each complaint case. The applicant being authorized signatory of the company had issued 12 cheques in favour of opposite party No.2 in discharge of lawful liability for material supplied by opposite party No.2. The aforesaid cheques were presented for encashment, which were dishonoured for the reason 'stop payment' by the applicant herein. Thereafter, the demand notice was sent by the opposite party No.2 and when the demand notice was not complied with, the instant complaint case under Section 138 of N.I. has been filed by the opposite party No.2 against the company as well as its Directors including the applicant herein. Thereafter, trial court having found the prima facie case made out under Section 138 of N.I. Act against the applicant herein has summoned the applicant herein alone, who had signed the cheques and did not summon the company.

6. The aforesaid summoning orders have been challenged by the applicant in these applications mainly on the ground that without summoning the company the proceeding under Section 138 of N.I. Act cannot be proceeded only against the applicant herein. In support of his submissions, learned counsel for the

applicant has relied upon the judgment of Apex Court in **Anil Gupta vs. Star India Pvt. Ltd. : (2014) 10 SCC 373** and also the judgment of **N.Harihara Krishnan vs. J.Thomas : (2018) 13 SCC 663**.

7. Learned counsel for the applicant has further submitted that in the proceedings under Section 138 of N.I. Act, the Magistrate takes the cognizance of the offenders not of the offence, therefore, the summoning order only against the applicant is unwarranted. He further relies upon the judgment of **Aneeta Hada vs. M/s. Godfather Travels & Tours Pvt. Ltd. : (2012) 5 SCC 661**. Therefore, learned counsel for the applicant submits that the summoning order is bad in law and could not survive and, therefore, he seeks quashing of the summoning order against the applicant herein in all the aforesaid cases.

8. *Per contra*, learned counsel appearing for opposite party No.2 submits that the complaints under Section 138 of the N.I. Act were filed by opposite party No.2 against the company as well as all the known directors and they were made party to the said complaints and proper averments in compliance of Section 141 of the N.I. Act have also been made in the complaints. However, the trial court has issued summons only against the applicant herein in its discretion for which the opposite party No.2 cannot be held responsible. Learned counsel for the opposite party No.2 while relying upon the judgment of **Jang Singh vs. Brijlal : AIR 1966 SC 1631** submitted that for the mistakes of the court, the complainant cannot be held responsible. Learned counsel for the opposite party No.2 has further submitted that at the most non-summoning of the company is an

irregularity, which can be cured by the trial court by summoning the company as well if so directed by this Court. Learned counsel for the opposite party No.2 has further relied upon the judgment of **Sarabjit Singh vs. State of NCT Delhi and others : (2018) SCC Online Del 12257** wherein it was held by Delhi High Court that even though if the company is not made party, however, the allegations are made in the complaint. The company can be summoned by the trial court by curing the defect if there are sufficient allegations against the company. Therefore, learned counsel for the opposite party No.2 further submits that it is the applicant herein, who has issued the cheques and also the instructions to stop the payment of the cheque, therefore, he was responsible for day to day affairs of the company. The signatures on the cheque has not been denied by the applicant nor the issuance of the cheque, therefore, relying upon the judgment of **Modi Cements Ltd. vs. Kuchil Kumar Nandi : (1998) 3 SCC 249**, learned counsel for the opposite party No.2 has submitted that the provisions of Section 138 of the N.I. Act are attracted even in the cases of 'stop payment' instructions issued by the drawer of the cheque. In view thereof, he submits that no interference is called for in the instant case at the most, these applications may be disposed of with a direction to trial court to issue a fresh summoning order against the company as well without interfering with the summoning order qua the applicant herein. Learned counsel for the opposite party No.2 has also submitted that in the instant case, the complaints were filed in the year 2015 and the summoning orders were issued in the year 2015 and instant application is nothing, but a dilatory tactics on the part of the applicant herein to delay the proceedings without disputing the

issuance of cheque and the signatures thereon.

9. To appreciate the arguments advanced by learned counsels for the parties it would be relevant to take note of the provisions of Sections 138 and 141 of the N.I.Act, which reads as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for 4[a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, 5[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

141. Offences by companies.— 1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

[Provided further that where a person is nominated as a

Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section, —

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

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

10. From the plain reading of the provisions of Section 138 of the N.I. Act, it is apparent that the offence under Section 139 of the N.I. Act would be constituted after fulfilment of the following conditions:

1) the cheque has been presented to the Bank within its validity period and the said cheque

has been dishonoured for the reasons:

(i) the amount outstanding in account is insufficient to honour the cheque; or

(ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

2) After the dishonour of cheque for the aforesaid reasons the holder in due course of the cheque give notice to the drawer of the cheque within a period of 30 days and makes a demand for payment of the cheque amount.

3) the payee or the holder in due course of the cheque gives notice to the drawer of the cheque within a period of thirty days and makes a demand for payment of the cheque amount.

4) The drawer of the cheque fails to make the payment of the cheque amount within fifteen days from the receipt of the said notice.

11. In **Electronics Trade and Technology Development Corpn. Ltd. vs Indian Technologists and Engineers (Electronics) (P) Ltd.** : (1996) 2 SCC 739, the Apex Court has held that the dishonour of cheque with the endorsement like refer to the drawer, instructions of stop payment and exceeds arrangement are well covered within the meaning of dishonour of cheque under Section 138 of the N.I. Act.

12. In **Modi Cements Ltd. vs. Kuchil Kumar Nandi** : (1998) 3 SCC 249, the Three Judges' Bench of the Apex Court has held that the dishonour of cheque for the reason stop payment is well covered within the meaning of Section 138 of the N.I. Act.

13. Further, in **C.C. Alavi Haji vs. Palapetty Muhammed and Another : (2007) 6 SCC 555**, the Apex Court has categorically held that where the payee dispatches the demand notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the General Clauses Act, 1977 would be attracted and the requirement of Clause (b) of proviso 2 to Section 138 of the N.I. Act stands complied with and the cause of action to file a complaint arises on expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque.

14. In view of the aforesaid authoritative pronouncement of the Apex Court once the demand notice issued by the payee of the cheque was dispatched on the correct address of the drawer of the cheque, the presumption shall be drawn and after the expiry of 15 days from such dispatch, it shall be presumed that the demand notice was served on the opposite party no.2, however, such presumption is a rebuttable presumption and the drawer of the cheque may prove during the trial that he had no notice with regard to the aforesaid dishonour of cheque and demand notice issued by the payee of the cheque. However, in the aforesaid judgement of **C.C. Alavi Haji (supra)**, it has been further clarified that a person who does not pay within 15 days from the receipt of the summons from the court alongwith the copy of the complaint under Section 138 of the N.I. Act, cannot obviously contend that there is no proper service of notice as required under Section 138 of the N.I. Act, by ignoring the statutory presumption to the contrary under Section 27 of the General Clauses Act, 1977 and Section 114 of the Indian Evidence Act, 1872. Therefore, the offence under Section 138 of

the N.I. Act, would be constituted after expiry of 15 days period from the date of dispatch of the notice to the drawer of the cheque and as per Section 142 (1)(b) of the N.I. Act, the complaint under Section 138 of the N.I. Act, is required to be filed within a period of one month from the cause of action so arises in favour of the payee of the cheque.

15. So far as the requirement under Section 141 of the N.I. Act is concerned, which deals with the offences under Section 138 of the N.I. Act, committed by the companies, provides that the person, who at the time of the offence was responsible for the conduct of the business of the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against for the punishment, accordingly. The provisions of sub-section (1) of Section 141 of the N.I. Act, makes out an exception and holds that if a person is able to prove that when the offence was committed, he was not in-charge of the day-to-day affairs of the company or such offence was committed without his knowledge, despite he has exercised all due diligence to prevent the commission of such offence, such person cannot be punished for the offence.

16. In **S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and Another : (2005) 8 SCC 89**, the Apex Court has held as under:

"4. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which

result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence."

(Emphasis Supplied)

17. Following the aforesaid principles in *K.K. Ahuja vs. V.K. Vora : (2009) 10 SCC 48*, the Apex Court has held as under:

"27. The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) **In the case of a Director, secretary or manager [as defined in Section 2(24) of the Companies Act] or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the**

company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

(Emphasis Supplied)

18. In **National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal**, (2010) 3 SCC 330, the Apex Court has held as under:

"39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) **If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.**

(vi) **If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.**

(vii) The person sought to be made liable should be in charge of and responsible for the conduct

of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

(Emphasis Supplied)

19. In ***Aneeta Hada v. Godfather Travels & Tours (P) Ltd.***, (2012) 5 SCC 661, the Apex Court has held as under:

"53. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and **a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless they are arrayed as accused.** It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents

have vehemently urged that the use of the term "as well as" in the section is of immense significance and, in its tentacle, it brings in the company as well as the Director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the Directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the context.

58. Applying the doctrine of strict construction, we are of the considered opinion that **commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.**

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that **for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is**

imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in *C.V. Parekh* [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada* [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] is overruled with the qualifier as stated in para 51. The decision in *Modi Distillery* [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove." (Emphasis Supplied)

20. Relying upon the judgement of ***Aneeta Hada (supra)***, the Division Bench of Apex Court had held that once the High Court had quashed the summons against the company, the proceedings against the Director cannot continue.

21. In the judgement of ***Sunita Palita v. Panchami Stone Quarry, (2022) 10 SCC 152***, referring to the judgement of ***K.K. Ahuja (supra)***, the Apex Court has held as under:

"29. As held in *K.K. Ahuja v. V.K. Vora* [*K.K. Ahuja v. V.K. Vora, (2009) 10 SCC 48 : (2009) 4 SCC (Civ) 1 : (2010) 2 SCC (Cri) 1181*] **when the accused is the Managing Director or a Joint Managing Director of a**

company, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company for the conduct of the business of the company. This is because the prefix "Managing" to the word "Director" makes it clear that the Director was in charge of and responsible to the company, for the conduct of the business of the company. **A Director or an officer of the company who signed the cheque renders himself liable in case of dishonour.** Other officers of a company can be made liable only under sub-section (2) of Section 141 of the NI Act by averring in the complaint, their position and duties in the company, and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

(Emphasis Supplied)

22. In ***Ashutosh Ashok Parasrampuriya v. Gharrkul Industries (P) Ltd., 2021 SCC OnLine SC 915***, the Apex Court has held as under:

"23. In the light of the ratio in *S.M.S. Pharmaceuticals Ltd. (supra)* and later judgments of which a reference has been made what is to be looked into is whether in the complaint, in addition to asserting that the appellants are the Directors of the Company and they are incharge of and responsible to the Company for the conduct of the business of the Company and if statutory compliance of Section 141 of the NI Act has been made, it may not open for the High Court to

interfere under Section 482 CrPC unless it comes across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of Court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the particular Director for which there could be various reasons."

(Emphasis Supplied)

23. In the recent judgement of **S.P. Mani & Mohan Dairy v. Snehalatha Elangovan, (2023) 10 SCC 685**, the Apex Court has held as under:

"58.1. The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, the first proviso to sub-section (1) of Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable of punishment.

58.2. The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. It is only the Directors of the company or the partners of the firm, as the case may be, who have the special knowledge about the role they had played in the company or the partners in a firm to show before the Court that at the relevant point of time they were not in charge of the affairs of the company. Advertence to Sections 138 and Section 141, respectively, of the NI Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company/partners of a firm to show that they were not liable to be convicted. The existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial to show that at the relevant time they were not in charge of the affairs of the company or the firm.

58.3. Needless to say, the final judgment and order would depend on the evidence adduced. Criminal liability is attracted only

on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners "qua" the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal.

*58.4. If any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, he/she must in order to persuade the High Court to **quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention. He/she must make out a case that making him/her stand the trial would be an abuse of process of Court.***

(Emphasis Supplied)

24. Thus, from above judgements it is crystal clear that when the offence is committed under Section 138 of the N.I. Act by the companies, then, the Joint Managing Director and signatory of the cheque are liable for the offence alongwith the company. So far as the other Directors are concerned it is required to be stated in the complaint that they were in-charge of the day-to-day affairs

of the company and this is, if such assertion is made in the complaint, then, the Magistrate is competent to summon them for the trial and during the trial they can prove otherwise.

25. From the aforesaid judgements it is also categorically held that the company is a necessary party and must be impleaded as an accused in the complaint under Section 138 of the N.I. Act, for the offence committed by the company. Now, the question which is relevant to be decided in the instant case is if the complainant has arrayed the company in his complaint case and has also made the necessary assertions with regard to the signatory of the cheque, Managing Director of the company and also the Directors who were allegedly in-charge of the day-to-day affairs of the company and thereupon having found a prima facie case the trial court summoned the signatory of the cheque or the Managing Director of the company. Without summoning the company as such what would be the effect of such a summoning order?

26. Learned counsel for the applicant submitted that for the offences under the N.I. Act, the principle that the Magistrate takes the cognizance of the offence and not of the offender, is not applicable. For the offences under Section 138 of the N.I. Act, the Magistrate must take cognizance not only of the offence but also of the offenders and since in the instant cases the Magistrate has not summoned the company as such, therefore, the prosecution against the Director alone cannot be sustained as the company is the principal offender and its Directors and signatories are liable vicariously in view of the provisions of Section 141 of the N.I. Act.

27. In reply thereto, learned counsel for the opposite party no.2 has submitted that since there is no fault on the

part of the opposite party no.2 that is the complainant, as the complaint has been filed against the company as well as against the Directors responsible for the offence.

28. Before dealing with the aforesaid it would be relevant to keep note of the objects of Chapter XVII of the N.I. Act, which contains the provisions from Sections 138 to 142 of the N.I. Act, which are initially inserted in the N.I. Act by way of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 with the object of promoting and inculcating faith in the efficacy of banking system and its operations and giving credibility of negotiable instruments in business transactions. The introduction of the said chapter was intended to create atmosphere of reliance on banking system by discouraging people from not honouring their commitments by way of payment through cheque. The aforesaid provisions were enacted to punish those unscrupulous persons who are purported to discharge liability without any real intention to do so. Subsequently, making the aforesaid provisions more effective some more sections were inserted in Chapter XVII of the N.I. Act. Therefore, as per the doctrine of purposive interpretation the provisions ought to have been interpreted in such a manner which gives effect to the object of the legislation and not frustrate the same.

29. It is to be noted that company is a juristic person and not a corporal persons. In view thereof, once a complainant has been made against the company as an accused alongwith the Directors and the person in-charge in day-to-day affairs of the company including the signatory of the cheque and also made assertions in the company in terms of

Section 141 of the N.I. Act, there is sufficient compliance on the part of the complainant. Therefore, such juristic person can be summoned only through the person who is in-charge of the affairs of the company and if the person in-charge of the company is summoned, therefore, it can't be said that the company has not been summoned for the trial.

30. Section 63 of the Criminal Procedure Code deals with the service of summons on the corporate bodies and the societies, which reads as under:

"Section 63- Service of summons on corporate bodies and societies- *Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the chief officer of the corporation in India, in which case the service shall be deemed, to have been effected when the letter would arrive in ordinary course of post."*

31. Therefore, once the company has been arrayed as an accused alongwith the signatory Director and if the trial court summons the signatory Director the sufficient summoning of the company shall be presumed. Therefore, the submission of learned counsel for the applicant is that the company has not been summoned is not sustainable. A similar view has been taken by the Coordinate Bench of this Court in ***Shashibala Agrawal v. State of U.P. : 2024 SCC OnLine All 1216***, wherein it has been held as under:

"13. In the present case, while issuing the summon, the

learned Magistrate in his order dated 9.11.2017, specifically mentioned that the offence was committed on behalf of M/s Anupam Omerian Infrastructure Pvt. Ltd. that was impleaded as respondent No.1 in the complaint. Therefore, notice was not required to be issued to the company but to its signatory director (applicant). It is clear from the order dated 9.11.2017 that the company was impleaded as a party in the complaint, and the learned Magistrate summoned the applicant after determining that the offence had been committed on behalf of the company and being the signatory and active director of the company, notice should be served to the present applicant on behalf of the company. Therefore, there was no illegality in the summoning order dated 9.11.2017. "

(Emphasis Supplied)

32. In view thereof, this Court does not find any illegality in the summoning order and by summoning the applicant herein, the summoning of the company is also presumed as the company was also being prosecuted through the applicant herein. Therefore, there is no illegality in the summoning order. The judgement of **Anil Gupta (supra)** would not be applicable to the facts of the instant case as in that case the company and its Director were summoned in different capacities and it appears that the company was summoned through any other person than the Director who was also summoned alongwith the company and

the proceedings in that case were quashed against the company being time barred. In the instant case there was no bar of prosecution against the company as the demand notice was issued against the company as well and the company is sued through the applicant herein. Therefore, by summoning applicant the company is also summoned as the applicant is representing the company as also individually.

33. In the instant case the company was also made an accused through the applicant herein, who was the Director of the company and also the signatory of the cheque. Therefore, by summoning the applicant herein the company is also deemed to have been summoned and served, therefore, there is no illegality in the summoning order and by summoning the applicant herein the summoning of the company is also presumed, therefore, in the considered view of this court by summoning the applicant, the learned Magistrate has also summoned the company which was represented by the applicant herein. Therefore, no interference is called for in the instant case and these applications are without any merit, hence **dismissed**.

34. Since, the instant complaint cases were filed by the opposite party no.2 in the year, 2015 since then the same are pending trial, therefore, the trial court is directed to proceed in the complaint cases as expeditiously as possible, and try to conclude the proceedings of the instant cases preferably within a period of six months from the production of certified copy of this Order, if there is no legal impediment.

(Delivered by Hon'ble Anish Kumar Gupta, J.)

3. The brief facts of the instant case are that on 20.07.2016, an F.I.R. was lodged by the opposite party no.2/Jalaj Sharma being Case Crime No. 287 of 2016, alleging herein that the sister (Shailey) of the opposite party no.2 was married to the applicant no.1/Mayank Gautam, as per the Hindu customs and rituals on 02.03.2016 and various gifts were given during the marriage and a total sum of Rs. 9,00,000/- was spent by the family of the opposite party no.2 in the marriage of his sister. Since after the marriage, the applicant and the other family members of the applicant started harassing and assaulting the sister of

the opposite party no.2 and initially on 05.03.2016, she was badly beaten up and locked inside the room on 05.03.2016. Initially, the sister of the opposite party no.2 did not disclose the aforesaid incident. On 08.04.2016, the sister of the opposite party no.2 again went to her matrimonial house. Again, the behaviour of the family members of the applicant herein was not good towards the sister of the opposite party no.2 and they told her that her brother has not spent the enough amount of money in the marriage and subsequently it was informed by the sister of the opposite party no.2 that these persons used to demand a further sum of Rs. 2,00,000/- from her and when the demand was not fulfilled they used to torture and assault her.

4. On 16.07.2016 at about 8:37 A.M., from the Mobile No. 9412888897 to Mobile No. 9711407603, a video was sent which depicted that the applicant and the other family members tortured and assaulted the sister of the opposite party no.2 and she had become unconscious due to such torture, and this video was sent to create panic among the opposite party no.2 and his family members. After receiving the said video the opposite party no.2 alongwith other family members went to the house of the applicant. When they reached the in-laws place of the sister of the opposite party no.2, they found the injury marks on the body of the sister of the opposite party no.2 and she was lying unconscious in the room. The in-laws, namely Archana Gautam, Manmohan Gautam and the applicant herein were also present there. When the opposite party no.2 and others reached there the applicant and other family members told them that if they will not pay an amount of Rs. 2,00,000/-, she will be beaten up like this and when only they bring Rs.2,00,000/- only then

they bring her there. Thereupon, the opposite party no.2 has taken his sister from the in-laws place and admitted her at Sharda Hospital, Greater Noida, who was very serious condition. She was brought by the opposite party no.2 on the clothes, which were worn by the sister of the opposite party no.2 and all stridhan and jewellery etc., were kept by the applicant and his family members. On the aforesaid averments, the F.I.R. was lodged.

5. Subsequent thereto, during treatment the sister of the opposite party no.2 had died on 12.08.2016, which was intimated by the opposite party no.2. After such intimation of death of the sister of the opposite party no.2 the Inquest Report was prepared and thereupon the dead body was sent for postmortem. As per the Inquest Report, in the opinion of the punch witnesses, the death of the deceased was caused as the deceased went into coma, due to the injuries sustained on her body. Thereafter, the postmortem was conducted and as per the postmortem the following injuries were sustained by the deceased, which reads as under:

"Anti Mortem Injury-

- 1. Contusion 3 x 10 cm left ulna joint*
- 2. Contusion 1 x 1 cm from leg 3.5 cm.....*
- 3. Contusion 4 x 3 cm probated sore or back of Rt. heal*
- 4. Contusion 3 x 3 cm probated over back of left heal"*

6. As per the postmortem report the cause of death could not be ascertained, hence, viscera was preserved. During the investigation the statements of witnesses were recorded and thereupon the investigation of the case was handed over

to the Circle Officer (CO), after adding Section 304B I.P.C. in the said F.I.R. Thereupon, the statements of various witnesses including the opposite party no.2 were recorded wherein categorical allegations were made with regard to the demand of dowry, torture and harassment of the sister of the opposite party no.2 by the applicant and his family members.

7. The witnesses, namely Jalaj Sharma, Devendra Kumar Sharma and Madan Gopal, have supported the allegations of demand of dowry and torture committed by the applicant and his family members on the deceased for the demand of dowry. The viscera, which was preserved, was sent for Forensic Science Laboratory, Ghaziabad, for examination and from the examination, no poisoning was found on the viscera, as per the report of Forensic Science Laboratory dated 15.12.2016. The other witnesses were also examined during the investigation by the Circle Officer such as Hitesh Kumar, Sunil Kumar Sharma, Mahesh Chandra Sharma, Smt. Kavitra Tyagi and Yashpal Chaudhary, who have denied the allegations of demand of dowry, torture and harassment by the applicant and his family members to the sister of the opposite party no 2, however, none of them have stated any reason for the deceased being unconscious in the house of the applicant herein.

8. During the investigation the statement of Dr. Dinesh Srivastava of Sharda Hospital, Greater Noida was also recorded. As per the statement of the doctor, the opposite party no.2 has admitted the deceased on 17.07.2016 at 1:04 P.M. The deceased was in unconscious position and there was no movement in the body. At the time of admission her sugar level was 24 and BP was 90/60. The doctor further

stated that after controlling the blood sugar level and after getting her stomach clean the Magnetic Resonance Imaging (MRI) was conducted. As per the MRI report, such condition of patient would be due to deficiency of blood and oxygen. As per the MRI report, the condition of the patient could have been due to Hyporia or Hypo Glycaemia. Therefore, it was told that the patient was suffering from either Hypoxic-Ischemic brain injury, which could be caused due to deficiency of oxygen and sugar at any age. The deficiency can be caused due to not eating food for sufficiently a long period of time and the deficiency of oxygen would occur due to deficiency of blood sugar or deficiency of supply of blood to the brain during any treatment. Therefore, Dr. Dinesh Srivastava has concluded that the deceased had died due to not eating for sufficiently long time, thereby, the deficiency of sugar as well as the deficiency of blood was there. The mother of the deceased has also supported the allegations of demand of dowry by the applicant herein and it was further stated that despite being serious condition of the deceased the applicant had not admitted her in any hospital due to which her condition had worsen.

9. In view of the aforesaid investigation conducted by the IO, on 18.08.2017 the charge-sheet was filed against the applicant only, exonerating the other family members of the applicant, for the offence u/S 498A, 323, 304B I.P.C. and Sections 3/4 of the D.P. Act. In the charge-sheet it has been concluded by the IO that the applicant herein had demanded the additional dowry from the deceased and when the demand was not fulfilled, the deceased was kept hungry, whereby her BP and sugar level came down and due to which she also suffered the deficiency of

oxygen and blood in her body due to which she had died, for which principally the applicant herein was held responsible.

10. After submission of the charge-sheet, the applicant herein had moved a Discharge Application on 11.01.2019 u/S 227 Cr.P.C., which was rejected by the trial court vide order dated 15.11.2019, having found no case for discharge and has proceeded to frame charges against the applicant herein u/S 498A, 304B, 323 I.P.C. with an additional charge u/S 302 I.P.C. and Sections 3/4 of the D.P. Act. Against the rejection of the Discharge Application the instant application has been filed by the applicant herein.

11. Learned counsel for the applicant submits that since the death of the deceased was caused due to her medical condition, whereby she was suffering from the deficiency of blood as well as oxygen and was diagnosed at the Sharda Hospital as Hypoxic Ischemic Encephalopathy brain injury and she was admitted in the hospital on 17.07.2016 and she was discharge on 23.07.2016. After explaining her conditions, subsequently thereto she has died on 12.08.2016. He further stated that the disease Hypoxic Ischemic Encephalopathy brain injury could be caused to any person of any age.

12. Relying upon the literature of Access Medicine from McGraw-Hill, learned counsel for the applicant contends that Hypoxic Ischemic Encephalopathy occurs from lack of delivery of oxygen to the brain because of hypotension or respiratory failure. Causes include myocardial infarction, cardiac arrest, shock, asphyxiation, paralysis of respiration and carbon monoxide or cyanide poisoning. In some circumstances, hypoxia may

predominate. Carbon monoxide and cyanide poisoning are termed histotoxic hypoxia since they cause a direct impairment of the respiratory chain.

13. In view thereof, learned counsel for the applicant submits that since the deceased was suffering from the Hypoxic Ischemic Encephalopathy disease, which is primarily cause due to lack of supply of oxygen and deficiency in the blood level, therefore, the cause of death was her medical condition not any act done by the applicant herein.

14. Further relying upon the injuries sustained as have been found on the body of the deceased in the postmortem, learned counsel for the applicant submits that the first two injuries are the injuries caused due to drip injected in the body of the deceased during the treatment and the other two injuries are the back sore, which had occurred due to the continued treatment of the deceased. While she was unconscious for about 25 days, therefore, none of the injuries can be attributed to the applicant herein.

15. In support of his submissions learned counsel for the applicant has relied upon the judgements of the Apex Court in *Rajiv Thapar v. Madan Lal Kapoor*: (2013) 3 SCC 330, *Baljeet Singh v. State of Haryana*: (2004) 3 SCC 122 and *Tarsem Singh v. State of Punjab*: (2008) 16 SCC 155 and contends that since the death of the deceased was caused due to her medical condition and it was a natural death during her treatment, therefore, provisions of Section 304B I.P.C. would not attract in the instant case. Learned counsel for the applicant has further submitted that the trial court has erred in framing the charges u/S

304B I.P.C. as well as the additional charge u/S 302 I.P.C.

16. Learned counsel for the applicant submits that in the facts of the case, only one charge either u/S 304B I.P.C. or Section 302 I.P.C. can be levelled, however, both cannot be levelled at the same time. In support of his submissions learned counsel for the applicant has relied upon the judgement and order dated 30.05.2024 passed by the Co-ordinate Bench of this Court in Rammilan Bunkar vs. State of U.P (Criminal Appeal No. 1667 of 2021).

17. Per Contra, learned counsel for the opposite party no.2 submits that the marriage of the applicant with the deceased had taken place on 02.03.2016. Immediately, after the marriage on 05.03.2016 the deceased was beaten up and locked in the room for demand of dowry by the applicant. On 08.04.2016 also, when the opposite party no.2 came to take the deceased the applicant had also demanded for dowry. Thereby, the death of deceased has been caused on 12.08.2016 i.e., within 6 months from the date of her marriage. There is no material on record to show that the deceased was having any previous illness and just after three days of marriage torture and harassment on the part of the applicant herein was started for demand of dowry. She was kept locked in a room after beaten up by the applicant and his family members. The deceased, who was diagnosed with Hypoxic Ischemic Encephalopathy disease, which would be caused by keeping a person hungry for sufficiently long time, whereby the oxygen and blood circulation to the brain stopped and the deceased can become unconscious.

18. In the instant case the deceased was found unconscious and when she was

admitted to the hospital the disease of Hypoxic Ischemic Encephalopathy was diagnosed, meaning thereby the deceased was kept hungry by the applicant and his family members for sufficiently long time, which had caused deficiency of blood and oxygen in the brain, thereby deceased had become unconscious and no attempt of any treatment was made by the applicant herein. Rather, a video was circulated by the applicant to the opposite party no.2 and his family members and thereupon the opposite party no.2 had taken her to the hospital, where she was treated and diagnosed that she was kept hungry for sufficiently long time by the applicant and immediately after admitting the deceased in the hospital the F.I.R. was lodged by the opposite party no.2 during treatment itself, on 20.07.2016 making out a categorical allegation with regard to the demand of dowry and cruelty committed by the applicant and his family members to the deceased. Therefore, from the allegations as levelled the deceased became unconscious due to the ill treatment committed by the applicant and his family members and despite the best efforts made by the opposite party no.2, the deceased could not be saved. Therefore, the cause of death of the deceased was cruelty and harassment committed by the applicant for demand of dowry before six months of marriage. Therefore, the death of the deceased could not be said to be a natural death and by all means it is an unnatural death caused within six months of marriage, therefore, all the ingredients of Sections 304B, 498A, 323 I.P.C. and Sections 3/4 of the D.P. Act, are attracted against the applicant, for which he has been rightly charge-sheeted by the trial court and the trial court has further rightly rejected the application for discharge moved by the applicant herein. Therefore, no interference

is called for in the instant case by this Court.

19 Learned A.G.A. also supports the submissions so made by learned counsel for the opposite party no.2 and submits that in the instant case, from the entire material available on record as noted hereinabove, admittedly, the applicant herein was the husband of the deceased and marriage took place on 02.03.2016 and the deceased was found in unconscious condition, in the house of the applicant and there are sufficient material to show that the applicant used to commit cruelty towards the deceased for demand of dowry and from her medical examination and diagnosis, after admitting her to the hospital, it was categorically found that the deceased was not given proper food for sufficiently long time by the applicant, which led to such condition of the deceased, whereby the supply of oxygen and blood to the brain was stopped, she become unconscious and ultimately died despite the best efforts made by the opposite party no.2 to get the appropriate treatment for her. From the aforesaid uncontroverted material a prima facie case against the applicant is made out for the offences u/S 498A, 304B, 323 I.P.C. and Section 3/4 of the D.P. Act. Further, the act of the applicant by not providing food to the deceased deliberately and keeping her locked in the room also goes to the extent of constituting the act of murder by the applicant herein. Therefore, the offence u/S 302 I.P.C. is also attracted in the said case, for which the additional charge has already been framed by the trial court. Therefore, there is no illegality in rejection of discharge application as well as framing of charge against the applicant in the instant case. Therefore, learned A.G.A submits that

the instant application has no merit and is liable to be dismissed

20. Having heard the rival submissions made by learned counsels for the parties, this Court has carefully gone through the record of the case.

21. Section 304B I.P.C., reads as under:

"304B. Dowry death.-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.-For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

22. To attract the offence u/S 304B I.P.C., the following are required to be established:

i) the death is an unnatural death;

ii) Such death is caused within seven years of marriage;

iii) there are materials to show that she was subjected to cruelty by her husband or any relative of her husband soon before her death; or

iv) such cruelty is committed for any demand of dowry.

23. In the instant case, admittedly, the deceased had died within seven years of marriage and there are sufficient allegations that she was subjected to cruelty soon before her death, for demand of dowry.

24. In **Baljeet Singh (Supra)**, the Apex Court has held as under:

"10. The explanation to the said section says that the word 'dowry death' shall have the same meaning as in Section 304-B IPC which means such death should be otherwise than in normal circumstances and within seven years of marriage. On a conjoint reading of these sections, it is clear that for drawing a presumption under Section 113-B of the Evidence Act firstly, there should be death of a woman otherwise than in normal circumstances, within seven years of marriage and the prosecution having shown that soon before her death she was subjected to cruelty or harassment in connection with any demand for dowry by persons accused of having committed the offence. Unless and until these preliminary facts are established by the prosecution, it is not open to the courts to draw a presumption

against the accused invoking Section 113-B of the Evidence Act."
(emphasis supplied)

25. In **Harjit Singh v. State of Punjab, (2006) 1 SCC 463**, the Apex Court has held as under:

"16. A legal fiction has been created in the said provision to the effect that in the event it is established that soon before the death, the deceased was subjected to cruelty or harassment by her husband or any of his relatives; for or in connection with any demand of dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death."

Noticing the provisions of Section 113-B of the Evidence Act, it was opined:

"17. From a conjoint reading of Section 304-B of the Penal Code and Section 113-B of the Evidence Act, it will be apparent that a presumption arising thereunder will operate if the prosecution is able to establish the circumstances as set out in Section 304-B of the Penal Code.

19. In the case of unnatural death of a married woman as in a case of this nature, the husband could be prosecuted under Sections 302, 304-B and 306 of the Penal Code. The distinction as regards commission of an offence under one or the other provisions as mentioned hereinbefore came up for consideration before a Division Bench of this Court in Satvir Singh v. State of Punjab [(2001) 8 SCC

633 : 2002 SCC (Cri) 48] wherein it was held: (SCC p. 643, paras 21-22)

'21. Thus, there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is "at any time" after the marriage. The third occasion may appear to be an unending period. But the crucial words are "in connection with the marriage of the said parties". This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of "dowry". Hence the dowry mentioned in Section 304-B should be any property or valuable security given or agreed to be given in connection with the marriage.

22. It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304-B is to be invoked. But it should have happened "soon before her death". The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression.

The legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasise the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry-related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide the court would be in a position to gauge that in all probabilities the harassment or cruelty would not have been the immediate cause of her death. It is hence for the court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept "soon before her death".' (Harjit Singh case [(2006) 1 SCC 463 : (2006) 1 SCC (Cri) 417] , SCC pp. 469-70, paras 17 & 19)

30. The ingredients of Section 306 and Section 304-B IPC are different and distinct. In any event, no evidence has been brought on record to show that there has been any act of omission or commission on the part of the accused, before the death of the deceased to demonstrate that the appellant was responsible for the same. We have noticed hereinbefore that the High Court, for the first time, in its judgment on a hypothesis observed that when her father came to see her, he must have been insulted or felt hurt as

she might have been subjected to harassment. Unfortunately, no evidence whatsoever has been brought to our notice to enable us to sustain the said finding and in that view of the matter we are unable to accept the submissions of the learned counsel appearing for the respondent State. (Harjit Singh case [(2006) 1 SCC 463 : (2006) 1 SCC (Cri) 417] , SCC pp. 472-73, para 30)"

(emphasis supplied)

26. In *Tarsem Singh v. State of Punjab*, (2008) 16 SCC 155 the Apex Court has held as under:

"The essential ingredients of the said offence are: (i) death of a woman must have been caused by any burns or bodily injury or otherwise than under normal circumstances; (ii) such death must have occurred within seven years of marriage; (iii) soon before her death she was subjected to cruelty or harassment by her husband or relative of her husband; (iv) such cruelty or harassment must be in connection with the demand of dowry; and (v) such cruelty is shown to have been meted out to the woman soon before her death."

(emphasis supplied)

27. Learned counsel for the applicant has heavily contended that such death of the applicant is not an unnatural death but the death was caused due to her medical condition. Admittedly, the deceased was found at the residence of the applicant, in an unconscious condition and when she was taken to the hospital on the same date, the diagnosis revealed that she

was suffering from Hypoxic Ischemic Encephalopathy brain injuries, which is primarily caused due to deficiency of oxygen and blood supply to the brain, as Dr. Dinesh Srivastava has categorically admitted that such disease could be caused if the deceased was not provided food for sufficiently long time and there are categorical allegations in the instant case. Just three days after the marriage, she was beaten up and was locked in the room by the applicant for demand of dowry. The deceased was found in an unconscious condition at the house of the applicant herein, which categorically shows that she was not given food intentionally by the applicant for sufficiently long period, due to which the deceased had suffered the aforesaid disease of Hypoxic Ischemic Encephalopathy brain injury due to non supply of oxygen and blood to the brain, having not provided food sufficiently for long period of time, thus, by no stretch of imagination it can be said to be a natural death but it appears to be an unnatural death, deliberately caused by the applicant by not providing the food to the deceased for sufficiently long period of time. Having clear and categorical intention to kill the deceased for non fulfilment of demand of dowry, therefore, all the conditions of Section 304B I.P.C. are fulfilled in the instant case, which goes to the extent of intentionally killing the deceased thereby attracts provisions of Section 302 I.P.C. as well. Since, there are sufficient allegation for demand of dowry, cruelty caused by the applicant for demand of dowry and the demand of dowry raised by the applicant and the assault committed on the deceased by the applicant, therefore, Sections 302, 498A, 304B, 323 I.P.C. and also Sections 3/4 of the D.P. Act, is categorically attracted in the instant case, for which the charges have been framed against the

applicant herein by rejecting the discharge application.

28. In **Rajiv Thapar (Supra)**, the Apex Court has laid down the following guidelines for attracting the judicial conscience of the High Court to quash the criminal proceedings while exercising the power u/S 482 Cr.P.C., which reads as under:

"30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1.Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2.Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3.Step three: whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4.Step four: whether proceeding with the trial would

result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

(emphasis supplied)

29. The principal of law has been laid down in **Rajiv Thapar (Supra)** to attract the judicial consciousness of the High Court in the considered opinion of this case, none of the conditions as laid down in **Rajiv Thapar (Supra)** are present in the present case. Therefore, this Court does not find any good reason to interfere with the charges framed against the applicant and does not find any illegality in rejection of the discharge application filed by the applicant herein. So far as the reliance placed by the applicant in the judgement of **Rammilan Bunkar (Supra)**, to contend that the accused can be convicted either u/S 304B I.P.C. or u/S 302 I.P.C., he cannot be convicted for both the offences simultaneously. The question in **Rammilan Bunkar (Supra)** was whether an accused, who is charged u/S 302 I.P.C. could be convicted for the alternative charge u/S 304B I.P.C. without the said offence being specifically put in-charge. This Court has categorically held that since

Criminal Procedure Code, 1973 – Sections – 4, 5, 154, 155, 156, 157, 161, 162, 173, 190, 202, 204 & 482 - The Indian Penal Code, 1860 - Sections – 315 & 511 - The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 - Sections – 4, 5, 5(2), 6, 6(a), 17, 17-A, 23, 25, 28 & 30 - The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1994 - Rule – 12, 18-A, 18-A(3), 18-A(3)(iv) – Application u/s 482 – for quashing the summoning order as well as entire criminal proceedings – cognizance order as well as FIR and the Charge-sheet deserve to be quashed, as the Magistrate is incompetent to take Cognizance of such charge-sheet / police report, specially, for the offence under the provisions of PC & PNDT Act, 1994 – hence, with regards to the questions related to the Act, 1994 there are divergent opinion of the different high courts, which are required to be settle by the Apex Court – hence, it is certified that it is a fit case for appeal to be filed before the Apex Court on the questions – Whether, for the offence under the Act, 1994, the registration of an FIR at the police station, investigation by police is permissible and whether after investigation and on submission of the chargesheet, the competent magistrate can take cognizance of the offence under this Act 1994. (Para – 88, 89)

Application Allowed. (E-11)

List of Cases cited:

1. Pramod Suryabhan Pawar Vs St. of Mah. - (2019) 9 SCC 608,
2. Dr. Vinod Kumar Bassi Vs The St. of U.P. & anr. passed in Application U/S 482 Cr.P.C. 2998 of 2014, 2024 SCC OnLine All 778, Criminal Misc. Writ Petition No. 2085 of 2017 (Dr. Rahul Malik Vs St. of U.P. & ors.) Decided on 21.02.20217,
3. Dr. Varsha Gautam Vs St. of U.P. & ors., ALJ 2006 (5) Page No. 221,
4. Dr. Vinod Kumar Bassi Vs St. of U.P. & anr., 2024 SCC OnLine All 778,
5. Criminal Misc. No. 4211 of 2021 (Hardeep Singh Vs St. of Har.) decided on 4.12.2014,
6. Criminal Misc. No. M-421 of 2021 - Dr. Aparna Singhal v. St. of Har.,
7. Dr. Anant Ram Vs St. of Har., 2022 SCC OnLine P&H 2284, Manoj Krishan Ahuja Vs St. of NCT of Delhi & anr., 2023 SCC OnLine Del 2303, S
8. Suo Motu Vs St. of Guj., 2008 SCC OnLine Guj 294,
9. Dr. Sai Vs St. of Mah., (2016) SCC OnLine Bom 8812,
10. Ramesh Chandra Naik Vs St. of Orissa, 2018 SCC OnLine Ori 480,
11. W.P. no. 18904 of 2018 (M/s Sujatha Scan Cente Vs The St. of Telangana),
12. Dr. Amritlal Rohledar Vs St. of Chhattisgarh, 2019 SCC OnLine Chh 137,
13. Manvinder Singh Gill (Dr.) Vs St. of M.P. : ILR (2014) MP 1176,
14. Dr. Swaroop Charan Sahu Vs The St. of M.P. (M.Cr.C. No. 11773 of 2013),
15. SLP (Cri.) No. 2226 of 2014 (St. of M.P. Vs Manvinder Singh Gill),
16. Ravinder Kumar Vs St. of Har., 2024 SCC OnLine SC 2495,
17. Jeewan Kumar Raut & anr. Vs Central Bureau of Investigation, (2009) 7 SCC 526,
18. St. NCT of Delhi Vs Sanjay, (2014) 9 SCC 772,
19. Jayant Vs St. of M.P., (2021) 2 SCC 670,
20. Pradeep S. Wodeyar Vs St. of Karn., (2021) 19 SCC 62,
21. U.O.I. Vs Ashok Kumar Sharma, (2021) 12 SCC 674,

22. R.P. Kapur v. St. of Pun., 1960 SCC OnLine SC 21,

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

24. Rajiv Thapar Vs Madan Lal Kapoor: (2013) 3 SCC 330,

25. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors.: 2021 SCC OnLine SC 315.

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri S.M.A. Abdy, learned counsel for the applicant and Sri Pankaj Srivastava, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of the summoning order dated 02.01.2018 as well as the entire proceedings of Criminal Case No. 60 of 2018, arising out of Case Crime No. 0628 of 2017 u/S 315, 511 I.P.C. and under Sections 4/5(2)6(a)/23/25 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred as, 'the PC&PNDT Act'), P.S.- Kotwali Shahar, District- Bulandshahar, pending in the court of learned Chief Judicial Magistrate, Bulandshahar.

BRIEF FACTS

3. The brief facts of the case are that on 14.3.2017, the Tehsildar Khurja, District- Bulandshahar submitted a written report to the police station Kotwali Nagar stating therein that the District Magistrate-Bulandshahar has received information from the secret informer that in Sobha Ram Hospital, the sex identification of the foetus of the pregnant women is being done with the object to prevent the female child being born alive and if any pregnant women is

sent as decoy customer then the doctors of the said hospital and the persons associated with the doctor can be caught red handed. On such secret information, the District Appropriate Authority (PC&PNDT), District-Bulandshahar authorised the Tehsildar Khurja to conduct the required proceedings. For the aforesaid purpose, a Special Action Team was constituted by nominating Subhash Singh, Sub-Inspector, P.S.-Kotwali Nagar, District-Bulandshahar along with the Tehsildar.

4. In compliance of the aforesaid order, the said Tehsildar called the said Sub-Inspector along with two constables and one lady constable in plain clothes and the team met at the Kaala aam crossing and in the process the decoy customer, the lady constable Preeti along with her decoy husband, Sanjay Kaushik also came there and were informed by the Tehsildar about the action to be taken. Then the decoy customer, lady constable Preeti consented therefor and then the Tehsildar handed over Rs. 11,000/- (5 x Rs. 2000/- Notes and 2x Rs. 500/- Notes) to the said decoy customer and as per the planning all of them went towards the Sobha Ram Hospital and the decoy customer Preeti and her decoy husband Sanjay were sent to Sobha Ram Hospital for the sex identification of the foetus. After sometime, Sanjay Kaushik came back and told that near the gate of the hospital two persons were standing and when he disclosed the cause of their arrival, those persons informed him that they are known to the doctor and they will get the sex identification of the foetus done through the doctor. Both the aforesaid persons disclosed their name as Kallan and Sanjeev. He further said that these persons disclosed the expense to be incurred in such examination by the doctor and then both of them went to talk to the doctor and a deal

for Rs. 9,000/- was fixed as charge for such examination. He further told that out of Rs. 11,000/- given to said Kallan, Rs. 2,000/- were returned and Rs. 9,000/- was given to decoy customer, constable Preeti, who has gone inside for examination by the doctor and the doctor is doing the sex identification of the foetus. Saying so, the said Sanjay Kaushik returned the note of Rs. 2,000/-. On such intimation, the Tehsildar had reason to believe that doctors of Sobha Ram Hospital are conducting the sex identification of foetus by taking the customer through their brokers.

5. On such information, Tehsildar along with his team came near the gate of the hospital and waited for the return of the decoy customer, Preeti who came from the hospital after sometime and informed that sex identification of the foetus in her womb has been done by the doctor and the doctor has told her that the foetus is a girl child. She further stated that the doctor has not entered her name or address in any of the register nor any receipt was given and she informed that two persons standing outside the hospital are the agents of the said doctor. On such information, the police team came along with the Tehsildar, arrested the aforesaid two persons and both of them were searched and one of them disclosed his name as Jitendra @ Satyaprakash @ Kallan S/o Sobhraj Sharma resident of House No. 26, Brahmlok Colony, P.S. Kotwali Nagar, District-Bulandshahar and on search Rs. 2,000/- note, which was given to the decoy customer was recovered from right side pocket of his pant. The other person disclosed his name as Sanjeev S/o Rajendra Pal resident of Village Chandpur, P.S. Kotwali Nagar, District-Bulandshahar and on search Rs. 2,000/- note was recovered from right side pocket of his jeans. On

enquiry from both of them, they told that the lady, who came for sex identification of the foetus has given Rs. 9,000/- out of which they have received Rs. 2,000/- each as commission from the doctor and Rs. 5,000/- is kept by the doctor himself. Taking immediate action along with the police team and the two accused persons, they went to the ultrasound room and the person, who was present there was interrogated and he disclosed his name to be Dr. Brij Pal Singh S/o Late Sobha Ram resident of Sobha Ram Hospital Bhund, P.S.-Kotwali Nagar, District-Bulandshahar and on search Rs. 5,000/- was found on the back pocket of his pant. The notes which were recovered were the same, which were given to the decoy customer Preeti by the Tehsildar. The said seized notes were kept in separate envelope and were sealed. The accused persons were informed that they have committed an offence under Section 4, 5, 6, 23 and 25 of the PC & PNDT Act and under Section 315/511 of the I.P.C. and then they were arrested by the police team. The Sonography machine, sonography probe, transvaginal probe and one printer of make Sony was seized and sealed on the spot and in the process the persons present there were asked to be witness of the said seizure, however, they refused to become witness and in view thereof, the arrest memo and seizure memo were prepared. The instant FIR was written by S.I. Subhash Singh on the dictation of Tehsildar and all the members of the police team have signed as witness to the said incident and a copy of the said report was also given to them. On such written report, the Case Crime No. 0628 of 2017 was registered against the applicant herein as well as two other accused persons.

6. After the registration of FIR, the police has investigated the matter and

thereupon submitted the charge sheet on 6.8.2017 before the Magistrate, whereupon the Chief Judicial Magistrate, Bulandshahar has taken cognizance on the said charge sheet on 2.1.2018 and Case No. 60 of 2018 was registered. Hence, the instant application under Section 482 Cr.P.C. has been filed by the applicant- Dr. Brij Pal Singh, seeking quashing of the entire proceedings of the aforesaid criminal case along with summoning order dated 2.1.2018.

SUBMISSIONS OF APPLICANT

7. Learned counsel for the applicant submits that as per the mandate of Section 28 of the PC & PNDT Act, no court can take cognizance of an offence under this Act, except on the complaint filed by the appropriate authority. Therefore, the impugned summoning order dated 02.01.2018, based on an F.I.R. lodged by the Tehsildar, Khurja, Bulandshahar and charge sheet submitted by the police, is against the provisions of Section 28 of the PC & PNDT Act, as the said Tehsildar is not the appropriate authority within the meaning of Section 28 of the PC & PNDT Act. He submits that in view of Section 17 of the PC&PNDT Act, the appropriate authority is the District Magistrate concerned and not the Tehsildar. Therefore, no cognizance could have been taken in the instant case by the court concerned. Therefore, he has prayed for quashing of the entire proceedings of the instant case.

8. In support of his submissions, learned counsel for the applicant has relied upon the judgement dated 22.3.2024 of the Co-ordinate Bench of this Court in the case of **Dr. Vinod Kumar Bassi vs. The State of U.P. and Anr.** passed in **Application U/S**

482 Cr.P.C. 2998 of 2014, 2024 SCC OnLine All 778, wherein a complaint case was lodged by the Additional Chief Medical Officer, who was not the appropriate authority. In view thereof, the proceedings in the said case were quashed. Learned counsel for the applicant further submits that even the appropriate authority under the PC & PNDT Act is not competent to lodge the F.I.R., rather the complaint case has to be filed by appropriate authority in view of Section 28 of the PC&PNDT Act. However, in the instant case, the F.I.R. has been lodged by the Tehsildar, who claims in the F.I.R. that the Appropriate Authority i.e., District Magistrate, has authorised him to carry out the search and seizure and take action on the information received by the Appropriate Authority.

9. Learned counsel for the applicant has further relied upon the provisions of Section 30 of the PC & PNDT Act that no search and seizure could have been done by a person other than the Appropriate Authority or any other officer authorized in this behalf by the Central Government or the State Government as the case may be.

SUBMISSIONS OF A.G.A.

10. *Per contra*, Sri Pankaj Srivastava, learned A.G.A for State relying upon the judgement dated 21.02.2017 of the Division Bench of this Court passed in **Criminal Misc. Writ Petition No. 2085 of 2017 (Dr. Rahul Malik vs. State of U.P. and 3 Ors.)** submits that there is no bar in registration of the F.I.R. and investigation thereof by the police for the offences under the PC & PNDT Act. Therefore, there is no illegality in the process adopted in the instant case. He further submits that once the FIR was lodged by the person,

authorised by the Appropriate Authority, which was investigated by the police authorities and thereupon charge-sheet was filed, on which the cognizance is taken, there cannot be any illegality. The FIR lodged by person authorised by the Appropriate Authority is sufficient compliance of Section 28 of the PC & PNDT Act. Thus, he submits that the applicant herein was caught red handed and a prima facie case has been made out, therefore, no interference is called for in the instant case, while exercising the powers under section 482 of the Criminal Procedure Code as such powers are can be exercised very sparingly in rarest of rare cases. Hence, he prayed for dismissal of the instant case.

OBJECT OF THE ACT

11. Before considering the case on merits, it would be relevant to briefly understand the historical background of the PC & PNDT Act as well as the objectives, which it wants to achieve and the scheme of the Act with regard to the prosecution of the offence under the Act. In the year 1994, the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was enacted by the Parliament and it was brought into force on 1.1.1996. By way of Amendment in the year 2003, the title of the Act was amended as the Pre-Conception And Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act. The circumstances, which led to the enactment of the PC & PNDT Act is summarised in the 'introduction' to the Act itself, which reads as under:-

"In the recent past Pre-natal Diagnostic Centres sprang up in the urban areas of the country using pre-natal diagnostic

techniques for determination of sex of the foetus. Such centres became very popular and their growth was tremendous as the female child is not welcomed with open arms in most of the Indian families. The result was that such centres became centres of female foeticide. Such abuse of the technique is against the female sex and affects the dignity and status of women. Various Organisations working for the welfare and uplift of the women raised their heads against such an abuse. It was considered necessary to bring out a legislation to regulate the use of, and to provide deterrent punishment to stop the misuse of, such techniques. The matter was discussed in Parliament and the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill, 1991 was introduced in the Lok Sabha. The Lok Sabha after discussions adopted a motion for reference of the said Bill to a Joint Committee of both the Houses of Parliament in September, 1991. The Joint Committee presented its report in December, 1992 and on the basis of the recommendations of the Committee, the Bill was reintroduced in the Parliament."

12. The background and the need of such Act was arrived due to the advancement in the medical technology which was capable of determination of gender of a foetus before birth, which came into existence in the late 1970s and 80s and due to availability of such technology there was widespread practice of sex-selective abortions, which in long term started to disbalance the birth ratio of male and

female child and such technology has led to female foeticide, which had deep social and cultural impacts and in the long run it may disturb the existence of human race itself, if not regulated in time. The intention of the legislators behind enacting any Act can be well understood from the 'Statement of objects and reasons' of the said Act. The Statement of objects and reasons are the indicative of the goal, which such Act wants to achieve. To understand the same with regard to the PC&PNDT Act, the Statement of objects and reasons of the same is being reproduced below:-

*"It is proposed to **prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide.** Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. A legislation is required to **regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act.***

The Bill, inter alia, provides for:-

(i) prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide;

*(ii) **prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex;***

*(iii) **permission and regulation of the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;***

*(iv) **permitting the use of such techniques only under***

***certain conditions by the registered institutions; and**
(v) **punishment for violation of the provisions of the proposed legislation.***

2. The Bill seeks to achieve the above objectives."

13. Therefore, the main objective of the Act is to prohibit and regulate the misuse of medical advancement with regard to pre-natal diagnostic technique for determination of sex of the foetus, which ultimately leads to female foeticide. The object of the PC&PNDT Act can also be understood from its long title which reads as "The Pre-Conception And Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994". By the Amendment in the PC&PNDT Act in 2003 some provisions were included which are more stringent to ensure better implementation of the Act.

SCHEME OF THE ACT

14. As per the definition of "Appropriate Authority" in Section 2(a), the Appropriate Authority means the Appropriate Authority appointed under Section 17 of the PC&PNDT Act. Section 2(b) defines "foetus" which means a human organism during the period of its development beginning on the fifty-seventh day following fertilization or creation, excluding any time in which its development has been suspended, and ending at the birth. Section 2(i) defines the "pre-natal diagnostic procedures" which means all gynaecological or obstetrical or medical procedures. Section 2(j) defines "pre-natal diagnostic techniques. Section 2(o) defines "Sex Selection", which reads as under:-

"2(o) "sex selection" includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex."

15. Section 3 of the PC & PNDT Act provides for the 'Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics'. Section 3A prohibits the sex-selection and the same reads as under:-

"3A. Prohibition of sex-selection.-No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them."

16. Section 3B prohibits the sale of ultrasound machine, etc., to persons, laboratories, clinics, etc., not registered under the PC & PNDT Act.

17. Chapter III of the PC & PNDT Act provides for regulation of pre-natal diagnostic techniques. Section 4 deals with Regulation of pre-natal diagnostic techniques, Section 5 provides for prior consent of the pregnant woman before undergoing any pre-natal diagnostic techniques and prohibits the communication of sex of the foetus. For ready reference, Section 5 of the PC & PNDT Act is reproduced below:-

"5. Written consent of pregnant woman and prohibition of communicating the sex of foetus.-(1) No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless—

(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;

(b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and

(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

(2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner. "

18. Section 6 prohibits the determination of sex and the same is also reproduced herein:-

"6. Determination of sex prohibited.—On and from the commencement of this Act,—

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-

natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus;

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception."

19. Chapter IV of the PC & PNDT Act deals with the constitution of the Central Supervisory Board and procedures with regard to meeting of the Board, etc., filling of the vacancies, appointment of all officers and other employees of the Board, eligibility and disqualifications and the functions of the Board. Section 16A deals with the Constitution of State Supervisory Board and Union Territory Supervisory Board. Section 17 under Chapter V of the PC & PNDT Act deals with the appointment of the Appropriate Authority and Advisory Committee, which reads as under:-

"17. Appropriate Authority and Advisory Committee.—*(1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.*

(2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.

(3) The officers appointed as Appropriate Authorities under

sub-section (1) or sub-section (2) shall be,—

(a) when appointed for the whole of the State or the Union territory, consisting of the following three members:—

(i) an officer of or above the rank of the Joint Director of Health and Family Welfare—Chairperson;

(ii) an eminent woman representing women's organization; and

(iii) an officer of Law Department of the State or the Union territory concerned:

Provided that it shall be the duty of the State or the Union territory concerned to constitute multimember State or Union territory level Appropriate Authority within three months of the coming into force of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002:

Provided further that any vacancy occurring therein shall be filled within three months of that occurrence.

(b) when appointed for any part of the State or the Union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.

(4) The Appropriate Authority shall have the following functions, namely:—

(a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

(b) to enforce standards prescribed for the Genetic

Counselling Centre, Genetic Laboratory and Genetic Clinic;

(c) **to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;**

(d) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5), on application for registration and on complaints for suspension or cancellation of registration;

(e) **to take appropriate legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice and also to initiate independent investigations in such matter;**

(f) to create public awareness against the practice of sex selection or pre-natal determination of sex;

(g) to supervise the implementation of the provisions of the Act and rules;

(h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions;

(i) **to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration.**

(5) The Central Government or the State Government, as the case may be, shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the

discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.

(6) The Advisory Committee shall consist of—

(a) **three medical experts from amongst gynaecologists, obstetricians, paediatricians and medical geneticists;**

(b) one legal expert;

(c) one officer to represent the department dealing with information and publicity of the State Government or the Union territory, as the case may be;

(d) three eminent social workers of whom not less than one shall be from amongst representatives of women's organisations.

(7) No person who has been associated with the use or promotion of pre-natal diagnostic technique for determination of sex or sex selection shall be appointed as a member of the Advisory Committee.

(8) The Advisory Committee may meet as and when it thinks fit or on the request of the Appropriate Authority for consideration of any application for registration or any complaint for suspension or cancellation of registration and to give advice thereon:

Provided that the period intervening between any two meetings shall not exceed the prescribed period.

(9) The terms and conditions subject to which a person may be appointed to the Advisory Committee and the

procedure to be followed by such Committee in the discharge of its functions shall be such as may be prescribed."

20. Sub-section (1) of Section 17 empowers the Central Government to appoint one or more Appropriate authorities for each of the Union territories for the purpose of this Act. Sub-section (2) of Section 17 empowers the State Government to appoint, by notification in the official Gazette, one or more Appropriate Authorities for the whole or part of the State having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide. Sub-section (3) of Section 17 deals with the eligibility as to who can be appointed as Appropriate Authorities. Sub-section (4) of Section 17 deals with the functions of the Appropriate Authority. Section 17(4)(c) empowers the Appropriate Authority to investigate the complaints received by it for any breach of the provisions of the Act or the Rules. Section 17(4)(e) empowers the Appropriate Authority to take appropriate legal action against use of any sex selection techniques, either suo-motu or on information received and to carry out independent investigation. Section 17(4)(i) directs that after completion of investigation, the Appropriate Authority shall act on the recommendation of the Advisory Committee constituted under Section 17(5) of the Act. Sub-section (5) empowers the Central Government or the State Government, as the case may be, to constitute a Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its function and shall appoint one of the members of such Advisory Committee as Chairman thereof. Sub-section (7) prohibits the person, who has been associated with

the determination of sex or sex-selection shall not be appointed as member of the Advisory Committee. Sub-section (8) of Section 17 provides the procedure with regard to functioning of the Advisory Committee and sub-section (9) empowers the concerned Government to regulate the terms and conditions of the Advisory Committee. Section 17A which was introduced by way of Amendment in 2003 describes the powers of the Appropriate Authority which are as follows:-

"17A. Powers of Appropriate Authorities.- *The Appropriate Authority shall have the powers in respect of the following matters, namely:-*

a) summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the rules made thereunder;

b) production of any document or material object relating to clause (a);

c) issuing search warrant for any place suspected to be indulging in sex selection techniques or pre-natal sex determination; and

d) any other matter which may be prescribed."

21. Thus, Section 17A gives teeth to the existing power of the Appropriate Authority. Now while investigating any matter in view of Section 17(4) of the Act, the Appropriate Authority can summon any person, who has any information regarding the violation of the provisions of the Act or the Rules and direct for production of documents and can issue search warrant for any place, suspected to be indulging in any sex-selection techniques or pre-natal sex

determination. Further powers may also be assigned to the Appropriate Authorities by the appropriate Government or by the Rules.

22. Chapter VI of the PC & PNDT Act deals with the 'Registration of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics'. Section 20 of the PC & PNDT Act deals with cancellation or suspension of registration and the same reads as under:-

"20. Cancellation or suspension of registration.-(1) The Appropriate Authority may suo moto, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

(2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.

(3) Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is, of the opinion that it is necessary or expedient so to do in the public interest, it may, for

reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1)."

23. Chapter VII of the PC & PNDT Act deals with 'Offences and Penalties' and Section 23 thereof is reproduced below:-

"23. Offences and penalties.- (1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

(2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action **including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.**

(3) Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, **he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any**

subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.

(4) For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection."

24. Section 24 of the PC & PNDT Act which was amended in 2003 protects the pregnant women from prosecution under the Act as the presumption is raised that unless proved otherwise, it shall be presumed that the pregnant women was compelled by her husband or any other relative, as the case may be, to undergo pre-natal diagnostic technique for the purposes other than those specified in sub-section (2) of Section 4 and such person shall be liable for abetment of offence under sub-section (3) of Section 23 and shall be punished for such offence. Section 25 provides for penalty for contravention of the provisions of the Act or rules for which no specific punishment is provided. Section 26 deals with the offence committed by the companies. Section 27 makes the offence under the PC & PNDT Act to be cognizable, non-bailable and non-compoundable and the same reads as under:-

"27. Offence to be cognizable, non-bailable and non-compoundable.-Every offence under this Act shall be cognizable, non-bailable and non-compoundable."

25. Section 28 of the PC & PNDT Act deals with the cognizance of offence which is reproduced herein:-

"28. Cognizance of offences.—(1) No court shall take cognizance of an offence under this Act except on a complaint made by—

(a) **the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority;** or

(b) a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court.

Explanation.—For the purpose of this clause, "person" includes a social organisation.

(2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of subsection (1), the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person."

26. From the perusal of sub-section (1) of Section 28, the Courts are prohibited from taking cognizance of any offence under the PC & PNDT Act except on a complaint made by (i) Appropriate Authority concerned; (ii) any officer authorised in this behalf by the Central

Government or the State Government, as the case may be; (iii) any officer authorised in this behalf by the Appropriate Authority; and (iv) a person who has given notice of not less than 15 days of his intention to make a complaint to the court. For this purpose, it has been explained that the person shall include a social organisation as well. Sub-section (2) of Section 28 mandates that only a Metropolitan Magistrate or a Judicial Magistrate of the first class shall be the competent court to try the offence punishable under the PC & PNDT Act. Sub-section (3) of Section 28 provides that when a complaint is made by a person, who has given the notice for filing the complaint to the Appropriate Authority and on the request made by such person to the court, the court can direct the Appropriate Authority to produce all relevant records, which is in its possession.

27. Chapter VIII deals with 'Miscellaneous' provisions. Section 29 deals with the 'Maintenance of records', Section 30 deals with the powers of the Appropriate Authority or the authorized person to search and seize records of any such clinic, where violations of the provisions of the PC & PNDT Act are being made and sub-section (2) of Section 30 also makes the provisions of the Cr.P.C. applicable with regard to the searches and seizures. Section 30 of the Act is also reproduced herein.

"30. Power to search and seize records, etc. —(1). If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place, **such Authority or any officer**

*authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and **seize and seal** the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.*

(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act."

28. Section 31 of the PC & PNDT Act protects the officers who have acted in good faith under the provisions of this Act. Section 31A which has been introduced by way of Amendment in 2003 empowers the Central Government to make such provisions with regard to necessity or which may be experienced for removing of any difficulty. Though such powers were limited for a period of 3 years from the amendment. Section 32 of the Act empowers the Central Government to make rules to regulate the procedures. Section 33 empowers the advisory boards to frame the regulations with the prior sanction of the Central Government. Any such rules and regulations made under the PC & PNDT Act were directed to be laid before the Parliament for its approval as per Section 34.

29. In exercise of the powers under section 32 of the PC & PNDT Act, the Central Government has framed the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996. Rule 12 of the Rules, 1996 provides for entire mechanism for search and seizure as under:

"12. Procedure for search and seizure.-(1) The Appropriate Authority or any officer authorised in this behalf may enter and search at all reasonable times any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of **two or more independent witnesses for the purposes of search and examination** of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.

Explanation:-In these Rules-

(1) 'Genetic Laboratory/Genetic Clinic/Genetic Counselling Centre' would include an ultrasound centre/imaging centre/nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure technique or test for pre-natal detection of sex of foetus, is used;

(2) 'material object' would include records, machines and equipments; and

(3) 'seize' and 'seizure' would include 'seal' and 'sealing' respectively.

(2) A list of any document, record, register, book, pamphlet, advertisement or any other material object found in the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and seized shall be prepared in duplicate at the place of effecting the seizure. Both copies of such list shall be signed on every page by the Appropriate Authority or the officer authorised in this behalf and by the witnesses to the seizure:

Provided that the list may be prepared, in the presence of the witnesses, at a place other than the place of seizure if, for reasons to be recorded in writing, it is not practicable to make the list at the place of effecting the seizure.

(3) One copy of the list referred to in sub-rule (2) shall be handed over, under acknowledgement, to the person from whose custody the document, record, register, book, pamphlet, advertisement or any other material object have been seized:

Provided that a copy of the list of such document, record, register, book pamphlet, advertisement or other material object seized may be delivered under acknowledgement, or sent by registered post to the owner or manager of the Genetic counselling Centre, Genetic laboratory or Genetic Clinic, if no person acknowledging custody of the

document, record, register, book, pamphlet, advertisement or other material object seized is available at the place of effecting the seizure.

(4) If any material object seized is perishable in nature, the Appropriate Authority, or the officer authorised in this behalf shall make arrangements promptly for sealing, identification and preservation of the material object and also convey it to a facility for analysis or test, if analysis or test be required: Provided that the refrigerator or other equipment used by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic for preserving such perishable material object may be sealed until such time as arrangements can be made for safe removal of such perishable material object and in such eventuality, mention of keeping the material object seized, on the premises of the Genetic counselling Centre or Genetic Laboratory or Genetic Clinic shall be made in the list of seizure.

(5) In the case of non-completion of search and seizure operation, the Appropriate Authority or the officer authorized in this behalf may make arrangements, by way of mounting a guard or sealing of the premises of the Genetic Com 1 selling Centre, Genetic Laboratory or Genetic Clinic, for safe keeping, listing and removal of documents, records, book or any other material object to be seized, and to prevent any tampering with such documents, records, books or any other material object."

30. Rule 18A which has been introduced by the amendment in the year 2014, which is relevant for the purpose of the controversy involved in the instant case and which deals with the code of conduct to be observed by the Appropriate Authority is being reproduced herein:-

“18A. Code of Conduct to be observed by Appropriate Authorities.- (1) All Appropriate Authority including the State, District and Sub-district notified under the Act, inter-alia, shall observe the following general code of conduct, namely:-

(i) maintain dignity, and integrity at all times;

(ii) observe and implement the provisions of the Act and Rules in a balanced and standardised manner in the course of their work;

(iii) conduct their work in a just manner without any bias or a perceived presumption of guilt;

(iv) refrain from making any comments which demean individuals on the basis of gender, race, religion;

(v) delegate his or her powers by administrative order to any authorised officer in his or her absence and preserve the order of authorisation as documentary proof for further action.

(2) All the Appropriate Authorities including the State, District and Sub-district notified under the Act, inter-alia, shall observe the following Conduct for Advisory Committees, namely:-

(i) ensure that the re-constitution, functions and other relevant matters related to advisory

committee shall be in accordance with the provisions of the **Advisory Committee Rules, 1996;**

(ii) ensure that a person who is the part of investigating machinery in cases under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (57 of 1994), shall not be nominated or appointed as a member of the Advisory Committee;

(iii) ensure that the process of filling up of vacancies in Advisory Committee shall start at least ninety days before the probable date of the occurrence of vacancy;

(iv) ensure that no person shall participate as a member or a legal expert of the Advisory Committee if he or she has conflict of interest;

(v) conduct frequent meetings of the Advisory Committee to expedite the decisions regarding renewal, cancellation and suspension of registration.

(3) All the Appropriate Authorities including the State, District and Sub-district notified under the Act, inter-alia, shall observe the **following conduct for processing of complaint and investigation, namely:-**

(i) **maintain appropriate diaries in support of registration of each of the complaint or case under the Act;**

(ii) **attend to all complaints and maintain transparency in the follow-up action of the complaints;**

(iii) **investigate all the complaints within twenty-four**

hours of receipt of the complaint and complete the investigation within forty-eight hours of receipt of such complaint;

(iv) as far as possible, not involve police for investigating cases under the Act as the cases under the Act are tried as complaint cases under the Code of Criminal Procedure, 1973 (2 of 1974).

(4) All the Appropriate Authorities including the State, District and Sub-district notified under the Act, inter-alia, shall observe the following conduct for registration and renewal of applications under the Act, namely:-

(i) dispose of the application for renewal and new registration within a period of seventy days from the date of receipt of application;

(ii) ensure that no application for fresh registration or renewal of registration is accepted if any case is pending in any court against the applicant for violation of any provision of the Act and the rules made thereunder.

(5) All the Appropriate Authorities including the State, District and Sub-district notified under the Act, inter-alia, shall observe the following conduct for Legal Action, namely:

(i) ensure that protection and expenses of witness shall be met from the registration amount collected;

(ii) ensure that all the notifications of the Government be produced in original in the court

and a copy of the same be preserved:

(iii) ensure that while filing the cases, all the papers, records, statements, evidence, panchnama and other material objects attached to the case file shall be in original;

(iv) suspend the certificate of registration in the course of taking legal action of seizure, and sealing of the facility;

(v) ensure that there shall be no violation of the provisions of the Medical Termination of Pregnancy Act, 1971 (34 of 1971) and the Rules made thereunder while implementing the provisions of the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996;

(vi) take immediate action for filing appeal, revision or other proceeding in higher courts in case of order of acquittal within a period of thirty days but not later than fifteen days of receipt of the order of acquittal.

(6) All the Appropriate Authorities including the State, District and Sub-district notified under the Act, inter-alia, shall submit quarterly progress report to the Government of India through State Government and maintain Form H for keeping me information of all the registrations made readily available.

(7) All the Appropriate Authorities including the State, District and Sub-district- notified under the Act, inter-alia, shall observe the following regulation of ultrasound equipments, namely:-

(i) monitor the sales and import of ultrasound machines

including portable or buyback, assembled, gift, scrap or demo;

(ii) ensue regular quarterly reports from ultrasound manufacturers, dealers, wholesalers and retailers and any person dealing with the sales of ultrasound machines at the State level;

(iii) conduct periodical survey and audit of all the ultrasound machines sold and operating in the State or district to identify the unregistered machines;

(iv) **file complaint against any owner of the unregistered ultrasound machine and against the seller of the unregistered ultrasound machine.**

(8) All the Appropriate Authorities including the State, District and Sub-district fied under the Act, inter-alia, shall observe the following conduct for inspection monitoring, namely:-

(i) conduct regular inspection of all the registered facilities once in every ninety days and shall preserve the inspection report as documentary evidence and a copy of the same be handed over to the owner of facility inspected and obtain acknowledgement in respect of the inspection;

(ii) place all the inspection reports once in three months before the Advisory Committee for follow up action;

(iii) maintain bimonthly progress report containing number of cases filed and persons convicted, registration made, suspended or cancelled, medical licenses cancelled, suspended,

inspections conducted Advisory Committee meetings held I at the district level and quarterly progress report at the State level;

(iv) (a) procure the copy of the charges framed within seven days and in the case of doctors, the details of the charges framed shall be submitted within seven days of the receipt of copy of charges framed to the State Medical Council;

(b) procure the certified copy of the order of conviction as soon as possible and in the case of conviction of the doctors, the certified copy of the order of conviction shall be submitted within seven days of the receipt of copy of the order of conviction.

(9) All the Appropriate Authorities including the State, District and Sub-district notified under the Act, inter-alia, shall observe the following conduct for accountability, namely:-

(i) obtain prior sanction or approval of the Government of India for any resolution concerning the implementation of the provisions of the Act;

(ii) **take action, if any, required under the Act and immediately on receipt of notice under clause (b) of sub-section (1) of section 28 of the Act and if he or she fails to do so, shall not be entitled for the protection under section 31 of the said Act and defend the case in his or her own capacity and at his or her own cost.**

(10) All the Appropriate Authorities including the State, District and Sub-district notified

under the Act, inter-alia, shall follow the following financial guidance, namely:-

(i) maintain a separate and independent bank account operated by two officers jointly, at all levels;

(ii) ensure transparency and adherence to standard Government financial norms for disbursement of money.”

31. Sub-rule (3)(iv) of the rule 18A specifically prohibits that so far as possible the Appropriate Authority is directed not to involve police for investigation of the cases under the PC & PNDT Act as the cases under the Act are tried as complaint case under the Code of Criminal Procedure, 1973. Thus, from the comprehensive reading of the provisions of the PC & PNDT Act, the object of the PC & PNDT Act is regulatory in nature, which regulates and facilitates the use of technological advancement for the benefit of general public. However, it prohibits the use of technological advancement for the purposes of pre-natal or pre-conception sex-selection. In view of the provisions of Section 17(4)(c), (e) and (i), the Appropriate Authority after completion of investigation, is bound to take further action in the matter only the recommendation of the Advisory Committee constituted under Section 17(5) with regard to suspension or cancellation of registration. Rule 18A also empowers the Appropriate Authority to adopt various regulatory measures, without involving the police and even filing of the complaint before competent court under Section 28 is the last resort.

**NOTIFICATIONS U/S 17(2) OF
THE PC&PNDT ACT IN THE STATE
OF UTTAR PRADESH**

32. The State of Uttar Pradesh vide Gazette Notification dated 30.11.2007 has appointed the following persons as the Appropriate Authority for whole of the State, namely:-

(i) Dr. L.B. Prasad,
Director General, Medical Health
Services and National Programme,
Monitoring and Evaluation,
Directorate of Family Welfare,
Uttar Pradesh- Chairperson.

(ii) Smt. Yashodhara, Kriti
Resource Centre, Indira Nagar,
Lucknow-Member

(iii) Shri J.N. Sinha,
Special Secretary and Additional
Legal Remembrance, Uttar Pradesh
Government-Member

By the same Notification, it has been further provided that the District Magistrate of every district of the State shall be the appropriate authority under the PC & PNDT Act and it had been directed that such authority shall function under the administrative control of the Appropriate Authority for the State. It has been further provided in the notification that the District Magistrate, may nominate any Executive Magistrate of the District as his/her nominee to assist him/her in monitoring and implementation of the PC & PNDT Act, as deemed necessary.

33. Vide notification dated 31.07.2008 by modifying the previous notification, it has been provided that the Director General, Medical Health Services and National Programme, Monitoring and Evaluation, Directorate of Family Welfare, Uttar Pradesh by post shall be the chairman of the appropriate Authority for the State.

Further, time-to-time, the members of the appropriate Authority for the State have been changed; however, the District Magistrate continues to be the Appropriate Authority for the particular district. Vide another notification dated 8.2.2013 in exercise of powers under Section 17 (3) of the PC & PNDT Act, the Sub- District Magistrate has also been appointed as the Appropriate Authority for the purposes of the Act, who shall act in accordance with the provisions of the PC & PNDT Act under the administrative control of the District Appropriate Authority, which is the District Magistrate. In the aforesaid notification, it has been further provided that the Sub- District Magistrate may also take assistance of any other executive Magistrate for enforcement of the provisions of the PC & PNDT Act.

**INTERPRETATION OF
PROVISIONS OF PC&PNDT ACT BY
DIFFERENT HIGH COURTS AND
THE APEX COURT**

(I) ALLAHABAD

34. In the case of **Dr. Varsha Gautam vs. State of U.P. and others, ALJ 2006 (5) Page No. 221**, while dealing with the provisions of Section 28 of the PC & PNDT Act, the Division Bench of this Court has held as under:-

"5. In our view the said prohibition does not apply at the stage of investigation and only relates to the stage when cognizance is sought to be taken by the concerned court. In this regard " In our view the said prohibition does not apply at the stage of investigation and only relates to the stage when cognizance is sought to

be taken by the concerned court. In this regard when dealing with the question of a bar under Section 195 (1) (b) (ii), it has been held in M. Narayan Das v. State of Karnataka AIR 2004 SC 768, that the said bar only applies at the time when the court takes cognizance of an offence, and not at the stage of investigation. The material Paragraph 8 reads as follows:

We are unable to accept the submissions made on behalf of the Respondents. Firstly it is to be seen that the High Court does not quash the complaint on the ground that Section 195 applied and that the procedure under Chapter XXVI had not been followed. Thus such a ground could not be used to sustain the impugned judgment. Even otherwise there is no substance in the submission. The question whether Sections 195 and 340 of the Criminal Procedure Code affect the power of the police to investigate into a cognizable offence has already been considered by this Court in the case of State of Punjab v. Raj Singh. In this case it has been that as follows :

2. We are unable to sustain the impugned order of the High Court quashing the FIR lodged against the respondents alleging commission of offences under Sections 419, 420, 467 and 468, I.P.C. by them in course of the proceeding of a civil suit, on the ground that Section 195(1)(b)(ii), Cr. P. C. prohibited entertainment of and investigation into the same by the police. From a plain reading of Section 195, Cr. P.C. it is

manifest that it comes into operation at the stage when the Court intends to take cognizance of an offence under Section 190(1), Cr. P. C; and it has nothing to do with the statutory power of the police to investigate into an FIR which discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceedings in Court. In other words, the statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195, Cr. P. C. It is of course true that upon the charge-sheet (challan), if any, filed on completion of the investigation into such an offence the Court would not be competent to take cognizance thereof in view of the embargo of Section 195(1)(b), Cr. P. C., but nothing therein deters the Court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340, Cr. P. C. The judgment of this Court in **Gopala-krishna Menon v. Raja Ready** on which the High Court relied, has no manner of application to the facts of the instant case for there cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the civil Court and hence it was held that the Court could not take

cognizance on such a complaint in view of Section 195, Cr. P.C.

Not only are we bound by this judgment but we are also in complete agreement with the same. Sections 195 and 340 do not control or circumscribe the power of the police to investigate, under the Criminal Procedure Code. Once investigation is completed then the embargo in Section 195 would come into play and the Court would not be competent to take cognizance. However that Court could then file a complaint for the offence on the basis of the FIR and the material collected during investigation provided the procedure laid down in Section 340, Criminal Procedure Code is followed. Thus no right of the Respondents, much less the right to file an appeal under Section 341, is affected. "

35. It will be relevant to note the observations of the Division Bench of this Court in the judgment dated 21.2.2017 passed in Criminal Misc. Writ Petition No. 2085 of 2017 (**Dr. Rahul Malik vs. State of U.P. and Others**) wherein the Division Bench relying upon the earlier judgement in the case of Dr. Varsha Gautam (Supra) has refused to quash the FIR holding that in view of the provisions of Section 27 of the PC & PNDT Act, every offence under this Act shall be a cognizable, non-bailable and non-compoundable offence. Thus, a non-bailable offence is reported to the police, the police has power to investigate and submit a report. The relevant paragraph of the said judgment is as under:-

"10. According to the Provision of Section 27 of the

P.N.D.T. Act every offence under this Act shall be cognizable, non-bailable and non-compoundable.

11. From the perusal of the F.I.R. it is clear that prima facie cognizable offence is made out, therefore there is no ground to quash the F.I.R. and stay the arrest of petitioner. Petition has no force and it is accordingly, dismissed.”

36. The co-ordinate Bench of this Court in **Dr. Vinod Kumar Bassi vs. State of U.P. And Another, 2024 SCC OnLine All 778**, where the complaint under the PC & PNDT Act, 1994 was lodged by the Additional Chief Medical Officer, who was not authorised under Section 17(3) of the PC & PNDT Act, therefore, this Court has allowed the Application U/S 482 Cr.P.C. and has quashed the entire proceedings of the said complaint case lodged under the PC & PNDT Act by the Additional Chief Medical Officer, who was neither the Appropriate Authority nor the authorised person. The Court has observed as under:-

“9. When the Act of 1994 clearly provides that no Court shall take cognizance of any offence under the Act except on a complaint made by the appropriate authority, the court has no jurisdiction to take cognizance of any offence except on a complaint made by the appropriate authority. There can be no dispute against the fact that the Additional Chief Medical Officer is not an appropriate authority and he has no authority to file a complaint for any alleged offence committed under the provisions of the aforesaid Act and the Government

Order. Therefore, as the complaint itself was incompetent, the trial court had no jurisdiction to take cognizance of the offences alleged in the complaint and to summon the applicant for being tried for the alleged offences.”

37. The Division Benches of this Court in **Dr. Varsha Gautam (Supra)** and **Dr. Rahul Malik (Supra)** have taken a view that though in view of the bar under Section 28 of the PC & PNDT Act, the Magistrate cannot take cognizance on the police report submitted after investigation of the offence under the Act, however, only for that reason the lodging of FIR and investigation thereof is not barred and on such observation, the Division Benches of this Court have refused to quash the FIR lodged for the offence under the provisions of the PC & PNDT Act.

(II) PUNJAB & HARYANA

38. A Division Bench of High Court of Punjab & Haryana on reference of following questions by Single Judge, vide judgement dated 4.12.2014 passed in **Criminal Misc. No. 4211 of 2021 (Hardeep Singh vs. State of Haryana)** has dealt with procedural aspects with regard to the offences under PC & PNDT Act :-

“(1) Whether FIR for the offences committed under this Act can be registered on the complaint of Appropriate Authority and can be investigated by the Police?

(2) Whether the report under Section 173 CrPC along with the complaint of an Appropriate Authority can be filed to the Court?

(3) Whether no FIR can be lodged nor the offences can be

investigated by the Police and only complaint by the Appropriate Authority directly to the Court lies?”

The Division Bench after considering the matter at length, returned the following findings:-

“In the circumstances, the questions as formulated in the reference are answered in the following manner, that:—

(1) FIR for the offence committed under the Act can be registered on the complaint of the Appropriate Authority and can be investigated by the Police; however, cognizance of the same can be taken by the Court on the basis of a complaint made by one of the persons mentioned in Section 28 of the Act.

(2) A report under Section 173 CrPC along with the complaint of an appropriate authority can be filed in the Court. However, cognizance would be taken only the complaint that has been filed in accordance with Section 28 of the Act.

(3) FIR can be lodged and offences can be investigated by the Police but cognizance only of the complaint is to be taken by the Court.”

(Emphasis supplied)

39. In ***Criminal Misc. No. M-421 of 2021 - Dr. Aparna Singhal v. State of Haryana***, learned Single Judge of Punjab & Haryana High Court following the Division Bench in Hardeep Singh has observed that FIR can be registered after completing the investigation the police would file a kalandra (Report) for the offences under the PC&PNDT Act before District Appropriate Authority and thereafter a complaint, alongwith a kalandra (police report), would be filed, on which cognizance can be taken by Magistrate. However, for the offence under the provisions of IPC, the police can file the report, directly on which cognizance can be taken.

40. The Punjab and Haryana High Court in ***Dr. Anant Ram vs. State of Haryana, 2022 SCC OnLine P&H 2284*** relying upon the judgement in ***Dr. Hardeep Singh (Supra)*** has taken a view that though magistrate is not competent to take cognizance on the police report submitted; therefore, if any investigation has been carried out, then such police report has to be handed over to the concerned Appropriate Authorities and only they may file the complaint along with the said report. There is no absolute bar for registration of FIR, however, the police officer on receipt of FIR is required to inform the officers of department, Health and Family Welfare. The following observation would be relevant to note:-

“17. A perusal of 28 of the PNDT Act would show that it envisages that no Court is to take cognizance of offence under the Act except on a complaint made by the persons enumerated in clause (a) thereof. Besides, clause (b) envisages that a complaint may

also be made by a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court. **‘Cognizance by Court’ and ‘investigation of offence’ are two different things. Investigation precedes cognizance by Court. The stage of cognizance by Court would come only upon conclusion of investigation. Taking cognizance is function of Court whereas investigation is domain of police/investigating agency.** A Division Bench of this Court in its judgment dated 4.12.2014 rendered in Criminal Misc. No. M-4211 of 2021 - Hardeep Singh v. State of Haryana, has dealt with in detail the procedural aspects in respect of cases under PNDDT Act. The judgment was delivered while considering the following issues which had been referred to a larger Bench by a Single Bench of this Court:—

“(1) Whether FIR for the offences committed under this Act can be registered on the complaint of Appropriate Authority and can be investigated by the Police?

(2) Whether the report under Section 173 CrPC along with the complaint of an Appropriate Authority can be filed to the Court?

(3) Whether no FIR can be lodged nor the offences can be investigated by the Police and only complaint by the Appropriate Authority directly to the Court lies?”

22. There is no dispute that in terms of Section 28 of the

PNDDT Act, it is only upon a complaint made by Appropriate Authority that a Court can take cognizance and not on the basis of a report under Section 173 Cr.P.C., as far as offences under PNDDT Act are concerned. As has been specifically stated in the reply filed by the State that a Kalandra is going to be filed by the Appropriate Authority in respect of offences under Sections 23, 3(1), 3(a), 4, 5(ii) and 6(b) of the PNDDT Act, whereas the police has separately filed a chargesheet under 173 Cr.P.C. in respect of the offences under IPC only. As such, it cannot be said that there has been any violation of Section 28 of the PNDDT Act.

Submission No. (vii)

(vii) that as per Rule 18A(3)(iv) of The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996, framed in exercise of the powers conferred by section 32 of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994, the Appropriate Authority is not supposed to associate police for investigating case under PNDDT Act.

23. As already noticed above, while discussing submission no. (v), there is no absolute bar under PNDDT Act against the police investigating a case, as evident from Rule 18-A(3)(iv) of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996. The said Rule reads as follows:—

(3) All the Appropriate Authorities including the State,

District and Sub-district notified under the Act, inter alia, shall observe the following conduct for processing of complaint and investigation, namely:—

(i) maintain appropriate diaries in support of registration of each of the complaint or case under the Act;

(ii) attend to all complaints and maintain transparency in the follow-up action of the complaints;

(iii) investigate all the complaints within twenty four hours of receipt of the complaint and complete the investigation within fortyeight hours of receipt of such complaint;

(iv) ***as far as possible***, not involve police for investigating cases under the Act as the case under the Act are tried as complaint case under the Criminal Procedure Code, 1973 (2 of 1974).”

24. No doubt, the aforesaid rule does suggest that ordinarily the police officers should not be associated for the purpose of investigating a case but the words ‘as far as possible’, as occurring in Rule 18-A(3)(iv) cannot be interpreted to mean an absolute bar against involvement of the police. Rather, it does show that there would be cases where police could be associated. However, it goes without saying that keeping in view the fact that offences under PNDT Act are committed using specialised equipment requiring technical knowledge, with which ordinary police would not be very familiar, even if commission of an offence under PNDT Act comes to

notice of police, the officials of Department of Health and Family Welfare should be informed immediately. As such, Rule 18A(3)(iv) cannot be made a ground for quashing of the FIR, particularly when no such absolute bar is provided in the PNDT Act, unlike the provisions of PMLA Act wherein a specific bar is envisaged in provisions of Section 45(1A) of the PMLA Act. The aforesaid submission being sans merit cannot be accepted.”

(Emphasis supplied)

(III) DELHI

41. The Delhi High Court in the case of ***Manoj Krishan Ahuja vs. State of NCT of Delhi and Another, 2023 SCC OnLine Del 2303*** has held that though it is not specifically provided under the PC & PNDT Act that the Appropriate Authority can file the FIR after the preliminary inquiry, search and seizure, on a complaint received by them, the purpose of law cannot be defeated by quashing the FIR, where investigation also related to commission of cognizable offence under the PC&PNDT Act. The relevant paragraphs of the judgement is reproduced below:-

“32. Having discussed the procedure contemplated under Section 28 of the Act in the preceding discussion, this Court notes that ***the manner in which the cognizance was taken by the learned Trial Court upon a chargesheet is not the procedure envisaged***

under the PC&PNDT Act. In the present case, the complaint had to be filed by the concerned Appropriate Authority before the learned Trial Court as a complaint under Section 200 Cr. P.C. Since the cognizance has been taken on the chargesheet filed under Section 173 of Cr. P.C., it is clearly in the teeth of the bar under Section 28 of this Act which bars cognizance except upon receipt of complaint in the manner provided therein. It is also the sine qua non for taking cognizance that the said Appropriate Authority or the person so authorised should be validly appointed.

33. During the course of arguments, learned APP for the State had also produced a copy of complaint filed by the District Appropriate Authority before the learned Trial Court, almost a year after the cognizance had been taken in the present case, to contend that the irregularity, if any, stood cured.

34. On the contrary, it has been brought to the notice of this Court that the complaint filed by the Appropriate Authority on 02.09.2020. was filed as a separate complaint case, which has

been registered separately vide CT Case No. 3778/2020, pending before the same Trial Court.

35. In the considered opinion of this Court, since Section 28 of the Act expressly prohibits taking of cognizance by the Courts in absence of a complaint made by Appropriate Authority or any other person authorised on its behalf, the complaint filed subsequently and registered and pending adjudication as per law under the Act cannot come to the rescue of the prosecution, more so since it will amount to prosecuting the same persons for same offences by two procedures prescribed under law i.e. by way of filing of a complaint case which was mandatory under this Act and on the basis of cognizance taken of a chargesheet which is prohibited under the Act.

36. In this case, this Court also takes note of an order dated 15.07.2019. vide which the Appropriate Authority had granted 'sanction' under Section 28 to the police to prosecute accused no. 3 in the present FIR. The relevant portion of said order reads as under:

“With reference to letter no 1538/R-SHO/PS LAJPAT NAGAR/NEW DELHI dated-24/06/2019 regarding request for sanction under section-28 of PC&PNDT Act against the accused in the case filed vide FIR No-375/2018 at P.S. Sunlight Colony.

By virtue of power granted under section 28.l(A) of PC & PNDT act, sanction is hereby conveyed to prosecute following accused in above mentioned case...

39. However, this Court holds that **technically, though the police had been authorised to prosecute the offenders, the same did not absolve the Appropriate Authority of their duty to file a complaint which was mandatory under the PC&PNDT Act under Section 28.** The Appropriate Authority, however, had filed a complaint in the Court on 02.09.2020. Therefore, **the cognizance in absence of complaint of the Appropriate Authority was barred in law.**

52. However, as observed in preceding discussion, the bar under Section 28 of the Act that cognizance can be taken only if a complaint of the Appropriate Authority is before the Trial Court is an

absolute bar. Therefore, though registration of the FIR is not expressly barred under the Act on the complaint made by Appropriate Authority, taking of cognizance only on the basis of chargesheet filed by the police on the basis of such a complaint is barred. A similar view was also taken by the Division Bench of Hon'ble High Court of Punjab and Haryana in case of Hardeep Singh v. State of Haryana CRM No. M-4211/2014.

53. As held by Hon'ble Apex Court in Rasila S. Mehta v. Custodian, Nariman Bhavan, Mumbai, (2011) 6 SCC 220, **it is incumbent upon the Courts to interpret the statute in such a way that it protects and advances the purpose of enactment, and to not adopt any technical or restricted interpretation of the provisions which would negate the legislative intent and policy.**

54. Albeit, it is not specifically provided in the Act that the Appropriate Authority can get an FIR registered after their preliminary inquiry, search, seizure etc. or on a complaint received by them, the purpose of law cannot be defeated by

quashing of FIRs where investigation also reveals commission of cognizable offence under the Act only due to lack of clarity in this regard in the Act. At the cost of repetition, it is to be noted that when the Appropriate Authority, as per mandate of PC&PNDT Act, informs the police about commission of offence under the Act, the police is duty bound and it is mandatory for them to register an FIR if commission of cognizable offence is made out.”

(Emphasis supplied)

(IV) GUJARAT

42. Similarly, the Full Bench of Gujarat High Court in ***Suo Motu vs. State of Gujarat***, 2008 SCC OnLine Guj 294, has held as under:-

“16. The provisions of section 28 clearly provide for taking cognizance of an offence under the Act only upon a complaint being made by any of the four categories of complainants, viz:

(1) the Appropriate Authority concerned;

(2) any officer authorised in that behalf by the Central Government or State Government;

(3) any officer authorised in that behalf by the Appropriate Authority; and

(4) a person, which includes a social organisation, who has given notice as prescribed in section (28)(1) (b).

17. Use of the words “Appropriate Authority” twice, at the beginning and end of clause (a) of sub-section (1) of section 28, clearly conveys that complaint could be made by an officer who is authorised in that behalf by the Central Government, the State Government or the Appropriate Authority, besides the Appropriate Authority itself. The power to delegate and authorise an officer to make a complaint is clearly conferred upon all the three authorities under the provisions of section 28, and therefore, a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in that behalf by the Appropriate Authority. The first issue is answered accordingly. As seen earlier, the Act and the Rules made thereunder provide for an elaborate scheme to ensure proper implementation of the relevant legal provisions and the possible loop-holes in strict and full compliance are sought to be plugged by detailed provisions for maintenance and preservation of records. In order to fully operationalise the restrictions and injunctions contained in the Act in general and in sections 4, 5 and 6 in particular, to regulate the use of pre-natal diagnostic technique, to make the pregnant woman and the person conducting the prenatal diagnostic tests and procedures aware of the legal and other

consequences and to prohibit determination of sex, the Rules prescribe the detailed forms in which records have to be maintained. Thus the Rules are made and forms are prescribed in aid of the Act and they are so important for implementation of the Act and for prosecution of the offenders, that any improper maintenance of such record is itself made equivalent to violation of the provisions of sections 5 and 6, by virtue of the proviso to sub-section (3) of section 4 of the Act. It must, however, be noted that the proviso would apply only in cases of ultrasonography conducted on a pregnant woman. And any deficiency or inaccuracy in the prescribed record would amount to contravention of the provisions of sections 5 and 6 unless and until contrary is proved by the person conducting such ultrasonography. The deeming provision is restricted to the cases of ultrasonography on pregnant women and the person conducting ultrasonography is, during the course of trial or other proceeding, entitled to prove that the provisions of sections 5 and 6 were, in fact, not violated.

19. Upon above analysis and appreciation of the scheme and provisions of the Act and Rules made thereunder, opinion on issues referred to the larger bench is as under:

(i) **Under the provisions of section 28 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 ("the PNDT Act"), a Court can take**

cognizance of an offence under the Act on a complaint made by any officer authorised in that behalf by the Appropriate Authority.

(ii) The proviso to sub-section (3) of section 4 of the PNDT Act does not require that the complaint alleging inaccuracy or deficiency in maintaining record in the prescribed manner should also contain allegation of contravention of the provisions of section 5 or 6 of the PNDT Act.

(iii) In a case based upon allegation of deficiency or inaccuracy in maintenance of record in the prescribed manner as required under sub-section (3) of section 4 of the PNDT Act, the burden to prove that there was contravention of the provisions of section 5 or 6 does not lie upon the prosecution.

(iv) Deficiency or inaccuracy in filling Form F prescribed under Rule 9 of the Rules made under the PNDT Act, being a deficiency or inaccuracy in keeping record in the prescribed manner, it is not a procedural lapse but an independent offence amounting to contravention of the provisions of section 5 or 6 of the PNDT Act and has to be treated and tried accordingly. It does not, however, mean that each inaccuracy or deficiency in maintaining the requisite record may be as serious as violation of the provisions of section 5 or 6 of the Act and the Court would be justified, while imposing punishment upon conviction, in taking a lenient view in cases of

only technical, formal or insignificant lapses in filling up the forms. For example, not maintaining the record of conducting ultrasonography on a pregnant woman at all or filling up incorrect particulars may be taken in all seriousness as if the provisions of section 5 or 6 were violated, but incomplete details of the full name and address of the pregnant woman may be treated leniently if her identity and address were otherwise mentioned in a manner sufficient to identify and trace her.

(v) The judgment in *Dr. Manish C. Dave v. State of Gujarat* reported in 2008 (1) GLH 475 stands overruled to the extent it is inconsistent with the above opinion. The references stand disposed accordingly.”

(Emphasis supplied)

(V) BOMBAY

43. The Bombay High Court in the case of *Dr. Sai vs. State of Maharashtra*, (2016) SCC OnLine Bom 8812 has held as under:

16. If we look into the provisions of PCPNDT Act, then u/s 28(1)(a) of the said Act it is specifically provided that no Court shall take cognizance of an offence under the PCPNDT Act except on a complaint made by an Appropriate Authority i.e. the Authority notified u/s 17 of PCPNDT

Act. The provision has been engrafted with an object that the provisions of the Said Act may not be misused and police have been deliberately kept out of the purview of initiating prosecution though the offences are made

cognizable, nonbailable and non-compoundable by virtue of Section 27 of the said Act. The entire process of taking legal action against the person violating the provisions of PCPNDT Act which includes investigation of complaint has been entrusted to Appropriate Authority. In order to empower the Appropriate Authority the powers to summon any person who is in possession of any information relating to violation of provisions of the Act and Rules made thereunder, production of any document or material object relating to possession of information relating to such violation including the powers of issuance of search warrant etc. are entrusted and conferred upon Appropriate Authority. In general, the high ranking officer from the field of Medical have been notified as an Appropriate Authority to file such complaint.

18. Thus, if we read the provisions of sections 17, 17A and 28 of the said Act together, then the role of the Appropriate Authority is very important. **The Appropriate Authority has to act as an investigator to inquire into the allegations of violation of the PCPNDT Act and Rules thereunder either on the basis of complaint received as well as to act suo motu. The role of the Appropriate Authority is not just to receive the complaint and file the proceeding in the Court of law. Section 17(4)(c) specifically provides that, one of the function of the Appropriate Authority is to investigate the complaints of breach of provisions of the act and the rules made thereunder and take legal action. Section 17(4)(e) provides that, the Appropriate Authority to take legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice or also to initiate independent investigation in such matter. Thus, to investigate the complaints received against the persons violating the provisions of PCPNDT Act is the job of Appropriate Authority. Outcome of such investigation provides basis**

either to drop the proceeding or to initiate appropriate proceeding which includes initiation of criminal prosecution by filing complaint u/s 28 of PCPNDT Act. Mere report or complaint or information received cannot be sole basis to prosecute the person. **If the complaint is inquired and investigated results into collection of evidence sufficient to prosecute the person for violation of the provisions of PCPNDT Act, then only criminal proceeding is expected to be filed u/s 28 of the PCPNDT Act. There appears to be specific legislative intent behind introducing Section 17-A in the PCPNDT Act (incorporated by amended act of 2003) to vest full-fledged powers of inquiry and Appropriate Authority to investigate the matter. Thus, the role of the Appropriate Authority is much more than the authority to file complaint.**

19. In the light of role of the Appropriate Authority discussed as above, it was expected on the part of the Appropriate Authority to have investigated the information received in the form of inspection report from the Vigilance Squad to find out there was any

violation of provisions of PCPNDT Act on the part of the petitioner. It was expected on the part of Appropriate Authority to have summoned the persons referred in the inspection report to verify as to whether the petitioner had complied with the requirement of obtaining written consent as contemplated under Section 5 r/w Rule 9 of the PCPNDT Act and there was any violation in observing the mandatory conditions. Simply certain lacunae, omission detected in the consent form could not be the basis to prosecute the person. By exercising the powers u/s 17-A, certainly the Appropriate Authority could have summoned those persons, recorded their statement and conducted further investigation as deemed fit and proper to collect the evidence to sustain the prosecution in the Court of law..... The expected role of Appropriate Authority u/s 17(4) of PCPNDT Act is to probe the matter and then to arrive at a proper decision as to whether prima facie case of violation of the provisions of the PCPNDT Act and Rules framed thereunder is made out or not. In the

case of Dr. Uma Shankarrao Rachewad v. Appropriate Authority reported in 2012 Cri.L.J. 2634 decided by one of us (Coram : A.V. Nirgude, J.), dealing with the case more or less identical to the facts of the case, has observed in para 14 as under:

“14. In view of the discussion above, the case filed against the petitioner does not disclose prima facie case and therefore should fail. Before I conclude this judgment, I think I must also hold that when the Competent Authority visits a clinic for inspection, after inspection he should record statement of the person against whom he intends to file the case. In such statement, such person would get ample opportunity to put-forward his or her explanation. The Competent Authority under this Act, in my view, should consider each case on its merits, examine it meticulously, preferably with the help of a Legal Advisor and then file complaint in the Court. At least in this case, it appears that the necessary care was not taken and the case was filed hurriedly, without examining its strength.”

(Emphasis supplied)

(VI) ORISSA

44. The High Court of Orissa in the case of **Ramesh Chandra Naik v. State of Orissa, 2018 SCC OnLine Ori 480** has held as under:-

*“13. I shall first deal with the order of taking cognizance under sections 23 and 25 of the PCPNDT Act. Section 28 of the PCPNDT Act enumerates on what basis a Court can take cognizance of an offence under the Act and which Court is empowered to try the offence punishable under the Act. **Cognizance of an offence under the Act can be taken on the basis of a complaint made by the (i) Appropriate Authority; (ii) any officer authorized in that behalf by the Central Government or State Government and also (iii) any officer authorized in that behalf by the Appropriate Authority. It could also be taken on the basis of a complaint made by a person, who had given a notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the Court.** The later situation would arise in a case where the Appropriate Authority had failed to initiate action even in spite of the notice of the person concerned. In the later situation, after the complaint is filed, the Court is empowered to direct the Appropriate Authority to make available copies of the relevant records in its possession to the person concerned. If he makes such a demand before the Court. A*

Metropolitan Magistrate or a Judicial Magistrate of first class is empowered to try any offence punishable under the Act. The explanation contained under clause (b) of sub-section (1) of section 28 states that the term ‘person’ includes a social organization. Therefore, the legislature in order to prevent the social evil has allowed any person to set the law in motion under the Act by approaching the Court after fulfilling the criteria laid down under clause (b) of sub-section (1). The word ‘may’ as it appears in sub-section (3) of section 28 of the PCPNDT Act gives discretion to the Court to decide whether

the complainant is entitled to the copies of the relevant records as sought for from the Appropriate Authority. Though the complainant has got right to demand the copies of the relevant records but he has no vested right to get the same. The word may cannot be interpreted as ‘shall’ or ‘must’. The Court has to consider various factors including the right of privacy of an individual who is likely to be affected, the purpose and object of the legislation, the right of the person to receive the documents and the violation, if any, of the provisions of the Act and Rules.

17. The PCPNDT Act in section 28 lays down the restriction for a Court in taking cognizance of an offence under the Act except on a complaint being made by certain categories of authorities or any person after fulfilling certain criteria. As per section 2(d) of Cr. P.C., complaint means any

allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. In the explanation to section 2(d) of Cr. P.C., it lays down that a report made by a police officer in a case which discloses, after investigation, the commission of a noncognizable offence shall be deemed to be a complaint and the police officer by whom such report is made shall be deemed to be the complainant.

20. *In view of the foregoing discussion, since cognizance of offences under sections 23 and 25 of the PCPNDT Act has been taken on the basis of the chargesheet submitted by police and not on the basis of a complaint petition as envisaged under section 28 of the PCPNDT Act, I am of the humble view that the learned Magistrate has committed illegality in taking cognizance of such offences' and therefore, the impugned order of taking cognizance of offences under sections 23 and 25 of the PCPNDT Act stands quashed. The authorities mentioned under clause (a) of sub-section (1) of section 28 of the PCPNDT Act is at liberty to file complaint petition within four weeks from today before the appropriate Court for taking cognizance of offences under the PCPNDT Act which will be considered in accordance with law.*

21. *So far as the other offences are concerned, after going through the case records-*

produced by the learned counsel for the State, the statements of witnesses and documents seized, I find prima facie case for commission of offences under sections 312, 315, 316, 109/34 of the Penal Code, 1860 and section 5(3)(4) of the MTP Act is clearly made out. At the stage of taking cognizance of offence and issuance of process, the Magistrate has to be satisfied whether prima facie case is made out or not and whether there is sufficient ground for proceeding against the accused and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial. A detailed discussion of the merits or demerits of the case is not required to be gone into at that stage. While exercising jurisdiction under section 482 of the Code, the High Court should not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, the accusation would not be sustained. That is the function of the trial Judge. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Section 482 of the Code is not an instrument handed over to an accused to short-circuit a legitimate prosecution and bring about its sudden death.

22. *In view of the above, I find no perversity in the impugned*

order of taking cognizance so far as the offences under sections 312, 315, 316, 109/34 of the Penal Code, 1860 and section 5(3)(4) of the MTP Act and therefore, I am not

inclined to interfere with the same. Accordingly, the CRLMC application is allowed in part. The impugned order of taking cognizance of offences under sections 23 and 25 of the PCPNDT Act stands quashed. The order of taking cognizance of offences under sections 312, 315, 316, 109/34 of the Penal Code, 1860 and sections 5(3)(4) of the MTP Act is upheld. Since it is a case of the year 2007, the trial of the case be expedited. The MTP registers which have been received from the Court below be sent back in sealed cover to the concerned Court.”

(Emphasis supplied)

(VII) TELANGANA & ANDHRA PRADESH

45. The High Court for the State of Telangana in ***W.P. no. 18904 of 2018 (M/s Sujatha Scan Cente vs. The State of Telangana)*** has held as under:-

“7. Thus, these rules and regulations have passed only in exercise of power under Section 34 of the Act and in view of these guidelines referred above, any complaint against the person, who violated the provisions of the Act, compliant case

alone is to be filed but not otherwise, as per guideline No.3 of the Code of Conduct for Appropriate Authorities under the PCPNDT Act that as far as possible, not to involve the police for investigating cases under the Act as the cases under the Act are tried as complaint cases, that means, the police are not competent to investigate into the offences under the Act since it depends upon the scientific investigation by the person having knowledge in the specific field i.e., doctors. The police cannot investigate into and collect any evidence in such cases. Similarly, in the guidelines for responding to complaint, it is made clear that FIR should be avoided under the PC & PNDT Act as there is no direct role of police in the Act. This is in consonance with the rule 18A(3)(iv) of the Act. Therefore, unless those guidelines or regulations are placed before the Parliament in exercise of power under Section 34 of the Act, they will have no statutory force like any other enactment.

8. It is the contention of the counsel for the petitioners that the rule is framed contrary to the power conferred on the

Government under Section 32 of the Act. But this Court cannot decide the validity of the rule or guidelines while exercising power under Article 226 of the Constitution of India to quash the crime registered against the petitioners. The judgment of the Allahabad High Court relied upon by the respondent has no application to the present facts of the case for the reason that the Allahabad High Court did not consider these guidelines referred above. **Therefore, registration of crime and investigation by the police is illegal since they are not competent and they have no role to play in the investigation.**

Consequently, the proceedings in C.C.No.303 of 2018 of Banjara Hills Police Station, Hyderabad, are liable to be quashed.”

(Emphasis supplied)

(VII) CHATTISGARH

46. In the case of **Dr. Amritlal Rohledar vs. State of Chhattisgarh**, 2019 SCC OnLine Chh 137, the Chhattisgarh High Court has observed as under:

“21. In exercise of the powers conferred by Section 32 of the PCPNDT Act, the Central Government has framed rules known as the Pre-conception and Pre-natal Diagnostic Techniques

(Prohibition of Sex Selection) Rules, 1996. Rule 12 of the Rules of 1996 provides for the procedure for search and seizure. Rule 18A provides the Code of Conduct to be observed by Appropriate Authorities including the State. Sub-rule (3) of Rule 18A provides that all the Appropriate Authorities including the State, District and Sub-district notified under the Act shall observe the following conduct for processing of complaint and investigation, namely:—

(i) maintain appropriate diaries in support of registration of each of the complaint or case under the Act;

(ii) attend to all complaints and maintain transparency in the follow-up action of the complaints;

(iii) investigate all the complaints within twenty-four hours of receipt of the complaint and complete the investigation within forty-eight hours of receipt of such complaint;

(iv) as far as possible, not involve police for investigating cases under the Act as the cases under the Act are tried as complaint cases under the Code of Criminal Procedure, 1973 (2 of 1974).

22. Thus, **a focused perusal of the aforesaid provisions would show that a complete legislative scheme has been enacted for ensuring strict compliance of the stringent provisions of the PCPNDT Act directed against female foeticide and to stop the misuse of pre-natal diagnostic techniques and offence(s) under the Act has to be investigated only**

by the appropriate authority named in the Act read with the notification issued in that behalf and no power and jurisdiction has been conferred to the Station House Officer to investigate the offences under the Act though the offences under the Act have been made cognizable.

39. In the matter of *Rohtas v. State of Haryana*, (1979) 4 SCC 229, the Supreme Court held that Section 5 of the CrPC carves out a clear exception to the provisions of trial of an offence under any special or local law for the time being in force or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force.

40. In the matter of *Maru Ram v. Union of India*, (1981) 1 SCC 107, the Supreme Court (Constitution Bench) with reference to Section 5 of the CrPC held as under:—

“33. The anatomy of this saving section is simple, yet subtle. Broadly speaking, there are three components to be separated. Firstly, the Procedure Code generally governs matters covered by it. Secondly, if a special or local law exists covering the same area, this latter law will be saved and will prevail. ...”

41. The PCPNDT Act is certainly and obviously “other law” within the meaning of Section 4 of the CrPC, as the PCPNDT Act and the rules made thereunder prescribe the manner or regulate the manner or place of investigating, inquiring into and

trying of the offence alleged to have been committed under the Act.

48. Similarly, the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in the matter of *Sujatha Scan Centre v. State of Telangana*, LAWS(APH) 2018 7 39 while quashing the investigation made pursuant to the first information report lodged under the

PCPNDT Act and while highlighting the scientific investigation to be made by the appropriate authority having knowledge and experience in the field, held as under:—

“7. Thus, these rules and regulations have passed only in exercise of power under Section 34 of the Act and in view of these guidelines referred above, any complaint against the person, who violated the provisions of the Act, compliant case alone is to be filed but not otherwise, as per guideline No. 3 of the Code of Conduct for Appropriate Authorities under the PCPNDT Act that as far as possible, not to involve the police for investigating cases under the Act as the cases under the Act are tried as complaint cases, that means, the police are not competent to investigate into the offences under the Act since it depends upon the scientific investigation by the person having knowledge in the specific field i.e., doctors. The police cannot investigate into and collect any evidence in such cases. Similarly, in the guidelines for responding to

complaint, it is made clear that FIR should be avoided under the PC & PNDT Act as there is no direct role of police in the Act. This is in consonance with the rule 18A(3)(iv) of the Act. Therefore, unless those guidelines or regulations are placed before the Parliament in exercise of power under Section 34 of the Act, they will have no statutory force like any other enactment."

(Emphasis supplied)

(VIII) MADHYA PRADESH

47. In **Manvinder Singh Gill (Dr.) vs. State of M.P. : ILR (2014) MP 1176**, the complaint was filed by the Additional Collector, who was never authorised either by the Central Government or by the State Government and the District Magistrate was the appropriate authority. Therefore, on the aforesaid facts the High Court of Madhya Pradesh, has allowed the application for quashing of the complaint cases, holding that the private complaints filed by the Additional Collector are not maintainable and held that the Additional Collector was incompetent to initiate the action against the accused persons for the purpose of Section 28 of the PC & PNDT Act. It was further held that even the authorization by the appropriate authority would not authorize the Additional Collector, as the same cannot be treated the order of the appointment of appropriate authority to file private complaints under provisions of Section 28 PC & PNDT Act. The following observations of the M.P. High Court are relevant to be noted which reads as under:

"11. In view of the language of Section 28, it is

apparent that the cognizance by the Court can be taken for an offence under the PC & PNDT Adhiniyam, on a complaint made by the Appropriate Authority concerned or any officer

authorised in this behalf by the Central or the State Governments as the case may be or by the Appropriate Authority. As per Section 17 of the Adhiniyam, it is clear that the Central Government or the State Government by notification in the official gazette may appoint one or more Appropriate Authorities for each of the Union Territories or for whole or part of the State for the purpose of the said Adhiniyam. In case the Appropriate Authority has been appointed for whole of the State or the Union Territory it shall consist with three members which includes the Joint Director of Health and Family Welfare, eminent woman representing the Womens Organisation and an Officer of the Law Department of the Central or the State. But simultaneously the State Government has also conferred the power under Section 17(3) (b).to appoint any officer, for any part of the State. It appears that by the notification dated 4.04.2007. the District Magistrate, Indore was appointed as Appropriate Authority as per Section 17(3)(b) of the PC & PNDT Adhiniyam, in Sub-Section 4 of Section 17 the functions of the Appropriate Authority has been specified. Section 17(4) (e) has been introduced by 14th amendment in 2003, by which the Authority may take appropriate

legal action against the use of any such selection technique, suo motu or bringing it to the notice to the said authority or he may initiate the independent investigation in a manner as prescribed. On the conjoint reading of Section 17 & 28, it is clear that the appointment of Appropriate Authority for the purpose of Section 17(3)(a) or (b) shall be by the Central or State Government as the case may be, by issuing a notification in the official gazette. It further reveals, why the legislation has used the word "appropriate authority concerned" and "appropriate authority" again in Section 28(1)(a). In the said context it is hereby explained that if the appropriate authority has been declared as per Section 17(3)(a) then the word "appropriate authority concerned" is relevant but in cases of Section 17(3)(b) the word "appropriate authority" as used in Section 28(a) would be relevant. **On reading Section 28(1)(a) it further reveals that the Central or the State Government can also appoint any officer authorized in this behalf, but the cognizance of an offence under the PC & PNDT Adhiniyam can be taken by the court only when a complaint is made by the "appropriate authority" or "by any officer authorized" by Central or State Government, otherwise not.** It is relevant to note here that as per Section 28(1)(b) in case a social organization has filed a complaint being juristic person as explained in the explanation, then it may be maintained by giving 15 days notice to the Appropriate

Authority indicating the intention of filing a complaint in the Court. As per Section 28(3) on issuance of the notice by the person against whom the complaint is made the documents used against him shall be supplied. In the facts of the present case the provision of Section 28(1)(a) applies and Section 28(1)(b) is not attracted, however, it is not discussed in detail.

12. In both the above mentioned petitions, the record of the trial Court has been called. On perusal of the record of the private complaint No. 1839/2011 in M.Cr.C. No. 4393/2013 it is clear that the said-private complaint has been filed by one Shri Anand Sharma, Additional Collector, Indore indicating himself as Competent Officer under the PC & PNDT Adhiniyam as per order dated 28.07.2010 issued by the Collector, District Indore. Similarly in M.Cr.C. No. 4395/2013 the private complaint No. 19564/07 has been filed by **Smt. Renu Pant, Additional Collector specifying herself to be the Appropriate Authority or officer authorized under the PC & PNDT Adhiniyam as per order dated 12.04.2007 passed by the District Magistrate, Indore.** In both these complaints the evidence before charge has not yet been recorded. The Court has passed the order of taking cognizance on the said private complaints, therefore, the issue to maintain such complaint and the order taking cognizance has been assailed before this Court.

13. In view of the notification issued by the State Government dated 4.4.2007, it is clear that in exercise of the power conferred under Section 17(2)(3)(b) the District Magistrate, Indore has been appointed as appropriate authority. **No other order/notification issued by the State Government for appointment of appropriate authority or officer authorized, in favour of Smt Renu Pant or Shri Anand Sharma, Additional Collectors has been filed. By the order passed by the Collector on 12.4.2007 and 28.7.2010 they have been nominated to help the appropriate authority in monitoring for execution of the PC & PNDDT Adhiniyam. As per the requirement of law, in view of the language of Section 28(1)(a) the complaint may be maintained either by the appropriate authority or by the officer authorized by the Central or State Government. On the basis of nomination order of Collector in favour of Smt. Renu Pant and Shri Anand Sharma, they cannot be treated to be the appropriate authority or officers authorized for the purpose of Section 28 of the Adhiniyam.**

14. As per the discussion made herein above and looking to the notifications and the orders filed by the State Government, it is clear that the notification dated 4.4.2007 issued by the State Government declaring the District Magistrate, Indore as appropriate authority for the purposes of District Magistrate is in consonance to the provisions

contained under Section 17(3)(b) of the PC & PNDDT Adhiniyam. The orders passed by the Collector, District Indore nominating Smt. Renu Pant and Anand Sharma, Additional Collectors to help him in monitoring on 12.4.2007 and 28.7.2010 are not the orders of appointment of appropriate authority or the officers authorized to maintain the complaint. As discussed herein above the appointment of appropriate authority or officer authorized shall be as per the provisions of the Adhiniyam by the Central or the State Government. The order of nomination passed by the District Magistrate cannot be termed the order of appointment of appropriate authority or the officers authorized for the purpose of Section 17(2)(3)(b) and for the purpose of Section 28(1)(a) of the PC & PNDDT Adhiniyam. **Thus, it is to be held that the aforesaid private complaints filed by Smt. Renu Pant and Shri Anand Sharma, Additional Collectors are not filed by the appropriate authority or the officer authorized, therefore the said complaint is not maintainable. The order taking cognizance passed by the Court on such complaint is also unsustainable as per Section 28(1)(a) of the PC & PNDDT Adhiniyam.**

15. xxxxxxxxxxxx.

16. It is relevant to observe here that the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Adhiniyam & Rules is special enactment. The said Adhiniyam has

been introduced with an object to prohibit the sex selection. The legislature intent is to restrain the sex determination before or after conception and for regulation of Pre-natal Diagnostic Techniques for the purpose of and detecting genetic abnormalities and metabolic disorder or chromosomal or certain technical male formation or sex link disorder and for prevention of their misuse or sex determination leading to female foeticide. In this regard, the stringent provision has been made and the procedure has also been specified codifying all the possibilities. On commission of the offence and after conviction Jail sentence and suspension or cancellation of the registration of the Genetic Counselling Center, Generic Laboratory or Genetic Clinic is there. In case the Central Government by enacting the law making stringent provisions want to implement it, then the Central or State Government are also bound to follow the procedure as prescribed in the Adhiniyam. If the action is taken by the State authorities in violation to the statutory provisions and the procedure as prescribed, it can be

writ large. It is a settled principle of law that no one can be deprived by the right without following the procedure established under the law. However, in the present case without following the provisions and the procedure prescribed under PC & PNDT Adhiniyam the private complaint has been filed by the State authorities whereupon the

cognizance has been taken by the Court which cannot be regarded as per law and on account of violation of the statutory provisions the Court can pass the appropriate order for quashing such complaints and by setting aside the order taking cognizance, in exercise of power under Section 482 of Cr. P.C.

17. xxxxxxxx.

18. In view of the foregoing discussion, in the considered opinion of this Court, M.Cr.C. Nos. 4393/2013 and 4395/2013 both are allowed. Private complaints filed by the Additional Collectors are held to be incompetent to initiate the action against the petitioners for the purpose of Section 28 of the Adhiniyam. It is to be further held that the orders of nomination dated 12.04.2007 and 28.07.2010 passed by the District Magistrate, Indore, cannot be treated the orders of appointment of the Appropriate Authority or an officer authorized to file private complaints. In consequence if the complaint has not been filed by the appropriate authority or the officer authorized by the Central or the State Government as required under Section 28(1)(a) of the Adhiniyam the order taking cognizance passed by the Court is also not in conformity to the law, therefore set aside. However, the State Government or the appropriate authority is at liberty to take recourse of law as per the discussion made herein above and after following the procedure prescribed under the PC & PNDT Adhiniyam if law permits. In the

facts and circumstances of the case, parties to bear their own costs."
(Emphasis supplied)

48. The issue whether the complaints made by the officer authorized by the appropriate authority and also investigation under 17(3) of the PC & PNDT Act is maintainable in view of Section 28 of the PC & PNDT Act, has been further dealt by the M.P. High Court in Judgement of **Dr. Swaroop Charan Sahu vs. The State of Madhya Pradesh (M.Cr.C. No. 11773 of 2013)** in the judgement and order dated 05.01.2018 and it has been held that the appropriate authority and the members of the Advisory Committee has specified for Section 17 as the authority for the purpose of Section 28(1) of the PC & PNDT Act. In the aforesaid judgment the M.P. High Court has held as under:-

"15. Looking to the aforesaid, in the context of observation of Hon'ble Supreme Court in Special Leave to Appeal (Crl.) No.2226/2014 dated 3.8.2015, "any officer authorized by the Appropriate Authority notified under

Section 17(3) would also be entitled to file the complaint" now, it would be apt to see whether Appropriate Authority has notified or authorized any officer under Section 17(3) to initiate the action by filing complaint. In this regard, nothing has been brought on record by the State Government or by the OIC of the case, producing the document. In absence thereto, the argument advanced by learned counsel for the respondent is of no avail.

16. In addition, it is required to be noticed under PC & PNDT Act, the complaint can be made in a competent Court of the State by the officer as specified in Section 17(3)(b) or as specified in Section 28(1)(a) of the Act. The word "complaint" has been defined in Cr.P.C. under Section 2(d) which is

reproduced as under :-

"(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.- A report made by a police officer in a case which discloses after investigation, the commission of non- cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

and the word "made" has also been defined in the **Law Lexicon P. Ramanatha Aiyar, Second Edition**, which is as under :-

"The word 'made' means 'filed'. Filing does not contemplate personal presentation. Any mode can be used but the application should be received by the authority concerned within the time prescribed by law. Kanchan Singh vs. S.T.A.T. Lucknow AIR 1980 All 23.

Section 28(1)(a) of the PC & PNDT Act start with non-obstante clause and to restrict the Court in taking cognizance of the

offence under the provisions of this Act except on a complaint made, therefore, **the word "complaint" and "made" both are relevant. In the backdrop of the definition of complaint as per Section 2(d) of Cr.P.C., means a written or oral accusation made to the Judicial Magistrate to start proceedings against a known or unknown person. It does not include the report given to the police (F.I.R.). The purpose of the complaint is to apply to the Judicial Magistrate for setting the criminal action in motion.** Unlike the provisions as specified in Section 142 of Negotiable Instruments Act wherein also cognizance can be taken for an offence punishable under Section 138 of the said Act on filing a complaint in writing. Thus, looking to the language of Section 28(1)(a) of the PC & PNDT Act, the cognizance can be taken by a Court on a complaint made for the offence under the said Act. The said complaint can be made either by the authorities specified under Section 17(2)(3) & 28(1)(a) or by the person in a manner as specified in Section 28(1)(b), for setting up a criminal action of an offence under PC & PNDT Act. **The case at hands relates to Section 28(1)(a), therefore, it can safely be concluded that the complaint must be signed by the appropriate authorities or appropriate authority or the person notified by the Central Government or the State Government or authorised by the appropriate authority by notification, though its personal presentation is not required.**

17. The aforesaid issue has been dealt with by this Court in the case of **Dr. Das Motwani (supra)** in M.Cr.C. No.10264/2016, wherein this Court after referring to the judgment of the Supreme Court has held as under :-

"12. Shri Sanjay Dwivedi, learned Deputy Advocate General lays much emphasis on the observation made by Hon'ble the Apex Court observing

that the High Court omitted under Section 28(1)(a) of the Act, **any officer authorized by the appropriate authority notified under Section 17(3) would also be entitled to initiate action under the Act. It is submitted by him, the said observation may be contrary to the provision of Section 17(3) but in view of the observation made in the judgment of the Apex Court it would operate as law. In this regard, it is suffice to observe that this Court has already discussed the provisions of Section 17(2)(3)(a) and (b) and also Section 28(1) of the PC and PNDT Act. It is not for the Court to say that observation in the judgment is in consonance to the provision of the Act or not.** But looking to the facts of the present case, even if the observation of the Apex Court in the said judgment has considered, the CMHO, Bhopal has not notified as officer authorized by the appropriate authority to act as per Section 17(3) of the PC and PNDT Act. No notification has been produced before this Court, therefore, it can safely be concluded that CMHO, Bhopal has not authorized by the District

Magistrate, Bhopal as appropriate authority to make the complaint as required under Section 28(1) of the Act and as per the judgment of the Apex Court. Therefore, in the facts of the present case, it is held that complaint has not made by "appropriate authority" or any officer authorized by the State Government under the provision of PC and PNDT Act, however, the trial Court cannot take cognizance as specified under Section 28(1)(a) of the PC and PNDT Act, therefore, the order taking cognizance passed by trial Court is not in accordance to law.

13. In view of the foregoing discussion, this petition under Section 482 of the Cr.P.C. is hereby allowed. The complaint made by the Chief Medical and Health Officer, Bhopal against the petitioner is hereby quashed. However, it is open to the appropriate authority to take action as permissible under the law. In the facts parties to bear their own costs."

18. In view of the foregoing discussion, in my considered opinion, **the C.M.H.O., Bhopal and Hoshangabad, are not the officer authorized under Section 17(2)(3) and 28(1)(a) of the PC and PNDT Act, however, cognizance taken by the Court on the complaint made by them for the offence under the provisions of this Act is illegal and without jurisdiction and such complaints are liable to be quashed in exercise of the powers under Section 482 of Cr.P.C.** Thus, the

questions posed for answer are decided accordingly."

(Emphasis supplied)

(IX) APEX COURT

49. The aforesaid judgement in **Manvinder Singh Gill (supra)** (Madhya Pradesh) was assailed before the Apex Court in **SLP (Cri.) No. 2226 of 2014 (State of M.P. vs. Manvinder Singh Gill)**. While dismissing the aforesaid Special Leave Petition on 03.08.2015, the Apex Court has observed as under:-

"By the impugned order, the High Court after noticing that the person who prosecuted the respondent did not come within the definition of "Appropriate Authority" as stipulated under Section 17(3) of the Pre-Conception and Pre-Natal Diagnostic Technique(Prohibition of Sex Selection) Act,1994, [hereinafter referred to as 'the Act'] held that the complaint was not maintainable.

We perused Section 28(1)(a) of the Act which reads as under:-

"28. Cognizance of offences.(1) No court shall take cognizance of an offence under this Act except on a complaint made by-
- (a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be or the appropriate authority;"

When read carefully it emerges that the Authority is vested in three officers, namely, **the**

Appropriate Authority, i.e. the authority as notified under Section 17(3) of the Act apart from any officer authorised in that behalf either by the Central Government or the State Government or by the concerned Appropriate Authority notified under Section 17(3) itself.

In the case on hand, however, the High Court has noted that the officers who were authorised by the concerned appropriate authorities to help the Appropriate Authority to monitor and have effective implementation of the Act cannot construed as officers authorised in that behalf as provided under Section 28(1)(a) of the Act. The High Court had, therefore, no other go except to set aside the proceedings initiated at the instance of the petitioner and while setting aside the same gave liberty to the petitioner to take appropriate recourse under the provisions of the Act.

Learned counsel for the petitioner, however, drew our attention to paragraph 11 of the impugned judgment wherein while considering Section 17(3)(b) and (28)(1)(a) of the Act, the High Court stated that action under the Act can be taken by the Court only when a complaint is made by "the appropriate authority" or "by any officer authorised by the Central Government or State Government, otherwise such action would not be valid in law. While stating so, the High Court **has omitted to note that under Section 28(1)(a) any officer authorised by the "Appropriate Authority" notified**

under Section 17(3) would also be entitled to initiate action under the Act.

While clarifying the said position, since we do not find any flaw in the ultimate order of the High Court based on the facts noted in the case on hand, we do not propose to interfere with the same.

The Special Leave Petitions stand disposed of with the above clarification."

(Emphasis supplied)

50. In the aforesaid judgement while dismissing the Special Appeal Petition the Apex Court has observed that the High court has omitted to note that under Section 28 (1)(a) of the PNDT Act, any officer authorized by the "Appropriate Authority" notified under Section 17(3) would also be entitled to initiate action under the Act.

51. In ***Ravinder Kumar v. State of Haryana, 2024 SCC OnLine SC 2495***, the Apex Court while dealing with Section 30 of the PC & PNDT Act, has observed as under:

"11. Now, coming back to Section 30, it is a very drastic provision which grants power to the Appropriate Authority or any officer authorized by it to enter a Genetic Laboratory, a Genetic Clinic, or any other place to examine the record found therein, to seize the same and even seal the same. The first part of sub-section (1) of Section 30 safeguards these centres or laboratories from arbitrary search and seizure action. The safeguard is that search and

seizure can be authorized only if the Appropriate Authority has a reason to believe that an offence under the 1994 Act has been committed or is being committed.

12. The question is what meaning can be assigned to the expression “has reason to believe”. Section 26 of the Penal Code, 1860 defines the expression “reason to believe”, which reads thus:

“26. “Reason to believe”.— A person is said to have “reason to believe” a thing, if he has sufficient cause to believe that thing but not otherwise.”

In the case of **Aslam Mohammad Merchant v. Competent Authority & Others : (2008) 14 SCC 186**, this Court had an occasion to interpret the same expression. In paragraph 41, this Court held thus:

“41. It is now a trite law that whenever a statute provides for “reason to believe”, either the reasons should appear on the face of the notice or they must be available on the materials which had been placed before him.”

However, interpretation of the expression will depend on the context in which it is used in a particular legislation. In some statutes like the present one, **there is a power to initiate action under the statute if the authority has reason to believe that certain facts exist. The test is whether a reasonable man, under the circumstances placed before him, would be propelled to take action under the statute. Considering the object of the 1994 Act, the expression “reason to believe”**

cannot be construed in a manner which would create a procedural roadblock. The reason is that once there is any material placed before the Appropriate Authority based on which action of search is required to be undertaken, if the action is delayed, the very object of passing orders of search would be frustrated. Therefore, what is needed is that the complaint or other material received by the appropriate authority or its members should be immediately made available to all its members. After examining the same, the Appropriate authority must expeditiously decide whether there is a reason to believe that an offence under the 1994 Act has been or is being committed. The Appropriate Authority is not required to record reasons for concluding that it has reason to believe that an offence under the 1994 Act has been or is being committed. But, there has to be a rational basis to form that belief. However, the decision to take action under sub-section (1) of Section 30 must be of the Appropriate Authority and not of its individual members.

13. Under the notification dated 7th November 2013, the Appropriate Authority for the district consists of the Civil Surgeon, the District Program Officer of the Women and Child Development Department, and the District Attorney. The Civil Surgeon is the Chairman of the appropriate authority. Looking at the object of sub-section (1) of Section 30 and the express

language used therein, only the Chairman or any other member acting alone cannot authorise search under subsection (1) of Section 30. It must be a decision of the Appropriate Authority. If a single member of the Appropriate Authority authorises a search, it will be completely illegal being contrary to sub-section (1) of Section 30. If the law requires a particular thing to be done in a particular manner, the same shall be done in that manner only. In the present case, going by the affidavit filed by Dr. Virender Yadav, the Chairman of the District Appropriate Authority cum-Civil Surgeon, Gurugram, the decision to conduct a search by appointing three officers by order dated 27th April 2017 was only his decision purportedly taken in his capacity as the Chairman of the Appropriate Authority. Admittedly, the other two members of the appropriate authority are not parties to the said decision. The Civil Surgeon has given the excuse of urgency. The Appropriate authority doesn't need to have a physical meeting. The Civil Surgeon could have held a video meeting with the other two members. However, when a video meeting is held, every member must be made aware of the complaint or the material on which a decision will be made. It was a matter of a few minutes.

14. Therefore, in the facts of the case, no legal decision was made by the Appropriate Authority in terms of sub-section (1) of Section 30 to search for the appellant's clinic. **As stated earlier,**

sub-section (1) of Section 30 provides a safeguard by laying down that only if the Appropriate Authority has reason to believe that an offence under the 1994 Act has been committed or is being committed that a search can be authorized. In this case, there is no decision of the Appropriate Authority, and the decision to carry out the search is an individual decision of the Civil Surgeon, who was the Chairman of the concerned Appropriate Authority. Therefore, the action of search is itself vitiated.

16. A perusal of the impugned FIR and impugned complaint shows that its foundation is the material seized during the raid on 27th April 2017. **Except for what was found in the search and the seized documents, there is nothing to connect the accused with the offence punishable under Section 23 of the 1994 Act. As the search itself is entirely illegal, continuing prosecution based on such an illegal search will amount to abuse of the process of law.** The High Court ought to have noticed the illegality we have pointed out."

(Emphasis supplied)

SIMILAR PROVISIONS UNDER THE OTHER SPECIAL ACT

52. The first and foremost, which is almost identical to the provisions of the PC & PNDT Act, is the Transplantation of Human Organs Act, 1994 (hereinafter referred to as the 'TOHO Act'), which was also passed in the same year as the PC PNDT Act i.e 1994. Section 22 of TOHO

Act deals with cognizance of offence and the same reads as under:-

“22 - Cognizance of offences.- (1) No Court shall take cognizance of an offence under this Act except on a complaint made by—

(a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or the State Government or, as the case may be, the Appropriate Authority; or

(b) a person who has given notice of not less than sixty days, in such manner as may be prescribed, to the Appropriate Authority concerned, of the alleged offence and of his intention to make a complaint to the Court.

(2) No Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1), the Court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.”

53. Similarly, Section 22 of the Mines And Minerals (Development And Regulation) Act, 1957 (in short ‘MMDR Act’) deals with cognizance of offence and the same reads as under:-

“Cognizance of offence

22. No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon

complaint in writing made by a person authorised in this behalf by the Central Government or the State Government.”

54. Similar provision is contained in Section 32 of the Drugs and Cosmetics Act, 1940 (in short ‘Drugs Act’), which is being reproduced below:-

“32. Cognizance of offences. — (1) No prosecution under this Chapter shall be instituted except by—

(a) an Inspector; or

(b) any gazetted officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government or a State Government by a general or special order made in this behalf by that Government; or

(c) the person aggrieved; or

(d) a recognised consumer association whether such person is a member of that association or not.

(2) Save as otherwise provided in this Act, no court inferior to that of a Court of Session shall try an offence punishable under this Chapter.

(3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter.”

INTERPRETATION BY APEX COURT OF SIMILAR PROVISIONS UNDER THE SPECIAL ACT

55. Before proceeding further, it will be relevant to note how the courts have dealt with the similar provisions under other special Acts of the like nature.

(I) TOHO ACT

56. The first and foremost, which is almost identical to the provisions of the PC & PNDT Act is the Transplantation of Human Organs Act, 1994 (hereinafter referred to as the 'TOHO Act').

57. The provision of Section 22 of the TOHO Act has been dealt by the Apex Court in the case of ***Jeewan Kumar Raut And Another vs. Central Bureau of Investigation, (2009) 7 SCC 526*** wherein the Apex Court has dealt with the conflict of provisions of Section 167(2) of the Code with Section 22 of the TOHO Act. The following observations of the Apex Court in ***Jeewan Kumar Raut (supra)*** would be relevant for the purpose of controversy involved in the instant case.

“19. TOHO is a special Act. It deals with the subjects mentioned therein, viz. offences relating to removal of human organs, etc. Having regard to the importance of the subject only, enactment of the said regulatory statute was imperative.

20. TOHO provides for appointment of an appropriate authority to deal with the matters specified in sub-section (3) of Section 13 thereof. By reason of the aforementioned provision, an appropriate authority has specifically been authorised inter alia to investigate any complaint of the breach of any of the provisions of TOHO or any of the rules made thereunder and take appropriate

action. The appropriate authority, subject to exceptions provided for in TOHO, thus, is only authorised to investigate cases of breach of any of the provisions thereof, whether penal or otherwise.

21. Ordinarily, any person can set the criminal law in motion. Parliament and the State Legislatures, however, keeping in view the sensitivity and/or importance of the subject, have carved out specific areas where violations of any of the provisions of a special statute like TOHO can be dealt with only by the authorities specified therein. The FIR lodged before the officer in charge of Gurgaon Police Station was by way of information. It disclosed not only commission of an offence under TOHO but also under various provisions of the Penal Code. The officer in charge of the police station, however, was not authorised by the appropriate Government to deal with the matter in relation to TOHO; but, the respondent was. In that view of the matter, the investigation of the said complaint was handed over to it.

22. TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried

and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences.

23. TOHO being a special Act and the matter relating to dealing with offences ***thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code. The investigation in terms of Section 13(3)(iv) of TOHO, thus, must be conducted by an authorised officer. Nobody else could do it. For the aforementioned reasons, the officer in charge of Gurgaon Police Station had no other option but to hand over the investigation to the appropriate authority.***

24. The respondent has been constituted under the Delhi Special Police Establishment Act, 1946. In terms of the provisions of the said Act, the authorities specified therein could make investigation in connection with a complaint. The mode and manner in which the investigation could be carried out have been laid down in the Act and/or the Manual framed thereunder. It is for the aforementioned reason, upon receipt of the complaint from the officer in charge of Gurgaon Police Station, it presumably having made a preliminary inquiry, lodged the FIR. Only because it lodged the FIR and proceeded in terms of the said Act and the Manual, the same

by itself would not mean that all the provisions of Chapter XII of TOHO vis-à-vis Chapter XV thereof could not be invoked.

25. Section 22 of TOHO prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as laid down therein. ***The respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of TOHO. If by reason of the provisions of TOHO, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of sub-section (2) of Section 173 of the Code did not and could not arise. In other words, if no police report could be filed, sub-section (2) of Section 167 of the Code was not attracted.***

26. ***It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorisation under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition***

only; sub-section (2) of Section 167 of the Code may not be applicable.

27. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and **as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO.**

28. To put it differently, upon completion of the investigation, an authorised officer could only file a complaint and not a police report, as a specific bar has been created by Parliament. In that view of the matter, the police report being not a complaint and vice versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the offence only in the manner laid down therein and not by any other mode. The procedure laid down in TOHO, thus, would permit the respondent to file a complaint and not a report which course of action could have been taken recourse to but for the special provisions contained in Section 22 of TOHO.

35. Before parting, however, we must place on record

that we have not been called upon to consider the constitutionality of the provisions of TOHO and in particular Section 22 thereof. Thus, fairness in procedure as adumbrated in Article 21 of the Constitution of India as also the restrictions on liberty imposed by reason of the statute having regard to the fact situation obtaining herein has neither been argued nor is required to be determined. We have made these observations keeping in view the dichotomy in the matter of application of TOHO vis-à-vis the provisions of the Code. **If a complaint petition is filed, the procedure laid down under Chapter XV of the Code can be taken recourse to despite the fact that the same has been filed after full investigation and upon obtaining the remand of the accused from time to time by reason of orders passed by a competent Magistrate.**

36. We are, however, not oblivious of some decisions of this Court where some special statutory authorities like the authorities under the Customs Act have been granted all the powers of the investigating officer under a special statute like the NDPS Act, but, **this Court has held that they cannot file charge-sheet and to that extent they would not be police officers.** (See Ramesh Chandra Mehta v. State of W.B. [AIR 1970 SC 940] and Raj Kumar Karwal v. Union of India [(1990) 2 SCC 409 : 1990 SCC (Cri) 330] .

37. In the present case, however, the respondent having specially been empowered both

under the 1946 Act as also under the Code to carry out investigation and file a charge-sheet is precluded from doing so only by reason of Section 22 of TOHO. It is doubtful as to whether in the event of authorisation of an officer of the Department to carry out investigation on a complaint made by a third party, he would be entitled to arrest the accused and carry on investigation as if he is a police officer. We hope that Parliament would take appropriate measures to suitably amend the law in the near future.”

(Emphasis supplied)

58. Thus, in the case of **Jeewan Kumar Raut (supra)**, the Apex Court has categorically held that the police officers are incompetent to file a police report before the Magistrate. It is only an Appropriate Authority, who can investigate the matter under the TOHO Act and file a complaint case before the Magistrate only on which cognizance can be taken by the Magistrate. Filing a police report in view of the specific provisions of Section 22 of the TOHO Act, is precluded.

(II) MMDR ACT

59. In State **NCT of Delhi vs. Sanjay, (2014) 9 SCC 772**, the Apex Court while dealing with Section 22 of the Mines and Minerals (Development and Regulation) Act, 1976 (in short ‘the MMDR Act’) ,which also contains the same similar bar has held as under:-

“61. Reading the provisions of the Act minutely and carefully, prima facie we are of the view that there is no complete and

absolute bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offence.

62. Sub-section (1-A) of Section 4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the Rules made thereunder. In other words no person will do mining activity without a valid lease or licence. Section 21 is a penal provision according to which if a person contravenes the provisions of sub-section (1-A) of Section 4, he shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section (6) has been inserted in Section 4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure, 1973. Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any Rule made thereunder except upon a complaint made by a person authorised in this behalf. It is very important to note that Section 21 does not begin with a non obstante clause. Instead of the words “notwithstanding anything contained in any law for the time being in force no court shall take cognizance....”, the section begins with the words “no court shall take cognizance of any offence.”

69. **Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and**

absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels.

70. There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorised under the Act shall exercise all the powers including making a complaint before the Jurisdictional Magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorised officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist the Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging

contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person is sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitutes an offence under the Penal Code.”

60. Relying upon the aforesaid judgment of **Sanjay (Supra)**, the Apex Court in the case of **Jayant vs. State of Madhya Pradesh, (2021) 2 SCC 670** while dealing with the same provisions of Section 22 of the MMDR Act has held as under:-

“21. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the MMDR Act and the Rules made thereunder vis-à-vis the Code of Criminal Procedure and the Penal Code, and the law laid down by this Court in the cases referred to hereinabove and for the reasons stated hereinabove, our conclusions are as under:

21.1. That the learned Magistrate can in exercise of powers under Section 156(3) of the Code order/direct the In-charge/SHO of the police station concerned to lodge/register crime case/FIR even for the offences under the MMDR Act and the Rules made thereunder and at this stage the bar under Section 22 of the MMDR Act shall not be attracted.

21.2. The bar under Section 22 of the MMDR Act shall be attracted only when the learned

Magistrate takes cognizance of the offences under the MMDR Act and the Rules made thereunder and orders issuance of process/summons for the offences under the MMDR Act and the Rules made thereunder.

21.3. For commission of the offence under IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act and the Rules made thereunder.

21.4. That in respect of violation of various provisions of the MMDR Act and the Rules made thereunder, when a Magistrate passes an order under Section 156(3) of the Code and directs the In-charge/SHO of the police station concerned to register/lodge the crime case/FIR in respect of the violation of various provisions of the Act and the Rules made thereunder and thereafter after investigation the In-charge of the police station/investigating officer concerned submits a report, the same can be sent to the Magistrate concerned as well as to the authorised officer concerned as mentioned in Section 22 of the MMDR Act and thereafter the authorised officer concerned may file the complaint before the learned Magistrate along with the report submitted by the investigating officer concerned

and thereafter it will be open for the learned Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the MMDR Act and the Rules made thereunder and at that stage it can be said that cognizance has been taken by the learned Magistrate.

21.5. In a case where the violator is permitted to compound the offences on payment of penalty as per sub-section (1) of Section 23-A, considering sub-section (2) of Section 23-A of the MMDR Act, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any Rules made thereunder so compounded. However, the bar under sub-section (2) of Section 23-A shall not affect any proceedings for the offences under IPC, such as, Sections 379 and 414 IPC and the same shall be proceeded with further.”

61. It will be further relevant to note the subsequent Full Bench judgment of the Apex Court in **Pradeep S. Wodeyar vs. State of Karnataka, (2021) 19 SCC 62**, wherein having regard to the provisions of Section 22 of the MMDR Act the Full Bench has held that if the FIR is lodged by the person authorized under the Act, who is empowered to file a complaint under the provisions of Section 22 of the MMDR Act, if on such FIR investigation has been carried out and the report under Section 173 (2) of the Code has been filed, this will be sufficient compliance of Section 22 of the MMDR Act and the Magistrate is empowered to take cognizance on such

report submitted under Section 173(2) of the Code. However, the aforesaid observation was made in view of the peculiar circumstances of the aforesaid case. The relevant paragraphs are reproduced herein:-

*“101. The Government of Karnataka issued a Notification on 29-5-2014 declaring that the Office of the Inspector General of Police, Special Investigation Team, Karnataka Lokayukta shall be a “police station” for the purpose of Section 2(s) and shall have jurisdiction throughout the State of Karnataka for the offences related to the illegal mining of minerals. The FIR was filed by the SIT, Lokayukta pursuant to the order of this Court dated 16-9-2013 [Samaj Parivartana Samudaya v. State of Karnataka, (2018) 5 SCC 732 : (2018) 2 SCC (Cri) 858] and was signed by the Sub-Inspector of Police, Karnataka Lokayukta. On a reading of the Notification dated 29-5-2014, it is evident that the SIT has the jurisdiction throughout Karnataka in relation to mining offences. **Sl. No. 13 of the Notification dated 21-1-2014 authorises the “Sub-Inspector of Police” within its jurisdiction for the purpose of Section 22 of the MMDR Act. Therefore, on a combined reading of both the notifications, it is clear as daylight that the complaint filed by SIT and signed by the Sub-Inspector of Police has complied with Section 22 of the MMDR Act.***

D. The conclusion

108. In view of the discussion above, we summarise our findings below:

108.1. The Special Court does not have, in the absence of a specific provision to that effect, the power to take cognizance of an offence under the MMDR Act without the case being committed to it by the Magistrate under Section 209CrPC. The order of the Special Judge dated 30-12-2015 taking cognizance is therefore irregular.

108.2. The objective of Section 465 is to prevent the delay in the commencement and completion of trial. Section 465CrPC is applicable to interlocutory orders such as an order taking cognizance and summons order as well. Therefore, even if the order taking cognizance is irregular, it would not vitiate the proceedings in view of Section 465CrPC.

108.3. The decision in Gangula Ashok [Gangula Ashok v. State of A.P., (2000) 2 SCC 504 : 2000 SCC (Cri) 488] was distinguished in Rattiram [Rattiram v. State of M.P., (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] based on the stage of trial. This differentiation based on the stage of trial must be read with reference to Section 465(2)CrPC. Section 465(2) does not indicate that it only covers challenges to pre-trial orders after the conclusion of the trial. The cardinal principle that guides Section 465(2)CrPC is that the challenge to an irregular order must be urged at the earliest. While determining if there was a failure of

justice, the courts ought to address it with reference to the stage of challenge, the seriousness of the offence and the apparent intention to prolong proceedings, among others.

108.4. In the instant case, the cognizance order was challenged by the appellant two years after cognizance was taken. No reason was given to explain the inordinate delay. Moreover, in view of the diminished role of the committal court under Section 209 of the Code of 1973 as compared to the role of the committal court under the erstwhile Code of 1898, the gradation of irregularity in a cognizance order made in Sections 460 and 461 and the seriousness of the offence, no failure of justice has been demonstrated.

108.5. It is a settled principle of law that cognizance is taken of the offence and not the offender. However, the cognizance order indicates that the Special Judge has perused all the relevant material relating to the case before cognizance was taken. The change in the form of the order would not alter its effect. Therefore, no "failure of justice" under Section 465CrPC is proved. This irregularity would thus not vitiate the proceedings in view of Section 465CrPC.

108.6. The Special Court has the power to take cognizance of offences under the MMDR Act and conduct a joint trial with other offences if permissible under Section 220CrPC. There is no express provision in the MMDR Act which indicates that Section

220CrPC does not apply to proceedings under the MMDR Act.

108.7. Section 30-B of the MMDR Act does not impliedly repeal Section 220CrPC. Both the provisions can be read harmoniously and such an interpretation furthers justice and prevents hardship since it prevents a multiplicity of proceedings.

108.8. Since cognizance was taken by the Special Judge based on a police report and not a private complaint, it is not obligatory for the Special Judge to issue a fully reasoned order if it otherwise appears that the Special Judge has applied his mind to the material.

108.9. A combined reading of the Notifications dated 29-5-2014 and 21-1-2014 indicate that the Sub-Inspector of Lokayukta is an authorised person for the purpose of Section 22 of the MMDR Act. The FIR that was filed to overcome the bar under Section 22 has been signed by the Sub-Inspector of Lokayukta Police and the information was given by the SIT. Therefore, the respondent has complied with Section 22CrPC.

(Emphasis supplied)

(III) The DRUGS & COSMETICS ACT

62. Similarly, in the case of **Union of India vs. Ashok Kumar Sharma, (2021) 12 SCC 674** the Division Bench of the Apex Court while dealing with the provisions of Drugs and Cosmetics Act, 1940 (Drugs Act), where also the bar is provided under Section 32 of the said Act that no proceedings can be initiated except

on the complaint of the Drug Inspector for the offences under the Drugs Act. The Apex Court has held as under:-

“73. Chapter XII CrPC carries the chapter heading “Information to the Police and their Powers to Investigate”:

73.1. The Chapter starts off with Section 154 carrying section heading “Information in cognizable cases”. It declares that every information relating to a cognizable offence given to an officer-in-charge of the police station, if given orally, is to be reduced to writing and whether given in writing or reduced to writing it is to be signed by the informant. The key elements of Section 154CrPC can be noticed. Information in relation to a cognizable offence reaching the officer in charge of a police station which is ordinarily understood as first information statement concerning cognizable offences sets the ball rolling so far as the police officer in charge of a police station is concerned.

73.2. The next provision to notice in the Chapter is Section 156. It provides that any officer in charge of a police station may without the order from a Magistrate investigate any cognizable offence within which a court, having jurisdiction over a local area within the limits of such station, would have the power to enquire into or try under the provisions of Chapter XIII. In fact, Section 177CrPC, which is the first section in Chapter XIII dealing with jurisdiction of criminal courts

inquiries and trial, proclaims that every offence shall ordinarily be enquired into and tried by a court within whose jurisdiction, the offence was committed. Thus, ordinarily, it is the police officer, within whose jurisdiction the cognizable offence is committed, would have the jurisdiction to investigate that offence. Section 178 onwards provide for the exceptions to Section 177 and we need not probe this matter further. Sub-section (2) declares the proceedings of police officer in a case of cognizable offence shall not in any stage be called in question on the ground that the case was one which he was not empowered to investigate under the provision. Lastly, sub-section (3) provides that any Magistrate who is empowered under Section 190 may order such an investigation which the officer is to undertake under sub-section (1)

73.3. It is next relevant to notice Section 157CrPC:

“157. Procedure for investigation.—(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to

investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

Provided that

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated."

74. It comes under the section heading "Procedure for investigation". The body of the section can be split up into the following parts:

74.1. An officer in charge of a police station may from information received have reason to suspect the commission of an offence. He may also have reason

to suspect the commission of cognizable offence not on the basis of any information but otherwise.

74.2. As far as information is concerned, it is clearly relatable to the information which has been provided to him within the meaning of Section 154. Cases where he acts on his own knowledge would be covered by the expression otherwise.

74.3. **The offences must be an offence which he is empowered under Section 156 to investigate. We have noticed that a police officer is empowered to investigate a cognizable offence without an order of the Magistrate.** As far as non-cognizable offence is concerned, he cannot investigate such offence without the order of the Magistrate having power to try or commit the case for trial.

74.4. **However, a police officer who undertakes to investigate the matter is obliged to forthwith send a report of the same to the Magistrate empowered to take cognizance of an offence upon a police report. It is at once relevant to notice in the facts of this case that this indispensable element is not present. This is for the reason that under Section 32 of the Act, a Magistrate is not competent to take cognizance of the offences under Chapter IV of the Act upon a police report.**

74.5. At this juncture, we may notice Section 158CrPC. It speaks about the manner of sending the report to the Magistrate under Section 157. **It is a matter governed by a general or special order issued by the State**

Government. Quite clearly even Section 158 cannot apply in the case of a cognizable offence falling under Chapter IV of the Act for the reasons which we have adverted to.

74.6. Section 159 enables the Magistrate on receiving such report to direct investigation or if he thinks fit at once to proceed or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry or otherwise to dispose of the case in the manner provided in the Code. It is clear that the purpose of Section 157 is to hold the police officer accountable to keep informed the Magistrate. It acts as an assurance that the reports are not tampered with, and that the rights of the accused are sought to be secured. The purport of Section 159 is also to enable the Magistrate to exercise control over the investigation. All these aspects are irrelevant and out of bounds both for the police officer and the Magistrate in respect of an offence falling under Chapter IV of the Act.

75. Section 160 refers to investigation under the Chapter viz. Chapter XII. Section 161 speaks about the examination of witnesses and how the statements are to be reduced to writing. Again, Section 161 speaks about an investigation carried out under Chapter XII. The use to which statements under Section 161 can be put and the limitation on the same are spelt out in Section 162CrPC. Reverting back to Section 157, we have taken note of the requirement about the police officer reporting to the

Magistrate about the reason to suspect entertained by the police officer about the commission of a cognizable offence on which the Magistrate is to take cognizance on a report. Be it remembered that the Magistrate can take cognizance under Section 190CrPC on a complaint, a police report or information received from any person other than a police officer or otherwise. Section 157 appears to contemplate information received under Section 154 or knowledge gained otherwise about the commission of a cognizable offence clothing the police officer with the power to investigate leading to the sending of the report to the Magistrate being confined to cases where officer intends to send the police report which has been defined as the "report" under Section 173CrPC.

76. **In regard to taking cognizance under Section 32 of the Act, it is unambiguously clear that there is no place for a police report within the meaning of Section 173CrPC in regard to offences falling under Chapter IV of the Act.** Section 157CrPC contemplates that the officer proceeding either by himself or through his subordinate officer to investigate the facts and circumstances, and if necessary, to take measures for the discovery and the arrest of the offender. **But on reading the provisions, we gather the unmistakable impression that the law-giver has empowered the police officer to investigate in the case of a cognizable offence without any order of the**

Magistrate where he ultimately in an appropriate case wishes the Court to take cognizance based on the material he gathers and transmits a police report. If this impression of ours is not flawed, an inevitable corollary would be that in the case of offence under Chapter IV of the Act though it be cognizable, a police officer would not have the power to investigate the matter.

85. It is to be noted that the duty to register FIR, when information is received about a cognizable offence falling under Chapter IV of the Act, it is clear from the very inception that a police officer has no jurisdiction to investigate the offence. It is not a case of absence of territorial jurisdiction. No doubt, if it is a case of another police officer being empowered to investigate the offence in terms of powers under CrPC, the law is, as laid down, that there is the obligation to register an FIR and then make it over to the police station which has jurisdiction. In fact, a conflict, when in the context of Sections 178 to 185CrPC, which constitute exceptions to the general principle laid down in Section 177CrPC, the High Court is to decide the dispute, as is provided in Section 186CrPC. If an information is relatable only to cognizable offences under Chapter IV of the Act, we would think that the police officer would be out of bounds and he has no role to play in the investigation as neither he nor any other police officer has any role to play in the investigation. His duty lies in

referring the complainant to the Drugs Inspector concerned. If he is in receipt of information about an offence under Chapter IV of the Act, he must promptly notify the Drugs Inspector concerned.

The Conclusions/Directions

170. Thus, we may cull out our conclusions/directions as follows:

170.1. In regard to cognizable offences under Chapter IV of the Act, in view of Section 32 of the Act and also the scheme of CrPC, the police officer cannot prosecute offenders in regard to such offences. Only the persons mentioned in Section 32 are entitled to do the same.

170.2. There is no bar to the police officer, however, to investigate and prosecute the person where he has committed an offence, as stated under Section 32(3) of the Act i.e. if he has committed any cognizable offence under any other law.

170.3. Having regard to the scheme of CrPC and also the mandate of Section 32 of the Act and on a conspectus of powers which are available with the Drugs Inspector under the Act and also his duties, a police officer cannot register an FIR under Section 154CrPC, in regard to cognizable offences under Chapter IV of the Act and he cannot investigate such offences under the provisions of CrPC.

170.4. Having regard to the provisions of Section 22(1)(d)

of the Act, we hold that an arrest can be made by the Drugs Inspector in regard to cognizable offences falling under Chapter IV of the Act without any warrant and otherwise treating it as a cognizable offence. He is, however, bound by the law as laid down in D.K. Basu [D.K. Basu v. State of W.B., (1997) 1 SCC 416 : 1997 SCC (Cri) 92] and to follow the provisions of CrPC.

170.5. It would appear that on the understanding that the police officer can register an FIR, there are many cases where FIRs have been registered in regard to cognizable offences falling under Chapter IV of the Act. We find substance in the stand taken by learned Amicus Curiae and direct that they should be made over to the Drugs Inspector, if not already made over, and it is for the Drugs Inspector to take action on the same in accordance with the law. We must record that we are resorting to our power under Article 142 of the Constitution of India in this regard.

170.6. Further, we would be inclined to believe that in a number of cases on the understanding of the law relating to the power of arrest as, in fact, evidenced by the facts of the present case, police officers would have made arrests in regard to offences under Chapter IV of the Act. Therefore, in regard to the power of arrest, we make it clear that our decision that police officers do not have power to arrest in respect of cognizable offences under Chapter IV of the

Act, will operate with effect from the date of this judgment.

170.7. We further direct that the Drugs Inspector, who carry out the arrest, must not only report the arrests, as provided in Section 58CrPC, but also immediately report the arrests to their superior officers.”

(Emphasis supplied)

63. From the aforesaid authoritative pronouncement in **Ashok Kumar Sharma (supra)** by the Apex Court, which has dealt with the provisions of the Code of Criminal Procedure in great detail with the special law i.e. the Drugs Act, the Apex Court has concluded that in view of the bar created under the special Act that no proceedings can be initiated except by the person authorized to do so, then the police investigation or submission of report in the matter merely because the offence under the special law were cognizable and non-bailable offence, is impermissible and it is only the person authorized under the special Act, who can investigate the matter and thereupon file the complaint before the Magistrate, only upon which cognizance can be taken by the Magistrate. The cognizance in the police report cannot be taken.

INTERPLAY BETWEEN THE PROVISIONS OF (Cr.P.C) (THE GENERAL LAW) AND PC&PNDT ACT (SPECIAL LAW)

64. Learned counsel for the applicant has argued that no FIR/charge-sheet could have been filed in the present

case, since the offence against the applicant is under the PC & PNDT Act, which is an special enactment and all the proceedings under the Act, can only be performed by the Appropriate Authority. With regards to the registration of the FIR as well as investigation by the police, it will be relevant to note some provisions of the Code of Criminal Procedure, 1973 (herein after referred to as 'the Code'). Section 2(a) of the Code defines the "bailable offence" as an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence. Section 2(c) defines cognizable offence and the same reads as under:-

(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

65. Section 2(d) of the Code defines the complaint. Section 2(h) defines investigation. Section 2 (r) of the Code defines the police report meaning a report forwarded by a police officer to a magistrate under sub-section (2) of Section 173. Section 4 and 5 of the Code are relevant and are reproduced herein:-

"4. Trial of offences under the Indian Penal Code and other laws.—(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. ***Saving.***—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

66. Chapter XII of the Code deals with Information to the Police and their powers to investigate. Section 154 provides that every information relating to the commission of a cognizable offence given orally to a police officer in charge of a police station shall be reduced to writing and be read to the informant and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it and the substance of the same to be entered in the book as prescribed by the State Government. Section 155 deals with the information received by a police officer with regard to non-cognizable offences and the manner of investigation of such cases. It is further provided that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. Section 156 of the Code deals with police officer's power to investigate

cognizable cases and the same reads as under:-

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

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

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

67. Section 157 provides for the procedure of investigation and the same is reproduced below:-

“157. Procedure for investigation.—(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State

Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

Provided that—

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that subsection, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be

prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated."

68. Section 161 of the Code provides for the recording of the statement of witnesses during investigation and Section 162 limits the use of such statements. Section 173 provides for the report of police officer on completion of investigation. Chapter XIV deals with conditions requisite for initiation of proceedings and in this Chapter Section 190 reads as under:-

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

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

(b) upon a police report of such facts;

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

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

69. Chapter XV of the Code deals with Complaints to Magistrates. Section

202 provides for the procedure how the Magistrate shall proceed with the enquiry of such complaint made to it. Section 202 of the Code is also reproduced herein:-

"202. Postponement of issue of process.—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session,

he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.”

70. Chapter XVI of the Code provides for Commencement of Proceedings before Magistrates. Section 204 deals with the issue of process in a case where the Magistrate taking cognizance there is sufficient ground for proceeding in the matter. It may also be relevant to note Part II of the First Schedule to the Code wherein the offences have been classified being cognizable or non-cognizable. For ready reference, Part II of the First Schedule of the Code is being reproduced below:-

II.—CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS			
Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
If punishable with death, imprisonment for life, or imprisonment for more than 7 years	Cognizable	Non-bailable	Court of Session
If	Ditto	Ditto	Magistrate

punishable with imprisonment for 3 years and upwards but not more than 7 years			ate of the first class.
If punishable with imprisonment for less than 3 years or with fine only	Non-cognizable	Bailable	Any Magistrate.

71. Section 4 of the Code provides that all the offences under the Indian Penal Code shall be investigated, inquired into and tried, and otherwise dealt with in accordance with the provisions of the Code. This is however, subject to any enactment for the time being in force which provides otherwise in the matter of manner or the place of investigation in regard to offence under special law. Section 5 of the Code provides if any special law contemplates any special jurisdiction, power or any special form of procedure prescribed unless there is something contrary to be found, it is the provisions of the special law/local law which shall prevail.

72. Section 27 of the PC & PNDT Act provides that every offence under the PC & PNDT Act shall be cognizable, non-bailable and non-compoundable. However, in view of Section 28 of the PC & PNDT Act, no court is competent to take cognizance of offence under the PC & PNDT Act except on a complaint made by the persons described in the Act. Section

17(4) (c) empowers the Appropriate Authority to investigate the complaints for breach of the provisions of this Act or the rules made thereunder and take immediate action. Section 17A of the PC & PNDT Act further empowers the Appropriate Authority to summon any person who is in possession of any information relating to the violation of the provisions of the Act or the rules made thereunder, production of any document or material object relating to the offence, issuing search warrant for any place indulging in sex-selection techniques or pre-natal sex determination and any other matter, which may be prescribed. Section 30 of the PC & PNDT Act empowers the Appropriate Authorities under the Act to search and seize the records in case of any violation is found and with regard to said search and seizure, the procedure prescribed in the Code shall be followed. Sub-rule (3) of Rule 18A of the Rules, 1996 provides the procedure on receipt of complaint and the investigation thereof and further provides that investigation in all the complaints received under the PC & PNDT Act shall be completed within 48 hours of receipt of such complaint. It further provides that as far as possible, the police authorities shall not be involved for the purpose of investigation as the cases under the PC & PNDT Act are tried as complaint case under the Code. In view of the aforesaid provisions, specifically provided in the Rule 18A and Section 28 and 30 of the PC & PNDT Act, on receipt of any complaint for violation under the PC & PNDT Act, it is only the Appropriate Authority authorized under Section 28, that can investigate the matter. The police investigation has been specifically barred. It is, however, when any obstruction is created by such violators, which cannot be handled without the involvement of the

police, only for that purpose, for the assistance of the Appropriate Authority, the police can be associated with the investigation but in all cases the investigation has to be done by the Appropriate Authorities as prescribed under Section 17 and Section 28 of the PC & PNDT Act and Rule 18A of the PC & PNDT Rules.

**PC & PNDT ACT AND RULES
ARE COMPLETE CODE IN ITSELF
WITH REGARD TO
INVESTIGATION, SEARCH &
SEIZURE AND FILING OF
COMPLAINT BEFORE THE COURT**

73. From the perusal of the provisions of section 17, 17A & 30 of the PC & PNDT Act and Rule 12 & 18A of the PC & PNDT Rules forms a complete Code in itself with regard to the receipt of the complaints, investigation, search and seizure and filing of the complaint before the competent authority. Rule 18A(3)(iv) specifically prohibits the involvement of the police for the investigation of case under the PC & PNDT Act. Rule 18A(3)(iv) further provides the proper procedure for receiving of the complaint and registration of each of the complaints so received by the appropriate authority. It is further mandated in the aforesaid rules that while dealing with such complaint received by the appropriate authority, the appropriate authority shall maintain the transparency in every follow up action and the appropriate authority is expected to investigate the matter immediately after receipt of the complaints without involving the police. Therefore, from inception of receipt of the complaint for violation of the provisions of the Act and with regard to the investigation, search and seizure, which is provided under

Section 30 read with Rule 12 of the Rules and after completing the investigation procedure to take the remedial measures and also to file the complaint case, if so required, looking at the gravities of the offence. From the scheme of the Act as well as the rules in the considered opinion of this Court it is not mandatory for the appropriate authority to file the complaints in each and every case of violation of the provisions of the Act. The Act itself provides sufficient remedial measures and if those measures are adopted the criminal complaints are not required to be filed in each and every case. In view of the aforesaid the registration of F.I.R. for violation of any provisions of this Act, is impermissible and consequentially, no investigation by the police is permissible for offence under the Act, which are otherwise specifically technical area of investigation. Therefore, the PC & PNDT Act, being the Special Law, the provisions of General Law i.e., Cr.P.C., would not apply with regard to receipt of the complaints for any violation of any provisions of this Act and investigation search, seizure and initiating the criminal proceedings in the competent court and would be governed only under provisions of the PC & PNDT Act.

THE ISSUES FOR DETERMINATION

74. From the arguments advanced by the parties and from the perusal of the record and the provisions of the PC & PNDT Act as well as the Criminal Procedure as noted herein above, the following questions emerge for determination in the instant case:-

(A) Whether, the Appropriate Authority, merely on

suspicion, without there being any reason to believe, can direct the search and seizure in terms of Section 30 of the PC & PNDT Act?

(B) Whether, for the offences under the PC & PNDT Act, the registration of FIR at the police station is permissible, merely because the offences under PC & PNDT Act have been made cognizable and non-bailable?

(C) Whether the investigation by the police is permissible for the offences under the PC & PNDT Act? AND Who can investigate the complaints, received for violation of the provisions of the PC & PNDT Act?

(D) Whether on the charge sheet submitted after the investigation by the police, the competent magistrate can take cognizance of the offence under the PC & PNDT Act?

(E) Who are the persons, who are authorised to file a complaint case under Section 28 of the PC & PNDT Act?

(F) Whether, it is mandatory for the Appropriate Authority to file a complaint case before the Magistrate U/S 28 of the PC & PNDT Act, if on a investigation done by it or the officer authorised by it, finds the violation of the provisions of the PC & PNDT Act?

(G) What are the parameters for quashing of the FIR, charge-sheet and cognizance orders, for the offence under the PC & PNDT Act?

FINDINGS

ISSUE (A)

75. In view of the judgement of the Apex Court in **Ravinder Kumar (supra)**, wherein the Apex Court while interpreting Section 30 of the PC & PNDT Act, held that first part of sub-section (1) of Section 30 safeguards the interest of the Genetic Laboratory or Genetic Clinic etc., and held that search and seizure can be authorized only if appropriate authority has reason to believe that an offence under the PC & PNDT Act has been committed or is being committed and the reason to believe is not mere formality. Before asking the search and seizure in terms of Section 30, there must be sufficient material on the basis of which the appropriate authority has reason to believe that offence under the PC & PNDT Act are being committed or have been committed. Therefore, the ISSUE (A) is answered to the effect that the appropriate authority merely on suspicion without there being any reason to believe, based on sufficient material, cannot direct the search and seizure in terms of Section 30 of the PC & PNDT Act.

ISSUE (B & C)

76. In **Jeewan Kumar Raut (Supra)**, the Apex Court, while dealing with the identical provisions of the TOHO Act, has taken a categorical view that the police report is inconsequential and the FIR for the offence under the provisions of the TOHO Act cannot be entertained, if any such information is received in writing, it is the duty of the police officer to report it to the Appropriate Authority, under the Act only, who can investigate the matter and file a complaint on conclusion of the investigation. The aforesaid view, finds approval in the judgment of **Ashok Kumar Sharma (Supra)**, which has categorically

dealt with the provisions of Code of Criminal Procedure as well as the special Act. Thus, in view of the aforesaid, this court is of the opinion that wherever the special law provides that the complaints can be lodged or the prosecution can be initiated only by the specified persons under such special law, the police officers are debarred from registering the FIR and investigating the matter as in almost all the special laws the power to investigate under the Special Acts has been given to the specified officers under such special laws. Therefore, in the considered opinion of this Court, in view of the Bar created under section 28 of the PC & PNDT Act, for any offence under the Act, no person is authorized to register the F.I.R. Therefore, the registration of the FIR and investigation thereof is categorically barred, as under the scheme of the PC & PNDT Act and the rules, on a complaint received by the Appropriate Authority for violation of any provisions of the PC & PNDT Act, the investigation can be done only by the Appropriate Authority himself or by the authorized person only. Therefore, police officers are debarred from registering the F.I.R. and investigating the matter. The PC & PNDT Act further provides that while carrying out the investigation, so far as it is possible, the Appropriate Authority or the person authorized under the PC & PNDT Act shall avoid the involvement of the police; however, involvement of police can be sought only for the purpose, when some restraint is there on the part of accused persons.

ISSUE (D)

77. Though, there are divergent views by different High Courts with regard to the investigation by the police and the results of such investigation and report

submitted by the police. Section 156 and 157 of the Code provide the procedure after registration of the F.I.R., wherein it is provided that after registration of the FIR, it has to be reported to the concerned magistrate immediately, who is having power to take cognizance of such offences, if report is submitted after the investigation by the police. Since for the offence under the PC & PNDT Act, the magistrate cannot take cognizance of the police report, therefore, the entire exercise will be nothing but a futile exercise. Thus, such exercise is impermissible under the provisions of the PC & PNDT Act. Therefore, in the considered opinion of this Court, in view of the specific bar created by Section 28 of the PC & PNDT Act, it is not open for the Magistrate to take cognizance of the offence under the PC & PNDT Act on the basis of the police report submitted after investigation. It is only on the complaint filed by the persons authorized to file the complaint under Section 28 of the PC & PNDT Act, in which the cognizance can be taken by the Magistrate. Therefore, the registration of F.I.R. and the police investigation is not warranted under the PC & PNDT Act; otherwise also if any investigation is carried out by the police officer, the Magistrate is incompetent to take cognizance thereof.

ISSUE (E)

78. In view of Section 28 of the PC & PNDT Act, the following persons are authorized to file complaint case for any offence under the PC & PNDT Act, i.e. (i) the Appropriate Authority; (ii) any other person authorized by the Central Government or the State Government, as the case may be; (iii) or any person authorized by the Appropriate Authority and (iv) a person who has given a notice of

not less than 15 days to the appropriate authority for filing of the complaint before the magistrate.

ISSUE (F)

79. Since the offences under the PC & PNDT Act are the special offences, which require specified skills for investigating such offences. The PC & PNDT Act itself provides the regulatory remedial measures also, therefore, it is at the discretion of the Appropriate Authority whether to file a complaint or not, subject to recommendation of the Advisory Committee, as per Section 17(4) (i) after completing the investigation, even for cancellation or suspension of Registration. Therefore, in the considered opinion of this court, it is not mandatory for the appropriate authority to file a complaint case in each and every case before the Magistrate under Section 28 of the PC & PNDT Act for each and every violation of the provisions of the PC & PNDT Act. It is only when at the discretion of the appropriate authority and subject to recommendation of the Advisory Committee, complaint under Section 28 of the PC & PNDT Act can be filed.

ISSUE (G)

80. In *R.P. Kapur v. State of Punjab, 1960 SCC OnLine SC 21*, the Apex Court has laid down the following guidelines for exercising the powers for quashing of the proceedings, which reads as under:

*"6. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that **there***

is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground.

Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise **where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged;** in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category **the allegations made against the accused person do constitute offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge.** In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not

support the accusation in question. In exercising its jurisdiction under Section 561-A the **High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under Section 561-A in the matter of quashing criminal proceedings....."**

(Emphasis Supplied)

81. The parameters for quashing of the complaint or the FIR are well settled parameters in view of the observations made in **State of Haryana vs. Bhajan Lal, 1992 Supp (1) SCC 335.**

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of

justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently

improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

(Emphasis Supplied)

82. In *Rajiv Thapar v. Madan Lal Kapoor*: (2013) 3 SCC 330 the Apex Court has laid down the following guidelines for attracting the judicial conscious of the High Court to quash the criminal proceedings, which reads as under:

"30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and

indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: *whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?*

30.3. Step three: *whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?*

30.4. Step four: ***whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?***

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

(emphasis supplied)

83. In the case of ***Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others*** : 2021 SCC OnLine SC 315, the Apex Court has held as under:-

33. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or "no coercive steps to be adopted", during the pendency of the quashing petition under Section 482CrPC and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the accused or "no coercive steps to be adopted" during the investigation or till the final report/charge-sheet is filed under Section 173CrPC, while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482CrPC and/or under Article 226 of the Constitution of India, our final conclusions are as under:

33.1. Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence.

33.2. Courts would not thwart any investigation into the cognizable offences.

33.3. It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on.

33.4. The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the “rarest of rare cases” (not to be confused with the formation in the context of death penalty).33.5. While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint.33.6. Criminal proceedings ought not to be scuttled at the initial stage.

33.5. While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint.

33.6. Criminal proceedings ought not to be scuttled at the initial stage.

33.7. Quashing of a complaint/FIR should be an exception rather than an ordinary rule.

33.8. Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere.

33.9. The functions of the judiciary and the police are complementary, not overlapping.

33.10. Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences.

33.11. Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice.

33.12. The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure.

33.13. The power under Section 482CrPC is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court.

33.14. However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in *R.P. Kapur* [*R.P. Kapur v. State of Punjab*, 1960 SCC OnLine SC 21 : AIR 1960 SC 866] and *Bhajan Lal* [*State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , has the jurisdiction to quash the FIR/complaint.

33.15. When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482CrPC, only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR.

33.16. The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482CrPC and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically.

Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or “no coercive steps to be adopted” and the accused should be relegated to apply for anticipatory bail under Section 438CrPC before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or “no coercive steps” either during the investigation or till the investigation is completed and/or till the final report/charge-sheet is filed under Section 173CrPC, while dismissing/disposing of the quashing petition under Section 482CrPC and/or under Article 226 of the Constitution of India.

33.17. Even in a case where the High Court is *prima facie* of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482CrPC and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

33.18. Whenever an interim order is passed by the High Court of “no coercive steps to be

adopted” within the aforesaid parameters, the High Court must clarify what does it mean by “no coercive steps to be adopted” as the term “no coercive steps to be adopted” can be said to be too vague and/or broad which can be misunderstood and/or misapplied.

84. Dealing with the special provisions of the PC & PNDT Act, the Delhi High Court in the case of **Manoj Krishan Ahuja (Supra)** has observed as under:-

“61. The Act is silent as to what course is to be adopted and what is the repercussion of such chargesheet being filed in the court. As held by the Hon'ble Apex Court in the case of Rasila S. Mehta (supra), the purpose of law is not to allow the offender to sneak out of the meshes of law and that “the statutes must be construed in a manner which will suppress the mischief and advance the object the legislature had in view. A narrow construction which tends to stultify the law must not be taken.”

62. Thus, hyper technical grounds cannot become the basis of quashing of chargesheets or FIRs, especially when offences under the Act are cognizable in nature.”

(Emphasis Supplied)

85. In view of the findings recorded by this Court that the investigation and the charge sheet by the police is impermissible in view of the provisions of the special enactment as well as the scheme of the Code of Criminal Procedure, therefore, if any cognizance is taken by the Magistrate on the police report

submitted, the same cannot be approved and in such circumstances, such cognizance order is bad in law and can be quashed. However, if any complaint is made by a person who is not the Appropriate Authority or have not been authorised by the State Government or the Central Government or is not the person authorised by the Appropriate Authority or is not the person, who has already given a notice of not less than 15 days to the Appropriate Authority, the complaint cannot be entertained. If any such complaint is filed and entertained, then of course this Court has the power to quash such proceedings as has already been done by the co-ordinate Bench of this Court in Dr. Vinod Kumar Bassi (Supra).

FINDGS IN THE INSTANT CASE

86. Since, in the instant case there is no material available on record to suggest that any satisfaction has been recorded by the appropriate authority with regard to there being any offence committed or have been committed by the applicant herein, except the action taken by the Tehsildar, who is allegedly the person authorized by the appropriate authority. However, no such authorization has been produced on record. Therefore, it appears that the instant proceedings were initiated merely on the basis of suspicion by the appropriate authority, which is not permissible in view of the judgement of the Apex Court in **Ravinder Kumar (supra)**. Further, in the instant case the person authorized by the appropriate authority after conducting the illegal raid has lodged the F.I.R. and thereupon, the charge-sheet was filed by the police on which the cognizance has been taken by the Additional Chief Judicial Magistrate,

Bulandshahr, vide order dated 02.01.2018 for the offence under Sections 315 and 511 I.P.C. and under Section 4/5(2)6(a)/23/25 of the PC & PNDT Act, is an impermissible exercise in view of the findings recorded by this Court hereinabove. Therefore, the cognizance order as well as the F.I.R. and the charge-sheet deserve to be quashed, as the Magistrate is incompetent to take cognizance of such charge-sheet/police report, specifically, for the offence under the provisions of PC & PNDT Act. Therefore, in the considered opinion of this Court the entire proceedings of the instant case is vitiated and deserve to be quashed and are hereby quashed. The instant application is **allowed** accordingly.

The Certificate under Article 134A read with Article 134 (1)(C) of the Constitution of India

87. As have been noted hereinabove, with regard to the following questions related to the PC & PNDT Act, there are divergent views of the different High Courts, which are required to be settled by the Apex Court:

(A) Whether, for the offences under the PC& PNDT Act, the registration of FIR at the police station is permissible, merely because the offences under PC & PNDT Act have been made cognizable and non-bailable?

(B) Whether the police investigation is permissible for the offences under the PC & PNDT Act? AND Who can investigate the complaints, received for violation of the provisions of the PC& PNDT Act?

(C) Whether on the charge sheet submitted after the

investigation by the police, the competent magistrate can take cognizance of the offence under the PC & PNDT Act?

89. Therefore, in the considered opinion of this Court, it is necessary that above questions be authoritatively settled by the Apex Court. In view thereof, it is certified that it is a fit case for appeal to be filed before the Apex Court under Article 134(1)(c) read with Article 134A of the Constitution of India with regard to the aforesaid questions for an authoritative pronouncement by the Apex Court.

(2024) 9 ILRA 1122
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.09.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application U/S 482 No. 8366 of 2024

Shankh Saxena **...Applicant**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Applicant:

Anil Kumar Tiwari, Rahul Mishra, Rajat Bansal, Rushida Farheen

Counsel for the Respondents:

G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 125 & 482 - Family Courts Act, 1984 - Section 10 - Application - challenging the maintainability of the second application preferred u/s 125 Cr.P.C. - matrimonial dispute - wife (opposite party no. 2) filed maintenance proceedings - on account of some typographical error she filed an application seeking withdrawal of her application u/s 125 Cr.P.C - dismissed as not press - second application u/s 125 Cr.P.C. filed - objection was

filed by Applicant (husband) - raising the issue of maintainability of second application on the ground principle of 'Res Judicata' - court finds that - proceedings u/s 125 Cr.P.C. are summary in nature - refusal by a man to maintain his wife and children whom he is bound to maintain under law, would be covered under maxim "de die in diem", which means "doing something every-day" - held, second application filed by wife u/s 125 Cr.P.C., though the earlier was dismissed without providing liberty to file fresh, would be maintainable - accordingly, Application dismissed. (Para -22, 24, 25)

Application u/s 482 Dismissed. (E-11)

List of Cases cited:

1. Anju Garg & anr.Vs Deepak Kumar Garg - 2022 SCC online SC 1314,
2. Jaihind Sahakari Pani Purvatha Mandali Ltd. Vs Rajendra Bandu Khot & ors.- 2019 SCC online Bom. 13271,
3. Nagendrappa Natikar Vs Neelamma - 2014 vol. 14 SCC 452,
4. Prem Kishore & ors.Vs Brahm Prakash & ors.- 2023 SCC online SC 356,
5. Sammrudhhi Cooperative Housing Society Ltd. Vs Mumbai Mahalaxmi Construction Pvt. Ltd. - 2022 vol. 4 SCC 103,
6. Shyam Bahadur Singh Vs St. of U.P. - 2023 AHC 914038,
7. Sarguja Transport Service Vs St. Transport Appellate Tribunal, MP Gwalior & ors.- AIR 1987 SC 88,
8. Sanjeev Kapoor Vs Chandana Kapoor & ors.- 2020 vol. 13 SCC 172.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the applicant, Sri Ajay Kumar Srivastava, learned AGA for the State of U.P. and perused the record.

2. By means of this application, the applicant has sought the following main relief(s):-

"WHEREFORE, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the impugned order dated-31/08/2024, passed by the Learned Additional Principal Judge-07, Family Court, Lucknow, passed in Criminal Miscellaneous Case Number-973/2023 in Saumya Sinha vs. Shankh Kumar Saxena, U/s.125 Cr.P.C. annexed herewith as Annexure No.1 to this Application and may also dismiss the case so that the applicant may live peacefully under the protection of law."

3. Vide order, under challenge, dated 31.08.2024, the Additional Principal Judge-7, Family Court, Lucknow (hereinafter referred to as "trial court") entertained the application preferred by the opposite party No. 2/Somya Saxena under Section 125 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") registered as Case No. 973/2023 (Somya Sinha vs. Shankh Kumar Saxena).

4. Brief facts of the case in hand are to the effect that an application dated 04.01.2023, registered as Criminal Case No. 25/2023 (Somya Saxena vs. Shankh Saxena), under Section 125 Cr.P.C. was preferred by the opposite party No. 2 in the court of Principal Judge, Family Court, Lucknow and thereafter, on account of some typographical error, the opposite party No. 2/Somya Saxena preferred an application dated 16.05.2023 seeking withdrawal of the application under Section 125 Cr.P.C. preferred by her registered as

Criminal Case No. 25 of 2023. The contents of the application dated 16.05.2023 are extracted hereunder:-

"प्रार्थना-पत्र वास्ते उपरोक्त वाद पर बल न दिये जाने / वापस लिये जाने हेतु:-

महोदय,
प्रार्थिनी का माननीय न्यायालय से निवेदन निम्नवत है:-

1- यह कि उपरोक्त वाद माननीय न्यायालय के समक्ष आज दिनांक 16/05/2023 को सुनवाई हेतु नियत है।

2- यह कि वाद उपरोक्त में कई त्रुटियां हो जाने के कारण प्रार्थिनी दूसरा नया वाद दाखिल करना चाहती है तथा उपरोक्त वाद वापस लेना चाहती है।

3- यह कि ऐसी स्थिति में वाद उपरोक्त पर बल न दिये जाने तथा वापस लिया जाना न्यायहित में उचित एवं आवश्यक है।

अतः माननीय न्यायालय से विनम्र निवेदन है कि उपरोक्त वाद को बलहीन करके वापस लिये जाने का आदेश पारित करने की कृपा करें।"

5. From a perusal of above quoted portion of the application dated 16.05.2023, it is apparent that on account of some typographical error, the opposite party No. 2/Somya Saxena, on account of some errors in the application under Section 125 Cr.P.C., moved an application before the court concerned permitting her to withdraw the application under Section 125 Cr.P.C. i.e. Case No. 25/2023 (Somya Saxena vs. Shankh Saxena) and this prayer was sought with an intention to file a fresh case under the said provision i.e. Section 125 Cr.P.C.

6. Thereafter, the Principal Judge, Family Court, Lucknow vide order dated 21.05.2023 after considering the averments made in above quoted application, dismissed the said case for want of prosecution and no liberty was granted to opposite party No. 2/Somya Saxena to file

a fresh case under Section 125 Cr.P.C. The order dated 21.05.2023 reads as under:-

"21.05.2023

आज पत्रावली लोक अदालत में पेश हुई।

वादिनी की ओर से प्रार्थना पत्र ए 13 प्रस्तुत वाद में बल न दिये जाने का कथन किया। वादिनी का कथन है कि उपरोक्त वाद में त्रुटियां पाये जाने के कारण वह उक्त मुकदमा को नाटप्रेस करना चाहती है।

सुना एवं पत्रावली का अवलोकन किया। पत्रावली के अवलोकन से स्पष्ट है कि वादिनी द्वारा उक्त वाद धारा 125 दण्ड प्रक्रिया संहिता के तहत विपक्षी के विरुद्ध प्रस्तुत किया था। चूंकि वादिनी उक्त वाद में बल नहीं देना चाहती है। अतः वादिनी का वाद बल न दिये जाने के आधार पर निरस्त किये जाने योग्य है।

आदेश

प्रस्तुत वाद वादिनी द्वारा बल न दिये जाने के आधार पर निरस्त किया जाता है।

पत्रावली नियमानुसार दाखिल दफ्तर हो।"

7. After the aforesaid, the opposite party No. 2/Somya Saxena preferred a fresh case registered as Case No. 973 of 2023 (Somya Sinha vs. Shankh Kumar Saxena), in which, an objection was filed by the applicant raising the issue of maintainability of the case on the ground, in nutshell, to the effect that in view of principle of "Res Judicata", subsequent application under Section 125 Cr.P.C. is not maintainable. In other words, it has been stated by the applicant before the court concerned that liberty was not granted to the opposite party No. 2/Somya Saxena to file a fresh case, as such, the instant application under Section 125 Cr.P.C. is neither entertainable nor maintainable and being so, without adjudicating the same on merits, it is liable to be dismissed.

8. The trial court thereafter considering the aforesaid facts including the ground aforesaid taken by the applicant

herein that earlier application filed by the opposite party No. 2/Somya Saxena registered as Case No.25/2023 (Somya Saxena vs. Shankh Saxena) was dismissed as withdrawn without liberty to file a fresh case as also the observations made by this Court in the judgment passed in the case of **Shyam Bahadur Singh vs. State of U.P.** reported in **2023 AHC 914038** rejected the objection of the opposite party/applicant herein vide order impugned dated 31.08.2024 and entertained the application fixing 19.09.2024 as date for filing of objection. The relevant portion of the order dated 31.08.2024 is extracted hereunder:-

"सुना तथा पत्रावली का अवलोकन किया अवलोकन से विदित होता है कि उक्त वाद में विपक्षी द्वारा ये कहते हुए आपत्ति की गयी है कि प्रार्थिनी द्वारा पुनः तथ्यों को बदलते हुए पुनः उक्त प्रार्थना पत्र प्रस्तुत किया गया है।

प्रार्थिया द्वारा पूर्व में एक प्रार्थना पत्र अन्तर्गत धारा 125 सी०आर०पी०सी० प्रस्तुत किया गया था जो उसके द्वारा इस आशय के साथ वापस लिया गया था, कि उक्त प्रार्थना पत्र में लिपिकीय त्रुटि है जिसके कारण से वह अपना वाद वापस लेना चाहती है।

उसके द्वारा पुनः प्रार्थना पत्र अन्तर्गत धारा 125 सी०आर०पी०सी० प्रस्तुत किया गया है। माननीय उच्च न्यायालय द्वारा अपने निर्णय श्याम बहादुर सिंह बनाम उत्तर प्रदेश सरकार 2023 AHC 914038 में अवधारित किया गया है कि..

"It may be noted that the solemn aim of the proceedings under Section 125 Cr.P.C. is to prevent vagrancy and destitution. Section 125 Cr.P.C. is piece of social legislation introduced in Cr.P.C. to grant a quick relief to the members of the society. At the same time, it may be noted that procedure which shall be adopted in such cases is a summary one. This is settled legal position that any matter which has been decided

in a summary manner shall not have an effect of res-judicata, hence in my view this argument is misconceived. More so because this application has been.."

जिससे स्पष्ट है कि प्रार्थना पत्र अन्तर्गत धारा 125 सी०आर०पी०सी० पुनः योजित किया जा सकता है। यहाँ यह तथ्य समीचीन है कि प्रार्थिया द्वारा पूर्व में अपना प्रार्थना पत्र अन्तर्गत धारा 125 सी०आर०पी०सी० इस शर्त के साथ वापस लिया गया था कि वह पुनः नया प्रार्थना पत्र अन्तर्गत धारा 125 सी०आर०पी०सी० योजित कर सकती है।

अतः उक्त तथ्यों एवं परिस्थितियों में विपक्षी का प्रार्थना पत्र निरस्त किये जाने योग्य है।

आदेश

विपक्षी का प्रार्थना पत्र कागज स० सी-13 निरस्त किया जाता है। पत्रावली वास्ते जवाबदावा / आपत्ति हेतु दिनांक 19.09.2024 को पेश हो।"

9. Impeaching the order impugned dated 31.08.2024, learned counsel for the applicant relying upon the judgment passed by the Hon'ble Apex Court in the case of **Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior, and others; AIR 1987 SC 88**, stated that second application under Section 125 Cr.P.C. filed by the opposite party No. 2/Somya Saxena was not maintainable, as such, the order dated 31.08.2024 is liable to be interfered with by this Court.

10. Learned AGA supported the impugned order dated 31.08.2024 on the basis of "aims and objects" of the provision i.e. Section 125 Cr.P.C.

11. Considered the aforesaid and perused the record.

12. For coming to the conclusion as to whether the impugned order dated 31.08.2024 is liable to be set-aside, this Court is of the opinion to first take note of

the observations made by the Hon'ble Apex Court on the "aims and objects" of Section 125 Cr.P.C.

13. In the case of **Sanjeev Kapoor vs. Chandana Kapoor and others** reported in (2020) 13 SCC 172, the Hon'ble Apex Court while considering the applicability of Section 362 Cr.P.C. in relation to the proceedings/case instituted under Section 125 Cr.P.C., on the "aims and objects" of Section 125 Cr.P.C., observed as under:-

"23. Before we proceed to look into the legislative scheme of Section 125 CrPC, we need to notice few rules of interpretation of statutes when the court is concerned with the interpretation of a social justice legislation. Section 125 CrPC is a social justice legislation which orders for maintenance for wives, children and parents. Maintenance of wives, children and parents is a continuous obligation enforced. This Court had occasion to consider the interpretation of Section 125 CrPC in Badshah v. Urmila Badshah Godse [Badshah v. Urmila Badshah Godse, (2014) 1 SCC 188 : (2014) 1 SCC (Civ) 51] . In paras 13.3 to 18, the following has been laid down: (SCC pp. 196-98)

"13.3. Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125 CrPC. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which

is the constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society.

14. Of late, in this very direction, it is emphasised that the courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:

'It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating

the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication. [Keynote address on “Legal Education in Social Context” delivered at National Law University, Jodhpur on 12-10-2005, available on last accessed 25-12-2013.] ’

15. *The provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from “adversarial” litigation to social context adjudication is the need of the hour.*

16. *The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a*

change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.

17. *Cardozo acknowledges in his classic [Benjamin N. Cardozo, The Nature of Judicial Process (Yale University Press, New Haven, 1921).]*

‘... no system of jus scriptum has been able to escape the need of it.’

and he elaborates:

‘It is true that codes and statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. ... There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a Judge's troubles in ascribing meaning to a statute. ...

Says Gray in his lectures [John Chipman Gray, *The Nature and Sources of the Law.*] :

“The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the Judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.”

18. The court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision — *libre recherche scientifique* i.e. “free scientific research”. We are of the opinion that there is a non-rebuttable presumption that the legislature while making a provision like Section 125 CrPC, to fulfil its constitutional duty in good faith, had always intended to give relief to the woman becoming “wife” under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. *Journey from Shah Bano* [Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 : 1985 SCC (Cri) 245] to *Shabana Bano* [Shabana Bano v. Imran Khan, (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC

(Cri) 873] guaranteeing maintenance rights to Muslim women is a classical example.

24. The closer look at Section 125 CrPC itself indicates that the court after passing judgment or final order in the proceedings under Section 125 CrPC does not become *functus officio*. The section itself contains express provisions where order passed under Section 125 CrPC can be cancelled or altered which is noticeable from Sections 125(1), 125(5) and 127 CrPC, which are to the following effect:

“125. Order for maintenance of wives, children and parents.—(1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to

pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.—For the purposes of this Chapter—

(a) “**minor**” means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) “**wife**” includes a woman who has been divorced by,

or has obtained a divorce from, her husband and has not remarried.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

127. Alteration in allowance.—(1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

(a) the woman has, after the date of such divorce, remarried,

cancel such order as from the date of her remarriage.

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order—

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom monthly allowance for the maintenance and interim maintenance or any of them has been ordered to be paid under Section 125, the civil court shall take into account that sum which has been paid to, or recovered by, such person as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of the said order.”

25. In Section 125 CrPC the expression used is “as the

Magistrate may from time to time direct”. The use of the expression “from time to time” has purpose and meaning. It clearly contemplates that with regard to the order passed under Section 125(1) CrPC, the Magistrate may have to exercise jurisdiction from time to time. Use of the expression “from time to time” is in exercise of jurisdiction of the Magistrate in a particular case. Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn. defines “time to time” as follows:

“Time to time. As occasion arises.”

26. The above legislative scheme indicates that the Magistrate does not become functus officio after passing an order under Section 125 CrPC, as and when the occasion arises the Magistrate exercises the jurisdiction from time to time. By Section 125(5) CrPC, the Magistrate is expressly empowered to cancel an order passed under Section 125(1) CrPC on fulfilment of certain conditions.

27. Section 127 CrPC also discloses the legislative intendment where the Magistrate is empowered to alter an order passed under Section 125 CrPC. Sub-section (2) of Section 127 CrPC also empowers the Magistrate to cancel or vary an order under Section 125. The legislative scheme as delineated by Sections 125 and 127 CrPC as noted above clearly enumerated the circumstances and incidents provided in the Code of Criminal Procedure where the court passing a judgment or final

order disposing of the case can alter or review the same. The embargo as contained in Section 362 is, thus, clearly relaxed in the proceedings under Section 125 CrPC as indicated above.

28. The submissions which have been pressed by the learned counsel for the appellant were founded only on embargo of Section 362 and when embargo of Section 362 is expressly relaxed in the proceedings under Section 125 CrPC, we are not persuaded to accept the submission of the counsel for the appellant that the Family Court was not entitled to set aside and cancel its order dated 6-5-2017 in the facts and circumstances of the present case."

14. Following paragraphs of the judgment passed by the Hon'ble Apex Court in the case of Anju Garg and another vs. Deepak Kumar Garg reported in 2022 SCC OnLine SC 1314 would also be relevant on the "aims and objects" of the provision i.e. Section 125 Cr.P.C.

"9. At the outset, it may be noted that Section 125 of Cr.P.C. was conceived to ameliorate the agony, anguish and financial suffering of a woman who is required to leave the matrimonial home, so that some suitable arrangements could be made to enable her to sustain herself and the children, as observed by this Court in *Bhuvan Mohan Singh v. Meena* (2015) 6 SCC 353. This Court in the said case, after referring to the earlier decisions, has reiterated the principle of law as to how the proceedings under

Section 125 Cr.P.C have to be dealt with by the Court. It held as under:

"In *Dukhtar*

Jahan v. Mohd. Farooq [(1987) 1 SCC 624 : 1987 SCC (Cri) 237] the Court opined that : (SCC p. 631, para 16)

16. "... *Proceedings under Section 125 [of the Code], it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner.*"

8. A three-Judge Bench in *Vimala (K.) v. Veeraswamy (K.)* [(1991) 2 SCC 375 : 1991 SCC (Cri) 442], while discussing about the basic purpose under Section 125 of the Code, opined that : (SCC p. 378, para 3)

3. "*Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing, and shelter to the deserted wife.*"

9. A two-Judge Bench in *Kirtikant D. Vadodaria v. State of Gujarat* [(1996) 4 SCC 479 : 1996 SCC (Cri) 762], while advertng to the dominant purpose behind Section 125 of the Code, ruled that : (SCC p. 489, para 15)

15. "... *While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents, etc. and to prevent*

destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation."

10. *In Chaturbhuj v. Sita Bai [(2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356], reiterating the legal position the Court held : (SCC p. 320, para 6)*

6. "... *Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Capt. Ramesh Chander Kaushal v. Veena Kaushal [(1978) 4 SCC 70 : 1978 SCC (Cri) 508] falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted*

in Savitaben Somabhai Bhatiya v. State of Gujarat [(2005) 3 SCC 636 : 2005 SCC (Cri) 787]."

11. *Recently in Nagendrappa Natikar v. Neelamma [(2014) 14 SCC 452 : (2015) 1 SCC (Cri) 407 : (2015) 1 SCC (Civ) 346], it has been stated that it is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children".*

10. This Court had made the above observations as the Court felt that the Family Court in the said case had conducted the proceedings without being alive to the objects and reasons, and the spirit of the provisions under Section 125 of the Code. Such an impression has also been gathered by this Court in the case on hand. The Family Court had disregarded the basic canon of law that it is the sacrosanct duty of the husband to provide financial support to the wife and to the minor children. The husband is required to earn money even by physical labour, if he is an able-bodied, and could not avoid his obligation, except on the legally permissible grounds mentioned in the statute. In *Chaturbhuj v. Sita Bai (2008) 2 SCC 316*, it has been held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife, by providing her food, clothing, and shelter by a speedy remedy. As settled by this Court, Section 125 Cr.P.C. is a

measure of social justice and is specially enacted to protect women and children. It also falls within the Constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution of India."

15. Regarding the issue involved in the instant case, this Court feels it appropriate to take note of the principle of "Res Judicata", as expressed by the Hon'ble Apex Court and also the judgments wherein it has been held that second petition/application claiming maintenance would be maintainable.

16. On the principle of "Res Judicata", the Hon'ble Apex Court in its latest judgment passed in the case of **Prem Kishore & Others Vs. Brahm Prakash & Others** reported in **2023 SCC OnLine SC 356**, in paragraphs 37 and 38 held as under:-

"37. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) of the CPC can be summarized as follows:-

(i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;

(ii) The defence made by the defendant in the suit must not be considered while deciding the merits of the application;

(iii) To determine whether a suit is barred by res judicata, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was

between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and

(iv) Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.

(See: Srihari Hanumandas Totala v. Hemant Vithal Kamat. (2021) 9 SCC 99)

38. The general principle of res judicata under Section 11 of the CPC contain rules of conclusiveness of judgment, but for res judicata to apply, the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit. Further, the suit should have been decided on merits and the decision should have attained finality. Where the former suit is dismissed by the trial court for want of jurisdiction, or for default of the plaintiff's appearance, or on the ground of non-joinder or mis-joinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for

failure to furnish security for costs, or on the ground of improper valuation, or for failure to pay additional court fee on a plaint which was undervalued, or for want of cause of action, or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision, not being on the merits, would not be res judicata in a subsequent suit."

17. In the case of **Nagendrappa Natikar v. Neelamma** reported in (2014) 14 SCC 452, the Hon'ble Apex observed as under:-

"5. We notice, while the application under Section 127 CrPC was pending, the respondent wife filed OS No. 10 of 2005 before the Family Court, Gulbarga under Section 18 of the Act claiming maintenance at the rate of Rs 2000 per month. The claim was resisted by the petitioner husband contending that, in view of the compromise reached at between the parties in Miscellaneous Case No. 234 of 1992 filed under Section 125 CrPC, the respondent could not claim any monthly maintenance and hence the suit filed under Section 18 of the Act was not maintainable. The question of maintainability was raised as a preliminary issue. The Family Court held by its order dated 15-9-2009 that the compromise entered into between the parties in a proceeding under Section 125 CrPC would not be a bar in entertaining a suit under Section 18 of the Act.

6. The suit was then finally heard on 30-9-2010 and the Family Court decreed the suit holding that

the respondent is entitled to a monthly maintenance of Rs 2000 per month from the defendant husband from the date of the filing of the suit.

7. Aggrieved by the said order, the petitioner took up the matter before the High Court by filing an appeal, being MFA No. 31979 of 2010, which was dismissed by the High Court by its judgment dated 28-3-2011 [Nagendrappa Natikar v. Neelamma, MFA No. 31979 of 2010, decided on 28-3-2011 (KAR)] , against which this SLP has been preferred.

8. Shri Raja Venkatappa Naik, learned counsel appearing for the petitioner husband submitted that suit filed under Section 18 of the Act is not maintainable in view of the order dated 3-9-1994, accepting the consent terms and ordering a consolidated amount towards maintenance under Section 125 CrPC.

9. We are in complete agreement with the reasoning of the Family Court and confirmed by the High Court that the suit under Section 18 of the Act is perfectly maintainable, in spite of the compromise reached at between the parties under Order 23 Rule 3 CPC and accepted by the Court in its order dated 3-9-1994.

10. Section 125 CrPC is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a

full and final determination of the status and personal rights of the parties, which is in the nature of a civil proceeding, though are governed by the provisions of CrPC and the order made under Section 125 CrPC is tentative and is subject to final determination of the rights in a civil court.

11. Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a court of law and such an agreement is void, since the object is unlawful. The proceeding under Section 125 CrPC is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125 CrPC by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the Act."

18. In the judgment dated 23.05.2023 passed in **Criminal Misc. Writ Petition No. 22529 of 2008 (Shyam Bahadur Singh vs. State of U.P. and another)**, this Court, while dealing with the issue related to filing of second petition/application under Section 125 Cr.P.C., observed as under:-

"4. The main crux of the argument of the petitioner is that the respondent's wife never challenged the order of the revisional court by which the earlier order passed by the trial court rejecting the first application under Section 125 Cr.P.C. was affirmed, therefore, the order passed against the wife became final and therefore, the matter

cannot be agitated again by filing another application under Section 125 Cr.P.C.; it is argued that the entire proceeding subsequently initiated by respondent no. 2 is barred by principle of constructive res-judicata and hit by the provisions of Constitution of India, therefore, it is liable to be quashed; it is further argued that the subsequent orders granting maintenance is passed ignoring the factual and legal positions; the learned trial court as well as the revisional court passed an illegal order, therefore the orders cannot be sustained.

xxx xxx xxx xxx

10. It may be noted that the solemn aim of the proceedings under Section 125 Cr.P.C. is to prevent vagrancy and destitution. Section 125 Cr.P.C. is a piece of social legislation introduced in Cr.P.C. to grant a quick relief to the members of the society. At the same time, it may be noted that procedure which shall be adopted in such cases is a summary one. This is settled legal position that any matter which has been decided in a summary manner shall not have an effect of res-judicata, hence in my view this argument is misconceived. More so because this application has been moved on the ground that there has been change in circumstances i.e. remarriage by the husband. Though the petitioner has objected to the fact of remarriage, however, this court in exercise of writ jurisdiction is not permitted to go into the disputed questions of fact.

11. There may be instances where the person who falls within the purview of section 125 Cr.P.C. as being one who has been neglected or refused maintenance during certain period of time. There may be some instances where a person, is for the time being able to maintain himself or herself loses her/his resources because of changed circumstances. In such cases a fresh right to claim maintenance may accrue. Legally the liability to maintain under section 125 Cr.P.C. is continuing one. In my view, when there is a change in circumstances entitling a person to be a claimant as per provisions of section- 125 Cr.P.C., he or she can very well apply for maintenance. If such an option is foreclosed, it shall frustrate the very purpose of section- 125 Cr.P.C. I do not find any good ground to interfere in the order of the trial court or of the revisional court in exercise of writ jurisdiction of this court."

19. In view of use of expression "from time to time" used in Section 125 Cr.P.C., in the facts of the instant case, it would also be useful to take note of expression "continuing wrong" and "recurring or successive wrong", as explained by the Hon'ble Apex Court.

20. In the case of **Samruddhi Cooperative Housing Society Limited vs. Mumbai Mahalaxmi Construction Private Limited** reported in (2022) 4 SCC 103, the Hon'ble Apex observed as under:-

"14. Speaking for the three-Judge Bench, P.B. Gajendragadkar,

J. (as the learned Chief Justice then was) observed that : (Balakrishna case [Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneswar Maharaj Sansthan, 1959 Supp (2) SCR 476 : AIR 1959 SC 798] , AIR p. 807, para 31)

"31. ... Does the conduct of the trustees amount to a continuing wrong under Section 23? That is the question which this contention raises for our decision. In other words, did the cause of action arise de die in diem as claimed by the appellants? In dealing with this argument it is necessary to bear in mind that Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked."

(emphasis supplied)

The Court held that the act of the trustees to deny the rights of

Guravs as hereditary worshippers and dispossessing them through a decree of the court was not a continuing wrong. Although the continued dispossession caused damage to the appellants, the injury to their rights was complete when they were evicted.

15. In CWT v. Suresh Seth [CWT v. Suresh Seth, (1981) 2 SCC 790 : 1981 SCC (Tax) 168] , a two-Judge Bench of this Court dealt with the question of whether a default in filing a return under the Wealth Tax Act amounted to a continuing wrong. E.S. Venkataramiah, J. (as the learned Chief Justice then was) observed that : (SCC pp. 798-99, para 11)

"11. ... The distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. It is reasonable to take the view that the court should not be eager to hold that an act or omission is a continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the legislature. In the instant case whenever the question of levying penalty arises what has to be first considered is whether the assessee has failed without reasonable cause to file the return as required by law and if it is held that he has failed to do so then penalty has to be levied in accordance with the measure provided in the Act. When the

default is the filing of delayed return the penalty may be correlated to the time lag between the last day for filing it without penalty and the day on which it is filed and the quantum of tax or wealth involved in the case for purposes of determining the quantum of penalty but the default however is only one which takes place on the expiry of the last day for filing the return without penalty and not a continuing one. The default in question does not, however, give rise to a fresh cause of action every day. Explaining the expression "a continuing cause of action" Lord Lindley in Hole v. Chard Union [Hole v. Chard Union, (1894) 1 Ch 293 : 63 LJ Ch 469 : 70 LT 52 (CA)] observed : (Ch pp. 295-96)

"... What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.'"

(emphasis supplied)

16. The Court further provided illustrations of continuous wrongs : (Suresh Seth case [CWT v. Suresh Seth, (1981) 2 SCC 790 : 1981 SCC (Tax) 168] , SCC p. 800, para 17)

"17. The true principle appears to be that where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the

duty in question is one which requires him to continue to do that act. Breach of a covenant to keep the premises in good repair, breach of a continuing guarantee, obstruction to a right of way, obstruction to the right of a person to the unobstructed flow of water, refusal by a man to maintain his wife and children whom he is bound to maintain under law and the carrying on of mining operations or the running of a factory without complying with the measures intended for the safety and well-being of workmen may be illustrations of continuing breaches or wrongs giving rise to civil or criminal liability, as the case may be, de die in diem."

17. In *M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das* [*M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das*, (2020) 1 SCC 1] , a Constitution Bench of this Court [of which one of us (D.Y. Chandrachud, J.) was a part] examined the precedents with regard to a continuing wrong. The Court observed that : (SCC p. 369, para 343)

"343. The submission of Nirmohi Akhara is based on the principle of continuing wrong as a defence to a plea of limitation. In assessing the submission, a distinction must be made between the source of a legal injury and the effect of the injury. The source of a legal injury is founded in a breach of an obligation. A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a

particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, whether positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature. ...

Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may enure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but

which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation."
(emphasis supplied)"

21. In the case of *Jaihind Sahakari Pani Purvatha Mandali Ltd. v. Rajendra Bandu Khot and others* reported in 2019 SCC OnLine Bom 13271, the High Court of Bombay observed as under:-

"8. The Supreme Court has explained the difference between a continuous wrong and recurring or successive wrongs in the case of *Union of India v. Tarsem Singh*, (2008) 8 SCC 648. A continuing wrong is a single wrong causing a continuing injury. In case of a continuing wrong, the grievance essentially is about an act which creates a continuous source of injury and renders the doer of that act responsible and liable for continuance of that injury. The injury is not complete when the act is committed; it continues even thereafter; and so long as it does, the cause of action itself continues. A recurring or successive wrong, on the other hand, occurs when successive acts, each giving rise to a distinct and separate cause of action, are committed. Each act, in itself wrongful, constitutes a separate cause of action for sustaining a claim or a complaint. It is important to bear in mind in this context the distinction between an injury caused by a wrongful act and the effect of such injury. What is to be seen is whether the injury itself is complete or is continuous. If the injury is complete, the cause

of action accrues and is complete; the clock starts ticking for the purposes of limitation, notwithstanding the fact that the effect of such injury continues even thereafter. For example, let us take the case of an occupant of a house who is driven out of it. The injury is complete with the act of throwing him out, though the effect of that injury namely, his being unable to use or occupy the house, continues even thereafter. Take, however, the case of a person who is detained in a house and not allowed to roam about. The act of detention is the one which causes an injury : This injury, however, is a continuing injury, since the injury here consists in being unable to move about. This injury continues and since the injury itself continues, the wrong is a continuous wrong and the cause of action, a continuing cause of action. Take, on the other hand, the case of a person who is barred from entering a house he is entitled to enter. When he is barred for the first time, an injury follows, and a cause of action thereby accrues. Each successive day on which he is so barred gives rise to a fresh and distinct cause of action, making it a case of recurring/successive wrongs.

9. In service jurisprudence, this distinction (i.e. the distinction between a continuing wrong and a recurring one) becomes important particularly from the point of view of relief. In *M.R. Gupta v. Union of India*, (1995) 5 SCC 628, the Supreme Court has explained it succinctly. The appellant before the court in that case was a workman,

whose grievance was that his wage fixation was not in accordance with the applicable rules. He asserted that the wrong was a continuous one. The court held that his cause of action was a recurring cause of action rather than a continuous one. Each time he was paid a salary which was not computed in accordance with the rules, a cause of action accrued unto him. The Court held as follows (SCC pp.629-30):

"So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery" of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time-barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs."

10. This law has been reiterated and summarised by the Supreme Court in Tarsem Singh's

case in the following words (Para 7 @ P651 of SCC):

"7. 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 re-fixation 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, the principles relating to recurring/successive wrongs will apply. As a consequence, 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."

22. For coming to the conclusion, this Court considered the following facts and aspects of the instant case.

(i) First case i.e. Case No. 25/2023 (Somya Saxena vs. Shankh Saxena) filed by opposite party No. 2/Somya Saxena was dismissed vide order dated 21.05.2023 passed on an application preferred by her for withdrawal of case with intention to file fresh case and the order dated 21.05.2023 indicates that the same was dismissed for want of prosecution.

(ii) The expression "from time to time" used in Section 125 Cr.P.C. and the principles related to "Res Judicata", "continuing wrong" and "recurring wrong or successive wrong" and also the "aims and objects" related to preferring an application under Section 125 Cr.P.C., as explained in the judgments, referred above.

(iii) The application under Section 125 Cr.P.C. should be decided summarily as per the procedure prescribed under the Code of Civil Procedure, 1908 (in short "CPC") by the Family Court. Section 10 of the Family Courts Act, 1984 (in short "Act of 1984") provides that provision of CPC shall be applicable to the suits and proceedings other than those under Chapter IX of Cr.P.C. i.e.

provisions related to maintenance of wives, children and parents.

(iv) The applicant is under obligation to maintain his wife (opposite party No. 2/Somya Saxena), which is his continuing duty.

(v) As per Hon'ble Apex Court, refusal by a man to maintain his wife and children whom he is bound to maintain under law, would be covered under maxim "de die in diem", which means "doing something everyday".

23. In view of the observations made in the judgments passed in the case of **Sanjeev Kapoor (supra)**, **Anju Garg (supra)**, **Prem Kishore (supra)**, **Nagendrappa Natikar (supra)**, **Shyam Bahadur Singh (supra)**, **Samruddhi Cooperative Housing Society Limited (supra)** and **Jaihind Sahakari Pani Purvatha Mandali Ltd. (supra)**, referred above, this Court is of the view that the judgment passed in the case of **Sarguja Transport Service (supra)** would not apply in this case.

24. Upon due consideration of the aforesaid, this Court is of the firm view that second application filed by the opposite party No. 2/Somya Saxena under Section 125 Cr.P.C., though the earlier was dismissed without providing liberty to file fresh, would be maintainable and the order dated 31.08.2024 is not liable to be interfered with by this Court.

25. Having observed above, this Court finds no force in the present application. It is accordingly **dismissed**.

26. The Court records the valuable assistance given by Ms. Urmish Shankar,

Research Associate, attached with me in drafting this judgment and finding out case laws applicable in the present case.

(2024) 9 ILRA 1142

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 11.09.2024

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Application U/S 482 No. 8645 of 2021
&
Application U/S 482 No. 6045 of 2020
With
Application U/S 482 No. 16035 of 2021

**Viresh Kumar @ Viresh Singh ...Applicant
Versus
State of U.P. & Anr. ...Respondents**

Counsel for the Applicant:

Rajiv Lochan Shukla, Uma Datta Tripathi

Counsel for the Respondents:

Anurag Pathak, G.A., Shashi Kant Shukla

**Criminal Law Code of Criminal Procedure -
Sections 227**-Applicant is husband of deceased- cognizance taken and Applicant summoned -discharge application filed stating that she died in a natural circumstance- has suffered myocardial infraction-rejected-impugned- more than prima-facie evidences against the applicant.

Application dismissed. (E-9)

List of Cases cited:

1. K.VS Prakash Babu Vs St. of Karn. 2016 (12) SCALE 280
2. Wazir Chand Vs St. of Har. AIR 1989 Supreme Court 378
3. Rumi Dhar Vs St. of W. B., (2009) 6 SCC 364

4. High Court of M. P. at Indore in Misc. Criminal Case No. 10385 of 2021

5. St. of T.N. Vs N Suresh Rajan, (2014) 11 SCC 709

6. Vishnu Kumar Shukla & anr. Vs St. of UP 2013 INSC 1026

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

8. U.O.I. Vs Prafulla K Samal, (1979) 3 SCC 4

9. Stree Atyachar Virodhi Parishad Vs Dilip N Chordia, (1989) 1 SCC 715

10. Niranjana Singh Karam Singh Punj.i Vs Jitendra B Bijjaya, (1990) 4 SCC 76

11. Dilawar B Kurane Vs St. of Mah., (2002) 2 SCC 135

12. Chitresh K Chopra Vs St. (Government of NCT of Delhi), (2009) 16 SCC 605

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

14. Dinesh Tiwari Vs St. of U.P., (2014) 13 SCC 137

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

16. St. (NCT of Delhi) Vs Shiv Charan Bansal, (2020) 2 SCC 290

17. K P Raghavan Vs M H Abbas, AIR 1967 SC 740

18. Almohan Das Vs St. of W.B., (1969) 2 SCR 520

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

20. St. of Gujarat Vs Dilipsinh Kishorsinh Rao, 2023 INSC 894, 2023 SCC OnLine SC 1294

21. St. of Mah. Vs Som Nath Thapa, (1996) 4 SCC 659

22. St. of M.P. Vs Mohan Lal Soni, (2000) 6 SCC 338

23. C.B.I. Vs Aryan Singh & ors., 2023 SCC Online SC 379

24. Ram Prakash Chadha Vs The St. of U.P. 2024 INSC 522

25. Om Parkash Sharma Vs C.B.I.(2000) 5 SCC 679

26. Kaushalya Devi Vs St. of M.P. 2003 SCC OnLine M.P. 672

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Mr. Viresh Kumar, in person (Applicant in Application at Serial Nos. 1 & 2 and opposite party no. 2 in Application at Serial No. 3), Mr. Anurag Pathak, learned counsel for (Complainant in Application at Serial Nos. 1 & 2 and Applicant in Application at Serial No. 3) and learned A.G.A for State.

2. The applicant (Viresh Kumar alias Viresh Singh), before this Court is husband of deceased, whose dead body was found, when allegedly applicant returned back after 2 days, from a room of his house, locked from inside. The door was forced open. It was found that door of balcony was also open and fan was running and deceased was found sitting on a sofa having her one leg on centre table.

3. During preparation of inquest report, statement of witness (Ravi Kumar a medicine delivery boy) to the inquest report was recorded that on 17.04.2017 he was asked to supply medicines to applicant's place by the applicant and on same day he supplied also.

4. Postmortem of dead body was conducted on 20.4.2017 and it was opined that death was occurred about 2 to 3 days prior. Cause and manner of death could not be ascertained, therefore viscera was preserved for chemical analysis.

5. In aforesaid circumstances, the complainant i.e. father of deceased lodged an FIR against the applicant and three co-accused persons that they have committed murder of his daughter. Relevant part of the complaint is being reproduced hereinafter:-

" नकल तहरीर हिन्दी वादी सेवा में श्रीमान थानाध्यक्ष महोदय सेक्टर-7 इन्दरापुरम गाजियाबाद महोदय निवेदन है कि प्रार्थी नीरज सिंह पुत्र रामवीर सिंह नि० 50 पुरुषोत्तम बाग दयाल बाग आगरा मैंने अपनी बहिन की शादी मुनीशा रानी पत्नी वीरेश सिंह नि० नगला बली जिला फिरोजाबाद (नजदीक अवागढ़) के साथ शादी हुई थी हाल में गाजियाबाद में निवास करता है शादी को आज 8 साल हो गयी है मेरी बहन मुनीशा के कोई सन्तान नहीं है इस कारण उसकी पति वीरेश और उसका भाई राकेश और भान्जा जो कि गाजियाबाद में ही निवास करता है आरती को बहन बताकर अपने साथ रखता था यह लोग मेरी बहन को परेशान करते थे हम लोगों ने कई बार समझाया लेकिन वो नहीं माने मेरी बहन को और ज्यादा परेशान करने लगे और कहते थे कि हम तुझे मार देंगे और आरती के साथ शादी कर लूँगा यह बात हमारी बहन ने हमें बताई थी क्योंकि आरती से वीरेश से नाजायज सम्बन्ध थे महोदय उक्त चारों लोग वीरेश, राकेश, सन्जू और आरती ने मिलकर मेरी बहन की हत्या कर दी और घर से भाग गये सूचना पर मैं आया इन चारों के खिलाफ हत्या का मुकदमा करने की कृपा करें प्रार्थी एस०डी० अंग्रेजी नीरज सिंह पुत्र श्री राजवीर सिंह नि० 50 पुरुषोत्तम बाग दयाल बाग आगरा मो० 7060205542 दिनांक 20.04.2017 नोट मैं एच०सी० 265 मोहर सिंह प्रमाणित करता हूँ कि रो० आम कायमी मेरे द्वारा किया गया तथा नकल तहरीर मुताबिक असल कम्प्यूटर पर सीसी 404 राजीव के द्वारा अंकित करायी गयी। "

6. In the Viscera report, dated 09.05.17, organo-chloro insecticide poison was found in stomach, intestine, liver, kidney and spleen of deceased. The Investigating Officer, conducted investigation and statements of witnesses were recorded. All witnesses have stated that applicant has illicit relationship with a co-accused and they have committed cruelty for demand of dowry and caused death of deceased in a planned manner .

7. In reply to a query of the Investigating Officer, the Vidhi Vigyan Prayogshala, Ghaziabad, submitted a reply dated 25.8.2017 that organo-chloro insecticide is available in the market as pesticides. The Investigating Officer there after filed a charge sheet dated 18.9.2017, only under Section 306 I.P.C., against present applicant only and further investigation was kept pending against co-accused 'Aarti'. For reference brief facts of the case as mentioned in the charge-sheet are reproduced here in after:-

"श्रीमानजी मुकदमा उपरोक्त वादी की तहरीर के आधार पर अभिगण वीरेश कुमार, आरती, राकेश, संजू के विरुद्ध धारा 302 भा०द०वि० पंजीकृत कराया गया तथा वादी की बहन मृतका मुनीशा का पोस्टमार्टम कराया गया पोस्टमार्टम में डाक्टर द्वारा कोई मृत्यु का कारण न पाये जाने के कारण विशरा सुरक्षित रखा गया था बिशरा जाँच रिपोर्ट में कीटनाशक पदार्थ का होना पाये जाने के कारण विवेचना में धारा 328 भा०द०वि० की बढोतरी की गयी थी दौराने विवेचना बयान वादी बयान गवाहान निरीक्षण घटनास्थल व अभि० राकेश व सन्जू की मोबाईल लोकेशन व गवाहान के आधार पर नामजदगी गलत पायी गयी तथा मृतका मुनीशा के घर में अकेले होने व घर के मुख्य दरवाजे की कुन्डी अन्दर से बन्द होने पर FSL टीम द्वारा दरवाजे को बाहर से खींचकर तोड़ते हुए खोलकर अन्दर प्रवेश किये जाने तथा नामजद अभि० वीरेश कुमार व आरती को दिनांक 17.04.17 को घर से जाने के बाद मृतका को गवाह

रवि कुमार के द्वारा जिन्दा देखा जाना आदि तमाम साक्ष्य के आधार पर अभियुक्तगण के विरुद्ध धारा 302 व 328 भा०द०वि० के स्थान पर धारा 306 भा०द०वि० का होना पाया गया पर्याप्त साक्ष्य के आधार पर अभियुक्त वीरेश कुमार पुत्र शंकर सिंह निवासी नंगला बली थाना एका जिला फिरोजाबाद हाल पता 872 द्वितीय तल सैक्टर 1 वसुन्धरा थाना इन्दिरापुरम गाजियाबाद का चालान धारा 306 भा०द०वि० में जरिये आरोप पत्र माननीय न्यायालय किया जाता है मदीय से अनुरोध है कि आरोप पत्र स्वीकार करते हुये सबूत तलब कर दण्डित करने की कृपा करें तथा शेष अभियुक्ता आरती के विरुद्ध विवेचना प्रचलित है "

8. The learned Trial Court took cognizance of the offence and summoned the applicant. In the aforesaid circumstances, the applicant filed a discharge application on 3.10.2019 disclosing various documents including expert reports and their opinions. The application was filed mainly on a ground that his wife had died under normal circumstances. She has suffered myocardial infraction. So far as presence of organo-chloro insecticide was concerned, it could be due to exposure to such areas, where it was normally used as pesticides.

9. The application for discharge, filed under section 227 Cr.P.C., was considered and rejected by Additional Sessions Judge, Ghaziabad. Relevant part of same is mentioned hereinafter:-

" सुना तथा पत्रावली का अवलोकन किया।

पत्रावली के अवलोकन से विदित होता है कि वादी मुकदमा नीरज सिंह की ओर से थाना हाजा पर इस आशय से प्रथम सूचना रिपोर्ट दर्ज करायी गयी कि उसकी बहन मुनीशा रानी की शादी वीरेश सिंह के साथ हुयी थी। शादी को करीब 8 वर्ष हो गये है। उसकी बहन मुनीशा के कोई संतान नहीं है। इस कारण उसका पति वीरेश और उसका भाई राकेश और भांजा सन्जू जोकि गाजियाबाद मे ही निवास करते है और आरती को बहन

बताकर अपने साथ रखता था और यह लोग उसकी बहन को परेशान करते थे। वादी ने उन्हें कई बार समझाया, लेकिन वह नहीं माने और बहन को ज्यादा परेशान करने लगे और कहते थे कि हम तुझे मार देगे और आरती के साथ शादी कर लूंगा। यह बात वादी की बहन ने उसे बतायी थी, क्योंकि आरती से वीरेश के नाजायज सम्बन्ध थे। उक्त तीनों ने वादी की बहन की हत्या कर दी और घर से भाग गये। उक्त कथनों के आधार पर अभियुक्तगण वीरेश सिंह, राकेश, संजू व आरती के विरुद्ध अन्तर्गत धारा 302 भा०द० सं० में प्रथम सूचना रिपोर्ट दर्ज की गयी।

विवेचक के द्वारा मृतका के पिता रामवीर सिंह का बयान अन्तर्गत धारा 161 द०प्र०सं० अंकित किया गया तो उक्त गवाह ने अपने बयानों में अभियुक्त वीरेश व सह अभियुक्तगण के द्वारा मृतका को दहेज के लिये प्रताड़ित करना, परेशान करना एवं दहेज में दस लाख रुपये की मांग फ्लैट / मकान खरीदने के लिये करना और आरती नाम की लड़की के साथ अभियुक्त के अवैध सम्बन्ध होने का कथन किया गया है और अभियुक्त के द्वारा अतिरिक्त दहेज मांगने के कारण वर्ष 2012-13 में स्वयं के सेवानिवृत्त होने पर अभियुक्त को पांच लाख रुपये देने का कथन किया है। तत्पश्चात भी दहेज की पूर्ति न होने पर मृतका की मृत्यु कारित करना कहा गया है। मृतका की माता व वादी मुकदमा के द्वारा अपने बयान धारा 161 द०प्र०सं० में गवाह रामवीर सिंह के बयानों का समर्थन किया है। गवाह शेर सिंह के द्वारा अपने बयान धारा 161 द०प्र०सं० में अभियुक्त के द्वारा मृतका को दहेज के लिये प्रताड़ित करना, दहेज में दस लाख रुपये की मांग करना और दिनांक 19-04-2017 को अचानक मृतका की मृत्यु की सूचना मिलने का कथन किया गया है। गवाह नरेश के द्वारा भी उपरोक्त गवाहों के बयानों का समर्थन करते हुए मृतका को अभियुक्त के द्वारा दहेज के लिये प्रताड़ित किया जाना, मारपीट किया जाना एवं दहेज की पूर्ति न होने पर उसकी हत्या किये जाने का कथन किया गया है। गवाह सफीक अहमद एफ०एस०एल० प्रभारी के द्वारा अपने बयान धारा 161 द०प्र०सं० में सीढियों से फ्लोर घर तक खून व पानी जैसा मिला हुआ पदार्थ पड़ा होने का कथन किया है। पोस्टमार्टम करने वाले डाक्टर के द्वारा अपने बयान धारा 161 द०प्र०सं० में पोस्टमार्टम करने में मृत्यु का सही कारण न मिलना व बिसरा सुरक्षित रखे जाने का कथन किया गया है। विवेचक के

द्वारा घटना स्थल का मौका मुआयना करके नक्शा नजरी तैयार किया गया और बाद विवेचना अभियुक्त वीरेश सिंह के विरुद्ध अन्तर्गत धारा 306 भा०द०सं० का पर्याप्त साक्ष्य पाते हुए आरोपपत्र न्यायालय प्रेषित किया गया।

अभियुक्त के द्वारा धारा 227 द०प्र०सं० के अन्तर्गत उन्मोचन प्रार्थनापत्र प्रस्तुत करते हुए स्वयं के विरुद्ध कोई अपराध न गठित होने के कारण उन्मोचित किये जाने की याचना की गयी।

धारा 227 द०प्र०सं० में यह वर्णित किया गया है कि

"यदि मामले के अभिलेख और उसके साथ दी गयी दस्तावेजों पर विचार कर लेने पर, और इस निमित्त अभियुक्त और अभियोजन के निवेदन की सुनवाई कर लेने के पश्चात न्यायाधीश यह समझता है कि अभियुक्त के विरुद्ध कोई कार्यवाही करने के लिये पर्याप्त आधार नहीं है तो वह अभियुक्त को उन्मोचित कर देगा और ऐसा करने के अपने कारणों को लेखबद्ध करेगा।"

इस प्रकार धारा 227 के उपरोक्त प्रावधानों के अवलोकन से यह स्पष्ट है कि विवेचना में अभियुक्त के विरुद्ध एकत्र की गयी साक्ष्य एवं उसके साथ दिये गये दस्तावेजों पर न्यायालय को विचार करना है कि क्या अभियुक्त के विरुद्ध कार्यवाही किये जाने का पर्याप्त आधार नहीं है। अर्थात् यहां पर अभियुक्त की दोषमुक्ति/दोषसिद्ध को नहीं देखा जाना है, मात्र कार्यवाही किये जाने के साक्ष्य पर विचार करना है।

अभियुक्त के द्वारा यह कथन किया गया है कि घटना के समय वह अपने भाई के मुकदमें के सिलसिले में जनपद एटा गया था, इस सम्बन्ध में छाया प्रति शपथपत्र भी प्रस्तुत की गयी है। यह स्वीकृत है कि मृतका की मृत्यु अभियुक्त के घर पर अर्थात् अभियुक्त के साथ रहने के दौरान हुयी है। अभियुक्त घटना स्थल पर मौजूद था या अन्यत्र जगह उपस्थित था, यह तथ्य साक्ष्य से साबित होना है और अन्यत्र उपस्थिति का तर्क भी अभियुक्त आरोप विरचन के स्वर पर नहीं उठा सकता। इस तर्क को अभियुक्त बचाव साक्ष्य के दौरान उठा सकता है अथवा बचाव पक्ष में साक्ष्य पेश कर सकता है।

प्रस्तुत मामले में अभियुक्त के विरुद्ध धारा 306 भा०द०सं० के अन्तर्गत आरोपपत्र प्रेषित किया गया है। धारा 306 भा०द०सं० के अनुसार किसी

व्यक्ति को आत्महत्या किये जाने के लिये दुष्प्रेरित करना वर्णित किया गया है।

दुष्प्रेरण के विषय में भारतीय दण्ड संहिता के अध्याय-5 में धारा 107 से 120 तक प्रावधानित किया गया है और दुष्प्रेरण के लिये यह आवश्यक नहीं है कि दुष्प्रेरित व्यक्ति घटना स्थल पर ही उपस्थित हो।

इस प्रकार अभियुक्त की घटना स्थल से अन्यत्र उपस्थिति का तर्क इस स्तर पर बलहीन है।

जहां तक अभियुक्त के द्वारा चिकित्सीय आख्या के आधार पर मृतका की प्राकृतिक मृत्यु होने का कथन किया गया है और इस सम्बन्ध में Science Dossier व अन्य वैज्ञानिक किताबों की छाया प्रति प्रस्तुत की गयी है और यह स्पष्ट करने का प्रयास किया गया है कि मृतका की मृत्यु ऐसे किसी पदार्थ से नहीं हुयी है जो उसे बाहर से दिया गया हो। अभियुक्त के ये सभी तर्क बचाव साक्ष्य के दौरान ही देखे जाने हैं। इस स्तर पर अभियुक्त को उक्त तर्क से कोई लाभ नहीं मिलता दिखायी देता है।

जहां तक अभियुक्त के इस तर्क का प्रश्न है कि मृतका की मृत्यु MI (Myocardial Infarction) के कारण हुयी है और इस सम्बन्ध में एफ०एस०एल० लखनऊ की आख्या कागज सं० 47 की छाया प्रति प्रस्तुत की गयी है। उक्त एफ०एस०एल० लखनऊ की आख्या कागज सं० 47 के अवलोकन से स्पष्ट है कि उक्त आख्या में यह वर्णित किया है कि No color change observed exclude MI (Myocardial Infarction) इस प्रकार उपरोक्त एफ०एस०एल० लखनऊ की आख्या में MI (Myocardial Infarction) के द्वारा मृतका की मृत्यु होना अभिकथित नहीं है। ऐसी दशा में अभियुक्ता का उपरोक्त तर्क बलहीन है।

इस प्रकार उपरोक्त विवेचना एवं पत्रावली पर उपलब्ध साक्ष्य से यह स्पष्ट होता है कि वादी मुकदमा, मृतका के माता पिता के बयान धारा 161 द०प्र०सं० व अन्य तथ्य के गवाहान शेर सिंह, नरेश सिंह के बयान धारा 161 द०प्र०सं० से अभियुक्त के द्वारा मृतका से दहेज मांगना, उसे प्रताडित करना, दहेज में पांच लाख रुपये दिया जाना और अचानक दिनांक 19-04-2017 को मृतका की मृत्यु की सूचना मिलना, इस तथ्य की ओर से इशारा करता है कि मृतका को तंग, परेशान किया गया व दहेज के लिये प्रताडित किया गया है। पोस्टमार्टम करने वाले डाक्टर के

द्वारा पोस्टमार्टम के दौरान मृतका की मृत्यु का कोई स्पष्ट कारण न मिलना एवं उसका बिसरा सुरक्षित रखना, मृतका की मृत्यु प्राकृतिक मृत्यु की ओर इशारा न करके अप्राकृतिक मृत्यु होना अभिकथित करता है। जैसा कि एफ०एस०एल० गाजियाबाद की आख्या में भी अंकित हैं कि मृतका के शरीर में आरगेनोक्लोरो इन्सैक्टीसाईड विष पाया गया है। जहां तक अभियुक्त के द्वारा वैज्ञानिक तथ्यों के विश्लेषण के तर्कों का प्रश्न है, यह आरोप विरचन के बिन्दु पर महत्वपूर्ण नहीं होता है और ऐसे तर्क को अभियुक्त अपने बचाव पक्ष की साक्ष्य के दौरान उठा सकता है।

इस प्रकार उपरोक्त तथ्यों एवं परिस्थितियों के आधार पर अभियुक्त के विरुद्ध प्रथम दृष्टया आरोप विरचित किये जाने का पर्याप्त आधार है। तदनुसार अभियुक्त की ओर से प्रस्तुत प्रार्थनापत्र दिनांकित 03-10-2019 व अतिरिक्त प्रार्थनापत्र दिनांकित 02-12-2019 निरस्त किये जाने योग्य है।

आदेश

अभियुक्त की ओर से प्रस्तुत उन्मोचन प्रार्थनापत्र दिनांकित 03-10-2019 व अतिरिक्त प्रार्थनापत्र दिनांकित 02-12-2019 निरस्त किये जाते हैं। अभियुक्त के विरुद्ध आरोप विरचित किये जाने हेतु पत्रावली दिनांक 10-02-2020 को पेश हो अभियुक्त नियत तिथि पर व्यक्तिगत रूप से उपस्थित हो।"

10. The applicant, appearing in person, has reiterated submissions mentioned in discharge application that his wife died under natural circumstances. There are reports on record that she died due to myocardial infarction and that there was no evidence that she consumed poisonous substance given by him. Applicant-in-person has referred a Report dated 25.10.2017 (Forensic Science Laboratory, U.P.) and a Report dated 26.08.2019 of State Medico Legal Cell, Lucknow). Both reports are subsequent to filing of charge-sheet. He further submitted that no evidence was collected in regard to offence of abatement of suicide and has placed reliance on judgement passed by

Supreme Court in the cases of **K.V. Prakash Babu Vs. State of Karnataka 2016 (12) SCALE 280** and **Wazir Chand Vs. State of Haryana AIR 1989 Supreme Court 378** and a judgement passed by **High Court of Madhya Pradesh at Indore in Misc. Criminal Case No. 10385 of 2021.**

11. The aforesaid submissions are vehemently opposed by learned A.G.A who has supported the impugned order, on basis of material available, that there was more than a prima-facie case against the applicant that he has committed an offence of abatement of suicide, and that there was no legal error in order whereby discharge application was rejected.

12. Learned counsel appearing on behalf of complainant submitted that it was a case of murder and investigation was not conducted fairly and has filed an Application U/S 482 No. 16035 of 2021, which is connected with present matter, in which he has prayed that the charges be modified from Section 306 I.P.C. to 302 I.P.C, however, he fairly submitted that no such objection was filed during the course of hearing of discharge application or at the time of framing of charge as well as that in terms of section 216 Cr.P.C., the charge could be altered anytime before the judgement is passed, on basis of material available

13. Heard counsel for the parties and perused the record.

14. The applicant before this Court is husband of deceased whose dead body was found from a room of his house, locked from inside, in a sitting posture. According to postmortem report death was caused about 1 to 2 days prior and cause of

death could not be ascertained, therefore, viscera was preserved and according to the viscera report organo-cholor insecticide was found.

15. There are subsequent reports in regard to Nitro BT Powder Test, whether heart of deceased has suffered myocardial infarction or not. The discharge application of the applicant was rejected by a reasoned impugned order, as all arguments raised before the Court were considered and rejected. The applicant-in-person, has argued that cause of death was only due to myocardial infarction, there was no evidence that victim has taken any poisonous substance and presence of organo-choloro insecticide would not be sufficient to presume that she has taken insecticide before death. In case death was natural then no offence of abatement of suicide was made out. In support of his submissions he has placed reliance on some reports taken from the websites as well as above referred judgements.

16. Presently the Court is considering the case only at the stage of discharge application. Law in regard to consideration of discharge application is being considered by the Supreme Court in the case of **Vishnu Kumar Shukla and another vs State of UP 2013 INSC 1026** and relevant part thereof is mentioned hereinafter:-

“19. In Rumi Dhar v. State of West Bengal, (2009) 6 SCC 364, this Court held that the Judge concerned with an application under Section 239, CrPC has to ‘... go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been

made out or not as a strong suspicion in regard thereto shall subserve the requirements of law.’

20. In *State of Tamil Nadu v. N Suresh Rajan*, (2014) 11 SCC 709, it was observed notwithstanding the difference in language of Sections 227 and 239, CrPC, the approach of the Court concerned is to be common under both provisions. The principles holding the field under Sections 227 and 228, CrPC are well-settled, courtesy, inter alia, *State of Bihar v. Ramesh Singh*, (1977) 4 SCC 39; *Union of India v. Prafulla K Samal*, (1979) 3 SCC 4; *Stree Atyachar Virodhi Parishad v. Dilip N Chordia*, (1989) 1 SCC 715; *Niranjana Singh Karam Singh Punjabi v. Jitendra B Bijjaya*, (1990) 4 SCC 76; *Dilawar B Kurane v. State of Maharashtra*, (2002) 2 SCC 135; *Chitresh K Chopra v. State (Government of NCT of Delhi)*, (2009) 16 SCC 605; *Amit Kapoor v. Ramesh Chander*, (2012) 9 SCC 460; *Dinesh Tiwari v. State of Uttar Pradesh*, (2014) 13 SCC 137; *Dipakbhai Jagdishchandra Patel v. State of Gujarat*, (2019) 16 SCC 547; and *State (NCT of Delhi) v. Shiv Charan Bansal*, (2020) 2 SCC 290. We need only refer to some, starting with *Prafulla K Samal* (supra), where, after considering *Ramesh Singh* (supra), *K P Raghavan v. M H Abbas*, AIR 1967 SC 740 and *Almohan Das v. State of West Bengal*, (1969) 2 SCR 520, it was laid down as under:

‘10. Thus, on a consideration of the authorities

mentioned above, the following principles emerge:

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

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

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

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on.

This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.'

(emphasis supplied)

21. In *Niranjan Singh Karam Singh Punjabi* (supra), this Court was alive to reality, stating that '... it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.' If a view gives rise to suspicion, as opposed to grave suspicion, the Court concerned is empowered to discharge the accused, as pointed out in *Sajjan Kumar v. Central Bureau of Investigation*, (2010) 9 SCC 368. The Court, in *Dinesh Tiwari* (supra) had reasoned that if the Court concerned opines that there is ground to presume the accused has committed an offence, it is competent to frame a charge even if such offence is not mentioned in the Charge Sheet. As to what is 'strong suspicion', reference to *Dipakbhai Jagdishchandra Patel* (supra) is warranted, where it was explained that it is '... the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.'

22. In a recent judgment viz. *State of Gujarat v. Dilipsinh Kishorsinh Rao*, 2023 INSC 894, 2023 SCC OnLine SC 1294. this Court held:

'7. It is trite law that application of judicial mind being necessary to determine whether a case has been made out by the prosecution for proceeding with trial and it would not be necessary to dwell into the pros and cons of the matter by examining the defence of the accused when an application for discharge is filed. At that stage, the trial judge has to merely examine the evidence placed by the prosecution in order to determine whether or not the grounds are sufficient to proceed against the accused on basis of charge sheet material. The nature of the evidence recorded or collected by the investigating agency or the documents produced in which prima facie it reveals that there are suspicious circumstances against the accused, so as to frame a charge would suffice and such material would be taken into account for the purposes of framing the charge. If there is no sufficient ground for proceeding against the accused necessarily, the accused would be discharged, but if the court is of the opinion, after such consideration of the material there are grounds for presuming that accused has committed the offence

which is triable, then necessarily charge has to be framed.

8. At the time of framing of the charge and taking cognizance the accused has no right to produce any material and call upon the court to examine the same. No provision in the Code grants any right to the accused to file any material or document at the stage of framing of charge. The trial court has to apply its judicial mind to the facts of the case as may be necessary to determine whether a case has been made out by the prosecution for trial on the basis of charge-sheet material only.

9. If the accused is able to demonstrate from the charge-sheet material at the stage of framing the charge which might drastically affect the very sustainability of the case, it is unfair to suggest that such material should not be considered or ignored by the court at that stage. The main intention of granting a chance to the accused of making submissions as envisaged under Section 227 of the Cr. P.C. is to assist the court to determine whether it is required to proceed to conduct the trial. Nothing in the Code limits the ambit

of such hearing, to oral hearing and oral arguments only and therefore, the trial court can consider the material produced by the accused before the I.O.

10. It is settled principle of law that at the stage of considering an application for discharge the court must proceed on an assumption that the material which has been brought on record by the prosecution is true and evaluate said material in order to determine whether the facts emerging from the material taken on its face value, disclose the existence of the ingredients necessary of the offence alleged. ...

xxx

11. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged. The expression "the record of the case" used in Section 227 Cr. P.C. is to be understood as the documents and articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. The submission of the accused is to be confined to the material produced by the investigating agency.

12. *The primary consideration at the stage of framing of charge is the test of existence of a prima-facie case, and at this stage, the probative value of materials on record need not be gone into. This Court by referring to its earlier decisions in the State of Maharashtra v. Som Nath Thapa, (1996) 4 SCC 659 and the State of MP v. Mohan Lal Soni, (2000) 6 SCC 338 has held the nature of evaluation to be made by the court at the stage of framing of the charge is to test the existence of prima-facie case. It is also held at the stage of framing of charge, the court has to form a presumptive opinion to the existence of factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial.'*

(emphasis supplied)''

17. I have also perused the literature supplied by the applicant in discharge application, which is part of present proceedings also, that insecticides, if consumed in any manner, may be a reason for myocardial infraction. A theory is put up by applicant that presence of insecticide found in the viscera report could

be due to exposure of surrounding places, but at this stage such argument could not be accepted since there is no material before this Court that the deceased was exposed to any such places where there was extensive use of insecticides.

18. According to the viscera report organo-chloro insecticide was found in stomach, intestine, liver, kidney and spleen of deceased which could be found if there was intake of such pesticide. The report dated 25.10.2017 states that 'No colour change observed exclude MI (Myocardial Infarction)'. The subsequent report dated 26.08.2019 is from State Medico Legal Cell which is self contrary as well, as it has not perused above report dated 25.10.2017. It also states that 'No colour change Heart attack is excluded by this pattern', otherwise also it would be subject of trial only. It would not be safe to rely solely on these reports at the stage of Discharge as it would be contrary to **Vishnu Kumar Shukla (Supra)**. The applicant-in-person, is not able to convince the Court that his wife died under natural circumstances, due to myocardial infarction and not due to intake of insecticides. Therefore, the Court is of the considered opinion that death of wife of the applicant was not natural.

19. The next question for consideration is that whether allegation of Section 306 I.P.C. is made out or not. In this regard Court takes note of circumstances under which dead body was found. The Court also takes note that on 17.4.2017, on applicant's directions, some medicine was handed over to his wife. The Court also take note of the statements recorded during investigation that it was a consistent case of complainant and his family members that the applicant has illicit relationship with one co-accused

‘Arti’. Since the applicant got married with deceased, he extended demand of dowry and put deceased under such circumstances that she was left with no other option but to commit suicide.

20. At this stage the Court also takes note of judgements placed by the applicant-in-person. So far as Section 306 I.P.C. is concerned, judgements are mainly after the stage of trial whereas, in present case the trial has still not commenced.

21. At this stage it could not be denied that there was proximity to positive action of the applicant. The Court also takes note of judgements passed by the Supreme Court in **Central Bureau of Investigation vs Aryan Singh and others, 2023 SCC Online SC 379** and **Ram Prakash Chadha Vs. The State of U.P. 2024 INSC 522** in regard to invoking of inherent powers and relevant paras of the same are reproduced respectively hereinafter:-

Relevant paras of **Central Bureau of Investigation Vs. Aryan Singh (Supra)**:-

“10. From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the

powers under Section 482 Cr. P.C., the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. This is not the stage where the prosecution/investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution/investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under Section 482 Cr. P.C., the Court has a very limited jurisdiction and is required to consider “whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not”.

11. One another reason pointed by the High Court is that the initiation of the criminal proceedings/proceedings is malicious. At this stage, it is required to be noted that the investigation was handed over to the CBI pursuant to the directions issued by the High Court. That thereafter, on conclusion of the investigation, the accused persons have been chargesheeted. Therefore, the High Court has erred in observing at this stage that the initiation of the criminal proceedings/proceedings is malicious. Whether the criminal

proceedings was/were malicious or not, is not required to be considered at this stage. The same is required to be considered at the conclusion of the trial. In any case, at this stage, what is required to be considered is a prima facie case and the material collected during the course of the investigation, which warranted the accused to be tried."

Relevant paras of **Ram Prakash Chadha (Supra):-**

"19. In the light of the decisions referred supra, it is thus obvious that it will be within the jurisdiction of the Court concerned to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused concerned has been made out. We are of the considered view that a caution has to be sounded for the reason that the chances of going beyond the permissible jurisdiction under Section 227, Cr. P.C., and entering into the scope of power under Section 232, Cr. P.C., cannot be ruled out as such instances are aplenty. In this context, it is relevant to refer to a decision of this Court in Om Parkash Sharma v. CBI (2000) 5 SCC 679. Taking note of the language of Section 227, Cr. P.C., is in negative terminology and that the language in Section 232, Cr. P.C., is in the positive terminology and considering this distinction between the two, this Court held that it would not be open to the Court while considering an application under Section 227, Cr.

P.C., to weigh the pros and cons of the evidence alleged improbability and then proceed to discharge the accused holding that the statements existing in the case therein are unreliable. It is held that doing so would be practically acting under Section 232, Cr. P.C., even though the said stage has not reached. In short, though it is permissible to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case is made out against the accused, on appreciation of the admissibility and the evidentiary value such materials brought on record by the prosecution is impermissible as it would amount to denial of opportunity to the prosecution to prove them appropriately at the appropriate stage besides amounting to exercise of the power coupled with obligation under Section 232, Cr. P.C., available only after taking the evidence for the prosecution and examining the accused.

20. Even after referring to the aforesaid decisions, we think it absolutely appropriate to refer to a decision of the Madhya Pradesh High Court in Kaushalya Devi v. State of MP 2003 SCC OnLine MP 672. It was held in the said case that if there is no legal evidence, then framing of charge would be groundless and compelling the accused to face the trial is contrary to the procedure offending Article 21 of the Constitution of India. While agreeing with the view, we make it clear that the expression 'legal evidence' has to be construed only as evidence disclosing prima

facie case, 'the record of the case and the documents submitted therewith'.

21. The stage of Section 227, Cr. P.C., is equally crucial and determinative to both the prosecution and the accused, we will dilate the issue further. In this context, certain other aspects also require consideration. It cannot be said that Section 227, Cr. P.C., is couched in negative terminology without a purpose. Charge sheet is a misnomer for the final report filed under Section 173 (2), Cr. P.C., which is not a negative report and one that carries an accusation against the accused concerned of having committed the offence (s) mentioned therein.

22. In cases, where it appears that the said offence(s) is one triable exclusively by the Court of Session, the Magistrate shall have to commit the case to the Court of Session concerned following the prescribed procedures under Cr. P.C. In such cases, though it carries an accusation as aforementioned still legislature thought it appropriate to provide an inviolable right as a precious safeguard for the accused, a pre-battle protection under Section 227, Cr. P.C. Though, this provision is couched in negative it obligated the court concerned to unflinching consider the record of the case and document submitted therewith and also to hear the submissions of the accused and the prosecution in that behalf to arrive at a conclusion as to whether or not sufficient ground for proceeding against the accused is

available thereunder. Certainly, if the answer of such consideration is in the negative, the court is bound to discharge the accused and to record reasons therefor. The corollary is that the question of framing the charge would arise only in a case where the court upon such exercise satisfies itself about the prima facie case revealing from "the record of the case and the documents submitted therewith" against the accused concerned. In short, it can be said in that view of the matter that the intention embedded is to ensure that an accused will be made to stand the ordeal of trial only if 'the record of the case and the documents submitted therewith' discloses ground for proceeding against him. When that be so, in a case where an application is filed for discharge under Section 227, Cr. P.C., it is an irrecusable duty and obligation of the Court to apply its mind and answer to it regarding the existence of or otherwise, of ground for proceeding against the accused, by confining such consideration based only on the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in that behalf. To wit, such conclusion on existence or otherwise of ground to proceed against the accused concerned should not be and could not be based on mere suppositions or suspicions or conjectures, especially not founded upon material available before the Court. We are not oblivious of the fact that normally, the Court is to

record his reasons only for discharging an accused at the stage of Section 227, Cr. P.C. However, when an application for discharge is filed under Section 227, Cr. P.C., the Court concerned is bound to disclose the reason(s), though, not in detail, for finding sufficient ground for rejecting the application or in other words, for finding prima facie case, as it will enable the superior Court to examine the challenge against the order of rejection.”

22. In the aforesaid circumstances, the Court is of considered opinion that at this stage it could not be held that wife of applicant died in natural circumstances, rather, on basis of material available, there is more than a prima-facie case against the applicant that deceased died under unnatural circumstances, due to intake of a poisonous substance. For sake of argument, if it is accepted that cause of death was due to Myocardial Infarction, still on basis of research reports available on record, it could not be ruled out that immediate cause of it was intake of poisonous substance found in different parts of dead body.

23. The circumstances under which her dead body was found as well as conduct of the applicant, just in the proximity of the occurrence, that he left for other station and returned back after two days as well as evidence collected during investigation, there are more than prima-facie evidences against the applicant as referred in **Central Bureau of Investigation Vs. Aryan singh and others (Supra)**. At this stage following observation of **Vishnu Kumar Shukla (Supra)** being relevant are repeated that “at the stage of framing of charge, the court has to form a presumptive opinion to the existence of factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of

the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial.’

24. In the aforesaid circumstances I do not find that the Trial Court has committed any error in rejecting the discharge application. The reasons assigned are sustainable legally. **Accordingly, Application U/S 482 No. 6045 of 2020 is rejected.**

25. **The application U/S 482 No. 8645 of 2021** is being filed by the applicant challenging framing of charge which is only a consequential order, since the Court has already rejected the challenge to rejection of discharge application, therefore, the **present Application U/S 482 No. 8645 of 2021 is also rejected.**

26. So far as **Application U/S 482 No. 16035 of 2021** is concerned, it is being filed by complainant to alter charge from Section 306 I.P.C to Sections 302 and 328 I.P.C., however as already referred above, no objection was raised by the complainant at the stage of framing of charge or earlier during the discharge application, therefore, at this stage the prayer cannot be considered, however, in terms of Section 216 Cr.P.C., learned Trial Court would be at liberty to alter the charge on basis of material available on records. **The Application U/S 482 No. 16035 of 2021 is accordingly disposed of.**

(2024) 9 ILRA 1155

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 18.09.2024

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Application U/S 482 No. 12482 of 2024

**Subhash Chandra & Ors.
Versus
State of U.P. & Anr.**

**...Applicants
...Respondents**

Counsel for the Applicants:

Sri Gaurav Pundir, Sri N.I. Zafri (Sr. Adv.)

Counsel for the Respondents:

Sri Ayush Mishra, G.A., Sri Hitesh Kumar Mishra,
Sri Sunil Kumar Misra

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 173, 173(1), 173(2) & 482 - Indian Penal Code, 1860 - Sections 420, 467, 468, 471, 341, 504 & 506 - Constitution of India, 1950 - Article 20 & 21

- Application u/s 482 - for quashing the impugned summoning order - complaint - allegations are that the applicants created two forged 'Power of attorneys' to fraudulently transfer the shops, which was in the names of the complainant's father & mother as well as restraining, abusing and causing threat to life and property of the complainant - trial court directed to registered FIR - investigation - within 18 days, police filed closure report - dissatisfied, complainant filed protest petition - allowed - applicants were summoned - instant application - Evaluation of police proceedings - court finds that - U.P. on close examination of closure report, it was revealed that the I.O. relied solely on the accused's St.ment treating it is an unquestionable truth and dismissed the victim's account, - no effort was made by the I.O. to test the adversity of the accused's St.ment by way of taking the assistance of scientific methods, - nor the C.J.M. or I.O. bothered for the alleged original forged Power of Attorneys which forms the basis for the complainant's entire case - sad part is that this is not the story of just one case; this court's docket is filled with similar petitions where I.O., despite allegations of cheating by personation, mischief, creation of forged documents, forgery of public records, forgery of valuable securities, forgery intended to harm reputation, fail to conduct proper investigations - yet the police continue to conduct investigations in an outdated manner, heavily relying on St.ments recorded u/s 161 Cr.P.C. without utilizing available scientific tools to establish the guilt of the accused - methods of committing crimes have changed drastically, yet the approach of the police in apprehending accused individuals and conducting investigations remain rooted in outdated

methods - this not only wastes significant court time but ultimately lead to a failure of justice - held, - on the next date of hearing, the D.G. of Training HQRS shall file the current training curriculum and schedule for police officers above the rank of constable, focusing on basic training and the fundamentals of investigation, including: - (i) registration of FIRs; (ii) arresting an accused; (iii) seizing incriminating material (including in offenses against the human body and property, as well as cybercrime); (iv) basic knowledge of the medico-legal aspects of investigation; (v) discovering facts that lead to the guilt of the accused; (vi) recording St.ments under Sections 180 and 183 of the Bhartiya Nagarik Suraksha Sanhita, 2023, including their relevance as evidence and related procedures; (vii) the importance of scientific evidence, such as fingerprints, forensic reports, weapon seizure, ballistic reports, blood samples, DNA, CDR, and CCTV footage; (viii) retrieving evidence from pen drives and hard disks, downloading evidence from social media, and the procurement and seizure of such evidence, as well as compliance with Section 63 of the Bhartiya Sakshya Adhiniyam, 2023; (ix) knowledge of collecting blood samples; and (x) precautions to be taken by Investigating Officer while preparing the charge-sheet [checklist, if any; or list of do's & don'ts], (xi) role and accountability of the S.S.P. in supervising investigations - date fixed - Interim order, granted earlier, shall continue till the next date of listing. (Para - 9, 12, 13, 28)

Application u/s 482 is pending. (E-11)

List of Cases cited:

1. Pakhandu & ors. Vs St. of U.P. & anr. - (2001) SCC OnLine All 967,
2. Harkesh Singh & ors. Vs St. of U.P. (2001) 43 All CRIC 720,
3. Anwar & ors. Vs St. of U.P & ors. - LAWS (ALL) 2016-5-560,
4. Dablu Kujur Vs St. of Jharkhand - (2024) 6 SCC 758,

5. R.K. Dalmia etc. Vs Delhi Administration - (1962) SCC OnLine SC 83,

6. Sharif Ahmed & anr.Vs St. of U.P. & anr.- (2024) SCC OnLine SC 726.

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri N.I. Zafri, learned Senior Counsel, assisted by Shri Gaurav Pundir, learned counsel for the applicants, Shri S.K. Mishra, learned counsel for the complainant, and learned A.G.A. for the State-respondent.

2. In the instant case, the applicants challenged a summoning order, passed by the Chief Judicial Magistrate on a protest petition owing to filing a closure report by the Police within 18 days of the registration of the FIR. Succinctly, the crux of the allegations is that the complainant's father had four shops in his name bearing no.7/11, 7/1, 7/2, 7/8, and his mother had two shops in her name bearing No. 7/11 and 7/4, respectively, situated at Ramganj, Sarai Hakeem Bannaderi, District Aligarh. Petitioner no. 3, who is the elder brother of the complainant's father, in connivance with other applicants, executed two forged power of attorneys dated 06.04.2023 in which, apparently, Amita Rani- the mother of complainant, authorized Gaurav and his wife Priyanka to execute the sale-deed and appoint advocate, and to take care of the demised property for and on her behalf, and Pradeep Kumar – the father of complainant, authorized Subhash Chandra, his younger brother to execute the sale deed and appoint advocate, and to take care of the demised property for and on his behalf, besides, other allegations of restraining, abusing and causing threat to life and property of the complainant.

3. Based on the aforesaid facts, learned Chief Judicial Magistrate, vide

order dated 10.01.2024, directed S.H.O. P.S. Civil Lines, Aligarh to register the FIR against the applicants and consequent thereupon, a case crime no. 8/2024, under Sections 420, 467, 468, 471, 341, 504, 506 I.P.C. was registered against (i) Gaurav S/o Subhash Chandra, (ii) Priyanka W/o Gaurav, (iii) Subhash Chandra S/o Late Shri Krishan Murari Lal, (iv) Saurabh S/o Subhash Chandra, (v) Ankur S/o Subhash Chandra, (vi) Richa W/o Saurabh, and, (vii) Priya W/o Ankur, all resident of Ramghat Road, Mahuwa Kheda, Aligarh at Police Station Civil Lines, District Aligarh.

4. The investigation was concluded within 18 days. The police decided to submit a closure report based on the statements of the accused, an inspection report of the crime scene, witness statements, CCTV footage, statements from police officers on duty, as well as testimonies from some fruit sellers and a stamp vendor, along with the notary public. Dissatisfied with the closure report, the complainant filed a protest petition against the applicants. This protest petition was allowed by a summoning order dated 03.04.2024, leading the applicants to bring the matter before this Court.

5. Shri N.I. Jafri, learned Senior Counsel for the applicants, submits that; (i) the impugned summoning order is in the teeth of **Pakhandu and Others v. State of U.P. & Anr.**¹, **Harkesh Singh and Others v. State of U.P.**² and **Anwar & Ors. v. State of U.P & Ors.**³, (ii) learned trial Court has placed reliance upon an affidavit containing certain documents- which were, of course not part of the closure report - filed by the complainant in support of the protest petition, erroneously, (iii) there is a civil suit bearing Original Suit No. 567 of 2016 and 568 of 2016 pending between the

parties, (iv) the Investigating Officer has rightly concluded the investigation and filed the closure report, and (v) both the power of attorneys dated 06.04.2023 is not a registered documents and are not supported by proper seal, signatures and stamps, and no illegal benefit could have been derived out of such documents.

6. Per contra, Shri Ajay Singh, holding brief of Shri Hitesh Kumar Mishra, learned counsel for the complainant/respondent no.2, submits that the Investigating Officer has conducted a tainted and biased investigation, which has curtailed the complainant's legitimate expectation of fair investigation as enshrined as part of constitutional rights guaranteed under Article 20 and 21 of the Constitution of India and thus, argues that; (i) the Investigating Officer has deliberately with the purpose to give undue advantage to the accused-petitioners, did not send the forged power of attorney dated 06.04.2023 for scientific examination; the complainant's father allegedly signed one and his mother signed the other, (ii) the specimen signature of Smt. Amita Rani and Shri Pradeep Kumar, the alleged executors of power of attorney and witness Gaurav Goyal, Ankita Agarwal W/o Gaurav Goyal; Notary Public, the Stamp Vendor and other persons who were signatories to the forged documents are not taken by the I.O., (iii) the CCTV footage, on which the I.O. has placed reliance, has not been sent to the F.S.L., (iv) the investigation has not been conducted in the direction in accordance with the ingredients of the offence, (v) the I.O. made no efforts to extract the truth of the case, (vi) the investigation was not fair and has been conducted with ulterior motive, and (vii) the investigation was conducted in collusion with the accused persons.

7. In brief, the main allegation is that the applicants created two forged powers of attorney to fraudulently transfer the shop, which was in the names of the complainant's father and mother. The entire investigation relies on statements recorded by the police under Section 161 of the Cr.P.C., and the investigation was botched-up, and hurriedly completed in just 18 days.

8. This Court vide order dated 22.04.2024 called upon learned A.G.A. to explain why the Investigating Officer has not taken the forensic and scientific assistance to determine the genuineness of a power of attorneys dated 06.04.2023 by way of an affidavit of S.H.O. P.S. Civil Lines, Alighrah explaining; (i) what precluded the Investigating Officer from taking the specimen signature of Smt. Amita Rani, Shri Pradeep Kumar, Shri Gaurav Goyal, Smt. Ankita Agarwal, Notary Public who had notarized the power of attorney dated 06.04.2023 and other concerned persons whom he could have deemed fit and proper to extract the truth of execution of the documents dated 06.04.2023, (ii) list of the cases assigned to S.I. Rajesh Kumar for investigation since his posting at P.S. Civil Lines, the lists shall include date of assignment of the case(s) with brief description of each case, status of investigation, date of filing of the charge sheet, if any, and other relevant information which discloses the details about the pendency and progress of investigation of each case from the date of registration of F.I.R. (s) (total number of cases assigned), (iii) as to why preference has been accorded to the instant case in concluding the investigation just within a period of 18 days; the F.I.R. was registered on 10.01.2024 and the investigation was concluded on 29.01.2024, (iv) the S.H.O. P.S. Civil Line shall also file the list of such

F.I.R.s (all F.I.R.s registered at P.S. Civil Lines) in which investigation is still in progress, in tabular form, containing date of registration of F.I.R. and status of investigation till date. The S.H.O. P.S. Civil Lines was directed to file an affidavit with the endorsement of S.S.P. Aligarh that the terms of the order dated 22.04.2024 are complied with in letter and spirit.

9. It is noteworthy that, upon close examination of the closure report, it was revealed that the Investigating Officer relied solely on the accused's statement and dismissed the victim's account, without even requesting the crucial document. The closure report was filed based entirely on the accused's statement, treating it as unquestionable truth and no effort was made by the Investigating Officer to test the adversity of the accused's statement by way of taking the assistance of scientific methods. Surprisingly, neither the Learned Chief Judicial Magistrate nor the Investigating Officer bothered for the alleged original forged Power of Attorney, which forms the basis of the complainant's entire case.

10. In compliance with the aforesaid order, S.H.O., P.S. Civil Lines filed an affidavit, but same was in complete disregard of the terms of the order passed by this Court. Subsequently, the S.S.P. was asked to file his personal affidavit, which turn out to be worst than the affidavit of S.H.O. Leaving no other option, the A.C.S. (Home) was directed to go through the order dated 22.4.2024 and 17.5.2024 passed by this Court in the instant case along with the personal affidavit filed by the S.S.P., Aligarh. It was also directed that the A.C.S. (Home) shall examine the closure report and the protest petition filed by the complainant. Based on the aforesaid

deliberations, it was directed a personal affidavit be filed by an official not below the rank of Secretary in the Home Department of U.P. addressing the points outlined herein (i) whether the orders dated 22.4.2024 and 17.5.2024 have been complied with in both letter and spirit. If these orders have not been fully complied with, the affidavit should explain what precluded the S.S.P. Aligarh to furnish the list of FIRs pending investigation at the Civil Lines police station, as referenced in paragraphs 8 (iii) and (vi) of the order dated 22.4.2024. It should be noted that the S.S.P. Aligarh only provided the list of cases registered in the year 2024, for reasons known only to him, (ii) what remedies are available to the Government when the senior-most police officer of the District disobeys orders issued by the Constitutional Courts?, intentionally or otherwise.

11. On examination of the affidavit filed by the Secretary (Home), it's revealed that the same was not adequate and the matter was adjourned on the request of learned Government Advocate to file a better affidavit complying with the terms of order dated 21.5.2024.

12. The sad part is that this is not the story of just one case; this Court's docket is filled with similar petitions where Investigating Officers, despite allegations of cheating by personation, mischief, creation of forged documents, forgery of public records, forgery of valuable securities, forgery intended to harm reputation, and using forged documents or electronic records as genuine, fail to conduct proper investigations. Cases also include offenses like possession of counterfeit items with intent to commit forgery, use of forged trademarks,

counterfeit currency or banknotes, fraudulent property registrations, publication of sexually explicit material in electronic form, video voyeurism, breach of confidentiality, data leaks by intermediaries, e-commerce fraud (including phishing and identity theft), and offensive messages through communication services. Yet, the police continue to conduct investigations in an outdated manner, heavily relying on statements recorded under Section 161 Cr.P.C., without utilizing available scientific tools to establish the guilt of the accused.

13. As time has progressed, the methods of committing crimes have changed drastically, yet the approach of the police in apprehending accused individuals and conducting investigations remains rooted in outdated methods. The most troubling aspect is that this fosters corruption within the police force, increasing the likelihood of false accusations, while the real offenders often escape their grasp. Consequently, the real culprits frequently evade justice. This not only wastes significant court time but ultimately leads to a failure of justice.

14. Recently, in a case before the Supreme Court in Special Leave to Appeal (Crl.) No. 10536 of 2023, titled Sanuj Bansal v. State of U.P. & Anr., the D.G.P., Uttar Pradesh gave an undertaking that chargesheet in Uttar Pradesh are not filed on the basis of the confessional statement, this undertaking needs to be implemented by the police across the entire state.

15. It is worth noting that charge sheets are often filed in routine template formats without containing sufficient material for the Courts to reasonably conclude that the offenses mentioned are

prima facie made out. While the Case Diary (C.D.) may outline a sequence of events, it cannot substitute for the requirement of a detailed account of the steps taken by the Investigating Officer, along with the material facts necessary to establish the ingredients of the sections under which the charge sheets are filed to part of the report under section 173(2) Cr.P.C.

16. The Supreme Court in **Dablu Kujur v. State of Jharkhand**⁴ has held that Investigating Officers while submitting the charge sheet/police report, did not comply with the requirements of Section 173(2) Cr.P.C. The mandatory requirement to be complied with by the Investigating Officer in the police report/chargesheet is laid down in Section 173 Cr.P.C., more particularly sub-section (2) thereof. A charge - sheet is nothing but a final report of the police officer under Section 173(2) Cr.P.C. It is an opinion or intimation of the Investigating officer to the Court concerned that on the material collected during the course of the investigation, an offence appears to have been committed by the particular person or persons or that no offence appears to have been committed.

17. The relevant portion of **Dablu Kujur's case (supra)** is reproduced herein below:

“19. The abovereferred discussion has been necessitated for highlighting the significance of the compliance of requirements of the provisions contained in Section 173(2) Cr.P.C.

20. Ergo, having regard to the provisions contained in Section 173, it is hereby directed that the Report of police officer on the

completion of the investigation shall contain the following:

20.1. A report in the form prescribed by the State Government stating-

(a) The names of the parties;

(b) The nature of the information;

(c) The names of the persons who appear to be acquainted with the circumstances of the

case;

(d) Whether any offence appears to have been committed and, if so, by whom;

(e) Whether the accused has been arrested;

(f) Whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) Whether the Report of medical examination of the woman has been attached where investigation relates to an offence under [Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or Section 376E of the Indian Penal Code (45 of 1860)]

20.2 If upon the completion of investigation, there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, the Police officer in charge shall clearly state in the Report about the compliance of Section 169 Cr.PC.

20.3. When the Report in respect of a case to which Section 170 applies, the police officer shall

forward to the Magistrate along with the Report, all the documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation; and the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

20.4. In case of further investigation, the police officer in charge shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and shall also comply with the details mentioned in the above sub paras 20.1 to 20.3.

21. It is further directed that the officer in charge of the police stations in every State shall strictly comply with the afore-stated directions, and the non-compliance thereof shall be strictly viewed by the courts concerned in which the police reports are submitted."

18. In the case of **R.K. Dalmia etc. v. Delhi Administration**⁵ a reference was made to Section 173(1) Cr.P.C. of the 1898 Code that the charge-sheet must contain name of the parties, nature of the information and the names of the persons who appears to be acquainted with the circumstances of the case.

19. The Supreme Court in **Sharif Ahmed and another v. State of Uttar Pradesh & Anr**⁶ while dealing with the requirements of charge-sheet, examined some of the regularly referred and relied upon judgments of the Supreme Court, the relevant portion of the Sharif Ahmed's case

(supra) is extracted herein below, for ready reference:

“22. Recently a three Judge Bench of this Court in Zakia Ahsan Jafri v. State of Gujarat (2022) 6 SCR 1: 2022 INSC 653, has observed:

11. This Court in Dayal Singh noted that the investigating officer is obliged to act as per the Police Manual and known canons of practice while being diligent, truthful and fair in his/her approach and investigation. It has been noted in the reported decision that an investigating officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Concededly, upon completion of investigation, the investigating officer is obliged to submit Report setting out prescribed details, to the Magistrate empowered to take cognizance of the offence referred to therein, without unnecessary delay. The Report so presented is the conclusion reached by the investigating officer on the basis of materials collected during investigation. The duty of the investigating officer is to collate every relevant information/material during the investigation, which he must believe to be the actual course of events and the true facts unraveling the commission of the alleged crime and the person involved in committing the same. He is expected to examine the materials from all angles. In the event, there is sufficient evidence or reasonable ground that an offence

appears to have been committed and the person committing such offence has been identified, the investigating officer is obliged to record his opinion in that regard, as required by Section 173(2)(i)(d) of the Code. In other words, if the investigating officer intends to send the accused for trial, he is obliged to form a firm opinion not only about the commission of offence, but also about the involvement of such person in the commission of crime.

12. Such opinion is the culmination of the analysis of the materials collected during the investigation - that there is “strong suspicion” against the accused, which eventually will lead the concerned Court to think that there is a ground for “presuming” that the accused “has” committed the alleged offence; and not a case of mere suspicion. For being a case of strong suspicion, there must exist sufficient materials to corroborate the facts and circumstances of the case; and be of such weight that it would facilitate the Court concerned to take cognizance of the crime and eventually lead it to think (form opinion) that there is ground “for presuming that the accused has committed an offence”, as alleged - so as to frame a charge against him in terms of Section 228(1) or 246(1) of the Code, as the case may be. For taking cognizance of the crime or to frame charges against the accused, the Court must analyze the Report filed by the investigating officer and all the materials appended thereto and then form an

independent prima facie opinion as to whether there is ground for “presuming” that the accused “has” committed an offence, as alleged. (It is not, “may” have or “likely” to have committed an offence, but a ground for presuming that he has committed an offence). The Magistrate in the process may have to give due weightage to the opinion of the investigating officer. If such is to be the eventual outcome of the final Report presented by the investigating officer, then there is nothing wrong if he applies the same standard to form an opinion about the materials collected during the investigation and articulate it in the Report submitted under Section 173 of the Code. It may be useful to refer to the decisions adverted to in Afroz Mohd. Hasanfata including in the case of Ramesh Singh and I.K. Nangia.

xx xx xx

63. Needless to underscore that every information coming to the investigating agency must be regarded as relevant. However, the investigating agency is expected to make enquiries regarding the authenticity of such information and after doing so must collect corroborative evidence in support thereof. In absence of corroborative evidence, it would be merely a case of suspicion and not pass the muster of grave suspicion, which is the pre-requisite for sending the suspect for trial. This is the mandate in Section 173(2)(i)(d) of the Code, which postulates that the investigating officer in his Report must indicate whether any

offence appears to have been committed and if so, by whom. The opinion of the investigating officer formed on the basis of materials collected during the investigation/enquiry must be given due weightage. That would only be the threshold, to facilitate the concerned Court to take cognizance of the crime and then frame charge if it is of the opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XIX of the Code.

23. In *K. Veeraswami v. Union of India and others* (1991) 3 SCC 655, K. Jagannatha Shetty, J. pronounced the judgment for himself and M.N. Venkatachaliah, J. (as His Lordship then was) on the question of contents of the chargesheet and observed:

75. In the view that we have taken as to the nature of the offence created under clause (e), it may not be necessary to examine the contention relating to ingredient of the offence. But since the legality of the chargesheet has been impeached, we will deal with that contention also. Counsel laid great emphasis on the expression “for which he cannot satisfactorily account” used in clause (e) of Section 5(1) of the Act. He argued that that term means that the public servant is entitled to an opportunity before the Investigating Officer to explain the alleged disproportionality between assets and the known sources of income. The Investigating Officer is required to consider his explanation and the chargesheet

filed by him must contain such averment. The failure to mention that requirement would vitiate the chargesheet and renders it invalid. This submission, if we may say so, completely overlooks the powers of the Investigating Officer. The Investigating Officer is only required to collect material to find out whether the offence alleged appears to have been committed. In the course of the investigation, he may examine the accused. He may seek his clarification and if necessary he may cross check with him about his known sources of income and assets possessed by him. Indeed, fair investigation requires as rightly stated by Mr. A.D. Giri, learned Solicitor General, that the accused should not be kept in darkness. He should be taken into confidence if he is willing to cooperate. But to state that after collection of all material the Investigating Officer must give an opportunity to the accused and call upon him to account for the excess of the assets over the known sources of income and then decide whether the accounting is satisfactory or not, would be elevating the Investigating Officer to the position of an enquiry officer or a judge. The Investigating Officer is not holding an enquiry against the conduct of the public servant or determining the disputed issues regarding the disproportionality between the assets and the income of the accused. He just collects material from all sides and prepares a report which he files in the Court as chargesheet.

The latter portion of the aforesaid paragraph, referring to the details of the offence and the requirement for them to be proved in order to bring home the guilt of the accused at the later stage (the stage of trial) by adducing acceptable evidence, has to be understood in the context that the chargesheet need not elaborately evaluate the evidence, as the process of evaluation is a matter of trial. This does not mean that the chargesheet should not disclose or refer to the facts as to meet the requirements of Section 173(2) of the Code, and the mandate of the State rules. Further, the earlier portion of the same paragraph, while referring to the opinion of the investigating officer, does so to demonstrate the significance of the opinion of the investigating officer at this stage. However, this does not preclude the Magistrate from exercising her powers in adopting an approach independent from such opinion, as has been held by this Court in *Bhagwant Singh* (supra) and *Minu Kumari* (supra).

24. It is the police report that would enable the Magistrate to decide a course of action from the options available to him. The details of the offence and investigation are not supposed to be a comprehensive thesis of the prosecution case, but at the same time, must reflect a thorough investigation into the alleged offence. It is on the basis of this record that the Court can take effective cognisance of the offence and proceed to issue process in terms of Section 190(1)(b) and

Section 204 of the Code. In case of doubt or debate, or if no offence is made out, it is open to the Magistrate to exercise other options which are available to him.

25. In support of our reasoning, we would refer to the very next paragraph in the judgment of Shetty, J. in *K. Veeraswami (supra)* which reads as under:

“76. The chargesheet is nothing but a final report of police officer under Section 173(2) of the CrPC. The Section 173(2) provides that on completion of the investigation the police officer investigating into a cognizable offence shall submit a report. The Report must be in the form prescribed by the State Government and stating therein (a) the names of the parties; (b) the nature of the information; (c) the names of the persons who appear to be acquainted with the circumstances of the case; (d) whether any offence appears to have been committed and, if so, by whom (e) whether the accused has been arrested; (f) whether he had been released on his bond and, if so, whether with or without sureties; and (g) whether he has been forwarded in custody under Section 170. As observed by this Court in *Satya Narain Musadi v. State of Bihar* that the statutory requirement of the Report under Section 173(2) would be complied with if the various details prescribed therein are included in the Report. This Report is an intimation to the magistrate that upon investigation into a cognizable offence the

Investigating Officer has been able to procure sufficient evidence for the Court to inquire into the offence and the necessary information is being sent to the Court. In fact, the Report under Section 173(2) purports to be an opinion of the Investigating Officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the Court. The Report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175(5). Nothing more need be stated in the Report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence.

This paragraph examines the contents of the chargesheet and on elaboration of the same holds that it is in accordance with the terms of Section 173(2) of the Code as well as the provisions of the penal enactment. In furtherance of this, reference is made to *Satya Narain Musadi v. State of Bihar* (1980) 3 SCC 152, in stating that the chargesheet should comply with the statutory requirements, and the various details prescribed therein should be included in the Report.

26. The object and purpose of the police investigation is manifold. It includes the need to ensure transparent and free investigation to ascertain the facts, examine whether or not an offence

is committed, identify the offender if an offence is committed, and to lay before the Court the evidence which has been collected, the truth and correctness of which is thereupon decided by the Court.

27. In *H.N. Rishbud and Inder Singh v. State of Delhi* (1954) 2 SCC 934, this Court notes that the process of investigation generally consists of : 1) proceeding to the concerned spot, 2) ascertainment of facts and circumstances, 3) discovery and arrest, 4) collection of evidence which includes an examination of various persons, a search of places and seizure of things, and 5) formation of an opinion on whether an offence is made out, and filing the chargesheet accordingly. The formation of opinion is therefore the culmination of several stages that an investigation goes through. This Court in its decision in *Abhinandan Jha v. Dinesh Mishra* AIR 1968 SC 117 states that the submission of the chargesheet or the final Report is dependent on the nature of opinion formed, which is the final step in the investigation.

30. Our attention has been drawn to the format prescribed for the State of Uttar Pradesh, which by column 16 requires the investigating officer to state brief facts of the case. In addition, the State of Uttar Pradesh has issued a circular dated 19.09.2023, which refers to an earlier circular bearing No. 59 of 2016 dated 20.10.2016, and states that the investigation provisions contained in the Code and the police regulations with reference to Section 173 of the

Code are not being consistently complied with and followed by the investigating officers and the supervising officers. The need to provide lead details of the offence in the chargesheet is mandatory as it is in accord with paragraph 122 of the police regulations. Similar directions were issued on 09.09.2022 following the direction of the High Court of Judicature at Allahabad that a brief narration of the material collected during the investigation, which forms the opinion of the investigating officer, should be mentioned in the charge sheet.

31. Therefore, the investigating officer must make clear and complete entries of all columns in the chargesheet so that the Court can clearly understand which crime has been committed by which accused and what is the material evidence available on the file. Statements under Section 161 of the Code and related documents have to be enclosed with the list of witnesses. The role played by the accused in the crime should be separately and clearly mentioned in the chargesheet, for each of the accused persons.”

20. Criminal investigation in India has a long and complex history, deeply influenced by the country's socio-political and cultural evolution. The traditional methods have heavily relied on physical evidence, witness testimony, and, at times, methods of coercion and intimidation. The criminal investigation in India was primarily shaped by the colonial legacy, where policing was designed to control rather than serve justice impartially. While

these methods may have been effective in their time, but they often lacked the fairness, transparency and efficiency required for just law enforcement in a democratic society. The idea was to effectively maintain law and order for British administration rather than serve the purpose of law. The investigation often depended on secret information and physical evidence without support of scientific methods. Community policing, or relying on local networks of informants (commonly known as Chowkidars), was a crucial part of this system, especially in rural areas, there is no harm in relying upon the time -tested method of investigation but, as the method of committing crime has evolved, therefore police needs to upgrade their skills effectively and efficiently in today's time.

21. In the absence of modern forensic science techniques, police investigations heavily rely upon physical evidence found at the scene of the crime. This includes items like seizure of weapons, personal belongings, blood stains and finger prints. However, the ability to preserve and scientifically analyse was limited, which often led to heavy dependence on eye-witness testimony. However, the reliability of eye-witnesses testimony has always been a matter of concern, as it can be influenced by fear, bias or external pressure. Confessions are often regarded as the most conclusive form of evidence; however, unfortunately, this practice gave rise to widespread use of coercion and torture in police custody. The heavy reliance on the village headman (Chowkidar) is prone to bias and manipulation. Local informants could use their influence to settle personal scores or to target marginalized communities.

22. The drawback of old method of investigation system is (i) reliance on coercion and force; (ii) lack of scientific rigor- lack of scientific methods in the investigation leading to weak prosecution and, in many cases, results in acquittal of actual criminals; (iii) the influence of local elites breeds bias-ness and corruption; (iv) the reliance on outdated methods, coupled with bureaucratic inefficiency, lead to long delays in the investigating and judicial process denying timely justice to the victim, and there could be many more drawbacks.

23. The introduction of scientific tools, digital forensics, and legal reforms together shall bring a more transparent, effective and accountable system of criminal investigation. In 2023, the Indian Parliament passed three landmark bills aimed at overhauling the criminal justice system. These laws reflect the Government's intent to modernize the criminal justice system, streamline legal procedures, and adopt the evolving needs of society. However, while these legislative changes aim to provide a more efficient legal frame work, their success largely depends on the capability of law enforcement agencies to enforce these laws effectively. This is where the need for police reform becomes evident.

24. The police officers at the police station level in Uttar Pradesh, often lack the necessary training to deal with complex criminal cases, digital evidence, and new age crime such as cyber- crime, and frequently face challenges in effectively managing complex criminal cases due to a lack of specialized training. As crime evolves, particularly with the rise of digital evidence and cybercrime, traditional policing techniques often fall

short. Many officers are not adequately equipped to investigate crimes involving technology, such as hacking, online fraud, and identity theft. This gap in training can hinder their ability to gather, analyze, and interpret digital evidence effectively. Consequently, there is an urgent need for enhanced training programs that focus on modern investigative techniques, digital forensics, and the nuances of cyber law to empower police officers to address contemporary criminal challenges effectively.

25. The key advantages of the training programme may include; (i) may foster a sense of responsibility and self-discipline with greater flexibility and independence; (ii) without the pressure of deadlines and with deeper understanding, the officer can engage with result-oriented and research-driven concepts independently; (iii) it impose critical thinking and develops problem-solving skills; (iv) it enhances officers ability to analyze, synthesize and evaluate information from different sources; (v) focusing on area of interest or identifying the issue, leading to more efficient and effective investigation; (vi) it strengthen self-motivation and helps to adapt the rapidly changing demands of society and fulfilling the expectation from police; (vii) it boots professional growth and enhances professional skills in staying relevant and informed in the challenging carrier opportunities; (viii) enhances case solving capabilities and research skills, and increases knowledge retention.

26. There is an urgent need to enhance police training to align with these changes. The training programme must include modules on rights of victim and accused, gender sensitization, and

technological tools for crime investigation. The requirement of modern forensic labs, digital crime investigation units and real time communication networks to improve the efficiency of crime solving in a fast evolving digital landscape is necessary. The training workshops for police would not only about imparting theoretical knowledge, but shall also enhance the investigative skills. Through interactive sessions, case studies and experimental exercises, the police would learn the nuances of investigation by an expert team of investigators.

27. Based on the deliberations above, it's high time that this Court to meets the ends of justice and, to prevent the abuse of the process of the law, directs the Registrar (Compliance) to forward a copy of this order to D.G.P. Uttar Pradesh and Director General of Police, DG/Training HQRS to go through the above referred judgements passed by the Supreme Court and after that shall assess whether charge-sheets filed by the U.P. police are in consonance with the law discussed by the Supreme Court in *Dablu Kujur's case (supra)* and *Sharif Ahmad's case (supra)*, and following this assessment, suggest the methods and schedule for training (training programme for the police officers to enhance the professional capabilities- from constables to S.S.P.) and as to how the requirement of law discussed herein above could be implicated in letter and spirit. It is expected from D.G. Training to have a wider consultation with the ADGs, IGs, DIGs, SPs, ASPs and DSPs, posted at various Police Training Centres of Uttar Pradesh. A.D.G. (Prosecution) and Director (Prosecution), Uttar Pradesh, and after that written suggestions may also be called from them. Suggestions from other stakeholders may also be sought, as

deemed necessary, to achieve the objectives discussed above.

28. On the next date of hearing, the D.G. of Training HQRS shall file the current training curriculum and schedule for police officers above the rank of constable, focusing on basic training and the fundamentals of investigation, including: (i) registration of FIRs; (ii) arresting an accused; (iii) seizing incriminating material (including in offenses against the human body and property, as well as cybercrime); (iv) basic knowledge of the medico-legal aspects of investigation; (v) discovering facts that lead to the guilt of the accused; (vi) recording statements under Sections 180 and 183 of the Bhartiya Nagarik Suraksha Sanhita, 2023, including their relevance as evidence and related procedures; (vii) the importance of scientific evidence, such as fingerprints, forensic reports, weapon seizure, ballistic reports, blood samples, DNA, CDR, and CCTV footage; (viii) retrieving evidence from pen drives and hard disks, downloading evidence from social media, and the procurement and seizure of such evidence, as well as compliance with Section 63 of the Bhartiya Sakshya Adhiniyam, 2023; (ix) knowledge of collecting blood samples; and (x) precautions to be taken by Investigating Officer while preparing the charge-sheet [checklist, if any; or list of do's & don'ts], (xi) role and accountability of the S.S.P. in supervising investigations. The list provided is illustrative and not exhaustive. The purpose of outlining these steps is to give the officer an understanding of the Court's intentions regarding the overall objective of this order.

29. A copy of this order be also communicated to the A.C.S (Home), Uttar

Pradesh, and Shri P.K. Giri, the learned Additional Advocate General for coordination and compliance. The Chief Secretary of Uttar Pradesh shall also be briefed by the ACS (Home) for future reference, if the need arises.

30. Put up as fresh on **30.09.2024 at 03:45 p.m. as a tied up case before this Bench** and the D.G. Training HQRS shall appear before the Court virtually through video conferencing.

31. Interim order, granted earlier, shall continue till the next date of listing.

(2024) 9 ILRA 1169
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2024

BEFORE

THE HON'BLE MRS. MANJU RANI
CHAUHAN, J.

Application U/S 482 No. 16162 of 2024

Vihari & Ors.	...Applicants
Versus	
State of U.P. & Anr.	...Respondents

Counsel for the Applicants:
 Sri Ashutosh Upadhyay

Counsel for the Respondents:
 G.A., Sri Ram Surat Patel, Sri Rajesh Kumar Singh

The application filed to quash the charge sheet as well as the entire proceeding of the case under the act on the basis of compromise-the opposite party no.2 has given St.ment before the Court that he does not want to proceed with the case-proceedings quashed.

Application allowed. (E-9)

List of Cases cited:

1. Gian Singh Vs St. of Punj. reported in (2012) 10 SCC 303

2. B.S. Joshi & ors. Vs St. of Har. & anr.; (2003) 4 SCC 675

3. Nikhil Merchant Vs C.B.I.; (2008) 9 SCC 677

4. Manoj Sharma Vs St. & ors.; (2008) 16 SCC 1

5. Gian Singh Vs St. of Punj.; (2012); 10 SCC 303

6. Narindra Singh & ors. Vs St. of Punj.; (2014) 6 SCC 466

7. Shaifullah & ors. Vs St. of U.P. & anr.; 2013 (83) ACC 278

8. Pramod & anr. Vs St. of U.P. & anr. (Application U/S 482 No.12174 of 2020

9. Daxaben Vs St. of Guj., reported in 2022 SCC Online SC 936

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Learned counsel for the State has filed an affidavit of compliance today on behalf of Krishan Kumar, posted as S.P. Sambhal, which is taken on record.

2. Learned counsel for the opposite party no.2 has filed an affidavit today, which is taken on record.

3. Heard Mr. Ashutosh Upadhyay, learned counsel for the applicants, Mr. Ram Surat Patel, learned counsel for opposite party no.2 as well as Mr. A.K. Sand, learned Government Advocate assisted by Mr. Mayank Awasthi, learned counsel for the State and perused the material on record.

4. This application under Section 482 Cr.P.C. has been filed with the prayer

to quash the charge sheet dated 22.05.2022 as well as entire proceeding of S.T. No.130 of 2022 (State vs. Vihari & Others), arising out of Case Crime No.101/2022, under Sections 504, 506, 323 I.P.C. and Sections 3(1)da, 3(1)dha S.C./S.T. Act, Police Station- Kaila Devi, District- Sambhal as well as stay the further proceeding of the aforesaid case, pending before the learned Additional District & Session Judge/Special Judge (S.C./S.T. Act), Sambhal at Chandausi, on the basis of compromise.

5. On 05.07.2024, the following order was passed :-

"1. Heard Mr. Ashutosh Upadhyay, learned counsel for the applicants, Mr. Ram Surat Pal, Advocate holding brief of Mr. Rajesh Kumar Singh, learned counsel for opposite party no.2 as well as Mr. D.P. Singh, learned A.G.A. appearing for the State and perused the record.

2. The application under Section 482 Cr.P.C. is filed with the prayer to quash the charge sheet dated 22.05.2022 as well as entire proceeding of S.T. No.130 of 2022, (State Vs. Vihari & others), arising out of Case Crime No.101 of 2022, under Sections 504, 506, 323 I.P.C., and Section 3(1)da, 3(1)dha of SC/ST Act, Police Station- Kaila Devi, District-Sambhal, pending before learned Additional District & Session Judge/Special Judge (SC/ST Act), Sambhal, on the basis of compromise.

3. Learned counsel for the applicants submits that the parties have reconciled their differences and a compromise has been entered

between them out of Court. In this regard, an affidavit on behalf of both the parties has been moved before the Court concerned mentioning therein that they have entered into compromise and they do not want to press the case, copy of said affidavit has been annexed as Annexure no.7 to this application. Therefore, no useful purpose would be served in continuing the proceedings before the court below and the same is not only sheer wastage of time of the Court but also abuse of the process of law. Hence, proceedings of the aforesaid case be quashed in the light of law laid down by the Apex Court in the case of *Gian Singh v. State of Punjab* reported in (2012) 10 SCC 303.

4. Learned counsel for the opposite party no.2 does not dispute the correctness of the submissions made by the learned counsel for the applicants.

5. Learned A.G.A., however, submits that it is the concerned court below, which has to verify the fact as to whether the parties have entered into compromise, hence the parties may approach the concerned court below and move an application with respect to compromise between the parties, which will be decided in accordance with law.

6. Whether a compromise has taken place or not can at best be ascertained by the court, where the proceedings are pending, after ensuring the presence of the parties before it.

7. In view of the above, both the parties are directed to

appear before the court below along with a certified copy of this order within two weeks from today and be permitted to file a proper compromise deed. It is expected that the trial court may fix a date for the verification of the compromise and after ensuring the presence of parties, pass an appropriate order with respect to the same in accordance with law, after hearing the informant, as expeditiously as possible, preferably within a period of two months from today. While passing the order verifying the compromise, the concerned court shall also record the statements of the parties as to whether all the terms and conditions mentioned in the original compromise deed, so filed, have been fulfilled or not? The facts regarding the amount towards compensation as received and stated to be returned, shall also be verified.

8. If the said compromise as well as compensation is verified, the same shall be made part of the record and report to that effect, will be prepared and the parties would be allowed to obtain certified copy thereof and file the same before this Court.

9. Put up this case on 06.08.2024, as fresh, at 02:00 p.m.

10. Till then, no coercive measure shall be taken against the applicants in the aforesaid case."

6. As the opposite party no.2 was not ready to return the money as informed by the learned counsel for the applicants, therefore, on 22.08.2024, the following order was passed :-

"1. Earlier on the basis of compromise deed annexed at page 61 (Annexure No. 7) to the application, the counsel for the parties (Mr. Ashutosh Upadhyay for the applicant and Mr. Ram Surat Patel, Advocate holding brief of Mr. Rajesh Kumar Singh for the opposite party no. 2, wrongly typed as Ram Surat Pal in the earlier order dated 05.07.2024), had requested the Court to send the matter for verification of the aforesaid compromise.

2. Today, when the matter was taken up counsel for the applicant has fairly conceded that he wants to withdraw the application as the opposite party no. 2 is not ready to return the compensation amount of Rs. 75,000/- as paid by State Government, therefore, the opposite party no. 2 Ajay Pal has reframed from the compromise as entered between the parties. This conduct of opposite party no. 2 is not appreciated.

3. Let the opposite party no. 2 be present here alongwith draft of Rs. 75,000/- as once he has entered into compromise and placed his signatures on the compromise deed, he cannot withdraw his consent from the compromise on this ground.

4. The S.P., Sambhal is directed to ensure presence of opposite party no. 2 on the next date of listing.

5. The aforesaid information shall also be given by Mr. Ram Surat Patel, Advocate holding brief of Mr. Rajesh Kumar Singh, learned counsel for the

opposite party no. 2 to opposite party no. 2.

6. Put up this case as fresh on 4th September, 2024.

7. Till then, no coercive action shall be taken against the applicants in the present case.

8. Registrar (Compliance) is directed to communicate this order to the S.P., Sambhal for its compliance forthwith.

9. Mr. Amit Singh Chauhan, learned AGA-I shall inform about this order to Mr. A.K. Sand, learned Government Advocate, who shall also look into necessary compliance of this order."

7. In non-compliance of the aforesaid order, on 04.09.2024, the following order was passed :-

"1. Heard Mr. Ashutosh Upadhyay, learned counsel for the applicants, Mr. Rajesh Kumar Singh, learned counsel for opposite party no.2 as well as Mr. Amit Singh Chauhan, learned AGA for the State.

2. As per the order dated 22.08.2024, the S.P. Sambhal was directed to ensure the presence of opposite party no.2 before this Court on 4th September, 2024 i.e. today. Though, letter from the office of learned Government Advocate has been sent but the order has not been complied with.

3. Learned counsel for opposite party no.2 submits that the opposite party no.2 has informed him that he has not received any compensation amount.

4. Let the District Magistrate, Sambhal place a report

regarding the fact as to whether compensation amount has been given to the opposite party no.2 or not by the next date. In compliance of the earlier order dated 22.08.2024, the S.P. Sambhal shall also be present before this Court.

5. Put up this case, as fresh, on 18th September, 2024.

6. Interim order granted earlier is extended till the next date of listing.

7. Registrar (Compliance) shall look into the compliance of this order by calling for the compensation report from the District Magistrate, Sambhal and also ensure the presence of S.P. Sambhal on the next date fixed.

8. The learned Government Advocate shall also look into compliance of this order.

9. Let a copy of this order be given to the learned Government Advocate free of cost."

8. In compliance of the aforesaid order, today Mr. Ashutosh Upadhyay, learned counsel for the applicants, Mr. Ram Surat Patel, learned counsel for opposite party no.2 as well as Mr. A.K. Sand, learned Government Advocate assisted by Mr. Mayank Awasthi, learned counsel for the State are present.

9. In compliance of the earlier order, S.P. Sambhal namely Krishan Kumar is present before this Court. The opposite party no.2 namely Ajay Pal has been brought to this Court by Rajeev Malik, SHO, Police Station- Kaila Devi, District-Sambhal and has been identified by Mr. Ram Surat Patel, learned counsel appearing on his behalf.

10. When specific query was raised by this Court to opposite party no.2 namely Ajay Pal as to why he was not returning the compensation amount, he could not give a proper answer and tendered apology admitting that, under pressure of the villagers he has lodged a false FIR. He states that he will be careful in the future. The opposite party no.2 also states that he does not want to press the case and has stated that he has given such a statement before the trial court and a certified copy of the aforesaid statement as given by the opposite party no.2 before the court below is passed on to the Court today and the same has been placed on record.

11. Opposite party no.2 has brought a demand draft of Rs.75,000/- in favour of District Social Welfare Officer, Sambhal dated 17.09.2022 issued by State Bank of India having Demand Draft No.071515. The aforesaid draft is being sent to Registrar General, High Court of Judicature at Allahabad to be returned to the concerned District Magistrate after retaining a photocopy of the same. The District Magistrate, Sambhal shall place the said draft before the District Social Welfare Officer, Sambhal who in turn shall deposit the aforesaid draft in the State Exchequer account and report about the same to the concerned District Magistrate, who in turn shall submit a report before Registrar General, High Court of Judicature at Allahabad, in respect of deposition of the aforesaid draft. The District Magistrate, Sambhal is further directed to ensure that the rest compensation amount of Rs.25,000/- is not released in favour of opposite party no.2.

12. The aforesaid order has been passed in the presence of learned counsel for the applicants, learned counsel for the

opposite party no.2 as well as learned counsels for the State.

13. Learned counsel for the applicants further submits that since the parties have entered into compromise and the opposite party no.2 has given his statement before this Court that he does not want to proceed with the case, the entire proceedings of the aforesaid criminal case may be quashed by this Court.

14. Learned A.G.A. for the State as well as learned counsel for the opposite party no.2 also accept that the parties have entered into a compromise and they have no objection, if the proceedings in the aforesaid case are quashed.

15. This Court is not unmindful of the following judgements of the Apex Court:

(i). **B.S. Joshi and others Vs. State of Haryana and Another; (2003)4 SCC 675,**

(ii). **Nikhil Merchant Vs. Central Bureau of Investigation; (2008) 9 SCC 677,**

(iii). **Manoj Sharma Vs. State and Others; (2008) 16 SCC 1,**

(iv). **Gian Singh Vs. State of Punjab; (2012); 10 SCC 303,**

(v). **Narindra Singh and others Vs. State of Punjab; (2014) 6 SCC 466,**

16. In the aforesaid judgments, the Apex Court has categorically held that compromise can be made between the parties even in respect of certain cognizable and non compoundable offences. Reference may also be made to the decision given by this Court in **Shaifullah and Others Vs.**

State of U.P. & Another; 2013 (83) ACC 278 and Pramod & Another Vs. State of U.P. & Another (Application U/S 482 No.12174 of 2020, decided on 23rd February, 2021) and Daxaben Vs. State of Gujarat, reported in 2022 SCC Online SC 936 in which the law expounded by the Apex court in the aforesaid cases has been explained in detail.

17. Given the facts and circumstances of the case, as outlined above, and considering the submissions made by counsel for both parties, the court is of the considered opinion that prolonging the proceedings in the aforementioned criminal case would serve no useful purpose, as the parties have already resolved their dispute.

18. It is deeply concerning to observe that, while adjudicating cases under the jurisdiction of the Prevention of Atrocities Act concerning SC/ST individuals, this Court has encountered numerous instances where false and exaggerated complaints are being filed for financial gain. The Act, which was designed to provide immediate relief to victims of atrocities, is being misused by some individuals to obtain compensation. The Court has identified several cases where false FIRs were lodged with the sole aim of securing such compensation. To prevent this abuse, a rigorous verification process must be implemented by the authorities before the lodging of an FIR. However, even with such mechanisms in place, if it is discovered that a false FIR has been filed purely for financial gain, the individuals responsible should be held legally accountable. This would serve as a deterrent against the misuse of the Act for personal profit.

19. The weaponization and misuse of provisions intended to protect vulnerable

groups who have historically faced discrimination not only undermines the very spirit of these laws but also hampers the progress toward genuine equality. When legal safeguards are exploited for personal or financial gain, it dilutes their effectiveness and erodes public trust in the justice system. Such actions divert attention and resources away from legitimate cases where real victims need protection and justice. Ultimately, this misuse threatens to perpetuate inequality, as it distorts the purpose of these protective measures, which are crucial for addressing systemic injustices and creating a truly equitable society. For true equality to be realized, these legal provisions must be applied with integrity, ensuring they serve those genuinely in need and not those seeking to exploit the system for unjust gains.

20. While the SC/ST Act plays a crucial role in safeguarding vulnerable communities, measures must be implemented to ensure that compensation relief funds are allocated efficiently and fairly, preventing misuse and supporting genuine victims. At the same time, to maintain balance and deter the abuse of this special legislation, courts should invoke the legal recourse available under Section 182 of the I.P.C. to hold accountable those individuals, who file false FIRs solely for the purpose of securing compensation. This will ensure that the integrity of the Act is preserved while punishing those who attempt to exploit it for personal gain.

21. The SC/ST Act is an essential legal safeguard that provides critical protection to historically disadvantaged and marginalized communities. It serves as a vital tool in combating entrenched discrimination, ensuring that those who have faced systemic injustices are afforded

legal recourse and relief. By addressing atrocities and promoting social justice, the Act helps bridge the gap between marginalized groups and the broader society, advancing the cause of equality and dignity for all. However, the exploitation of this important provision for personal or financial gain undermines its true purpose. When the Act is misused, it creates suspicion and skepticism within the criminal justice system, eroding the trust of both the public and the innocent individuals who are genuinely affected by discrimination. Such misuse diverts attention away from real victims, weakening the effectiveness of the law and casting doubt on the authenticity of future claims. In the long run, this not only harms the credibility of the justice system but also hinders the progress toward achieving genuine equality for those who continue to face prejudice and marginalization. Maintaining the integrity of the SC/ST Act is essential for preserving its role in protecting the vulnerable and upholding justice.

22. To effectively address the misuse of the SC/ST Act and ensure that its provisions are not exploited, several measures should be implemented. First, a thorough pre-registration verification process should be established, requiring law enforcement to assess the credibility of complaints before filing FIRs. This could involve mandatory mediation sessions, where parties can attempt to resolve disputes amicably before resorting to legal action. Second, training programs should be conducted for police officers and judicial officials to help them recognize signs of potential misuse and to ensure that they approach cases with sensitivity and awareness of the implications. Third, a dedicated oversight body could be

established to monitor complaints under the SC/ST Act, investigating patterns of misuse and providing recommendations for action. Finally, public awareness campaigns should be launched to educate communities about the Act's purpose and the consequences of filing false claims, thereby fostering a culture of integrity and accountability. These measures would not only help safeguard the Act's integrity but also support genuine victims in receiving the justice they deserve.

23. In view of the statement given by opposite party no.2 before this Court, the proceeding of charge sheet dated 22.05.2022 as well as S.T. No.130 of 2022 (State vs. Vihari & Others), arising out of Case Crime No.101/2022, under Sections 504, 506, 323 I.P.C. and Sections 3(1)da, 3(1)dha S.C./S.T. Act, Police Station- Kaila Devi, District- Sambhal, pending before the learned Additional District & Session Judge/Special Judge (S.C./S.T. Act), Sambhal at Chandausi, are hereby **quashed**.

24. The application is, accordingly, **allowed**. There shall be no order as to costs.

25. This order be placed before the Registrar General of this Court for its circulation to all District Courts highlighting the observations, made hereinabove, who will pass orders, in such cases, taking into consideration the reports submitted by Investigating Officers under Section 173(2) Cr.P.C., in accordance with law and also keeping in mind the provisions of Section 182 I.P.C.

26. A copy of this order be communicated to learned Government Advocate, High Court, Allahabad, who

shall send it to the Director General of Police, U.P., for issuance of necessary circular to the Police Authorities of the Districts to consider the observations of the Court with regard to invocation of the provisions of Section 182 I.P.C. (now 217 of B.N.S. 2023).

(2024) 9 ILRA 1176
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2024

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Application U/S 482 No. 21392 of 2022
 With
 Application U/S 482 No. 37671 of 2022

Awadhesh Agarwal ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
 Sri Aditya Prakash Singh, Sri Sushil Shukla

Counsel for the Respondents:
 Sri Anil Kumar Srivastava (Sr. Adv.), G.A., Sri Namit Srivastava, Sri Ram Bahadur, Sri Vikas Srivastava

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Section 307 - Attempt to murder, Section 34 - Common Intention, Section 120-B - Criminal Conspiracy, The Code of criminal procedure, 1973 - Section 161,164 - a few bits here and a few bits there on which the prosecution proposes to rely are woefully inadequate for connecting the accused with the crime.(Para - 11)

(B) Criminal Law - Indian Penal Code, 1860 - law relating to conspiracy under Section 120-B - importance of evidence and judicial scrutiny in establishing criminal conspiracy - High Court has the power to assess the weight of material on

record to determine if charges can be framed against the accused - an agreement between persons to do an illegal act or legal act by illegal means is essential for criminal conspiracy - motive alone cannot prove conspiracy and that direct evidence or circumstantial evidence is needed. (Para - 8)

(C) Criminal Law - The Code of criminal procedure, 1973 - Powers of discharge under Section 227 Cr.P.C. - Judge to discharge an accused person if there's insufficient ground to proceed with the case key principles - Consideration of Record and Documents - Threshold of Scrutiny - Prima Facie Case - Sifting Evidence - Strong Suspicion - Judicial Mind - Discharge Obligation - Pre-Battle Protection - No Mere Post Office. (Para -8)

(D) Criminal Law - The Code of criminal procedure, 1973 - The UP Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 2/3 - If the predicate offence is quashed, proceedings under Gangsters Act cannot survive - Quashing of the predicate offence renders the foundation for prosecution under the Gangsters Act non-existent - Continued prosecution in such cases amounts to abuse of court process. (Para -7)

Two petitions/applications of same applicant/accused - common features of origin in themselves - applicant not named in FIR - implication came later through a subsequent application by first informant - only casts suspicion on applicant - suspicion based on enmity between applicant & injured party - no evidence of a meeting of minds between accused persons to conspire and commit offense - No concrete or credible evidence links the applicant to the crime - Involvement in criminal and illegal activities as members of a gang - if predicate offense quashed - then proceedings under Gangsters Act invalid - trial court rejected discharge plea of accused-applicant - hence application.(Para -1,2,11)

HELD: - Prosecution failed to bring in credible and substantial evidence against the accused applicant. Court discharged applicant due to

insufficient evidence. Mere suspicion is inadequate to link them to the crime. Prosecution failed to establish a prima facie case. Court quashed the proceedings under Gangsters Act against the accused applicant since they've been discharged of the predicate offence in a connected case. (Para - 15,16,17,11)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

1. St. of Karn. Vs L. Muniswamy, (1977) 2 SCC 699
2. Vadilal Panchal Vs D.D. Ghadigaonkar, AIR 1960 SC 1113
3. Century Spinning & Manufacturing Co. Vs St. of Maha., AIR 1972 SC 545
4. CBI Vs K. Narayana Rao: (2012) 9 SCC 512
5. Yogesh @ Sachin Jagdish Joshi Vs St. of Maha., (2008) 10 SCC 394
6. Shivnarayan Laxminarayan Joshi Vs St. of Maha., (1980) 2 SCC 465
7. Saju Vs St. of Kerala: (2001) 1 SCC 378
8. Kanchan Kumar Vs St. of Bihar: (2022) 9 SCC 577
9. U.O.I. Vs Prafulla Kumar Samal, (1979) 3 SCC 4
10. Sajjan Kumar Vs CBI, (2010) 9 SCC 368
11. Dipakbhai Jagdishchandra Patel Vs St. of Guj., (2019) 16 SCC 547
12. Ram Prakash Chadha Vs St. of U.P., 2024 SCC OnLine SC 1709
13. R. Venkatakrishnan Vs C.B.I., (2009) 11 SCC 737
14. Stree Atyachar Virodhi Parishad Vs Dilip Nathumal Chordia, (1989) 1 SCC 715

15. St. of Orissa VS Debendra Nath Padhi, (2005) 1 SCC 568

16. St. of Guj. Vs Dilipsinh Kishorsinh Rao , 2023 (252) AIC 47

17. St. of Maha. Vs Som Nath Thapa, (1996) 4 SCC 659

18. St. of M.P. Vs Mohan Lal Soni, (2000) 6 SCC 338

19. Sanuj Bansal Vs St. of U.P & anr., SLP (Crl.) 10536 of 2023

20. M/S Karn. Emta Coal Mines Ltd. & anr. Vs C.B.I., 2024 SCC OnLine SC 2250

21. Rajiv Thapar Vs Madan Lal Kapoor, (2013) 3 SCC 330

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

23. Rukmini Narvekar Vs Vijaya Satardekar, (2008) 14 SCC 1

24. Anand Kumar Mohatta Vs St. (NCT of Delhi), Dept. of Home, (2019) 11 SCC 706

25. G. Sagar Suri Vs St. of U.P., (2000) 2 SCC 636

26. Umesh Kumar Vs St. of A.P., (2013) 10 SCC 591

27. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335

28. St. of Karn. Vs L. Munniswamy, (1977) 2 SCC 699

29. Farhana Vs St. of U.P., 2024 SCC OnLine SC 159

(Delivered by Hon'ble Samit Gopal, J.)

A. These two petitions/applications under Section 482 Cr.P.C. are connected together vide order dated 20.01.2023

passed by a co-ordinate Bench of this Court as they are of the same applicant/accused and have common features of origin in themselves and as such are decided by a common order.

B. Criminal Misc. 482 Cr.P.C. Application No. 21392 of 2022

1. Heard Sri Sushil Shukla, learned counsel for the applicant, Sri Anil Srivastava, learned Senior Advocate assisted by Sri Vikas Srivastava and Sri Namit Srivastava, learned counsels for the opposite party no.2, Sri Ajay Singh, learned A.G.A-I for the State and perused the records.

2. The present application under Section 482 Cr.P.C. has been filed by the applicant Awadhesh Agarwal with the following prayers:-

“It is, therefore most respectfully prayed that this Hon'ble Court may be pleased to allow this application and quash the impugned order dated 30.06.2022 as passed by the trial court rejecting discharge plea of the accused-applicant in terms of S. 227 CrPC as well as entire criminal proceedings of Session Trial No. 541 of 2018 (arising out of Case Crime No. 256 of 2015) u/s 307, 34, 120-B IPC, P.S. MM Gate, District Agra (State Vs. Vishal and others) pending currently in the court of Ld. Addl. District and Session Judge, Court No. 23, Agra qua him since the continuation of such proceedings as against him amounts to a clear abuse of the process of the court.

It is further prayed that this Hon'ble Court may also be pleased to quash the impugned order dated 12.10.2022 passed by aforesaid Ld. Trial court whereby and where under the charges u/s 307 IPC r/w S. 34 and 120-B IPC have been framed/drawn against the accused-applicant.

And by way of interim measure and during pendency of present application before this Hon'ble Court, it is further prayed that this Hon'ble Court may be pleased to stay further the impugned criminal proceedings of Session Trial No. 541 of 2018 (arising out of Case Crime No. 256 of 2015) u/s 307, 34, 120-B IPC, P.S. MM Gate, District Agra (State Vs. Vishal and others) pending currently in the court of Ld. Addl. District and Session Judge, Court No. 23, Agra pending as against the accused-applicant only, otherwise he shall suffer irreparable loss."

3. The present case started on a FIR which was lodged by Nem Kumar Jain on 22.11.2015 at 23:00 hours under Sections 307/34 IPC in connection with an incident which took place on the same day i.e. 22.11.2015 at about 21.45 hours against unknown persons alleging therein that he has a shop in the name of C.V. Chain's Ltd. at Joota Ram Phatak, Kinari Bazar, Police Station Kotwali and is permanent resident of Mukhani Gali, Gud Ki Mandi, Police Station M.M.Gate and his elder brother Dhan Kumar Jain sits with him in the shop. On 22.11.2015 at about 9.30 p.m. his elder brother after closing the shop left from there on a Swift Car and was coming to the house by passing Sidhi Bazar and when he reached Mukhani Gali at his house then his

gunner Kushal Kumar opened the door of the car and his brother Dhan Kumar Jain came out from car at about 9.45 p.m. and at that time 4-5 unknown persons on two motorcycles came from Phulatti Bazar side and in front of the house of his brother shot him with an intention to murder him. While firing they ran towards gud ki mandi. He immediately took his brother on the car to G.G. Nursing Home and got him admitted where his treatment is going on. He suspects that due to his work of jewellery the persons who have been attacking them since last two years are involved in the present incident in which 4-5 persons have fired upon jewellers and for their share they have tried to murder his brother. A report be lodged against unknown persons and they be punished.

4. The police on investigating the matter apprehended one person Yogesh Gautam on 24.11.2015 who gave his statement that Dhan Kumar was shot by Pramod S/o Devi Singh and at that time private gunner of Dhan Kumar had also fired which hit the left thigh of Pramod Kumar who is also getting his treatment done in Agra.

5. An application dated 26.11.2015 was given by Nem Kumar Jain of which Vikas Jain was the scribe to the police alleging therein that on 26.11.2015 his brother Dhan Kumar Jain was attacked by unknown persons regarding which he had got a FIR lodged. His family members saw the CCTV footage of the camera installed at police station Kotwali which covers the Phavvara Tiraha of Kinari Bazar of the date and time of the incident in which accused involved in the incident can be seen since the same

accused are also seen in the CCTV recording of the camera installed at his

house. From the CCTV footage it can be seen that along with the accused persons, Vishal Agarwal is also present. He has old enmity with Vishal Agarwal. Some of his known persons informed him that along with Vishal Agarwal, Awadhesh Agarwal, Narendra Kumar Goyal @ Lala and Ravi @ Tamatar and 5-6 other miscreants are involved. He has an old enmity with Awadhesh Agarwal. Thus legal action be taken against the said persons.

6. The investigation concluded and charge sheet dated 27.12.2015 was submitted against Ravi @ Tamatar, Vishal Agarwal, Narendra Goyal @ Lala, Awadhesh Agarwal and Suneel Verma for offences under Sections 307/34, 120-B IPC.

7. The court concerned vide its order dated 19.1.2016 took cognizance against Vishal Agarwal, Narendra Goyal @ Lala, Ravi @ Tamatar and Suneel Verma. The said order was challenged by the applicant before this Court by filing Criminal Misc. Application U/S 482 No. 21184 of 2016 (Awadhesh Agarwal Vs. State of U.P. and another) in which a coordinate Bench of this Court vide order dated 20.7.2016 while refusing to quash the proceedings of the said case permitted the applicant to file discharge application before court concerned which was directed to be considered by the court concerned in accordance with law. The applicant then filed an application for discharge dated 11.11.2021 under Section 227 Cr.P.C. with the prayer that the same be allowed and he be discharged for offences under Section 120-B IPC read with 307 IPC. The said discharge application stands rejected vide order dated 30.6.2022 passed by Addl. District and Sessions Judge, Court No.23, Agra which was numbered as Application

No.33-Kha in the records of the trial court. During the pendency of the present application under Section 482 Cr.P.C., the court of the Additional Sessions Judge, Court No. 30, Agra vide order dated 12.10.2022 framed charges against the applicant and four other co-accused persons under Sections 307 readwith 34 IPC and 120-B IPC, subsequent to which an amendment application dated 29.03.2023 was filed on behalf of the accused applicant with the prayer to allow the same and permit adding the subsequent development which was allowed vide order dated 04.07.2024 by this Court and an amended petition was also filed and place by the office through its report dated 05.08.2024. The learned counsels for the opposite party No. 1 / State of U.P. and opposite party No. 2 / first informant submitted that they do not intend to file any rebuttal to the amendment/amended petition and the same is recorded in the order dated 06.08.2024 of this Court. The present application under Section 482 Cr.P.C. has thus been filed before this Court with the prayers as aforesaid.

8. Learned counsel for the applicant submitted as under:-

(I). The FIR is lodged against unknown persons and the applicant is not named therein.

(II). The implication of the applicant in the present case is subsequently on the basis of an application dated 26.11.2015 moved after four days of lodging of the FIR and even therein his naming is on the basis of suspicion only by stating that he has an old enmity with the informant.

(III). There is nothing on record to show that the applicant is involved in the present matter.

(IV). The applicant is being implicated in the present matter only on the basis of suspicion of conspiring with other accused persons to commit the said offence.

(V). The alleged witnesses in the present matter namely Nem Kumar Jain/first informant, Dhan Kumar Jain/alleged injured, Smt. Shalini Jain/wife of the injured, Tribhuwan Nath Chaturvedi, Vipin Bansal, Pradeep Bansal, Anil Goyal and Abhishek Jain do not in any manner implicate the applicant in the present matter. In so far as Tribhuwan Nath, Vipin Bansal, Pradeep Bansal and Abhishek Jain are concerned, their evidence is hearsay only.

(VI). The statement of Anil Kumar although was recorded under Section 164 Cr.P.C. also but he only states of the fact that there were some strained relations between Dhan Kumar Jain and the applicant due to business in which he had mediated but the matter could not be settled. He had told the applicant Awadhesh Agarwal that Dhan Kumar Jain does not want to give material to him on which Awadhesh Agarwal had said that he will look to it.

(VII). On behalf of the applicant the following of the Apex Court have been relied upon:-

A.- For law relating to conspiracy under Section 120-B IPC

(i) State of Karnataka v. L. Muniswamy : (1977) 2 SCC 699

“7. The second limb of Mr Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says the learned counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that:

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

This section is contained in Chapter 18 called “Trial Before a Court of Session”. It is clear from the provision that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior

court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. Section 482 of the New Code, which corresponds to Section 561-A of the Code of 1898, provides that:

“Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or other wise to secure the ends of justice.”

In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in

quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.

8. Let us then turn to the facts of the case to see whether the High Court was justified in holding that the proceedings against the respondents ought to be quashed in order to prevent abuse of the process of the court and in order to secure the ends of justice. We asked the State counsel time and again to point out any data or material on the basis of which a reasonable likelihood of the respondents being convicted of any offence in connection with the attempted murder of the complainant could be predicated. A few bits here and a few bits there on which the prosecution proposes to rely are woefully inadequate for connecting the respondents with the crime, howsoever skilfully one may attempt to weave those bits into a presentable whole. There is no material on the record on which any tribunal could reasonably convict the respondents for any offence connected with the assault on the complainant. It is undisputed that the respondents were nowhere

near the scene of offence at the time of the assault. What is alleged against them is that they had conspired to commit that assault. This, we think, is one of those cases in which a charge of conspiracy is hit upon for the mere reason that evidence of direct involvement of the accused is lacking. We have been taken through the statements recorded by the police during the course of investigation and the other material. The worst that can be said against the respondents on the basis thereof is that they used to meet one another frequently after the dismissal of Accused 1 and prior to the commission of the assault on the complainant. Why they met, what they said, and whether they held any deliberations at all, are matters on which no witness has said a word. In the circumstances, it would be a sheer waste of public time and money to permit the proceedings to continue against the respondents. The High Court was therefore justified in holding that for meeting the ends of justice the proceedings against the respondents ought to be quashed.

10. On the other hand, the decisions cited by learned counsel for the respondents in *Vadilal Panchal v. D.D. Ghadigaonkar* [AIR 1960 SC 1113 : 1960 Cri LJ 1499 : 62 Bom LR 915] and *Century Spinning & Manufacturing Co. v. State of Maharashtra* [AIR 1972 SC 545 : 1972 Cri LJ 3291972 SCC (Cri) 495] show that it is wrong to say that at the stage of framing charges the court cannot

apply its judicial mind to the consideration whether or not there is any ground for presuming the commission of the offence by the accused. As observed in the latter case, the order framing a charge affects a person's liberty substantially and therefore it is the duty of the court to consider judicially whether the material warrants the framing of the charge. It cannot blindly accept the decision of the prosecution that the accused be asked to face a trial. In *Vadilal Panchal* case, Section 203 of the old Code was under consideration, which provided that the Magistrate could dismiss a complaint if after considering certain matters mentioned in the section there was in his judgment no sufficient ground for proceeding with the case. To an extent Section 327 of the new Code contains an analogous power which is conferred on the Sessions Court. It was held by this Court, while considering the true scope of Section 203 of the old Code that the Magistrate was not bound to accept the result of an enquiry or investigation and that he must apply his judicial mind to the material on which he had to form his judgment. These decisions show that for the purpose of determining whether there is sufficient ground for proceeding against an accused the court possesses a comparatively wider discretion in the exercise of which it can determine the question whether the material on the record, if unrebutted, is such on the basis

of which a conviction can be said reasonably to be possible.

11. We are therefore in agreement with the view of the High Court that the material on which the prosecution proposes to rely against the respondents is wholly inadequate to sustain the charge that they are in any manner connected with the assault on the complainant. We would, however, like to observe that nothing in our judgment or in the judgment of the High Court should be taken as detracting from the case of the prosecution, to which we have not applied our mind, as against Accused 1 to 9. The case against those accused must take its due and lawful course.”

(ii) CBI v. K. Narayana Rao : (2012) 9 SCC 512

“24. The ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing, by illegal means, an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and in a matter of common experience that direct evidence to prove conspiracy is rarely available. Accordingly, the circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused. Even if some acts are proved to have been

committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who were parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. In other words, an offence of conspiracy cannot be deemed to have been established on mere suspicion and surmises or inference which are not supported by cogent and acceptable evidence.

25. In the earlier part of our order, first we have noted that the respondent was not named in the FIR and then we extracted the relevant portions from the charge-sheet about his alleged role. Though statements of several witnesses have been enclosed along with the charge-sheet, they speak volumes about others. However, there is no specific reference to the role of the present respondent along with the main conspirators.

26. The High Court while quashing the criminal proceedings in respect of the respondent herein has gone into the allegations in the charge-sheet and the materials placed for his scrutiny and arrived at a conclusion that the same do not disclose any criminal offence committed by him. It also concluded that there is no material to show that the respondent herein joined hands with A-1 to A-3 for giving false opinion. In the absence of direct material, he cannot be implicated as one of the conspirators of the offences

punishable under Section 420 read with Section 109 IPC. The High Court has also opined that even after critically examining the entire material, it does not disclose any criminal offence committed by him. Though as pointed out earlier, a roving enquiry is not needed, however, it is the duty of the Court to find out whether there is any prima facie material available against the person who has been charged with an offence under Section 420 read with Section 109 IPC.”

(iii) Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra : (2008) 10 SCC 394

“17. In the light of the aforementioned principles, we may now consider whether or not in the present case the High Court was justified in declining to discharge the appellant. However, before advertng to the circumstances relied upon by the prosecution in support of its primary charge that a conspiracy had been hatched to eliminate Kunal, the essential features of the offence of conspiracy need to be noticed.

18. Section 120-A IPC defines criminal conspiracy. The section reads as under:

“120-A. Definition of criminal conspiracy.—
When two or more persons agree to do, or cause to be done,—

- (1) an illegal act, or
- (2) an act which is not illegal by illegal means, such an agreement is

designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.”

19. Section 120-B IPC provides for punishment for an offence of criminal conspiracy.

20. The basic ingredients of the offence of criminal conspiracy are :
(i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. Yet, as observed by this Court in *Shivnarayan Laxminarayan Joshi v. State of Maharashtra* [(1980) 2 SCC 465 : 1980

SCC (Cri) 493] a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible.

25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable, even if an offence does not take place pursuant to the illegal agreement.

26. Bearing in mind the essential features of the offence of criminal conspiracy enumerated above, we may advert to the facts of the instant case. The relevant portion of the charge-sheet filed against all the accused reads as follows:

“... Though son of the complainant, Kunal Parihar got married with Accused 4 Hema Joshi, his family again arranged for another marriage with one Meenal of Baroda on 24-2-2001. Engagement ceremony took place and date of marriage was fixed as 30-11-2001. This fact came to the knowledge of Accused 1, 2, 3, 4, 5, 11 and 12. Therefore, in order to teach a lesson to the complainant they hatched a conspiracy to kill his only son Kunal. Accordingly, Accused 1 contacted Accused 6, Suresh Jhajara and further informed him that the complainant and his son should be taught a lesson as Kunal Parihar betrayed him and hence, should be taught a lesson and further asked him to carry out future plan.

Accused 6 contacted Accused 7 and included him in the aforesaid conspiracy. Accused 1 to 4 contacted Accused 16 through Accused 6 and 7. Accused 16 (sic) is a notorious

criminal. Criminal cases are pending against him in the District Court of Pune. In the offence regarding body, Accused 7 contacted him through witness Atul Lohar in order to carry out the aforesaid plan. Accused 1 gave Rs 80,000 to Accused 7 via Accused 6. Accused 16 in order to cause hurt to Kunal introduced Accused 8, 9, 10, 13, 14 and 15 to Accused 7. Accused 7 asked Accused 8, 9, 10, 13, 14 and 15 to join the aforesaid conspiracy and in order to carry out the aforesaid conspiracy successfully, Accused 7 purchased one Maruti Car No. MH 14 D 3027 from witness Afzal Khan Ibrahim Khan, resident of Dehu Road, and also Motorcycle No. MH 14 M 5786. By using the aforesaid vehicles Accused 7 to 10 and 13 to 15 have committed the ghastly murder of Kunal. In order to carry out the aforesaid conspiracy successfully Accused 7 has used revolver, khukri, sickle, sword and iron bar and supplied it to Accused 8 to 10 and from 13 to 15. By using the aforesaid weapons, the aforesaid persons have assaulted Kunal Parihar due to which he sustained grave injuries and ultimately died. Hence,

Accused 1, 2, 3, 4, 5, 6, 7, 11 and 12 have been charged under Sections 302 and 120-B IPC and Accused 7, 8, 9, 10, 13, 14, 15 and 16 have been charged under Section 302 read with Section 120-B IPC and under Sections 3 and 25 of the Arms Act.”

(emphasis supplied)

Thus, according to the prosecution version, when Accused A-1 to A-5, A-11 and A-12 learnt about the marriage of Kunal with some other girl, they hatched a conspiracy to teach a lesson to the father of Kunal, the deceased. In furtherance thereof, Accused A-1 contacted one of the assassins to kill Kunal. It is alleged that Accused A-1 to A-4 also contacted Accused A-16, a notorious criminal. In other words, the gravamen of the accusation by the prosecution is that it is Accused A-1 to A-5, A-11 and A-12 who had hatched the conspiracy; acted in concert to give effect to their plan to get Kunal murdered and in pursuance of the aforesaid criminal conspiracy, the other accused facilitated commission of the said crime. It is common ground that the case of the prosecution is based on circumstantial evidence,

namely, threatening calls from the side of the accused to the complainant, his family and the earlier relationship between the deceased and Accused 4.

27. From the material on record, it is manifestly clear that it was the family members of the appellant, one of their employees and a friend who had all allegedly entered into an agreement to eliminate the deceased. However, as noted above, Accused A-1, A-2, A-4, A-11 and A-12 already stand discharged from the charges framed against them under Sections 120-B and 302 IPC vide orders dated 7-7-2006 and 14-5-2007, passed by the High Court and the Sessions Judge respectively. While discharging the said accused, both the courts have come to the conclusion that there is no material on record to show that they had hatched a conspiracy to commit murder of Kunal. Thus, the stand of the prosecution to the effect that the parents, sister and friends of the appellant had entered into a criminal conspiracy stands rejected by virtue of the said orders of discharge. Furthermore, in its order dated 7-7-2006, the High Court has opined that the circumstances, relied upon

by the prosecution, even if accepted in their entirety, only create a suspicion of motive, which is not sufficient to bring home an offence of murder. As noted above, the State's petition for special leave against the said judgment has already been dismissed.”

(iv) *Saju v. State of Kerala* : (2001) 1 SCC 378

“12. Regarding the circumstance relating to the existence of motive, PW 9 who is the sister of Ms Jameela deposed that the deceased had told her that the pregnancy conceived by her was through the appellant. According to her the appellant admitted the paternity of the conceived child in the initial stage but denied the paternity attributed to him six months thereafter. The trial court found that

“in the answers elicited in the further cross-examination also it would appear that her version about the first source of knowledge about the pregnancy of Jameela was inconsistent and unnatural”.

Dealing with her statement, the trial court observed that PW 9 had no occasion to meet Jameela as she was not visiting her mother's house and also because the second accused had consented for the

marriage. The only evidence regarding the appellant being responsible for the conception of the child is the testimony of Nabeesa (PW 6), the mother of the deceased. She had stated that she came to know about the pregnancy of Jameela only when she tried to fix her marriage with some person and Jameela told her that she was in love with the appellant. It is not discerned from the testimony of PW 6 that Jameela had conceived the child from the appellant. What the witness stated was only that Jameela and the appellant were in love and they knew each other for a period of two years before the death of Jameela. According to her the marriage between the deceased and the appellant could not be solemnised as they belonged to different religions. She never saw the deceased and the appellant talking as according to her they used to talk only in her absence. The appellant is stated to have visited the house of the aforesaid witness on 15-5-1991 and assaulted the deceased regarding which report Exhibit P-4 was lodged. According to her Jameela was killed while returning from the hospital where she had

gone for a check-up. Nowhere in her testimony Nabeesa (PW 6) stated that the appellant wanted the child, conceived by Jameela, to be aborted. There is no positive evidence proving or suggesting that the appellant was responsible for the pregnancy of the deceased. In the absence of evidence regarding the circumstance attributing the pregnancy of the deceased to the appellant and his insistence for abortion of the child, the important circumstance of motive cannot be held to have been proved. The trial court, therefore, rightly did not rely upon the testimony of PW 9 Amina with respect to the existence of the said circumstance. The testimony of PW 18 Meharban who is the sister-in-law of the deceased also does not inspire confidence to link the appellant with the pregnancy of the deceased. PW 2 who is the neighbour of the deceased stated that she had known about the pregnancy from Jameela herself. According to her the appellant had quarrelled with Jameela in connection with the pregnancy. Despite denial of the appellant Jameela was stated to have asserted that she did not have sexual intercourse with anyone

other than the appellant. In her cross-examination the witnesses stated that the appellant never threatened Jameela. She admitted that the appellant had apparently told Jameela that he was not the father of the child in her womb. The witness conceded that she had no direct knowledge about the relationship of the deceased with the appellant. PW 3 who is a neighbour and husband of PW 2 was declared hostile as he did not support the case of the prosecution. It was deposed by him that he was not aware that Jameela had requested the appellant to marry her. PW 2 stated that the appellant had categorically stated that he was not responsible for the pregnancy as someone else was responsible for it. The courts below, therefore, were not justified in holding this circumstance proved for the existence of criminal conspiracy to commit the crime of murder of the deceased. In the absence of any evidence suggesting the existence of a circumstance of insistence by the appellant for abortion, an important link in the chain of circumstances attributed against him is missing. Even otherwise, motive by itself cannot be a proof of conspiracy. In Girja

Shankar Misra v. State of U.P. [1994 Supp (1) SCC 26 : 1994 SCC (Cri) 214 : AIR 1993 SC 2618] though it was found that there were serious misunderstandings between the deceased and the appellant because of the illicit relationship between the appellant and the wife of the deceased, yet the Court held that despite the fact that the appellant had a motive, he could not be held responsible for hatching a conspiracy.

13. The other important circumstance relied on by the prosecution and believed both by the trial court and the High Court is the presence of the appellant in the company of Accused 1 near or about the place of occurrence on the date of incident. It is true that a number of witnesses have deposed that they had seen both the accused together on the date of occurrence but it is equally true that such meeting was not unusual as admittedly they were working together in the plantation. Mere meeting would by itself not be sufficient to infer the existence of a criminal conspiracy. There is no suggestion, much less legal evidence to the effect that both the accused were so intimate which would have compelled Accused 1 to

agree to be a conspirator for the killing of the deceased at the instance of the appellant. Accused 1 is also not stated to be a habitual criminal. There is no suggestion of Accused 1 being hired for the purpose of killing the deceased.”

B.- Powers of discharge under Section 227 Cr.P.C.

(i) Kanchan Kumar v. State of Bihar : (2022) 9 SCC 577

“Legal provision and precedents

12. Section 227CrPC relating to discharge is as under:

“227. Discharge.—

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

13. The threshold of scrutiny required to adjudicate an application under Section 227CrPC, is to consider the broad probabilities of the case and the total effect of the material on record, including examination of any infirmities appearing in

the case. In Prafulla Kumar Samal [*Union of India v. Prafulla Kumar Samal*, (1979) 3 SCC 4 : 1979 SCC (Cri) 609] it was noted that : (SCC p. 9, para 10)

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

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

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

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving

rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

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

(emphasis supplied)

14. In *Sajjan Kumar v. CBI* [*Sajjan Kumar v. CBI*, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371], the Court cautioned against accepting every document produced by the prosecution on face value, and noted that it was important to sift the evidence produced before the Court. It observed that : (SCC pp. 376-77, para 21)

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

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

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

(emphasis supplied)

15. Summarising the principles on discharge under Section 227 CrPC, in *Dipakbhai Jagdishchandra*

Patel v. State of Gujarat
 [Dipakbhai
Jagdishchandra Patel v.
State of Gujarat, (2019) 16
 SCC 547 : (2020) 2 SCC
 (Cri) 361], this Court
 recapitulated : (SCC p. 561,
 para 23)

“23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the court is expected to do is, it does not act as a mere post office. The court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the court dons the mantle of the trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is,

the court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.”

(emphasis supplied)”

(ii) **Ram
Prakash Chadha**

**v. State of U.P. :
2024 SCC OnLine
SC 1709**

“22. In cases, where it appears that the said offence(s) is one triable exclusively by the Court of Session, the Magistrate shall have to commit the case to the Court of Session concerned following the prescribed procedures under Cr. P.C. In such cases, though it carries an accusation as aforementioned still legislature thought it appropriate to provide an inviolable right as a precious safeguard for the accused, a pre-battle protection under Section 227, Cr. P.C. Though, this provision is couched in negative it obligated the court concerned to unfailingly consider the record of the case and document submitted therewith and also to hear the

submissions of the accused and the prosecution in that behalf to arrive at a conclusion as to whether or not sufficient ground for proceeding against the accused is available thereunder.

Certainly, if the answer of such consideration is in the negative, the court is bound to discharge the accused and to record reasons therefor. The corollary is that the question of framing the charge would arise only in a case where the court upon such exercise satisfies itself about the prima facie case revealing from “the record of the case and the documents submitted therewith” against the accused concerned. In short, it can be said in that view of the matter that the intention embedded is to ensure that an accused will be made to stand the ordeal of trial only if ‘the record of the case and the

documents
submitted
therewith' discloses
ground for
proceeding against
him. When that be
so, in a case where
an application is
filed for discharge
under

Section 227, Cr.

P.C., it is an
irrecusable duty
and obligation of
the Court to apply
its mind and
answer to it
regarding the
existence of or
otherwise, of
ground for
proceeding against
the accused, by
confining such
consideration based
only on the record
of the case and the
documents

submitted therewith
and after hearing
the submissions of
the accused and the
prosecution in that
behalf. To wit, such
conclusion on
existence or
otherwise of
ground to proceed
against the accused
concerned should
not be and could
not be based on
mere suppositions
or suspicions or
conjectures,

especially not
founded upon
material available
before the Court.
We are not
oblivious of the
fact that normally,
the Court is to
record his reasons
only for
discharging an
accused at the stage
of Section 227, Cr.
P.C. However,
when an
application for
discharge is filed
under
Section 227, Cr.

P.C., the Court
concerned is bound
to disclose the
reason(s), though,
not in detail, for
finding sufficient
ground for
rejecting the
application or in
other words, for
finding prima
facie case, as it will
enable the superior
Court to examine
the challenge
against the order of
rejection.

24. From
the above extracted
portion, it is
evident that the
implication of the
appellant in the
crime is with the

aid of Section 120B and Section 34 IPC. Apart from using the expression “criminal conspiracy” there is absolute absence of anything whatsoever in the said final report as also in the statement of any of the witnesses, suggesting that the appellant herein conspired with the other accused or what exactly is the criminal conspiracy.

25. This Court in the decision in *R. Venkatakrishnan v. CBI*, (2009) 11 SCC 737 held that criminal conspiracy, in terms of Section 120B, IPC, is an independent offence and its ingredients are:

(i) an agreement between two or more persons;

(ii) the agreement must relate to doing or causing to be done either –

(a) an illegal act;

(b) an act which is not illegal in itself but is also done by illegal means.

26. An important facet of law of conspiracy is that apart from it being a distinct offence, all conspirators are liable for the acts of each other of the crime or crimes which have been committed as a result of conspiracy. A careful scanning of the provisions under Sections 120A and 120B, IPC, would reveal that the sine qua non for an offence of criminal conspiracy is an agreement to commit an offence. It consists of agreement between two or more persons to commit the criminal offence, irrespective of the further consideration whether or not the offence is actually committed as the very fact of conspiracy constitutes the

offence (See the decision in K.S. Narayanan v. G Gopinathan, 1982 Cri LJ 1611 (Madras)).”

(VIII). It is submitted that the present case is such in which there is absolutely no evidence to show that there has been prior meeting of mind to execute the alleged offence.

9. Per contra, learned counsel for the opposite party no.2 as well as learned counsel for the state opposed the prayer as aforesaid.

Learned counsel for the opposite party no.2 argued as under:-

(I). The occurrence in the present matter is of 22.11.2015 at 9.30 p.m. of which the FIR was lodged immediately by Nem Kumar Jain on the same day at 11 p.m. against unknown persons giving the true and actual version of the incident.

(II). Subsequently an application dated 26.11.2015 was given by Nem Kumar Jain after

coming to know about the assailants of his brother and on seeing the CCTV Footage of the police station covering Phavvara Tiraha of Kinari Bazar and Seb Ka Bazar and also seeing the CCTV Footage of his house by stating that along with accused persons he had fired upon his brother Vishal Agarwal was also seen. Some of his known persons told him that along with Vishal Agarwal, Awadhesh Agarwal (the present applicant), Narendra Kumar Goyal @ Lala, Ravi @ Tamatar and 5-6 other miscreants were involved in the matter. Awadhesh Agarwal has an old enmity with him which is continuing.

(III). The first informant in his first statement recorded under Section 161 Cr.P.C. stated about the prosecution version as stated by him in the FIR.

(IV). The second statement of the first informant was recorded under Section 161 Cr.P.C. in which he has stated about the version given by him in his application dated 26.11.2015 naming the accused persons therein.

(V). Dhan Kumar Jain, the injured has stated about the CCTV Footage and then has stated that Awadhesh Agarwal used to do the work of his jewellery in Bihar since many years and he was removed from the work due to which he had enmity with him and some time before Anil Goyal, a close friend had told him that Awadhesh Agarwal has stated that he has been insulted by Dhan Kumar Jain and he would not leave him and then with his paid persons namely Narendra Kumar Goyal and other miscreants tried to commit his murder.

(VI). While placing the

statement of Tribhuvan Nath Chaturvedi and Vipin Bansal, it is apparent that the said persons have stated about Awadhesh Agarwal entering in a conspiracy with other accused persons for murdering the injured.

(VII).

Pradeep Kumar and Anil Goyal have been interrogated who have stated about the motive of Awadhesh Agarwal for the incident since he was ousted from the work of Bihar.

(VIII). The

statement of Shubham Jain who is the nephew of co-accused Vishal and elder son of Pradeep Kumar Jain @ Babbey (the brother of the injured) has stated about the enmity between Vishal Agarwal and the injured.

(IX). The

statement of Abhishek Jain has been placed for the purpose to demonstrate that he

has stated that after the incident Narendra Goyal came and took Vishal with him and they were talking that Dhan Kumar Jain after being shot has survived due to which Awadhesh will become anger as to how he has survived and is stating of giving the payment of contract later on.

(X).

Learned counsel submitted that the Court should not form an opinion on the material available on record at the stage and should leave it to be considered in the trial. Since exercising inherent jurisdiction has to be in only cases where there is no sufficient ground to proceed but in the present case there is sufficient ground including the statement of the applicant to implicate him in the matter and as such prima-facie it reveals that there is material against the applicant and thus

the Court should not interfere in the matter. Further, it is argued that the Court at the stage of discharge is to only see the material produced by the Investigating Agency and is not expected to go deep into probative value of the material on record. It is submitted that the defence of the accused cannot be seen at this stage.

To buttress his submissions, he has relied upon the following judgements of the Apex Court:

(i) **Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia : (1989) 1 SCC 715**, para 19. The same reads as under:

“19. We wish to add a word regarding interference by the High Court against a charge framed by the Sessions Court. Section 227 which confers power to discharge an accused was designed to prevent harassment to an

innocent person by the arduous trial or the ordeal of prosecution. How that intention is to be achieved is reasonably clear in the section itself. The power has been entrusted to the Sessions Judge who brings to bear his knowledge and experience in criminal trials. Besides, he has the assistance of counsel for the accused and Public Prosecutor. He is required to hear both sides before framing any charge against the accused or for discharging him. If the Sessions Judge after hearing the parties frames a charge and also makes an order in support thereof, the law must be allowed to take its own course. Self-restraint on the part of the High Court should be the rule unless there is a glaring injustice which stares the court in the face. The opinion on any matter may differ depending upon the person who views

it. There may be as many opinions on a particular matter as there are courts but it is no ground for the High Court to interdict the trial. It would be better for the High Court to allow the trial to proceed.

(emphasis supplied)”

(ii) **State of**

Orissa V. Debendra Nath Padhi : (2005) 1 SCC 568, para 8, the same reads as under:

“8. What is the meaning of the expression “the record of the case” as used in Section 227 of the Code. Though the word “case” is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to the Court of Session when offence is triable exclusively by it, inter alia, provides that when it appears to the Magistrate that the offence is triable

exclusively by the Court of Session, he shall commit “the case” to the Court of Session and send to that court “the record of the case” and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209. That is the plain meaning of Section 227 read with Section 209 of the Code. No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial.

(emphasis supplied)”

(iii) **State of Gujarat Vs. Dilipsinh Kishorsinh Rao : 2023 (252) AIC 47,** para 7, 8, 10, 11, 12, 14 and 15. They read as under:

“7. It is trite law that application of judicial mind being necessary to determine whether a case has been made out by the prosecution for proceeding with trial and it would not be necessary to dwell into the pros and cons of the matter by examining the defence of the accused when an application for discharge is filed. At that stage, the trial judge has to merely examine the evidence placed by the prosecution in order to determine whether or not the grounds are sufficient to proceed against the accused on basis of charge sheet material. The nature of the evidence recorded or collected by the

investigating agency or the documents produced in which prima facie it reveals that there are suspicious circumstances against the accused, so as to frame a charge would suffice and such material would be taken into account for the purposes of framing the charge. If there is no sufficient ground for proceeding against the accused necessarily, the accused would be discharged, but if the court is of the opinion, after such consideration of the material there are grounds for presuming that accused has committed the offence which is triable, then necessarily charge has to be framed.

8. At the time of framing of the charge and taking cognizance the accused has no right to produce any material and call upon the court to examine the same. No provision

in the Code grants any right to the accused to file any material or document at the stage of framing of charge. The trial court has to apply its judicial mind to the facts of the case as may be necessary to determine whether a case has been made out by the prosecution for trial on the basis of charge-sheet material only.

10. It is settled principle of law that at the stage of considering an application for discharge the court must proceed on an assumption that the material which has been brought on record by the prosecution is true and evaluate said material in order to determine whether the facts emerging from the material taken on its face value, disclose the existence of the ingredients necessary of the offence alleged. This Court in State

of Tamil Nadu v. N. Suresh Rajan, (2014) 11 SCC 709 adverting to the earlier propositions of law laid down on this subject has held:

“29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and

documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come

to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.”

11. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged. The expression “the record of the case” used in Section 227 Cr. P.C. is to be understood as the documents and articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. The submission of the accused is to be confined to the material produced by the investigating agency.

12. The primary consideration at the stage of framing of charge is the test of existence of a prima-facie case, and at this stage,

the probative value of materials on record need not be gone into. This Court by referring to its earlier decisions in the State of Maharashtra v. So m Nath Thapa, (1996) 4 SCC 659 and the State of MP v. Mohan Lal Soni, (2000) 6 SCC 338 has held the nature of evaluation to be made by the court at the stage of framing of the charge is to test the existence of prima-facie case. It is also held at the stage of framing of charge, the court has to form a presumptive opinion to the existence of factual ingredients constituting the offence alleged and it is not expected to go deep into probative value of the material on record and to check whether the material on record would certainly lead to conviction at the conclusion of trial.

14. This Court in the aforesaid judgment has also laid down principles to be considered for exercise of jurisdiction under Section 397 particularly in the context of prayer for quashing of charge framed under Section 228 Cr. P.C. is sought for as under:

“27. Having discussed the scope of jurisdiction under these two provisions i.e. Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction.

However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective

analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to

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

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

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and

materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed *prima facie*.”

15. The revisional court cannot sit as an

appellate court and start appreciating the evidence by finding out inconsistency in the statement of witnesses and it is not legally permissible. The High Courts ought to be cognizant of the fact that trial court was dealing with an application for discharge.

(emphasis supplied)”

(XI). While placing supplementary affidavit dated 24.8.2024 it is submitted that four persons namely Pushparaj Singh, Prabhakar Singh, Vinod Mudgal @ Dada and Sarvesh Shukla were arrested who were then interrogated by the police who stated that the applicant had given a contract for murder of the injured.

10. Learned counsel for the State submits as under:-

(I). The order impugned states that the present case

appears to be a case of conspiracy.

(ii). There was suspicion on the applicant since before and as such his implication later on was having a basis for it.

(iii). The charges can be framed merely on the basis of suspicion only and in the present case there is suspicion against the applicant and as such the framing of charge against the applicant is a legal order.

(iv). The injured has in his statement during investigation stated that his friend had named the applicant as a person who had enmity with him and had stated to take revenge.

(v). There is strong suspicion against the applicant and thus charges can be framed.

(vi). The present petition is devoid of any merit and be dismissed.

11. In rejoinder, learned counsel for the applicant submitted that the statement of co-accused which is confessional in nature cannot be looked into as is inadmissible and cannot form part of the charge sheet and the same has to be ignored as has been held by the Apex Court in the case of **Sanuj Bansal Vs. State of U.P and another : SLP (Crl.) 10536 of 2023, order dated 12.7.2024** wherein the Apex Court has held as under:-

“It is obvious that confessional statements recorded by the police officers which are part of the charge-sheet cannot remain a part thereof and the same must be ignored. The Trial Court to take note of this.”

12. After having heard learned counsel for the parties, perusing the records, it is evident that the applicant is not named in the first information report. His naming and implication in the matter is during investigation in a subsequent application given by the first informant even in which he has only cast suspicion about the involvement of the applicant. The naming of the applicant at the subsequent stage is on the basis of a suspicion that he has enmity with the alleged injured. The suspicion is of the applicant conspiring with the other persons to commit the offence. There is nothing on record to show that there has been meeting of minds between the accused persons to commit the offence. A settled principle of law is that a few bits here and a few bits there on which the prosecution proposes to rely are woefully inadequate for connecting the accused with the crime. In the present case the situation is such. There is nothing concrete and credible to show the implication of the applicant and also to

show that there has been meeting of minds between the accused persons to conspire to commit the offence.

13. The Apex Court in the case of **M/S Karnataka Emta Coal Mines Limited and another Vs. Central Bureau of Investigation : 2024 SCC OnLine SC 2250** while reiterating the powers of High Court under Section 482 Cr.P.C. and also at the stage of Section 227 Cr.P.C. has held as under:

“18. INHERENT JURISDICTION OF THE HIGH COURT UNDER SECTION 482, Cr. P.C.

18.1. For seeking quashing of the chargesheet and the order framing charges, learned counsel for the appellants has cited decisions of this court that lay down the proposition of law relating to quashing of criminal proceedings by a High Court under Section 482, Cr. P.C. In *Rajiv Thapar v. Madan Lal Kapoor*, (2013) 3 SCC 330 this court held as under:

“29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482

CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to

exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.”

[emphasis added]

18.2. In the captioned case, this court had further observed that the discretion vested in the High Court under Section 482 Cr. P.C. can be exercised suo moto to prevent abuse of the process of a Court, and/or to secure the ends of justice. After listing the factors that ought to weigh with the High Court to make a just and rightful choice, it was observed thus:

“30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one : whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two : whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three : whether the material relied upon by the

accused has not been refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four : whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused.”

[emphasis added]

18.3. In *State of Orissa v. Debendra Nath Padhi*, (2005) 1 SCC 568 the powers of the High Court under Section 482, Cr.P.C. and Article 226 of the Constitution of India were highlighted and the court observed that:

“29. Regarding the argument of the accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under Section 482 of the Code and Article 226 of the Constitution is unlimited whereunder in the interests of justice the High Court can make

such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice within the parameters laid down in *Bhajan Lal* case [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426].”

[emphasis added]

18.4. In *Rukmini*

Narvekar v. Vijaya Satardekar, (2008) 14 SCC 1, this Court has observed that the width of the powers of the High Court under Section 482, Cr. P.C. and under Article 226 of the Constitution of India are unlimited, that the High Court could make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. In a concurring order passed in the very same case, it was observed in addition that in exercising jurisdiction under Section 482, Cr. P.C., the High Court is free to consider even material that may be produced on behalf of the accused to arrive at a decision whether charge as framed could be maintained.

18.5. In *Anand Kumar Mohatta v. State (NCT of Delhi)*, Department of Home, (2019) 11 SCC 706, referring to the provisions of Section 482, Cr. P.C., this Court held as follows:

16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge

application is pending with the trial court [G. Sagar Suri v. State of U.P., (2000) 2 SCC 636, para 7 : 2000 SCC (Cri) 513. Umesh Kumar v. State of A.P., (2013) 10 SCC 591, para 20 : (2014) 1 SCC (Cri) 338 : (2014) 2 SCC (L&S) 237]. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced and the allegations have materialised into a charge-sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge-sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court.

xxxxx

28. In State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426], this Court has set out the categories of cases in which the inherent power under Section 482 CrPC can be exercised. Para 102 of the judgment reads as follows : (SCC pp. 378-79)

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or

otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are

so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

18.6. In State of Karnataka v. L. Munniswamy, (1977) 2 SCC 699, Y.V. Chandrachud, J. as he then was (speaking for a three Judge Bench) observed thus:

“7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court

proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice.”

[emphasis added]

18.7. As can be gathered from the above, Section 482 Cr. P.C. recognizes the inherent powers of the High Court to quash initiation of prosecution against the accused to pass such orders as may be considered necessary to give effect to any order under the Cr. P.C. or to prevent abuse of the process of any court or otherwise to secure the ends of justice. It is a statutory power vested in the High Court to quash such criminal proceedings that would dislodge the charges levelled against the accused and based on the material produced, lead to a firm opinion that the assertions contained in the charges levelled by the prosecution deserve to be overruled.

18.8. While exercising the powers vested in the High Court under Section 482, Cr. P.C., whether at the stage of issuing process or at the stage of committal or even at the stage of framing of charges, which are all stages that are prior to commencement of the actual trial, the test to be applied is that the Court must be fully satisfied that the material produced by the accused would lead to a conclusion that their defence is

based on sound, reasonable and indubitable facts. The material relied on by the accused should also be such that would persuade a reasonable person to dismiss the accusations levelled against them as false.”

XXXXXXXXXXXXX

“20. APPLICATION OF MIND AT THE STAGE OF SECTION 227, Cr. P.C.

20.1. We may note that there is no quarrel with the broad proposition canvassed by learned counsel for the respondent- CBI that at the stage of Section 227, Cr. P.C., the Special Judge, CBI had to sift the evidence to find out whether there was sufficient ground for proceedings against the appellants. That exercise would include taking a prima facie view on the nature of the evidence recorded by the CBI and the documents placed before the court so as to frame any charge. At the same time, one must be mindful of the language used in Section 227 of the Cr. P.C., which is extracted below:

“227. Discharge.—If,

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

20.2. As observed in Prafulla Kumar Samal (supra) the expression “not sufficient ground for proceeding against the

accused” clearly shows that the Judge is not a mere post office to frame the charge at the behest of the prosecution. The Judge must exercise the judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. The principles governing the scope of Section 227, Cr. P.C. have been succinctly summarized in the caption case as below:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

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

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

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

will be fully within his right to discharge the accused.

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

[emphasis added]

20.3. To the same effect is the view expressed in *Niranjan Singh KS Punjabi* (supra) where this court has observed as follows:

“5. Section 227, introduced for the first time in the new Code, confers a special power on the Judge to discharge an accused at the threshold if ‘upon consideration’ of the record and documents he considers ‘that there is not sufficient ground’ for proceeding against the accused. In other words his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds for proceeding with the trial against the accused. If he comes to the conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not he will discharge the accused. It must

be remembered that this section was introduced in the Code to avoid waste of public time over cases which did not disclose a *prima facie* case and to save the accused from avoidable harassment and expenditure.

6. The next question is what is the scope and ambit of the ‘consideration’ by the trial court at that stage. It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution.”

[emphasis Added]

20.4. In *N. Suresh Rajan* (supra), the following view was expressed as to the role of the trial Court at the time of considering an application for discharge.

“29. We have bestowed our consideration to the rival submissions and the submissions made by Mr Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court

cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has not to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.”

[emphasis added]

20.5. The aforesaid parameters had to be kept in mind by the learned Special Judge, CBI at the time of considering the

records/documents submitted by the respondent-CBI and the material produced by the appellants. In our view, the said consideration is lacking in the impugned orders for the reasons noticed above.”

14. The argument of learned counsels for the opposite party no.2 mainly hinged on the premise on the material which has to be looked into while considering discharge of the accused. It is trite law that the defence of the accused cannot be looked into at this stage. With regards to the evidence collected during investigation and as demonstrated from it, learned counsel did not dispute the same but only argued that the same was sufficient to reject the discharge and put the accused applicant for trial since he was suspected to have been involved in conspiracy to commit the offence.

15. The material as collected during investigation on the face of it only suggests involvement of the applicant accused in conspiracy to commit the offence. The admissible material does not go to show and positive evidence against him regarding meeting of minds and thereby entering in a conspiracy with other accused persons to commit the offence.

16. In view of the discussions as above, this Court comes to a conclusion that on the material collected during investigation and admissible in nature, the prosecution has failed to bring in credible and substantial evidence against the accused applicant. There has been no effort on the part of the learned counsel for the applicant to plead and argue the defence of the applicant accused in the matter but has

confined his submission only on the material collected during investigation.

17. The present application under section 482 Cr.P.C. thus succeeds and is **allowed**. The applicant is discharged of the offences in the above-mentioned case.

C.- Criminal Misc. 482
Cr.P.C. Application No. 37671 of
2022

1. Heard Sri Sushil Shukla, learned counsel for the applicant, Sri Anil Srivastava, learned Senior Advocate assisted by Sri Vikas Srivastava, learned counsels for the opposite party no.2, Sri Ajay Singh, learned A.G.A-I for the State and perused the records.

2. The present application under Section 482 Cr.P.C. has been filed by the applicant Awadhesh Agarwal with the following prayers:-

“It is, therefore most respectfully prayed that this Hon’ble Court may be pleased to allow this application and quash the impugned order-dated 25.7.2022 as passed by the trial court i.e. Ld Addl. Session Judge/Spl. Judge (Gangsters Act), Court No. 18 rejecting discharge plea of the accused-applicant in terms of S. 227 CrPC and directing framing of charge against him u/s 2/3 of the the UP Gangsters and Anti-Social Activities (Prevention) Act, 1986 as well as quash the entire impugned criminal proceedings of Gangsters Session Trial (GST) No. 77 of 2016 (arising out of Case Crime No. 48 of 2016) u/s 2/3 of the UP Gangsters and Anti-Social Activities (Prevention) Act, 1986,

P.S. Madan Mohan Gate, District Agra (State Vs. Ravi @ Tamatar and others) pending currently in the aforesaid court as against the accused-applicant only since the continuation of such proceedings as against him amounts to a clear abuse of the process of the court.

And by way of interim measure and during pendency of present application before this Hon’ble Court, it is further prayed that this Hon’ble Court may be pleased to stay further the impugned criminal proceedings of Gangsters Session Trial (GST) No. 77 of 2016 (arising out of Case Crime No. 48 of 2016) u/s 2/3 of the UP Gangsters and Anti-Social Activities (Prevention) Act, 1986, P.S. Madan Mohan Gate, District Agra (State Vs. Ravi @ Tamatar and others) pending currently in the in the court of Ld Addl. Session Judge/Spl. Judge (Gangsters Act), Court No. 18, Agra pending as against the accused-applicant only, otherwise he shall suffer irreparable loss.”

3. The facts of the case are a First Information Report was lodged on 22.04.2016 by Anuj Malik of Police station M.M.Gate, Agra as Case Crime No. 0048 if 2016 under Sections 2, 3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 against the applicant and eight other accused persons with the allegation that they are working in a gang and a leader/member of the said gang are indulged in criminal and illegal activities.

4. A gang chart dated 11.04.2016 was forwarded by the

SHO, P.S. M.M.Gate, Agra which after being recommend by the Circle Officer – Kotwali, Agra on 11.04.2016, the Superintendent of Police (City), Agra on 14.04.2016, the Senior Superintendent of Police, Agra reached the District Magistrate, Agra which was the approved by him on 21.04.2016. The gang chart showed the applicant to be a member of gang and involved in one case being Case Crime No. 660 of 2015 under Sections 307/120-B/34 IPC, Police Station M.M.Gate, Agra with further description that a charge sheet No. 111/15 dated 27.12.2015 has been submitted against him.

5. The matter was investigated and a Chargesheet No. 32 dated 01.07.2016 was submitted against the applicant and seven other accused persons under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

6. The court of the Additional Sessions Judge/ Special Judge (Gangsters Act), Court No. 18, Agra vide order dated 25.07.2022 framed charges against the applicant and other co-accused persons for offences under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

7. Learned counsel for the applicant while relying upon the judgment of the Apex Court in the case of **Farhana Vs. State of Uttar Pradesh : 2024 SCC OnLine SC 159** and has submitted that if the predicate offence in the connected matter finds favour with the applicant accused, then the

continuation of the proceedings of the present case are also bad in law. He has placed paras 13 to 16 to buttress his submission, which read as under:

“13. Needless to say that for framing a charge for the offence under the Gangsters Act and for continuing the prosecution of the accused under the above provisions, the prosecution would be required to clearly state that the appellants are being prosecuted for any one or more offences covered by anti-social activities as defined under Section 2(b).

14. There being no dispute that in the proceedings of the sole FIR registered against the appellants for the offences under Chapter XVII IPC being Crime Case No. 173 of 2019, the appellants stand exonerated with the quashing of the said FIR by the High Court of Judicature at Allahabad by exercising the powers under Section 482 of Criminal Procedure Code, 1973, vide order dated 3rd March, 2023 passed in Application No. 7228 of 2023.

15. Hence, the very foundation for continuing the prosecution of the appellants under the provisions of the Gangsters Act stands struck off and as a consequence, the

continued prosecution of the appellants for the said offence is unjustified and tantamounts to abuse of the process of Court.

16. As a consequence of the discussion made herein above, the impugned orders dated 14th November, 2022 and 6th December, 2022 passed by the High Court of Judicature at Allahabad are quashed and set aside. Resultantly, the impugned FIR being Crime Case No. 424 of 2022 for offence punishable under Section 3(1) of the Gangsters Act, registered at Police Station-Bhognipur, District-Kanpur Dehat and all the proceedings sought to be taken thereunder against the appellants are hereby quashed.”

8. It is further submitted that except for a single case, which is also under challenge in the connected matter, the applicant is not involved in any other criminal offence.

9. Learned counsels for the State/Opposite party No. 1 and original complainant/Opposite party No. 2 do not oppose the said submission and agree to the proposition of law as placed and argued.

10. The facts and law on the subject are clear and not in dispute. The challenge in the present

matter is of proceedings under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 which have been initiated on the basis of a single case against the applicant, which is also under challenge in the connected petition being Criminal Misc. 482 Cr.P.C. Application No. 21392 of 2022 - Awadhesh Agarwal Vs. State of U.P. and another.

11. Since the connected petition of the accused applicant for the predicate offence has been allowed by this Court and he has been discharged of the offences in the said case, the proceedings against him in the present case also cannot survive. The proceedings against him are thus quashed. The present application under Section 482 Cr.P.C. is **allowed.**

(2024) 9 ILRA 1218
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2024

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482 No. 27298 of 2019

Jitendra Kumar Keshwani **...Applicant**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Applicant:

Deepak Kumar Kulshrestha, Hitesh Pachori

Counsel for the Respondents:

G.A., Manish Trivedi

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Sections 405 - Criminal breach of trust, Sections 420 - Cheating and dishonestly inducing delivery of property, Section 409 - Criminal breach of trust by public servant, or by banker, merchant or agent - Distinction between cheating and criminal breach of trust - Cheating requires dishonest intention at the inception, while criminal breach of trust involves entrustment and subsequent misappropriation. (Para -14)

(B) Indian Penal Code, 1860 - Cheating (Section 420 IPC) and Criminal Breach of Trust (Section 409 IPC) are mutually exclusive - An act cannot constitute both offenses simultaneously - a person cannot claim to have entrusted any property to someone and at the same time he can also not say that he has been cheated by dishonest inducement to deliver the property - It can either be entrustment or the cheating, however, it cannot be both. (Para - 14,15)

(C) The Securities and Exchange Board of India Act, 1992 - Section 15-F - Penalty for default in case of stock brokers, Section 26 - Cognizance of offences by courts, Section 26B - Special courts for trial of offences - SEBI Act, being a special law, takes precedence over the IPC and CrPC in cases involving securities and brokerage. (Para - 19)

Investor and applicant were in a buyer-seller relationship - Applicant was a share broker - investor was aware of risks involved - investor's grievance was regarding non-payment - which was a civil dispute.

HELD: - Criminal courts cannot be used for monetary recovery; civil courts are the appropriate forum. Entire Criminal Proceedings along with the charge-sheet & cognizance order

quashed. Investor can approach SEBI authorities for redressal under Section 15F of the SEBI Act. (Para -20)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

1. Lalit Chaturvedi & ors. Vs St. of U.P. & anr., SLP (Crl.) No. 13485 of 2023

2. Mohammed Ibrahim & ors. Vs St. of Bihar & anr., (2009) 8 SCC 751

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Hitesh Pachori, learned counsel for the applicant, Sri Manish Trivedi, learned counsel for the opposite party no.2 and learned Sri Rajeev Kumar Singh, A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of charge-sheet dated 06.09.2018 and cognizance order dated 12.04.2019 as well as the entire criminal proceedings in Case No. 21416 of 2019 (State of U.P. Vs. Jitendra Kumar Keshwani), arising out of Case Crime No. 160 of 2018, under Sections 420, 409 of the India Penal Code (hereinafter referred to as, 'I.P.C.'), Police Station- Hariparvat, District- Agra, pending in the court of Chief Judicial Magistrate, Agra.

3. The brief facts of the instant case are that the opposite party no.2 has lodged an F.I.R. being Case Crime No. 160 of 2018 under Section 420 and 406 I.P.C. alleging therein that the applicant herein is the Director/proprietor of M/s LDK Share and Securities Pvt. Ltd., who was the licensed share broker. In the F.I.R. it has been alleged that the opposite party no. 2 and his younger brother Ram Kumar Sharma were having Demat Accounts with

the Stock Holding Corporation of the applicant, where the equity shares of differentit companies were deposited by the opposite party no. 2 and his brother. The opposite party no. 2 and his brother used to trade in share equity shares through the applicant, who was the licensed share broker. It is alleged that the applicant herein had contacted the opposite party no. 2 and his brother and asked them to invest and trade in shares through the applicant, whereby he will provide various facilities. On such assurance, the opposite party no. 2 and his brother had invested in equity shares and also subsequently sold the aforesaid shares. When the money of shares sold was asked by the opposite party no.2 from the applicant, he assured that the payment shall be made after sometime. Therefore, the aforesaid amount of shares sold by the opposite party no. 2 was an amount kept in the entrustment of the applicant herein and despite repeated demands made by the opposite party no. 2 the applicant has failed to make the payment of shares amounting Rs. 9,69,450/-. When the said payment was not made by the applicant herein, a legal notice dated 30.11.2017 was given to the applicant. Despite the said notice the applicant had not paid the amount, therefore, it is alleged that the applicant has committed the breach of trust and misappropriation of the amount of the opposite party no.2.

4. It has been further prayed in the F.I.R. that after registering the F.I.R. and initiating the legal proceedings against the applicant, the amount of the opposite party no. 2 be recovered. The matter was investigated by the police and the charge sheet dated 06.09.2018 was filed, on which cognizance was taken by the Chief Judicial Magistrate concerned on 12.04.2019,

against which the instant application has been filed by the applicant herein.

5. Learned counsel for the applicant relying upon the judgement of the Apex Court dated 06.02.2024 passed in Criminal Appeal arising out of ***SLP (Crl.) No. 13485 of 2023 (Lalit Chaturvedi & Others vs. State of U.P. and Another)***, submits that from the allegations made in the F.I.R. no offence whatsoever under Sections 420 and 409 I.P.C. can be said to have been made out against the applicant herein.

6. Learned counsel for the applicant further submits that the applicant is a broker appointed under the provisions of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '*the SEBI Act*') and opposite party no.2 herein, is an investor and the dispute between the parties with regard to investment made by opposite party no.2 in the shares, which were ultimately sold by opposite party no.2 and the amount of the same has been misappropriated by the broker. He submits that the aforesaid offence is covered under Section 15-F of SEBI Act. Therefore, he relies upon the Section 26 of SEBI Act.

7. Learned counsel for the applicant submits that no criminal prosecution can be initiated on the F.I.R. lodged by any person for the offence under the SEBI Act. The criminal prosecution can be initiated only on the complaint filed by the court under the SEBI Act. Therefore, he submits that the instant F.I.R. lodged by the opposite party no.2 is not sustainable in law. Therefore, he seeks quashing of the entire proceedings of the instant case initiated under the provisions of this Act.

8. Per contra, learned counsel for the opposite party no.2 has relied upon Section 26B of the SEBI Act and has tried to contend that the criminal prosecution in the special courts are permissible, therefore, he further submits that in the instant F.I.R., no offence under the SEBI Act has been alleged by the applicant. Rather, the prosecution has been lodged for the offences under Section 409 and 420 of I.P.C., therefore, the prosecution of the applicant herein for the offences under I.P.C. is permissible on the basis of the F.I.R. Therefore, learned counsel for opposite party no.2 submits that no interference is called for. Learned counsel further submits that if in any case, the Court comes to a conclusion that the F.I.R. lodged by opposite party no.2 against the applicant is not sustainable and barred under Section 26 of the SEBI Act, then he may be permitted to file an appropriate complaint before the SEBI, on which the delay in filing such complaint due to pendency of the instant application may be exempted.

9. Learned A.G.A. also supports the submissions made by learned counsel for the opposite party no.2.

10. Having heard the rival submissions made by learned counsels for the parties, this Court has carefully gone through the record of the case. Before proceeding further it would be relevant to note provisions of Sections 405, 420 and 409 I.P.C., which reads as under:

Sections 405, 409 and 420

I.P.C.

"405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property,

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

409. Criminal breach of trust by public servant, or by banker, merchant or agent.—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

420. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to

seven years, and shall also be liable to fine."

11. From the plain reading of provisions of Section 420 I.P.C. it is apparent that if any person cheats and thereby dishonestly induces any person to deliver any property or to make alter or destroy the whole or any part of the valuable security or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punishable under Section 420 I.P.C.

12. In the instant case there is no element of cheating or dishonest inducement on the part of the applicant herein. The applicant herein was a share broker and the opposite party no. 2 being fully conversant with the consequences of investment in shares, as having his eyes wide open and being aware of risk of such investment had made the investment through applicant. There is some accounting dispute between the parties, for which the instant F.I.R. has been lodged praying therein the recovery of the amount, which is not permissible by criminal action as has been held by the Apex Court in **Lalit Chaturvedi (Supra)** in the following terms:

"Having gone through the complaint, which was registered as an FIR and the assertions made therein, it is quite clear that respondent no. 2/complainant – Sanjay Garg's grievance is regarding failure of the appellants to pay the outstanding amount, in spite of the respondent no. 2/complainant – Sanjay Garg's repeated demands. The respondent no. 2/complainant – Sanjay Garg states that the supplies were made

between the period 01.12.2015 and 06.08.2017. The appellants had made the payments from time to time of Rs. 3,76,40,553/- leaving a balance of Rs. 1,92,91,358/-.

*We will assume that the assertions made in the complaint are correct, but even then, a **criminal offence under Section 420 read with Section 415 of the IPC is not established in the absence of deception by making false and misleading representation, dishonest concealment or any other act or omission, or inducement of the complainant to deliver any property at the time of the contract(s) being entered.** The ingredients to allege the offence are neither stated nor can be inferred from the averments. **A prayer is made to the police for recovery of money from the appellants. The police is to investigate the allegations which discloses a criminal act. Police does not have the power and authority to recover money or act as a civil court for recovery of money.***

*The chargesheet also refers to Section 406 of the IPC, but without pointing out how the ingredients of said section are satisfied. No details and particulars are mentioned. There are decisions which hold that **the same act or transaction cannot result in an offence of cheating and criminal breach of trust simultaneously. For the offence of cheating, dishonest intention must exist at the inception of the transaction, whereas, in case of criminal breach of trust there must exist a***

relationship between the parties whereby one party entrusts another with the property as per law, albeit dishonest intention comes later. In this case entrustment is missing, in fact it is not even alleged. It is a case of sale of goods. The chargesheet does refer to Section 506 of the IPC relying upon the averments in the complaint. However, no details and particulars are given, when and on which date and place the threats were given. Without the said details and particulars, it is apparent to us, that these allegations of threats etc. have been made only with an intent to activate police machinery for recovery of money."

(Emphasis Supplied)

13. In **Mohammed Ibrahim and Others vs. State of Bihar and Another : (2009) 8 SCC 751**, the Apex Court has held as under:

"18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:

(i) *deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;*

(ii) *fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would*

not do or omit if he were not so deceived; and

(iii) *such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.*

19. To constitute an offence under Section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or

(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security)."

(Emphasis Supplied)

14. Thus, a person cannot be held responsible for the offence under Section 409 I.P.C. as well as Section 420 I.P.C. on the basis on the same allegations as both the offences are contradictory and operate in different fields altogether. In the case of cheating, dishonest intention must be present from the inception of the transaction, which is categorically missing in the instant case. Thus, no offence under Section 420 I.P.C. is made out. For the offence of criminal breach of trust the precondition is valid entrustment and subsequently its misappropriation. In the instant case, the opposite party no.2 was dealing in shares through the applicant and subsequently there is some accounting dispute between the parties in such dealing and no determined sum is entrusted. Share Market has its own risks. Therefore, it cannot be said that there was any entrustment of the property by opposite party no.2 with the applicant. Thus, no

offence under Section 409 I.P.C. can be said to have been made out against the applicant.

15. Thus, from the aforesaid judgement it is crystal clear that a person cannot claim to have entrusted any property to someone and at the same time he can also not say that he has been cheated by dishonest inducement to deliver the property. It can either be the entrustment or the cheating, however, it cannot be both.

16. From the plain reading of the F.I.R., the tenor and prayer of the F.I.R. is to get the recovery of money, which has been specifically deprecated by the Apex Court in the aforesaid judgement of **Lalit Chaturvedi (Supra)**, therefore, the F.I.R. lodged by the opposite party no.2 to initiate the criminal proceeding for recovery of money is not sustainable and is self contradictory. At the most, from the allegations as made in the F.I.R., there can be an offence under Section 15-F of the SEBI Act, which reads as under:

"15F. Penalty for default in case of stock brokers---- *If any person, who is registered as a stock broker under this Act,---*

(a) *fails to issue contract notes in the form and manner specified by the stock exchange of which such broker is a member, he shall be liable to [a penalty which shall not be less than one lakh rupees but which may extend to [one crore rupees]] for which the contract note was required to be issued by that broker;*

(b) *fails to deliver any security or fails to make payment of the amount due to the investor in the manner within the period*

specified in the regulations, he shall be liable to [a penalty [which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which [such failure continues] subject to a maximum of one crore rupees];

(c) *charges an amount of brokerage which is in excess of the brokerage specified in the regulations, he shall be liable to [a penalty [which shall not be less than one lakh rupees but which may extend to five times the amount of brokerage] charged in excess of the specified brokerage, whichever is higher."*

17. For the aforesaid offences under Section 15F of the SEBI Act, Section 26 of the SEBI Act prohibits registration of the F.I.R. for which only complainant can be filed under Section 26 of this Act, by the Board.

18. Section 26 of the SEBI Act reads as under:

Section 26 : Cognizance of offences by courts.

"26. (1) No court shall take cognizance of any offence punishable under this Act or any rules or regulations made thereunder, save on a complaint made by the Board. []

(2) No court inferior to that of [a Court of Session] shall try any offence punishable under this Act."

19. The SEBI Act is an Special Act, which shall prevail over the general act, such as I.P.C. or Cr.P.C. It is settled

position of law that once a special Act holds the field, the provisions of general law would not apply and only the prosecution can be lodged in accordance with the provisions of such special law and the provisions of Section 26 of the SEBI Act, specifically. Reliance placed on section 26B of the SEBI Act by learned counsel for the opposite party no. 2 is misconceived. It is the applicable only for the purpose of filing of the complaint before the special courts and not for criminal prosecution under the provisions of I.P.C.

20. In view thereof, the instant application is **allowed** and the entire proceedings of cognizance order dated 12.04.2019 as well as the entire criminal proceedings along with the charge-sheet dated 06.09.2018, in Case No. 21416 of 2019 (State of U.P. Vs. Jitendra Kumar Keshwani), arising out of Case Crime No. 160 of 2018, under Section 420, 409 of I.P.C., Police Station- Hariparvat, District- Agra, pending in the court of Chief Judicial Magistrate, Agra, are hereby **quashed**.

21. However, it is open for the opposite party no. 2 to approach the Authorities under the SEBI Act for the redressal of his grievance, if any, in accordance with law with the provisions of SEBI Act. If any such application is made to the SEBI by the opposite party no.2, the same shall be considered without any objection with the regard to the limitation.

(2024) 9 ILRA 1225

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 27.09.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Capital Cases No. 2 of 2022

With

Criminal Appeal Nos. 2504 of 2022 & 2524 of 2022

Ramautar & Ors.

...Appellants

Versus

Awadhesh Narayan Singh & Anr.

...Respondents

Counsel for the Appellants:

Sri Akhilesh Kumar, Sri Suresh Chandra Srivastava

Counsel for the Respondents:

Sri Ishir Sripat

(A) Criminal Law - Capital case - The Code of Criminal Procedure, 1973 - Section 366 (1) - Reference for confirmation of death penalty, Indian Penal Code, 1860 - Sections 302, 307/34 - Rarest of rare cases - circumstantial evidence - chain of evidence - hostility of witnesses - death penalty - Evidence of a hostile witness not to be rejected in toto - Testimony of police personnel should be treated in the same manner as testimony of other witnesses - when there is choice between a death sentence and a sentence of life imprisonment, the latter is the rule and the former is the exception.(Para - 53,60,70)

(B) Indian Evidence Act, 1872 - Circumstantial Evidence - Conviction can be based on circumstantial evidence inspite of hostility of eye-witnesses - Evidence provided by hostile witnesses remains admissible if supported by credible corroboration - Conviction can be based on circumstantial evidence alone but for that prosecution must establish chain of circumstances, which consistently points to the accused and accused alone and is inconsistent with their innocence.(Para - 28,29,30,32)

(C) Five golden principles - Panchsheel of the proof of a case based on

circumstantial evidence - (1) circumstances must be fully established and not merely probable; (2) established facts must exclusively point to the guilt of the accused; (3) circumstances must be conclusive in nature; (4) they must exclude all other possible hypotheses except guilt; and (5) the chain of evidence must be so complete that it leaves no reasonable doubt, proving that the act was committed by the accused.(Para - 34)

Dispute over ownership and allocation of shops escalated into violence - Very gruesome murder of two persons and his son - eyewitnesses turned hostile – conviction based on circumstantial evidence - trial Court awarded death sentence to both the appellants for their conviction.(Para -27, 28,71)

HELD: - Conviction of appellants based on circumstantial evidence and there are no tangible reasons to interfere with. Conviction under Section 302/34 IPC upheld. Death penalty set aside; life imprisonment awarded. Present case does not fall within the category of 'rarest of rare cases' attracting death penalty. Life imprisonment substituted due to lack of prior criminal antecedent and circumstantial evidence. (Para -69,73)

Appeals partly allowed. (E-7)

List of Cases cited:

1. Paramjeet Singh @ Pamma Vs St. of Uttrakhand, (2010) 10 SCC 439
2. Bhajju Vs St. of M.P. . (2012) 4 SCC 327
3. Raja & ors. Vs St. of Karn., (2016) 10 SCC 506
4. St. of Raj. Vs Bhawani & anr. (2003) 7 SCC 291)
5. Radha Mohan Singh @ Lal Saheb & ors. Vs St. of U.P. (2006) 2 SCC 450
6. Mahesh Vs St. of Maha. (2008) 13 SCC 271

7. Rajendra & anr. Vs St. of U.P., (2009) 13 SCC 480

8. Koli Lakhman Bhai Chanabhai Vs St. of Guj., (1999) 8 SCC 624

9. Hari & anr. Vs The St. of U.P

10. Sudru Vs St. of Chatt.,2019 (8) SCC 333

11. St. of Guj. Vs Anirudh Singh, (1997) 6 SCC 514

12. Hanurnant Vs The St. of M.P., [1952] 3 SCR 1091

13. Joseph Vs St. of Kerala, (2000) 5 SCC 197

14. St. of Raj. Vs Kashi Ram, (2006) 12 SCC 254

15. Ganesh Lal Vs St. of Raj., (2002) 1 SCC 731

16. St. of Maha. Vs Suresh, (2000) 1 SCC 471

17. St. of T.N. Vs Rajendran, (1999) 8 SCC 679

18. Padala Veera Reddy Vs St. of A.P., (AIR 1990 SC 79)

19. Vijay Shankar Vs St. of Har., (2015) 12 SCC 644

20. Raja @ Rajinder Vs St. of Har., (2015) 11 SCC 43

21. St. of Himachal Pradesh Vs Raj Kumar : (2018) 2 SCC 69.

22. Bachan Singh Vs St. of Punjab, (1980) 2 SCC 684

23. Sunil Dutt Sharma Vs St. (Government of NCT of Delhi) : (2014) 4 SCC 375

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

Prelude

(1) Two accused persons, namely, **Vijay Prakash Sharma** and **Dheeraj Sharma**, were tried by the Additional Sessions Judge/Fast Track Court-II, Lucknow in Sessions Trial No. 579 of 2005 : *State of U.P. Vs. Vijay Prakash Sharma and another*, arising out of Case Crime No. 196 of 2005, under Sections 302, 307/34 of the Indian Penal Code, 1860 (in short, referred hereinafter as '**I.P.C.**'), Police Station Hazratganj, District Lucknow.

(2) Vide judgment and order dated 13.09.2022, the Additional Sessions Judge/Fast Track Court-II, Lucknow, convicted both accused persons, **Vijay Prakash Sharma** and **Dheeraj Sharma**, under Sections 302/34 I.P.C. and vide judgment and order dated 16.09.2022, sentenced them under Sections 302/34 I.P.C. to be hanged to death till they are dead and a fine of Rs.5,00,000/- each, in default of payment of fine to undergo additional two months' imprisonment, however, both accused persons were acquitted under Section 307/34 I.P.C. It was also directed that on payment of the aforesaid fine by the accused persons, Rs.8,00,000/- would be paid to the legal heirs of deceased Kapil Gupta as compensation in terms of Section 357 of the Code of Criminal Procedure, 1973.

(3) Aggrieved by the aforesaid conviction and sentences, accused, **Vijay Prakash Sharma**, has preferred Criminal Appeal No. 2504 of 2022 : *Vijay Prakash Sharma vs. State of U.P.*, whereas accused **Dheeraj Sharma** preferred Criminal Appeal No. 2524 of 2022 : *Dheeraj Sharma Vs. State of U.P.*

(4) Capital Case No. 2 of 2022 arises out of the Reference made by the learned trial Court under Section 366 (1) of

the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of convicts/appellants Vijay Prakash Sharma and Dheeraj Sharma.

(5) Since the above-captioned capital sentence reference and criminal appeals arise out of a common factual matrix and impugned judgment/orders dated 13.09.2022 and 16.09.2022, we proceed to decide the same by the common judgment.

Prosecution Case

(6) Shortly stated, the prosecution case runs as under :-

I Informant Uday Swaroop Bhardwaj (P.W.1), resident of Niralanagar, Police Station Hasanganj, Lucknow, was an architect and builder. An agreement was executed between him (P.W.1) and Krishna Kumar Gupta (deceased), resident of C-160 Sector-D, LDA Colony, Kanpur Road, Police Station- Krishnanagar, Lucknow, for construction of shops and office on the place situated above Basant Talkies near Mayfair Tiraha, Hazratganj, which was purchased from Kuber Finance by Krishna Kumar Gupta (deceased). As per agreement, P.W.1 had started the construction work of shops on the aforesaid place.

II Convict/appellant Vijay Sharma was the owner of Bajrang Security Agency and V.I.P. Security Agency and its office was situated appurtenant to other portion of the aforesaid place of construction.

III P.W.1-Uday Swaroop Bhardwaj gave a written complaint

(Ext. Ka.1) in the Police Station Hazratganj, district Lucknow, stating that construction of shops was almost completed in the aforesaid place. During construction, convict/appellant Vijay Sharma often used to come and threatened Krishna Kumar Gupta (deceased) that the construction place of shops belongs to Kuber Finance Company upon which Rs.17,00,000/- of him was outstanding and in lieu thereof, he (deceased Krishna Kumar Gupta) would have to give three shops to him (convict/appellant Vijay Sharma). On this matter, Krishna Kumar Gupta (deceased) used to say that he had bought this place, therefore, he (convict/appellant Vijay Sharma) did not have any right on it.

IV On 16.04.2005, when he (P.W.1), Krishna Kumar Gupta (deceased), his son Kapil Gupta (deceased) and his friend Rajeev Dixit (P.W.2) were working in the gallery near the stairs of first floor of office and shop, then, around 3:00 p.m., convict/appellant Vijay Sharma and his son Dheeraj Sharma (convict/appellant) came and told to Krishna Kumar Gupta (deceased) that Rs.17,00,000/- was outstanding against Kuber Finance; they (convicts/ appellants) had talked to Kuber Finance; and therefore, he (deceased Krishna Kumar Gupta) would have to give three shops to them (convicts/appellants). On this, Krishna Kumar Gupta (deceased) told them (convicts/ appellants) that they did not have any right on it. On this matter, the discussion

amongst them started increasing and then convict/appellant Dheeraj Sharma (son of convict/appellant Vijay Sharma) said that these people would not accept this and by saying this, convict/appellant Dheeraj Sharma ran and picked up a double barrel gun from his office and gave the gun to his father Vijay Sharma (convict/appellant), saying to finish their work today and then they would be able to get shops. Thereafter, Vijay Sharma (convict/appellant) shot with gun on the chest of Krishna Kumar Gupta (deceased), who was sitting on a chair, as a consequence of which, he (deceased Krishna Kumar Gupta) remained sitting on the chair. Seeing this, Kapil (deceased) got into a tussle with Vijay Sharma (convict/appellant) and grabbed his hair. Thereafter, Vijay Sharma (convict/ appellant) stuck Kapil (deceased) and shot in his chest, as a consequence of which, Kapil (deceased) got injured and fell there. After that Vijay Sharma (convict/appellant) started loading the gun again. On seeing this, he (P.W.1) and his friend Rajeev Dixit (P.W.2) ran backwards in fear to save their lives. Thereafter, Vijay Sharma (convict/ appellant) fired a shot at them with the intention to kill them, but they (P.W.1 and P.W.2) quickly reached gallery, therefore, bullet did not hit them. Thereafter, he (P.W.1) hid himself in the office and from there, he also heard two more shots of fire. Thereafter, he (P.W.1) started informing his friends and the police through his mobile phone. He (P.W.1), thereafter,

looked from his office window towards the road and saw that Vijay Sharma (convict/appellant) was going towards Mayfair Tiraha (intersection) while waving the gun in his hand.

V P.W.1 (informant) had also stated that due to the firing opened by Vijay Sharma (convict/appellant), panic spread in the market and the shopkeepers quickly closed their shops and started running away and there was silence due to which public order was disrupted and normal life came to standstill. When the police came and made efforts to restore the normal life, then people started coming out of fear. P.W.1 had further stated that when he came out, he saw that police took away Krishna Kumar Gupta and his son Kapil (deceased). After some time, he (P.W.1) came to know that Krishna Gupta and his son Kapil died.

(7) The evidence of Head Moharrir Satyapal Dixit (P.W. 6) shows that on 16.04.2005, at 04:25 p.m., informant Uday Swaroop Bhardwaj (P.W.1) and Ramesh Singh son of Vishwanath Singh came at Police Station Hazratganj, district Lucknow and Uday Swaroop Bhardwaj (P.W.1) lodged his written F.I.R. at Police Station Hazratganj, district Lucknow, on the basis of which Case Crime No. 196 of 2005, under Sections 302, 307, 34 I.P.C. was registered against the convicts/appellants. His evidence also shows that he prepared the chick F.I.R., a perusal of which shows that the distance between the place of the incident and the aforesaid police station was 500 metres.

(8) S.I. Shyamakant Tripathi (P.W.9) was the Investigating Officer of the case. In his examination-in-chief, he deposed that on 16.04.2005, he was posted as Inspector-in-charge at police station Hazratganj and he was on duty along with police personnel to maintain law and order in the vicinity of police station. At about 03:10 p.m., he received information through wireless that firing took place in Basant Cinema Building. On this information, when he reached Basant Cinema Building, he saw that there was stampede and also there was an atmosphere of chaos all around. When he along with police personnel reached on the first floor of the building, he saw that a man sat on a chair in the gallery with his neck hanging in an injured condition; other man was also lying in the gallery in an injured state; and blood of both persons was oozing out. Both these persons were sent for treatment to Medical College along with police force. Thereafter, on being inquired on the spot, informant Uday Swaroop Bhardwaj (P.W.1) told him about the incident. He recorded the statement of informant Uday Swaroop Bhardwaj (P.W.1), who informed him that he lodged the F.I.R. about the incident and the incident took place in the presence of him, his friend and other persons.

P.W.9 had further stated that after collecting chick F.I.R. and other papers, he commenced the investigation. After recording the statement of informant Uday Swaroop Bhardwaj, he got information from police station through wireless that accused Vijay Kumar Sharma was caught in front of Gandhi Ashram, upon which he also reached there, wherein he met with SSI Harendra Pratap Singh, police personnel and accused Vijay Prakash Sharma and also recovered Double Barrel Gun from Vijay Prakash Sharma

(convict/appellant). He also recorded the statement of Vijay Prakash Sharma. Thereafter, he reached the place of occurrence and on the pointing out of informant, he inspected the place of occurrence and prepared the site plan (Ext. Ka. 17). He also collected the tiles stained with blood; tiles without blood; concrete with blood; and without blood from the place of occurrence and prepared recovery memo of it (Ext. Ka. 6). Apart from it, he also took possession of a black iron chair on which deceased Krishna Kumar Gupta was sitting and blood was present thereon after he being shot. By taking possession of that chair, the blood-soaked cushion was cut and all were sealed under recovery memo (Ext. Ka. 7). He also recovered an empty cartridge, wad (tickli), dafti and a bullet from the spot under recovery memo (Ext. Ka. 8). Thereafter, he recorded the statement of witnesses of recovery memo, namely, Riyaz and Asfaq. On 17.04.2005, he recorded the statement of Rajeev Dixit (P.W.2) and Bharat (P.W.3); statement of Sub-Inspector Ramkrishna Singh Yadav, who collected the hair of accused under recovery memo; the statement of Constable Sri Ram, who brought the dead bodies for post-mortem; statement of Virendra Kumar Mittal and Virendra Prakash Bansal. On 18.04.2005, he recorded the statement of witnesses of panchayatnama, namely, Virendra Kumar Mittal, Rajesh Dubey, Kamlesh Kumar Verma and Ajay Pratap Singh.

On 20.04.2005, he got information about the surrender of accused Dheeraj Sharma in the Court. On 23.04.2005, he recorded the statement of Smt. Pushplata, wife of deceased Krishna Kumar Gupta and also the statement of Nidhi Gupta, daughter of deceased Krishna Kumar Gupta. On 03.05.2005, he recorded the statement of

accused Dheeraj Sharma in District Jail, Lucknow. On 25.05.2005, he recorded the statement of Ms. Monika, daughter of deceased Krishna Kumar Gupta. On 09.06.2005, he recorded the statement of Smt. Meghna, wife of Kapil Gupta. He proved the recovery memo Ext. Ka. 15, which was in relation to recovery of one D.B.B.L. gun, three live cartridges, one empty cartridge 12 bore and the arrest of the accused under Sections 302/307/34 IPC by SSI Shri Harendra Pratap Singh, which was written by SI Shri Rajkumar Singh.

In his cross-examination, P.W.9 had deposed that after 2-3 minutes in getting the information through wireless, he reached at the place of occurrence and at that time, informant Uday Swaroop Bhardwaj (P.W.1) was not present at the place of occurrence. Both witnesses Asfaq and Riyaz were present at the place of occurrence and both of them were present along with him at the place of occurrence about one hour and he prepared the recovery memos in their presence. He also deposed that he himself signed all the packets exhibited in the Court but he could not get signature of any witnesses thereon. He further deposed that only a double barrel gun was used in the incident. He further deposed that he did not sealed the chair but he sealed blood stained cloth of the chair. He further deposed that after reaching on spot till completion of all the formalities on spot, informant Uday Swaroop Bhardwaj was present, however, he could not make him witness in any documents prepared on the spot. He was present about 5-6 hours at the place of occurrence. He further deposed that when he was present on spot, F.I.R. of the incident was already lodged. When he got information from wireless, case was not registered. He got chik F.I.R. of the case on the spot after one hour of the incident. He

denied that F.I.R. was lodged ante-timed by him. He had not arrested accused Vijay Sharma but accused Vijay Sharma was arrested by SSI Harendra Pratap Singh.

(9) The evidence of S.I. Harendra Pratap Singh (P.W.10) shows that on 16.04.2005, he, while posted as S.S.I. in police station Hazratganj, district Lucknow, got information through wireless R.T. set that firing was occurring on the first floor of the cinema hall at Mayfair Tiraha near Basant Cinema in which two people have died. On this information, at about 03:10 p.m., he, S.I. Ashok Kumar and other police personnel were going towards the place of occurrence and when he reached in front of the showroom of Gandhi Ashram, he saw that Vijay Sharma armed with a gun was coming from the cinema side and some people from the public were running behind him by shouting 'catch-catch'. When they signalled the accused Vijay Sharma to stop, he got very nervous and stopped and no clear voice was coming from his mouth. When he was questioned, after washing his face with water and feeling normal, accused Vijay Sharma told his name as Vijay Prakash Sharma, son of Bajrangi Sharma and also told that he runs a security agency. P.W.10 had also stated that accused Vijay Sharma was arrested at 04:10 p.m. and one D.B.B.L. gun, one empty cartridge and one live cartridge were recovered from his possession under recovery memo (Ext. Ka.18). The recovered items were sealed and sent for Forensic Science Laboratory.

In cross-examination, P.W.10 had stated that signature of accused Vijay Sharma was not present in the sealed packet of gun and cartridges. He also stated that he could not say the name and address of any independent witnesses who refused to give statement. While preparing recovery

memo, S.H.O. had come to the spot and also interrogated the accused. The signature of S.H.O. was not present on recovered items. The Inspector-in-Charge, after recovery of gun and during preparation of recovery memo, told him that FIR of the incident has already been lodged in the police station. One and half hours took place in preparing the recovery memo. S.H.O. came at about 5:15 p.m. on the spot. He denied the suggestion that S.H.O. caught the accused along with gun from his house and on his direction, recovery memo was prepared.

(10) The evidence of P.W.7-Asfaq Ali alias Guddu shows that he was residing at 120/24, Lalbagh, Hazratganj, Lucknow since birth. On 16.04.2005, on coming to know the incident and on calling by the police, he went to Basant Cinema Building, wherein from the first floor, police took possession of pieces of tiles, pieces of blood stained tiles, pieces of bloodless tiles, blood stained concrete, without blood concrete, blood stained iron chair, one empty cartridge 12 bore and one plastic wad (tikli) and prepared recovery memo of it and sealed it and the Inspector put his signature on it.

In cross-examination, P.W.7 had stated that by sending a Constable, he was called by the police at the place of occurrence. He did not know the accused person prior to the incident but the accused was present at the place of occurrence.

(11) The evidence of P.W.8-Ram Krishna Yadav shows that on 16.04.2005, he was posted as Sub-Inspector at police station Chowk. The proceeding of panchayatnama of the dead bodies were made by him at Medical College in the presence of witnesses Virendra Kumar

Bansal, Virendra Kumar Mittal, Kamlesh Kumar Verma and Ajay Pratap Singh. The panchayatnama was prepared by Head Constable Mahatam Yadav on his dictation. After completion of proceeding of panchayatnama, he handed over the deadbodies for post-mortem to Constable 1040 Sriram. He also stated that since the deadbodies were lying in safe custody in the mortuary of Medical College, therefore, he could not deem it appropriate to seal the deadbodies.

(12) The evidence of P.W.11-Digvijay Singh shows that on 14.06.2005, he was posted as Inspector-in-Charge at police station Hazratganj, district Lucknow. He took the investigation of Case Crime No. 196 of 2005, under Sections 302, 307/34 I.P.C., police station Hazratganj, district Lucknow. After going through the investigation report of earlier Investigating Officer and also after completion of other proceedings, he submitted charge-sheet No. 84 of 2005 against the accused persons, Vijay Prakash Sharma and Dheeraj Sharma.

In cross-examination, P.W.11 had stated that he did not receive the report of forensic laboratory till the submission of the charge-sheet nor he received the report of ballistic expert.

(13) The evidence of P.W.12-Anwar Jamal shows that on 12.08.2005, he was posted as Ballistic Expert in Forensic Science Laboratory, Mahanagar, Lucknow. On the said date, he received a letter of S.S.P., Lucknow dated 11.08.2005 along with two sealed bundles and one sample seal. On opening bundle no.1, he found D.B.B.L. 12 bore gun, bearing No. 4810D/2, one empty cartridge 12 bore, one live cartridge 12 bore and one license book. The D.B.B.L. Gun and cartridge 1/2005

fired from D.B.B.L. were marked as E.C.1 and live cartridge was marked as L.C.1. Licence Book was marked as L-2.

P.W.12 had further stated that on opening of bundle no.2, he found four 12 bore Shaktiman Express cartridges, one ball-shot, three plastic cartridges and three cardboard boxes. The fired cartridges were marked as EC2, EC3, EC4 and EC5 and ball-shot was marked as M-1. He also stated that percussion cap was absent in EC-5.

P.W.12 had further stated that after examining, he reached to the conclusion that (i) cartridges in question i.e. E.C.1 and E.C.3 marked as 1/2005 were fired from the left barrel of DBBL Gun No. 4810-D/2; (ii) the cartridge in question i.e. E.C.2 marked as 1/2005 was fired from the right barrel of DBBL Gun No. 4810-D/2; (iii) on comparison of the cartridges in question EC1 with the DBBL Gun, there is lack of sufficient personal characteristics to do so; (iv) on comparison of the cartridges in question EC5 with the DBBL Gun, no comparison marks were found; (v) it is not possible to give opinion whether ball-shot in question marked as M.1 is the part of three pieces of plastic fence and three pieces of cardboard of boxes and cartridges in question marked as EC1 and EC5 or not. He proved the report of Forensic Science Laboratory dated 16.08.2012.

In cross-examination, P.W.12 had stated that out of cartridges sent for examination, he found that one cartridge was fired from one barrel of said DBBL Gun and two cartridges were fired from another barrel but he could not give any definite opinion on two cartridges whether it was fired or not. All the cartridges were made by Shaktiman Company. In the

report, no definite opinion on report nos. 3, 4 and 5 was given. He denied that report nos. 1 and 2 were different from the facts. He also denied that report was not prepared by him.

(14) The evidence of P.W.13-Nidhi Bansal, daughter of Krishna Kumar Gupta (deceased) shows that Vijay Sharma used to live in the building as a security guard. He used to cause disturbance while coming and going on the road and had a dispute with her father (deceased) that his money was invested in Kuber Finance so give him 2-3 shops. Vijay Sharma used to visit her house to threaten her father. Vijay Sharma had told her father to give him shops else he would kill him. On the day of incident, her father and brother had gone to the under-construction building, whereafter on argument, Vijay Sharma with the help of his son shot her father and brother. Her father and brother died at the place of occurrence.

Further she has stated that she was a housewife and her mother was also a housewife. Both were financially dependent. Her brother was married and his wife's name was Meghana. Her father was not an I.A.S. but he used to do a job. Neither she nor her mother has a bank account. She does not know whether her father purchased any property from any person or Kuber Finance. She did not receive any reward for the contract that she had made with her father.

In cross-examination, P.W.13 had stated that her father had taken power of attorney from her. It is true that after giving the power of attorney, she did not go to her father's office. She and her mother never opened any account in Kuber Company. She got a call at home that accident had

occurred. She does not know who took them to the hospital.

(15) Going backwards, the autopsy on the dead body of deceased Krishna Kumar Gupta was conducted on 17.04.2005, at 09:10 a.m. by Dr. Prabhu Nath (P.W. 4), at Dr. Shyama Prasad Mukherjee Hospital, Lucknow, who found on it the following ante-mortem injuries :-

(1) Firearm injury 2 cm x 2 cm x chest cavity wound present over right firing and present sematic Rt nipple. Margins are inverted blackening and tattooing is present wound all around with collar of abrasion ring present around the wound.

(2) Firearm wound of exit 2.5 cm x 2 cm x Chest cavity deep present in posterior lateral aspect of Rt. Back chest, 5 cm below Rt inferior of the scapula, Margins are everted.

(3) On opening ecchymosis present underneath (sic.) fracture of sternum and fracture of 5 to 6 ribs on Rt side of back and underneath the injury and fracture Rt lung with pleura lacerated, the track of ecchymosis extends from (sic.) Rt side chest. The direction of firearm injury is straight from front of Rt. Side of chest up to downward to Rt side of back of chest about one litre clotted & fluid mixed blood present in chest cavity.

(4) Firearm injury entry wound 2 cm x 2 cm x chest cavity deep present (sic.) of left side of chest 5 cm (sic.) margins are inverted, blackening & tattooing present all over the wound with

collar of abrasion ring present around the wound.

(5) Firearm (sic.) left side of abdomen, 12 cm above left scapular (sic.) left side of back of shoulder, extending from above to downward.

On opening ecchymosis is present underneath above vertebral injury fracture of 4th & 5th ribs on left side of chest present underneath the fracture and injury in left lung with plura, heart and peritonium, diaphragm left side, both intestines lacerated, about one litre of clotted & fluid mixed blood present on chest & abdominal cavity.

The cause of death spelt out in the postmortem report was due to shock and haemorrhage as a result of ante-mortem firearm injuries.

(16) In his deposition before the trial Court, Dr. Prabhu Nath (P.W.4) reiterated the said cause of death and stated that the deceased could have died at 03:00 pm on 16.04.2005 and injury Nos. 1 to 4 were attributable to firearm. He also stated therein that injuries suffered by him were sufficient in the ordinary course of nature to cause death.

(17) The autopsy on the dead body of deceased Kapil Gupta was conducted on 17.04.2005, at 09:15 a.m. by Dr. Ashok Kumar Yadav (P.W. 5) at Dr. Shyma Prasad Mukherjee Hospital, Lucknow, who found on it the following ante-mortem injuries :-

(1) Firearm wound of entry 2 cm x 2 cm x abdominal cavity deep present on right side of back 10 cm above the right iliac crest, 8 cm lateral to the mid line.

Blackening and tattooing and charring present all around the wound. Margins are inverted with collar abrasion ring present all around the wound.

(2) Firearm wound of exit – 3 cm x 3 cm x abdominal cavity deep present on lateral aspect of left side of abdomen, 17 cm below the left nipple. Margins are everted, loops of putentive coming out of the wound.

On opening ecchymosis present underneath including small intestine & ascending colon & Transverse colon are lacerated (sic.). Two litres of blood and mixed fluid present in abdominal cavity, direction of firearm wound, entry & exit is in straight line, straight from right side towards upwards & forwards upto left upper part of abdomen.

(3) Firearm wound of entry – 2 cm x 2 cm x chest cavity deep present on blood aspect of left side of back 8 cm below the inferior angle of left scapula and 10 cm lateral to mid line. Margins are inverted blackening, tattooing and charring is present all around the wound. On opening the injury No.3 ecchymosis present underneath the above mentioned injury. Fracture of the rib on left side present underneath the fracture of injury in left (sic.) and (sic.) lacerated trail of (sic.) chest, right (sic.) one metallic (sic.) one litre of clotted blood.

(4) Contusion with abrasion 3 cm x 3 cm present on postero lateral aspect of chest right side 5 cm the inferior angle of right scapula.

(5) Abrasion – 3 cm x 2 cm present on back of right elbow joint on opening injury no. (4) & (5) ecchymosis present underneath the injuries.

The cause of death spelt out in the postmortem report was due to shock and haemorrhage as a result of ante-mortem firearm injuries.

(18) Dr. Prabhu Nath (P.W.5), in his deposition, had reiterated the said cause of death and stated that the deceased could have died at 03:00 pm on 16.04.2005 and all the injuries were attributable to fire arm. He also stated therein that injuries suffered by him were sufficient in the ordinary course of nature to cause death.

(19) The case was committed to the Court of Sessions in the usual manner, where the appellants were charged on counts mentioned in paragraph-1. They pleaded not guilty to the charges and claimed to be tried. Their defence was of denial.

(20) During trial, in all, the prosecution examined thirteen witnesses which are as under:-

P.W.1	Uday Swaroop Bhardwaj	Informant/eye-witness
P.W.2	Rajeev Dikshit	Eye-witness
P.W.3	Bharat	Eye-witness
P.W.4	Dr. Prabhu Nath	Conducted post-mortem of the deceased Krishna Kumar Gupta
P.W.5	Dr. Ashok Kumar	Conducted post-mortem of the

	Yadav	deceased Kapil Gupta
P.W.6	Satyapal Dikshit	On the basis of written report of informant (P.W.1), chik F.I.R. has been prepared.
P.W.7	Asfaq Ali	Witness of recovery from the place of occurrence
P.W.8	H.C.P. Ram Krishna Yadav	Conducted panchayatnama of deadbodies of both the deceased Krishna Kumar Gupta and Kapil Gupta
P.W.9	Shyamakant Tripathi	Investigating Officer of the case
P.W.10	S.I. Harendra Pratap Singh	Arrested convict/appellant Vijay Prakash Sharma and also recovered D.B.B.L. Gun and cartridges from his possession
P.W.11	Digvijay Singh	Submitted charge-sheet against both the convicts/ appellants Vijay Prakash Gupta and Kapil Gupta
P.W.12	Anwar Jamal	Submitted ballistic report
P.W.13	Nidhi Bansal	Daughter of deceased Krishna Kumar Gupta and Kapil Gupta

(21) The prosecution, in order to prove its case, has also produced following documents :-

Description of documents	Dated	Exhibits
Written Report	16.04.2005	Ext. Ka. 1
Post-mortem report	17.04.2005	Ext. Ka. 2, 3
F.I.R.	16.04.2005	Ext. Ka. 24
Copied Report	16.04.2005	Ext. Ka. 5
Recovery memo of bloodstained tiles and without blood tiles and blood stained concrete	16.04.2005	Ext. Ka. 6
Recovery memo of bloodstained iron chair	16.04.2005	Ext. Ka. 7
Recovery memo of empty cartridge 12 bore, plastic wed (tikli), dafti and bullet	16.04.2005	Ext. Ka. 8
Police Papers No. 211, A 12/1	16.04.2005	Ext. Ka. 9
Constable paper no. 13	16.04.2005	Ext. Ka. 10
Photonash	16.04.2005	Ext. Ka. 11
Police paper No. 211, A, 14/1	17.04.2022	Ext. Ka. 12

U.P. Constable/ Police A-10/1	17.04.2005	Ext. Ka.13
Photonash	17.04.2005	Ext. Ka. 14
Papers Number	17.04.2005	Ext. Ka. 15
Recovery Memos police	16.04.2005	Ext. Ka. 16
Site plan	16.04.2005	Ext. Ka. 17
Recovery Memo D.B.B.L. Gun	16.04.2005	Ext. Ka. 18
Charge-sheet	14.06.2005	Ext. Ka. 19
Forensic Science Laboratory Report	16.12.2005	Ext. Ka. 20

(22) The accused/appellants were examined under Section 313 of the Code of Criminal Procedure, wherein they had denied the prosecution evidence and stated that a false case was lodged against them; in order to protect the real accused, case was lodged against them; they were innocent; due to misunderstanding, a case was filed against them under police pressure; in regard to P.W.12, who is the expert of Forensic Science Laboratory, they stated that P.W.12 is a departmental person, due to which he gave statement in favour of the Government; they denied their presence at the place of occurrence; and also denied to give clarifying evidence in defence.

(23) On conclusion of the trial, the trial Court, vide judgment/order dated 13.09.2022, held the accused persons/appellants herein guilty of committing the murder of two persons, namely, Krishna Kumar Gupta and Kapil

Gupta and accordingly convicted the appellants herein for offences punishable under Section 302/34 I.P.C. The trial Court, observing the offences committed by the appellants herein to have been falling in the ambit of the rarest of rare cases, imposed sentence of capital punishment to the appellants herein for the offence punishable under Section 302/34 I.P.C.

(24) Feeling aggrieved, convict/appellant Vijay Prakash Sharma, has preferred Criminal Appeal No. 2504 of 2022, whereas convict/appellant Dheeraj Sharma preferred Criminal Appeal No. 2524 of 2022.

Submissions

(25) Learned Counsel representing the convicts/appellants addressed us on merits of the matter. He would urge that the order of conviction under Section 302/34 I.P.C. as passed by the trial Court is not at all sustainable. Substantiating this, he made the following submissions :-

a) There are material inconsistencies and ambiguities in the prosecution's case. The prosecution examined P.W.1-Uday Swaroop Bhardwaj, P.W.2-Rajeev Dixit and P.W.3-Bharat as eye-witnesses, however, all of them have not supported the prosecution case and have turned hostile. Their testimonies are not in consonance with the allegations made against the appellants in the F.I.R. and lend no credence to the baseless prosecution case. P.W.1 has categorically denied the allegations levelled by him in the F.I.R. and has specifically stated that he had neither seen the accused persons at

the place of incident extending any threats to the deceased persons nor was he a witness to alleged incident. P.W.1 had also stated that he had given a written report about the alleged incident at the instance of the police personnel as dictated by the concerned police official. During cross-examination, P.W.1 has deposed that he was not present at the place of occurrence during the course of alleged incident, however, he was taken to the police station by police where he was made/pressurized by them to write a report against the appellants, as dictated by the police. P.W.2 has categorically stated that he had not seen the occurrence of the alleged incident and had arrived at the place of occurrence later upon hearing the sounds of 'firecracker'. Furthermore, P.W.2 has also denied that he has given any statement to the police officials implicating the appellants and has also denied the fact that he knows or had seen the accused persons/appellants at the place of the incident on the fateful day. P.W.3 has also not supported the allegations of the present case and categorically stated that he had not witnessed the alleged act of shooting at the deceased. In this backdrop, submission is that despite there being no support/corroboation of the alleged incident by P.W.1, P.W.2 and P.W.3 and the alleged eye-witness of the case and were declared hostile and in absence of any cogent evidence vis-a-vis the commission of the alleged offence by the present appellants, the trial court had proceeded to impose

harshest punishment upon the appellants.

b) The present case does not fall within the four corners of the wall inasmuch as the alleged incident took place in the heat of passion without any pre-planning nor did the appellants acted in a cruel manner. According to the learned Counsel, the appellants had been made an accused in the present case merely with the aid of Section 34 I.P.C. According to him, in order to invoke Section 34 I.P.C., it ought to be successfully shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone. Thus, the presence of the appellants at the place of occurrence is not established/proved by the prosecution in any manner whatsoever; none of the alleged eye-witnesses of the case have testified to have seen the appellants at the place of occurrence; there is no active participation or commission of any blatant act which manifests common intention by the appellants; and the false allegations, as levelled in the F.I.R., are not corroborated by any evidence brought on record. Thus, the trial Court has lost sight of the fact in not considering the aforesaid aspect of the matter while convicting the appellants under Section 302/34 I.P.C. by means of the impugned order.

c) Highlighting the report of the post-mortem, testimonies of P.W.4-Dr. Prabhu Nath, who conducted the post-mortem of deceased Krishna Kumar Gupta as well as testimony of P.W.12-Anwar Jamal, who submitted the forensic science laboratory report, learned Counsel has submitted that P.W.4, in his testimonies, has specifically stated that the deceased died as a result of firearm injuries, however, no pellet or bullet was recovered from the body, which was also not established that the deceased was done to death at the hands of the accused persons. However, metallic pellet said to have been recovered from the body of the deceased Kapil Gupta (marked as R-1), however, the same was not used to ascertain if it had been fired from the same gun shown to have been recovered from appellant-Vijay Prakash Sharma.

d) The recovery of the alleged weapons from the appellant-Vijay Prakash Sharma is not reliable as the same has not been made in compliance of the Criminal Procedure Code and in absence of any independent eye-witness. Thus, the recovery of the alleged weapon from the appellant-Vijay Prakash Sharma cannot be said to be free from any suspicion of doubts.

e) The investigation of the present case has been conducted in a most arbitrary and callous manner, which is illustrated from the fact that none of the police personnel, testifying the prosecution witnesses, has provided any explanation as to who

provided the Test Cartridges-TC in order to conduct the Ballistic Examination of the alleged weapon. Moreso, no gun shot residue examination has been conducted so as to suggest that the appellant Vijay Prakash Sharma fired at the deceased person. Furthermore, no noting as to the presence of any gun-powder residue or charring of clothes of the deceased persons has been made which further goes on to show the cavalier manner in the present case was investigated. According to the learned Counsel, in absence of any finger print analysis, it cannot be conclusively said that the appellant Dheeraj Sharma even held the alleged weapon much less bringing it to his father appellant Vijay Prakash Sharma. It has been stated that the prosecution's case is that deceased Kapil Gupta allegedly caught hold of the hairs of Dheeraj Sharma, however, there is no evidence in order to corroborate the alleged act which creates a doubt over the presence of the appellant Dheeraj Sharma at the place of occurrence. Thus, the conviction of the appellants is recorded on the basis of assumptions without material on record to convict the appellants.

f) So far as the point of sentence is concerned, learned Counsel would urge that even taking the prosecution case on its face value, the offence against the appellants would not come within the ambit of rarest of rare cases, hence the capital sentence awarded to the appellants by the trial Court does not warrant.

g) *Per contra*, Dr V. K. Singh, learned Government Advocate assisted by Sri Rajdeep Singh, learned A.G.A. representing the State, while supporting the impugned judgment of conviction, has submitted that though the informant P.W.1, P.W.2 and P.W.3, who are eye-witnesses of the incident, had turned hostile, yet their evidence cannot be totally discarded as it is well settled in law that the same can be relied upon by the prosecution as well as by the defence. According to him, the evidence of P.W.1, P.W.2 and P.W.3 clearly proves the first part of the incident and what he has stated in examination-in-chief cannot be disregarded and once that part of the testimony is accepted, their depositions, who are the eye-witnesses of the incident gains acceptance as he has vividly described the incident and the assault. According to him, the minor contradictions and discrepancies do not make their depositions unreliable.

h) Learned Government Advocate has further stated that the trial Court have expressly affirmed the presence of the appellants at the place of occurrence and their involvement in the occurrence, based on the testimonies of prosecution witnesses. According to him, there is specific accusation against the appellant Vijay Prakash Sharma of firing upon the deceased, which is supported by the Medical Legal Certificate conducted by Dr. Prabhu Nath (P.W.4) and Dr. Ashok Kumar Yadav (P.W.5), who confirmed the

presence of firearm injuries on the persons of the deceased. Appellant Vijay Prakash Sharma along with his licence gun was arrested by P.W.10-SI Harendra Pratap Singh, hence such a recovery is admissible in evidence as an incriminating material against the appellants. Thus the prosecution has established its case beyond reasonable doubt and as such, the trial Court has rightly convicted the appellants.

i) Learned Government Advocate has further stated that the appellants had killed two innocent persons only on account of enmity, hence the appellants who have committed such a heinous and gruesome crime, are not entitled to any leniency as the incident disturbed the public tranquility in the locality. The trial Court has rightly held the present case to be rarest of rare cases so as to award the death penalty to the accused. Thus, no interference would be warranted in the present case.

Discussion & Analysis

(26) We have heard learned counsel for the parties and perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellants recorded under Section 313, Cr.P.C.; and the impugned judgment.

(27) The case at hand is one of a very gruesome murder of two persons, namely, Krishna Kumar Gupta and his son Kapil Gupta on 16.04.2005 at around 03:00 p.m. in the first floor of Basant Talkies, Hazratganj, Lucknow. The F.I.R. of the

incident was lodged on the date itself i.e. on 16.04.2005 at 04:25 p.m. by P.W.1-Uday Swaroop Bhardwaj.

(28) Before we proceed further, it would be apposite to remind ourselves that this is a case where eye-witnesses, namely, P.W.1-Uday Swaroop Bhardwaj, who is informant of the case, his friend P.W.2-Rajeev Dixit and his watchman P.W.3-Bharat, did not support the prosecution version of murder of two persons, namely, Krishna Kumar Gupta and his son Kapil Gupta and all of them turned hostile. Prosecution seeks to bring home the charge levelled on the appellants by relying on certain circumstances. No doubt the conviction can be based on circumstantial evidence inspite of hostility of eye-witnesses, provided such circumstantial evidence stood the well-settled test reiterated by the Apex Court by a catena of pronouncements time and again for sustaining conviction of accused. In this connection, we may refer the case of **Paramjeet Singh @ Pamma Vs State of Uttarakhand** : (2010) 10 SCC 439, wherein all the seven eyewitnesses have turned hostile, it was observed by the Apex Court that the case is to be decided keeping in mind that as all the eye-witnesses turned hostile, it remained a case of circumstantial evidence.

(29) It would be pertinent to mention that even the evidence of a hostile witness is not washed off from consideration and by now it is settled principle of law, that such part of the evidence of a hostile witness, which is found to be credible, could be taken into consideration and it is not necessary to discard the entire evidence. Reference in this respect could be made to the judgment of the Apex Court in the case of **Bhajju v.**

State of M.P. : (2012) 4 SCC 327, which reads thus:-

"36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party."

(30) Similarly in the case of **Raja and others Vs. State of Karnataka**: (2016) 10 SCC 506, the Apex Court has held that the evidence of a hostile witness in all eventualities ought not stand effaced altogether. It was held that the evidence of a hostile 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. In this connection reference may be made to case of **State of Rajasthan v. Bhawani & Anr.** : (2003) 7 SCC 291), **Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P.** : (2006) 2 SCC 450, **Mahesh v. State of Maharashtra** : (2008) 13 SCC 271, **Rajendra & Anr. v. State of Uttar Pradesh** : (2009) 13 SCC 480, **Koli Lakhman Bhai Chanabhai vs. State of Gujarat** : (1999) 8 SCC 624, judgment and order dated 26.11.2021, **Hari & Anr. v.**

The State of U.P. and a recent case titled as **Sudru Vs. State of Chattisgarh** : 2019 (8) SCC 333.

(31) We may also gainfully refer the case **State of Gujarat v. Anirudh Singh** : (1997) 6 SCC 514, wherein the Apex Court observed as under :-

"Every criminal trial is a voyage in quest of truth for public justice to punish the guilty and restore peace, stability and order in the society. Every citizen who has knowledge of the commission of cognizable offence has a duty to lay information before the police and cooperate with the investigating officer who is enjoined to collect the evidence and if necessary summon the witnesses to give evidence. He is further enjoined to adopt scientific and all fair means to unearth the real offender, lay the charge-sheet before the court competent to take cognizance of the offence. The charge-sheet needs to contain the facts constituting the offence/s charged. The accused is entitled to a fair trial. Every citizen who assists the investigation is further duty-bound to appear before the Court of Session or competent criminal court, tender his ocular evidence as a dutiful and truthful citizen to unfold the prosecution case as given in his statement. Any betrayal in that behalf is a step to destabilise social peace, order and progress."

(32) Keeping the above stated settled position in view, in the instant case as the eye-witnesses have turned hostile thus, it is to be considered whether

evidence on record establishes the involvement of appellants in murder of Krishna Kumar Gupta and Kapil Gupta at the touchstone of circumstantial evidence. It is well-settled that conviction can be based on circumstantial evidence alone but for that prosecution must establish chain of circumstances, which consistently points to the accused and accused alone and is inconsistent with their innocence. It is further essential for the prosecution to cogently and firmly establish the circumstances from which inference of guilt of accused is to be drawn. These circumstances then have to be taken into consideration cumulatively. They must be complete to conclude that within all human probability, accused and none else have committed the offence.

(33) In case of **Hanurnant v. The State of Madhya Pradesh**, [1952] 3 SCR 1091 the Apex Court laid down fundamental and basic principles for appreciating the circumstantial evidence. The Hon'ble Supreme Court observed:-

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a

conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

(34) In a landmark judgment of Supreme Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra**, AIR 1984 SC 1622, Hon'ble Supreme Court held as under:-

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this court in Shivaji Sahebaro Bobade V State of Maharashtra 1973 CriLJ1783 where the following observations were made:

Certainly, it is primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should

not be explainable on any other hypothesis except that the accused is guilty.

(3) *the circumstances should be of a conclusive nature and tendency.*

(4) *they should exclude every possible hypothesis except the one to be proved, and*

(5) *there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

153. *These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".*

(35) In **Joseph vs. State of Kerala** : (2000) 5 SCC 197, the Apex Court has explained under what circumstances conviction can be based purely on circumstantial evidence. It observed:-

"16. It is often said that though witnesses may lie, circumstances will not, but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the

peculiar facts and circumstances of each case. The whole effort and endeavor in the case should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the accused."

(36) The similar principle was reiterated in **State of Rajasthan v. Kashi Ram** : (2006) 12 SCC 254, **Ganesh Lal v. State of Rajasthan** : (2002) 1 SCC 731, **State of Maharashtra v. Suresh** : (2000) 1 SCC 471 and **State of Tamil Nadu v. Rajendran** : (1999) 8 SCC 679, **Padala Veera Reddy v. State of Andhra Pradesh**, (AIR 1990 SC 79), **Vijay Shankar Vs. State of Haryana** : (2015) 12 SCC 644, **Raja @ Rajinder Vs. State of Haryana** : (2015) 11 SCC 43 and **State of Himachal Pradesh Vs. Raj Kumar** : (2018) 2 SCC 69.

(37) Bearing in mind the aforesaid legal principles, we would have to examine — (i) whether the circumstances relied by the prosecution have been proved beyond reasonable doubt; (ii) whether those circumstances are of a definite tendency unerringly pointing towards the guilt of the accused; (iii) whether those circumstances taken cumulatively form a chain so far complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused; (iv) whether they are consistent only with the hypothesis of the accused being guilty; and (v) whether they exclude every possible hypothesis except the one to be proved.

(38) Having enumerated the incriminating circumstances relied by the

prosecution, we shall now examine — (a) whether the above-mentioned circumstances have been proved beyond reasonable doubt; and (b) if so, whether they, individually or cumulatively, unerringly point towards the guilt of the two accused, or any one of the two accused, and rule out all other hypothesis except the one to be proved.

(39) Insofar as the construction of the shops situated in the first floor of the Basant Cinema by the deceased Krishna Kumar Gupta through contractor/architect P.W.1 is concerned, the same has been proved by the testimony of P.W.1. Nothing material could come out from his cross-examination nor any such suggestion has been given to them as may cast a doubt on his deposition in respect thereof. P.W.1 has specifically stated in his examination-in-chief that in 2001, he had entered into a registered agreement with Krishna Kumar Gupta and his co-owner for construction of shops on the land which was purchased by Krishna Kumar Gupta from Kuber Finance Company through registered sale deed. P.W.1 has also stated that he knew the appellant Vijay Sharma, who runs a security agency on the first floor left to the stairs. Informant (P.W.1) had alleged in F.I.R. that during construction, convict/appellant Vijay Sharma often used to come and threatened Krishna Kumar Gupta (deceased) that the place of construction of shops belongs to Kuber Finance Company upon which Rs.17,00,000/- of him was outstanding and in lieu thereof, he (deceased Krishna Kumar Gupta) would have to give three shops to him (convict/appellant Vijay Sharma). On this matter, Shri Krishna Kumar Gupta (deceased) used to say that he had bought this place, therefore, he (convict/appellant Vijay Sharma) did not

have any right on it. Informant P.W.1 has further alleged in the F.I.R. that on 16.04.2005, around 3:00 p.m., convict/appellant Vijay Sharma and his son Dheeraj Sharma (convict/appellant) came and told to Krishna Kumar Gupta (deceased) that Rs.17,00,000/- was outstanding against Kuber Finance; they (convicts/ appellants) had talked to Kuber Finance; and therefore, he (deceased Krishna Kumar Gupta) would have to give three shops to them (convicts/appellants). On this, Krishna Kumar Gupta (deceased) told them (convicts/ appellants) that they did not have any right on it. On this matter, the discussion among them started increasing and then convict/appellant Dheeraj Sharma (son of convict/appellant Vijay Sharma) said that these people would not accept this and by saying this, convict/appellant Dheeraj Sharma ran and picked up a double-barreled gun from his office and gave the gun to his father Vijay Sharma (convict/appellant), saying to finish their work today and then they would be able to get shops. Thereafter, Vijay Sharma (convict/appellant) shot with gun on the chest of Shri Krishna Kumar Gupta (deceased), who was sitting on a chair, as a consequence of which, he (deceased Krishna Kumar Gupta) remained sitting on the chair. Seeing this, Kapil (deceased) got into a tussle with Vijay Sharma (convict/appellant) and grabbed his hair. Thereafter, Vijay Sharma (convict/appellant) stuck Kapil (deceased) and shot in his chest, as a consequence of which, Kapil (deceased) got injured and fell there.

(40) There was no dispute to the fact that the deadbodies of Krishna Kumar Gupta and his son Kapil Gupta were found from the gallery situated in the first floor of the Basant Cinema Talkies, Hazratganj on 16.04.2005.

(41) All the aforesaid evidence establishes the fact that there was a dispute of shop between the appellant Vijay Sharma and deceased Krishna Kumar Gupta vis-a-vis appellant Vijay Sharma demanded three shops out of total constructed shops from deceased Krishna Kumar Gupta on the pretext that Rs.17,00,000/- was outstanding with Kuber Finance and land on which the Krishna Kumar Gupta constructed the said shops was purchased by him from Kuber Finance, therefore, in lieu of Rs.17,00,000/-, three shops out of total constructed shops be handed over to him, which, as per P.W.1, denied.

(42) Apart from the above, as regards the death of Krishna Kumar Gupta and his son Kapil Gupta being homicidal and a consequence of multiple injuries caused by fire arm, no serious challenge is there to the findings returned by the trial Court. Hence we accept the finding that the death was homicidal and a consequence of injuries caused by use of fire arm. Likewise, there is no challenge to the finding that blood etc. was collected from the place of occurrence i.e. first floor of the Basant Cinema thereby confirming that murder took place there.

(43) We would first like to take up the statement of P.W.1-Uday Swaroop Bhardwaj, who is the eye-witness and informant of the case and lodged the written report at police station Hazratganj, district Lucknow, on the basis of which F.I.R. was lodged. His evidence shows as under :-

“He was working as an architect builder since 1984. In 2001, he had entered into a registered agreement with Krishna

Kumar Gupta (deceased) and his co-owner, by which he took contract for renovation of office as per the layout plan and he would get 40% of the entire share and 60% of the share would get Krishna Kumar Gupta (deceased) and others. The land, which was taken to construct shops and office, was belonging to Kuber Finance and its registration was done by Krishna Kumar Gupta (deceased). There was no office next to his office. He knew Vijay Sharma (convict/appellant), who runs a security agency on the first floor left to the stairs. His office was also on the under constructed first floor. The incident was of 16.04.2005. On that day, he was talking with a client in his office at Naza Building, wherein Dr. C.P. Awasthi, Bina Joshi and other staff were sitting. His clerk Bharat (P.W.3), who looked after the work of his site of Basant Cinema, came and told him that Krishna Kumar Gupta has come to the site and is calling him, however, he became late as he was talking to his client, then his clerk Bharat (P.W.3) again came and told him that Krishna Kumar Gupta (deceased) said that ‘whether he is coming or he should go’, upon which he immediately left his office by saying to Bina Joshi to talk with the client, he would return within fifteen minutes. He did not come back to his office and he reached home at around 11:00-11:30 p.m. He did not remember at what time they were sitting in gallery. In the gallery, he, Anil Gupta (decease), Rajeev Dixit (P.W.2) were sitting. He called a

man and ordered tea. No one else came there in front of him. Accused Vijay Sharma did not come in his presence there. He did not see Vijay Sharma (convict/appellant) the shot being fired. He did not sustain any injury in the incident. After the incident, when he came there, the police had already arrived, however, he could not tell whether the deceased were alive or dead at that time or where was the blood. He heard the sound of firing. He could not tell the number of shots of fire. After hearing the sound of firing, he informed his officials and his friend Gustad through mobile. He did not see what the police did with the deadbodies. He tried to inform the police but the number was not available. His friend Rajeev Dixit informed by dialing 100 number to police. He scribed the report on his own handwriting on the dictation of the police and submitted to police station. He proved the written report (Paper No.A6/1-2) (Ext. Ka.1). The investigating officer had interrogated him. Neither he had told the Inspector that he had seen the incident with his own eyes nor told him the name of the accused.”

(44) On the aforesaid testimonies of P.W.1, the trial Court had declared P.W.1 hostile, however, the learned trial Court permitted the Public Prosecutor to cross-examine P.W.1, who, in his cross-examination, had denied that he made a statement to the Investigating Officer that Dheeraj Sharma (convict/ appellant) threatened to shoot the deceased and Vijay Sharma (convict/appellant) had shot in the chest. He also denied that he made a

statement to the Investigating Officer that Vijay Sharma (convict/appellant) also fired upon him with intention to kill him and he hid. He denied that he saw the whole incident and on account of fear, he could not tell the correct facts. He also denied that he gave false statement on account of association with the accused. He further deposed that after taking tea, he went along with Rajeev Dixit (P.W.2) to underconstructed site situated ahead at the turn. He was busy in underconstructed office. After around 20-25 minutes, he heard a lot of noise from inside the office. When he reached there again at the noise, many people were gathered there. There were about 10-15 people. An office in the name of P.T.I. was also in front of the place of occurrence, upon which journalist also came to the spot. He did not see Vijay Prakash Sharma (convict/appellant) at the place of occurrence. The police forcefully brought him and his Clerk (P.W.2) in Jeep to the police station Hazratganj, where the police kept him till 11:30 p.m. and all the senior police officers had come to the police station. He was forced to write a report on the incident against Vijay Prakash Sharma as instructed by some Inspector at night. Vijay Prakash Sharma was also caught in the evening and brought to the police station. P.W.1 has also stated that the police told him that the said Vijay Sharma has confessed to the crime, hence a report will have to be filed against him. Vijay Prakash Sharma was empty hand in front of him and he did not have a gun in his hand. The family members of the deceased Krishna Kumar Gupta had come to the police station and refused to file an F.I.R., however, he, out of compulsion, pressure as well as fear from the police, filed the written report against Vijay Prakash Sharma and his son.

(45) P.W.2-Rajeev Dixit, who has been examined as eye-witness, has stated in his examination-in-chief before the trial Court that on 16.04.2005, he was sitting with P.W.1-Uday Swaroop Bhardwaj in his office at Naza Market, Hazratganj, Lucknow, wherein his watchman Bharat (P.W. 3) came and told Uday Swaroop Bhardwaj (P.W.1) that Vijay Kumar Gupta (deceased) is calling him in Basant Talkies, on which place office of Uday Swaroop Bhardwaj was constructed. Thereupon, Uday Swaroop Bhardwaj (P.W.1) asked him to come with him to show his office. Thereafter, he went alongwith Uday Swaroop Bhardwaj (P.W.1) to his underconstructed office at Basant Talkies and when he reached there at around 01:30 p.m., 2-3 peoples were sitting there and the construction work was going on in the shops. While they were looking the office of P.W.1, they (P.W.1 and P.W.2) heard the sound of firecrackers, upon which they looked down and saw that the public was looking upward. Thereafter, they (P.W.1 and P.W.2) came out into the gallery to see from where the sound came from and when they reached in the gallery, they saw the crowd of 10-12 people gathered there and two people had been shot. Immediately thereafter, he dialled 100 number and informed the police about the firing and then in the stampede, he also came out. P.W.2 has also stated that he did not know Vijay Sharma (deceased) nor he saw the killing of Vijay Sharma. Thereafter, he went home.

(46) Based on the aforesaid statement of P.W.2, he was declared hostile and the trial Court permitted the learned Additional Government Counsel to cross-examine him. In his cross-examination, P.W.2 has deposed that the Inspector did not take any statement from him. He denied

that he gave statement to the effect that he was present at the place of incident and Vijay Sharma (convict/appellant) had a tiff of words with K.K. Gupta (deceased) and during the same, Vijay Sharma (convict/appellant) may have shot K.K. Gupta (deceased). He did not see anyone fighting at the spot. He was in the office of Uday Swaroop Bhardwaj (P.W.1). He did not see that anyone had rushed to kill Uday Swaroop Bhardwaj (P.W.1). He denied that he has given false testimony because he has been in association with the accused. He also denied that he gave false statement due to pressure of the accused.

(47) P.W.2 has further deposed in his cross-examination before the trial Court that neither he knew nor recognized Vijay Prakash Sharma and Dheeraj Sharma (appellants) present in Court. He stated that the day when he heard the sound like firecrackers and two persons were shot, Vijay Sharma and Dheeraj Sharma, present in the Court, were not present there nor he saw them. He left the spot before the police arrived. When he heard the sound of firecrackers, 20-25 people were already present in the office. He neither saw nor heard what were talking and what was happening inside the office. All of them on hearing the sound of firecrackers and saw two peoples were shot, a stampede broke out and everyone started running helter skelter.

(48) P.W.2 was re-examined and in his re-examination, he stated that he did not remember the date, month and day of the incident. He was doing the business of Hospital equipments. His father was a retired engineer. Uday Swaroop Bhardwaj (P.W.1) used to work as builder. Uday Swaroop Bhardwaj used to work under his father when he was working as the Director

of Agriculture University, on account of which, he also knew Uday Swaroop Bhardwaj (P.W.1). The office of Uday Swaroop Bhardwaj (P.W.1) was at Naza Market and his second office was at the building of Basant Talkies. He did not know Krishna Kumar Gupta (deceased). On the date of the incident, he went to the office of Uday Swaroop Bhardwaj (P.W.1). He denied to have knowledge that Krishna Kumar Gupta was constructing shops and office in the first floor of Basant Cinema. He denied to have knowledge that dispute regarding construction of shops might have taken place between Uday Swaroop Bhardwaj (P.W.1) and Krishna Kumar Gupta (deceased). He did not know Vijay Sharma (appellant) nor he has knowledge that Vijay Sharma was running V.I.P. Security Agency. He further stated that Uday Swaroop Bhardwaj never told him that Vijay Sharma (deceased) told him that he owed Rs.17,00,000/- to Kuber Finance and that he puts pressure on K.K. Gupta (deceased) to give him 2-3 shops. He accepted that at around 02:00 p.m., Uday Swaroop Bhardwaj had reached the office. He denied that he, Krishna Kumar Gupta (deceased) and his son Kapil Gupta (deceased) and Uday Swaroop Bhardwaj (P.W.1) were sitting on chair. He was sitting in the office of Uday Swaroop Bhardwaj (P.W.1). He further stated that no such thing happened in front of him that Vijay Sharma (appellant) came at the spot and told K.K. Gupta (deceased) that he (appellant Vijay Sharma) owed Rs.17,00,000/- to Kuber Finance and given him 2-3 shops. He denied that above thing happened in front of him; Krishna Kumar Gupta (deceased) did not tell Vijay Sharma (appellant) in front of him that he bought the shops and he (Vijay Sharma) has no right on it. On seeing the statements so recorded under Section 161 Cr.P.C. by the Inspector, P.W.2

denied that he never gave such type of statements so recorded by the Inspector. P.W.2 has stated that when there was a stampede and people started running helter-skelter, he dialled '100 number' in public interest. There was chaos at the place where the incident took place and people were running here and there, therefore, he dialled '100 number' in the public interest. He stated that it is true that he came to know about the death of two people at the place of incident. He denied that he was present at the place of occurrence and saw Vijay Sharma (appellant) firing at Krishna Kumar Gupta (deceased) and his son Kapil Gupta (deceased). He also denied that on the instigation of Dheeraj Sharma (appellant), Vijay Sharma (appellant) shot Krishna Kumar Gupta and Kapil Gupta (deceased). He also denied that he gave false statement due to pressure of Vijay Sharma and his son Dheeraj Sharma (deceased).

(49) In cross-examination, P.W.2 has stated that on 09.01.2007, he gave statement in the Court and on 19.01.2018, his second statement was recorded in the Court. In both the statements, he deposed that he did not see the incident. He stated that stampede took place on the first floor of Basant Cinema. He came out of the shop after hearing the sound of firecrackers and came to know that shots have been fired. He did not see anyone on injured condition at the place of occurrence. When he reached at the first floor, there was a crowd of 200-250 people. He did not see anyone there except the crowd. There were many labourers in the crowd armed with spades etc. He also saw fire arms in the hands of some people. At the spot, accused were not present. He knew the accused persons, however, he did not know accused Vijay Sharma. He deposed that he gave statement without any pressure.

(50) P.W.3-Bharat, who is also examined as eye-witness, has stated before the trial Court in his examination-in-chief that he knew Uday Swaroop Bhardwaj (P.W.1), who is an Engineer. His office is near Basant Cinema Talkies. He took the contract for constructing shops, where he used to work as Gateman. About two years ago, it must have been 3-3:30 p.m., Gupta (deceased) and his son came to the site and told him to call Bhardwaj (P.W.1), upon which he called Bhardwaj (P.W.1) from the office. Thereafter, Bhardwaj (P.W.1) sent him to bring tea. The shop (security office) of Vijay Sharma (appellant) was on the second part of the site. Gupta and his son (deceased) and Bhardwaj (P.W.1) started having tea and he went to the second floor to see the work of the the labourers. There was no conversation between Vijay Sharma and K.K. Gupta in front of him. Vijay Sharma did not shot K.K. Gupta and his son (deceased) in front of him. There was no fight between them in front of him.

(51) Based on the aforesaid statement, P.W.3 was also declared hostile, however, learned Additional District Government Counsel had requested and on his request, he was permitted to cross-examine this witness. P.W.3, in his cross-examination, has stated that after the incident, Inspector caught him and took him to the police station in his jeep. He stated that he could not tell the reason as to why the Inspector wrote in his statement about Vijay Sharma shot Krishna Kumar Gupta and his son. He denied to give such a statement to the Inspector. He ran away out of fear from there. He did not know whether Vijay Sharma and his son were caught or not. He denied that on account of pressure and fear of the accused, he did not tell the correct facts.

(52) Apparently, P.W.9-Shyamakant Tripathi, who was

Investigating Officer of the case, had presented P.W.1, P.W.2 and P.W.3 as eye-witnesses of the incident, however, they were declared hostile as all of them did not support the case of the prosecution, however, even then the prosecution has cross-examined them on being granted permission by the trial Court. Now, the question for determination whether the testimonies of P.W.1, P.W.2 and P.W.3 could be discarded in toto as they were declared hostile.

(53) Hon'ble Supreme Court in a catena of judgments has held that the evidence of a hostile witness is not to be rejected in toto. Keeping in view this position of law, we examine the evidence on record available on record. P.W.1-Uday Swaroop Bhardwaj in his deposition has stated that he is doing the work of Architect Builder since 1984. In the year 2001, he had entered into a registered agreement with Krishna Kumar Gupta (deceased) and his co-owner. He had taken contract for beautification and renovation. As per the said agreement, the layout of the office etc. had to be prepared out of which he was to get 40% of the entire share and 60% was to be given to Krishna Kumar Gupta (deceased) and others. This land which was used to build a shop and office belonged to Kuber Finance and its registration was done by Krishna Kumar Gupta (deceased). P.W.1 has stated that he knew Vijay Sharma (appellant). Vijay Sharma (Sharma) ran a Security Agency and his agency was on the first floor, left to the stairs so as him. The incident took place on 16.04.2005. On that day, he was talking to a client in his office at Naza Building, where his Clerk Bharat (P.W.3), who looked after the work of his Basant Cinema Side, came and told him that K.K. Gupta (deceased) has come to the site and has called him. As he got late in

talking to his client so his watchman Bharat (P.W.3) again came and told that he (deceased Krishna Kumar Gupta) wanted to know whether he (P.W.1) came or he should go. He immediately left from there and reached the gallery. He did not remember at what time he was sitting in the gallery. However, he (P.W.1), Kapil Gupta (deceased) and Rajeev Dixit (P.W.2) were sitting. The statement of P.W.1 clearly establishes the fact that he was present at the place of occurrence.

(54) PW-2 Rajeev Dixit stated in his examination-in-chief that on 16.04.2005, he was sitting with Bhardwaj (PW-1) in his office at Naza Market, Hazratganj, Lucknow when his watchman Bharat (P.W.3) came to call him and told him that Gupta (deceased) called him (P.W.1) in office of Basant Talkies. An office of Bhardwaj (P.W.1) was being built in Basant Talkies. He (P.W.1) told him (P.W.2) that let me show his office to him. He went with him (P.W.1) to the office of Basant Talkies. When he went there, 2-3 people were sitting there. He reached there at around 1:30 p.m. Construction work was going on in the building. Shops were being built. He showed him the shops and then took him to see his office. When they were watching the office, at the same time, the sound of firecrackers was heard. When they looked down, the public was looking upward, then they also came out into the gallery to see where the sound had come from and then in the gallery they saw that there was a crowd of 10-12 people there. When he went there, then he saw that two people were shot. P.W.2, in his cross-examination, has admitted that it is true that he had reached Bhardwaj's office at around 2:00 p.m. This witness further stated that he left the place of occurrence before the police arrived. It is clear from the statement

of P.W.2 that he was present at the place of occurrence at the time of incident.

(55) P.W.3-Bharat has stated in his statement that he knows Uday Swaroop Bhardwaj (PW-1). He is an engineer and his office is near Basant Cienema Talkies. He had taken the contract to build shops and he used to work as a Watchman in the same. The incident happened about two years ago (witness statement recorded on 01.02.2007). It must have been 3:30 in the afternoon. Krishna Kumar Gupta and his son Kapil Gupta (both deceased) had come to the site. He asked him to call Bhardwaj (P.W.1). He called him from the office and brought him. Vijay Sharma's shop (security office) was in other side of the site. Gupta, his son and Bhardwaj started drinking tea and he went to the second floor to see the work of the labourers. According to Chik First Information Report (Exhibit Ka-4), the time of the incident was around 3:00 p.m. and it is clear from the statement of P.W.3 that he was present at the spot at the time of the alleged incident. It is clear from the statement of this witness also that Gupta (deceased) had come to the site with his son (deceased) at around 3:30 in the afternoon.

(56) From close scrutiny of the testimonies of P.W.1, P.W.2 and P.W.3, it is established that all of them have proved their presence at the place of occurrence i.e. first floor of Basant Cinema Talkies, on the date of incident i.e.16.04.2005.

(57) P.W.1, P.W.2 and P.W.3, who are eye-witnesses of the incident, stated before the Court that neither they saw the appellants at the place of occurrence nor they saw them firing shooting. P.W.9-Shyamakant Tripathi, who is the Investigating Officer of the case, has stated

before the trial Court that aforesaid P.W.1, P.W.2 and P.W.3 are the eye-witnesses of the incident. Thus, it is quite apparent that the presence of the appellant in the crime scene and the murder was not established by direct evidence. However, in this case, father and son were shot dead in broad daylight at around 03:00 p.m. in Basant Talkies, Hazratganj, a prominent place in Lucknow and the appellants have been named in the F.I.R., but before the trial Court, the informant though was examined as P.W.1 but he has not named the appellants in committing the murder. In such a case, the point of determination before us whether such circumstances exist from which only one conclusion can be drawn that the deceased Krishna Kumar Gupta and his son Kapil Gupta have been murdered by the appellants and none else.

(58) Informant P.W.1-Uday Swaroop Bhardwaj has stated before the trial Court that he heard the sound of fire, whereas P.W.2-Rajeev Dixit has stated before the trial Court that he heard the sound of firecrackers at the place of incident. P.W.2 has further stated that when he came out from the gallery to ascertain from where the sound came out, then he saw that 10-12 persons were gathered and when he reached there, then, he saw that two persons were shot. P.W.2 has also stated that he also dialled '100 number' to police. This establishes the fact that after the incident, the police, on the information of P.W.2, reached at the place of incident. This establishes the fact that P.W.2 was present at the time when the police reached at the place of occurrence and the version of P.W.2 to the effect that the police reached at the place of occurrence prior to him, is not trustworthy.

(59) P.W.2, in his cross-examination, has also stated that he had

seen firearms in the hands of some persons at the place of incident. P.W.1 has stated that he knew the appellant Vijay Sharma, who runs security agency and his agency was on first floor on the left. Thus, presumption can safely be drawn that since appellant Vijay Sharma was running a security agency, he must have had a fire arm and that fire arm (double barrel gun) must have also been in his office located at the place of occurrence. P.W.10-S.I. Harendra Pratap Singh, who arrested the appellant Vijay Sharma with D.B.B.L. Gun and cartridges, has stated before the trial Court on 16.04.2005 (the day of the incident) at about 04:10 p.m., he recovered licensed double barrel gun from the possession of appellant Vijay Sharma near the showroom of Gandhi Ashram. The evidence on record discloses that co-appellant Dheeraj Sharma, who is the son of appellant Vijay Sharma, was empty handed at the place of occurrence and during arguments between the appellant Vijay Sharma and deceased Krishna Kumar Gupta, appellant Dheeraj Sharma went to his security office, which was nearby to the place of occurrence, and brought double barrel gun and handed it over to his father Vijay Sharma, by which deceased was shot dead by the appellant Vijay Sharma.

(60) Challenging the recovery point of the aforesaid gun, learned Counsel for the appellants has contended that neither site plan of recovery of weapon was prepared nor there was any independent witness of recovery memo of weapon. This argument of the learned Counsel for the appellants seems to be correct but at the same time, the evidence of P.W.10-S.I. Harendra Pratap Singh establishes the factum of recovery of double barrel gun from the possession of the appellant Vijay Sharma and he narrated the recovery site in

his testimony in a clear words. No doubt, not preparing the site plan of recovery of fire arms is one of the irregularity on the part of the prosecution during the investigation, but that itself cannot be a ground to wash off the entire prosecution case. The law is well settled that the testimony of police personnel should be treated in the same manner as testimony of other witnesses. Moreso, there is no principle of law that without corroboration by independent witnesses, the testimony of police personnel cannot be relied on. The presumption ought to be made that a person acts honestly applies as much in favour of a police personnel as of other persons.

(61) P.W.9-Shyamakant Tripathi, who is the Investigating Officer of the case, has recovered blood stained tiles, empty tiles, blood stained concrete and empty concrete in the presence of independent witness i.e. P.W.7-Asfaq Ali vide recovery memo Ext. Ka. 6, which has been proved by P.W.7 in the trial Court. Apart from it, P.W.7 has also proved the factum of recovery of a blood stained chair and blood stained cloth affixed on it by the Investigating Officer P.W.9. The Investigating Officer P.W.9 has also recovered four empty cartridges, three plastic tiklies and three wed from the place of occurrence in the presence of P.W.7, which also proved it before the trial Court. P.W.7 has also proved the sealed recovery memo Ext. Ka. 6, 7 and 8. P.W.9 has also proved his signature on the said recovery memo. The chair recovered from the place of occurrence was also produced before the trial Court, which has been identified by P.W.9.

(62) P.W.12-Anwar Jamal, who is the ballistic expert and examined the articles sent by the police, has stated

categorically before the trial Court in cross-examination that in his opinion, out of cartridges sent from the DBBL Gun, one cartridge was found to be fired from one barrel and two cartridges were found to be fired from the other barrel, however, there was no definite opinion regarding the remaining two cartridges whether they would fire or not. The evidence of P.W.12 establishes the fact that out of four cartridges recovered from the place of occurrence, three cartridges were definitely fired from the licensed two barrel gun recovered from the possession of the appellant Vijay Sharma. Apart from it, ballshot, wad and tiklies recovered from the place of occurrence may be dropped from the use of the said double barrel gun because as per the report of ballistic expert Ext. Ka. 20, all these items were part of 12 bore cartridge. All these circumstances establish that the contents of F.I.R., the report of ballistic expert Ext. Ka. 20, recovery memo Ext. Ka.8 and the statement of Investigating Officer P.W.9 are corroborated themselves. Thus, it seems that the deceased were killed by firing at the place of occurrence from the double barrel gun recovered from the possession of appellant Vijay Sharma.

(63) The other significant factor to connect the appellants in the crime is that P.W.4-Dr. Prabhu Nath, who conducted the post-mortem of deceased Krishna Kumar Gupta, has proved the date and time of the death of the deceased Krishna Kumar Gupta and has stated that the deceased Krishna Kumar Gupta died on 16.04.2005 at about 03:00 p.m. on account of fire arm injuries. In cross-examination P.W.4 has stated that dimensions of both the injuries of deceased were the same and these injuries could be attributable to a firearm, whose dimensions are 2 cm. P.W.2 has

further stated that blackening and tattooing were found all around on the outer surface of the wounds. His evidence clearly establishes the fact that the deceased were shot from very close range with a 12 bore gun. P.W.5-Dr. Ashok Kumar Yadav, who conducted the post-mortem of deceased Kapil Gupta, has stated that cause of death of Kapil Gupta (deceased) was due to excessive bleeding due to injuries sustained from fire arm before death, which, according to him, was sufficient to cause death. P.W.5, in his cross-examination, has stated that two entries existed on the body of the deceased were caused by firing two times and it could not be caused by one fire.

(64) Thus, from the testimonies of P.W.4 and P.W.5, it is quite apparent that since the dimensions of the injuries sustained by both the deceased persons is approximately equal, which establishes that both the deceased were shot dead by one firearm. Blackening and tattooing were present on all around on the outer surface of the wound, which also establishes that he was shot dead from firing close range. As per site plan, it reflects that the accused-appellant Vijay Sharma fired shots from a distance of 8 mts. which corroborates the ante-mortem injuries and also proved the guilt of the accused. Since a wad and piece of metal were found from the left lung of deceased Kapil Gupta, which conclusively established that the deceased was killed by a 12 bore cartridge.

(65) From the aforesaid, it is established that the testimonies of PW-6 to P.W.11, which are found cogent and credible, can not be doubted on the ground that they are police officials, particularly when there are absolutely no reasons to indicate that why they would depose falsely

against the appellants. In view of aforesaid facts it is clear that testimony of these witness is credible and inspires confidence and it can safely be acted upon.

(66) Here we may consider the case put by the appellants. In their statements recorded under Section 313 Cr.P.C., the appellants had alleged that they are innocent and have been implicated in the case on misunderstanding of the police.

(67) Considering the entire evidence on record, the version of appellants appears an afterthought and concocted, accordingly said defence version is discarded. Further, the conduct of appellants is quite inculpatory. As per appellants, the deceased were murdered by some unknown miscreants, but if it was so, they offered no satisfactory explanation that why they were trying to fled away with a DBBL gun instead of reporting the matter to police. As stated earlier the story made up by appellants that on misunderstanding of the police, they were implicated in the case were lying scattered, is also found false and concocted. Thus, it is clear that conduct of appellants is highly incriminating. The recovery of DBBL gun, soon after the incident, from appellant Vijay Prakash and unnatural conduct of him are highly incriminating circumstances against the appellant.

(68) Applying the ratio of above said pronouncement of Hon'ble Apex in the facts and circumstances of instant case and considering the evidence on record, it clearly emerges that all the incriminating circumstances have been cogently and firmly established and these circumstances are of definite tendency unerringly pointing towards guilt of the appellants. When these circumstances have been taken

cumulatively, it forms a complete chain so that there is no escape from the conclusion that within all human probability, the murder of deceased Krishna Kumar Gupta and Kapil Gupta was committed by the appellants and none else. The circumstantial evidence is incapable of explanation of any other hypothesis than that of the guilt of the appellants and is inconsistent with his innocence.

(69) In view of evidence on record we reach to the conclusion that conviction of appellants is based on evidence and there are no tangible reasons to interfere with the same and we uphold the conviction of the appellants as made out in the impugned judgment.

(70) We now come to the question of death sentence. It is true that the constitutionality of a death sentence has been upheld by the Hon'ble Supreme Court. It is also true that Section 302 IPC provides for the imposition of a death sentence. But, it is equally true that it also provides for the imposition of imprisonment for life. The mere fact that a death sentence can be awarded does not mean that it has to be awarded. Particularly, when the alternative sentence of life imprisonment is an adequate punishment. One thing, however, is clear that when there is choice between a death sentence and a sentence of life imprisonment, the latter is the rule and the former is the exception and, if we may say so, a very rare exception.

(71) Now we proceed to examine the propriety of sentence imposed by the trial Court. The trial Court has awarded death sentence to both the appellants for their conviction under Section 302/34 I.P.C. and a fine of Rs.5,00,000/- has also been imposed

on each of them. In default of payment of fine further imprisonment of two years has been awarded to all of them.

(72) On due consideration of the facts and circumstances of the case, the death sentence awarded by learned trial Court appears excessive in view of the legal position that death sentence should be awarded in 'rarest of rare cases' and the Courts should follow the guidelines as laid down by Hon'ble Supreme Court in a series of judgments. The Apex Court in the landmark case of **Bachan Singh Vs. State of Punjab**, (1980) 2 SCC 684 has laid down the guidelines and the sentencing norms. In case of **Sunil Dutt Sharma Vs. State (Government of NCT of Delhi)** : (2014) 4 SCC 375, the Apex Court has reiterated the law relating to death penalty and has summarized the circumstances under which life imprisonment should be awarded instead of death penalty as follows

- (i) The young age of the accused;
- (ii) The possibility of reforming and rehabilitating the accused;
- (iii) The accused had no prior criminal record;
- (iv) The accused was not likely to be a menace or threat or danger to society or the community;
- (v) A few other reasons need to be mentioned such as the accused having been acquitted by one of the courts;
- (vi) The crime was not premeditated;
- (vii) The case was one of circumstantial evidence;

(73) Testing the facts of the instant appeal on the touchstone of guidelines as

cited above and on consideration of the totality of circumstances, we are of the firm view that the present case does not fall within the category of 'rarest of rare cases' attracting death penalty due to presence of two factors; firstly, the present case, undisputedly is one of the circumstantial evidence and secondly, both the appellants have no prior criminal antecedent. Therefore, it appears expedient in the interest of justice that the extreme punishment of death penalty awarded to the appellants under Section 302/34 I.P.C. be substituted with sentence of imprisonment for life.

(74) In the result :-

Criminal Appeal Nos. 2504 of 2022 and 2524 of 2022

Both appeals are **partly allowed**. Though we confirm the conviction of the appellants, **Vijay Sharma and Dheeraj Sharma**, for the offence punishable under Section 302 read with Section 34 I.P.C. awarded vide impugned judgment dated 13.09.2022, however, we reduce their sentence awarded vide impugned 16.09.2022 from death penalty to imprisonment for the whole of the remaining natural life of the appellants, subject, however, to the condition that the appellants would be eligible to any commutation and remissions that may be granted by the Hon'ble President and the Hon'ble Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure for good and sufficient reasons.

Capital Sentence No. 2 of 2022

Reference made by the trial Court for confirmation of death sentence of the

appellants-Vijay Sharma and Dheeraj Sharma is, decided accordingly with the sentence modified.

(75) Office is directed to transmit the record of the Trial Court and a copy of this judgment be sent to the Court concerned for information and necessary compliance through fax/e-mail forthwith.

(2024) 9 ILRA 1255
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2024

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE DONADI RAMESH, J.

First Appeal No. 155 of 2011

Smt. Pinki **...Appellant**
Versus
Sri Pushpendra Kumar **...Respondents**

Counsel for the Appellant:

Sri Uma Nath Pandey, Sri Vinod Sinha, Sri Pradeep Kumar, Sri Sushil Kumar Tripathi, Sri Mahesh Sharma

Counsel for the Respondents:

Sri A.N. Pandey, Sri D.R. Kushwaha, Sri Manish C. Tiwari, Sri Rajesh Kumar Dubey

Civil Law - Hindu Marriage Act, 1955 - Section 13 & 28 - Code of Civil Procedure, 1908 - Order VIII - Rule 9 - First Appeal - filed by wife - marriage solemnized in 2006 - husband filed for divorce in 2008 - alleging desertion in 2007 and infertility of the wife - wife contested - filed a Written St.ment (WS) - during mediation, they initially agreed to dissolve their marriage by mutual consent - however, in subsequent mediations, appellant-wife agreed to live with the husband - Later, she contested the proceedings with a second WS, establishing that she was not infertile and had two children born in 2008 and 2010 - the trial court rejected the second WS and decreed the divorce suit on merits - court finds that no

proven fact to dissolve the marriage under section 13 (1) of the Act, as a Hindu marriage can only be dissolved under limited circumstances like proven impotency - the trial court overlooked this ground and relied on the initial WS and consent from 2008, ignoring later developments - therefore, the impugned judgment and order, along with the decree, were set aside - and the matter was remitted to the lower court for further proceedings - If mediation fails, the wife can rely on the second WS, and the husband can file a Replication St.ment - Appeal is allowed. (Para - 26, 36, 37, 38)

First Appeal Allowed. (E-11)

List of Cases cited:

1. Hitesh Bhatnagar Vs Deepa Bhatnagar, (2011) 5 SCC 234,
2. Smruti Pahariya Vs Sanjay Pahariya, (2009) 13 SCC 338,
3. Sureshta Devi Vs Om Prakash, (1991) 2 SCC 25,
4. Kantipudi Adinarayana v. Putta Venkata Satya Subba Rao & ors.2024, SCC OnLine AP 1503,
5. River Valley Tea Co. Pvt. Ltd. v. Assam Gas Co. Ltd, 2018 SCC OnLine Gau 1168,
6. Ashok Kumar Kalra Vs Wing CDR Surendra Agnihotri & ors.(2020) 2 SCC 394,

(Delivered by Hon'ble Saumitra Dayal Singh, J. & Hon'ble Donadi Ramesh, J.)

1. This is an old appeal. It has remained pending for 13 years. List revised. None appears for the respondent in either call. On the last date as well, none had appeared for the respondent. The appeal is listed peremptorily today. Heard Shri Mahesh Sharma, learned counsel for the appellant and perused the record.

2. Present appeal has been filed by the appellant/wife under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act') arising from the judgement and order dated 30.3.2011 passed by the learned Additional District Judge, Court no.8, Bulandshahar, in Original Suit No. 192 of 2008 (Pushpendra Kumar vs Smt. Pinki) whereby the learned Court below has dissolved the marriage between the parties under Section 13 of the Act, at the instance of the respondent/husband.

3. The parties were married on 2.2.2006 in accordance with the Act. At that time, the respondent was employed with the Indian Army. According to the plaint allegations, the appellant deserted her husband on 31.12.2007. On 11.02.2008, the respondent/husband instituted the divorce suit, primarily on the ground of infertility suffered by the appellant. On such suit being filed, a Written Statement was filed by the appellant, on 01.04.2008. Though it is disputed to the appellant, that document - described as the first Written Statement, reads as below:

"प्रतिवाद पत्र द्वारा प्रतिवादी पंकी उत्तरदाता निम्न प्रकार है:-

1- यह कि याचिका की धारा-1, 2, 3, 4, 5, 6, 7, 8, 9, 10 का कथन स्वीकार है।

2- यह कि वादपत्र की धारा-9 का कथन कानूनी है।

विशेष-कथन

3- यह कि मैं अपनी स्वेच्छा से अपने पिता के पास रह रही हूँ।

4- यह कि यह सत्य है कि मेरे अभी तक कोई संतान नहीं है।

5- यह कि मैं पति की पाबन्दी में उसके पास रहना नहीं चाहती हूँ।

6- यह कि तलाक की बाबत दावा डिग्री होने में मुझे भी कोई आपत्ति नहीं है।

सत्यापन :
मैं सत्यापित करती हूँ कि
प्रतिवाद पत्र का समस्त कथन
मेरे ज्ञान में सच व सही है।

स्थान — बुलन्दशहर

प्रतिवादी / उत्तरदाता
श्रीमती पंकी द्वारा
अधिवक्ता।

ह०-अपठनीय

1-4-08

जगवीर सिंह, एडवोकेट
कलेक्ट्रेट एडवोकेट्स सभागार

दिनांक- 1-4-08

बुलन्दशहर"

4. The matter was referred to mediation by the learned Court below. On that, first mediation was attempted by Ms. Anupama Raghuvanshi. It concluded on 25.4.2008. Paper no. 8C-2 which is the mediation report, reads as below:

"परामर्श एवं सुलह समझौता केन्द्र
बुलन्दशहर।

न्यायालय अपर जिला जज कोर्ट नं०-2
बुलन्दशहर।

ओ०स्त० 92/08

पुष्पेन्द्र कुमार बनाम श्रीमती पंकी

श्रीमान जी,

दोनों पक्षकार उपस्थित आये। दोनों पक्षकारों के मध्य समझौता करवाने का प्रयास किया गया किन्तु दोनों ही आपसी सहमती से एक दूसरे से तलाक चाहते हैं।

अतः पत्रावली पुनः न्यायालय प्रेषित की जाती है।

परामर्शका

अनुपमा रघुवंशी, एडवोकेट

ह०/- अस्पष्ट

ह०/- पी. कुमार

ह०/- पंकी

दिनांक 25-4-08

ह० अस्पष्ट

अपर जिला एवं सत्र न्यायाधीश

न्याय कक्ष सं०-2 बुलन्दशहर।

25-4-08"

5. The matter remained pending for two years, thereafter. On 30.7.2010, the appellant/wife appears to have filed another/second Written Statement. It is Paper no.40A-1. It runs into eleven paragraphs. It reads as below:

"प्रतिवाद पत्र रेस्पॉन्डेन्ट की ओर से

1- यह कि धारा-1 पेट्रीशन से इन्कार नहीं है।

2- यह कि धारा-2 पेट्रीशन स्वीकार है।

3- यह कि पेट्रीशन की धारा-3 का कथन मिथ्या व मनगढ़न्त है तथा स्वीकार नहीं है। रेस्पॉन्डेन्ट माह जून सन् 2008 तक पेट्रीशनर के घर उसके परिजनों के साथ अपने पत्नी धर्म का पालन करते हुए रही है। पेट्रीशनर के सम्पर्क व सहवास से रेस्पॉन्डेन्ट ने माह नवम्बर 2007 में गर्भ धारण किया है। पेट्रीशनर का यह कथन कि रेस्पॉन्डेन्ट का चिकित्सकों द्वारा गर्भधारण संबंधी ईलाज कराया, मनगढ़न्त निराधार तथा असत्य है। रेस्पॉन्डेन्ट का गर्भवती होने मात्र से यह निर्विवाद है कि रेस्पॉन्डेन्ट मां बनने के अयोग्य संबंधी तथ्य कभी सामने नहीं आया।

4- यह कि धारा-4 पेट्रीशन निराधार, असत्य एवं मनगढ़न्त है। रेस्पॉन्डेन्ट ने कभी पेट्रीशनर या अन्य परिजन के साथ अभद्र व्यवहार नहीं किया बल्कि सदैव अपने पत्नी के धर्म का पालन किया है। रेस्पॉन्डेन्ट की गर्भावस्था इस बात स्वमेव प्रमाण है कि रेस्पॉन्डेन्ट मां बनने के योग्य है।

5- यह कि पेट्रीशन की धारा-5 असत्य है तथा स्वीकार नहीं है। रेस्पॉन्डेन्ट के आचरण की कभी कोई शिकायत नहीं की गयी।

6- यह कि धारा-6 पेट्रीशन असत्य तथा मनगढ़न्त है एवं स्वीकार नहीं है। रेस्पॉन्डेन्ट कभी अपने पत्नी धर्म के विरुद्ध घर से बाहर नहीं निकली।

7- यह कि धारा-7 पेट्रीशन असत्य है तथा स्वीकार नहीं है। रेस्पॉन्डेन्ट माह जून सन् 2008 के मध्य तक पेट्रीशनर के घर उसके परिजनों के साथ

रही है। माह जून में गर्भावस्था के सातवें माह में माता पिता के घर कुछ दिन रहने के लिए पेटिशनर का भाई छोड़कर गया था तथा प्रसव से पूर्व वापिस ले जाने का वायदा किया था किन्तु अब रेस्पान्डेन्ट को पेटिशनर के परिजनों के साथ रहने में स्वयं अपना तथा बच्चे के जीवन को खतरा महसूस हो रहा है।

8- यह कि धारा-8 पेटिशन स्वीकार नहीं है। पेटिशन का कोई कारण नहीं है।

9- यह कि धारा-9 पेटिशन स्वीकार व अस्वीकार की आवश्यकता नहीं है।

10- यह कि धारा-10 पेटिशन स्वीकार नहीं है। विवाह विच्छेद की आज्ञा पारित किये जाने का कोई कारण या आधार नहीं है। पेटिशनर को विवाह विच्छेद की आज्ञा पारित करके जीवन के मूल्यों को नकारते हुए रेस्पान्डेन्ट व होनेवाले बच्चों के जीवन से खिलवाड़ करने की स्वतंत्रता प्रदान नहीं की जा सकती। पेटिशन व्यय सहित निरस्त होने योग्य है।

विशेष-कथन

11- यह कि पेटिशन आधारहीन, तुच्छ, तंग करनेवाला तथा अनिश्चित है तथा विचारण से पूर्व खण्डित होने योग्य है।

मैं रेस्पान्डेन्ट सत्यापन करती हूँ कि

प्रतिवाद पत्र की धारा 1 से 11 का कथन मेरे ज्ञान में सत्य है।

सत्यापन स्थान-बुलन्दशहर

दिनांक – 30-7-2010

रेस्पान्डेन्ट
द्वारा

मदन मोहन गर्ग, एडवोकेट

जजी, बुलन्दशहर

दिनांक"

6. Thereafter, further mediation appears to have been conducted. It is dated 20.08.2010. That second mediation was attempted by Mr. Ram Das Sharma. Its report is Paper No. 44C-2. It reads as below:

"श्रीमान जी,

विपक्षी श्रीमती पिकी प्रार्थी पुष्पेन्द्र के साथ बतौर पत्नी रहना चाहती है। परन्तु प्रार्थी पुष्पेन्द्र विपक्षी

को शारीरिक दोष बताकर साथ नहीं रखना चाहता। समझौता वार्ता सफल नहीं हो सका।

रिपोर्ट प्रेषित है।

दिनांक 20/8/2010

संधिकरता
राम दास शर्मा
एडवोकेट "

7. In such status of pleading and proceeding, it is also borne out from the record - the oral statement of the appellant was recorded on 03.02.2011. She was also cross-examined. That statement reads as below:

"साक्षी विपक्षी पिकी वाइफ आफ पुष्पेन्द्र उम्र 24 वर्ष पेशा-गृहणी निवासी ग्राम बबनपुरी डा० खास जिला बुलन्दशहर।

सशपथ बयान किया कि :-

XX XX XX XX द्वारा वादी पुष्पेन्द्र के साथ मेरी शादी के करीब 5 वर्ष हो गये हैं। मैं 21/2 वर्ष से अपने मायके में रह रही हूँ। मैं हाई स्कूल पास हूँ। मेरा बेटा व बेटी दोनों मायके में ही पैदा हुए थे। बेटी रिया शादी के 2 साल बाद पैदा हुई थी उसकी जन्म तिथि 7-8-08 है। लड़के की जन्म तिथि 12-10-10 है। मुझे अपने पति पुष्पेन्द्र से कोई शिकायत नहीं है।

संबंध खराब होने की कोई वजह नहीं है लड़की पैदा होने से पहले मेरा कहीं कोई इलाज नहीं हुआ। डा। निधि शर्मा के यहाँ पर मेरा कोई इलाज नहीं हुआ। मुझे इस दावे का पता जून वर्ष 2008 में चल गया था। मुझे नहीं पता कि मैं इस दावे में कोई जवाब दाखिल किया गया हो।

कागज संख्या 9ए पर लगा फोटो मेरा है। इस पर दस्तखत मेरे हैं जो कोरे कागज पर कराए गये थे ये दस्तखत मेरे कोई कागज पर वकील साहब ने कराए थे। मैंने इस को नहीं पढ़ा था क्योंकि दस्तखत तो कोरे कागज पर कराए थे।

यह कहना गलत है कि मैंने कोई सहमति तलाक के लिए दी हो।

यह कहना सही है कि इस मुकदमें में हम पक्षकार दिनांक 25-4-08 को तुबह समझौता केन्द्र

पर उपस्थित हुए थे। कागज संख्या 8 सी 2 पर मेरे हस्ताक्षर हैं मैंने तलाक की सहमति नहीं दी।

मेरे दोनों बार हुए प्रसव का खर्चा मेरे मायके वालों ने उठाया था। वह क्योंकि खर्चा नहीं दे रहे थे इसलिए अपने पति से प्रसव के लिए खर्चा नहीं माँगा।

सेना के अधिकारियों के सम्मुख समझौते की लिखत पढ़त 17-11-09 को हुई थी। यह समझौता सेना के अधिकारियों ने लिखा था। तब तक की मेरे सम्बन्ध खराब नहीं थे।

मुझे पुष्पेन्द्र के अलावा उसके घर वालों से भी कभी कोई शिकायत नहीं रही। सेना के अधिकारियों के सामने यह समझौता हुआ था कि पृष्पेन्द्र अपना केस वापस ले लेगा और हम साथ साथ रहेंगे। उसके बाद उन्होंने केस वापस नहीं लिया।

मेरे डब्लू.एस. पेपर संख्या 40ए के पैरा 7 में जो लिखा है वह सच है क्योंकि उस समय की परिस्थितियों के अनुसार मुझे डर था। अब मुझे कोई खतरा नहीं है।

यह कहना गलत है कि हमारे वैवाहिक सम्बन्ध 3-4 साल से बिल्कुल खत्म हो रहे हो। यह कहना भी गलत है कि मैं पुष्पेन्द्र के परिवार में अपनी मनमानी चलाती हूँ इसी वजह से हमारे सम्बन्ध खराब हुए हो।

सुनकर तसदीक किया।

उपरोक्त कथन मेरे बोलने पर
मेरे पेशकार द्वारा लिखा गया।

ह० अस्पष्ट
अपर जनपद न्यायाधीश
कोर्ट नं०5, बुलन्दशहर।
3-2-11
ह०/- पिकी"

8. As extracted above, in her oral statement, the appellant referred to another/third mediation conducted between her and the respondent, before the army authorities, on 17.11.2009. That document is paper no. 56 C-1/6. We consider it appropriate to extract the same as well. It reads:

*"JOINT STATEMENT - BY
EFFECTED PARTY AND*

*WITNESSES ON CASE
CONSIDERING ON
PUSHPENDRA KUMAR AND HIS
WIFE SMT. PINKI ON 17 NOV.
2009.*

हम NO 1466 3289 w
cfn/Vm (Apv) पुष्पेन्द्र कुमार पिकी देवी
{पुष्पेन्द्र की पत्नी} श्री उदयबीर सिंह पिकी देवी के
पिताजी और पुष्पेन्द्र के पिताजी श्री सतपाल सिंह हम
सब ने मिलकर तारीख 16-11-2009 और 17-
11-2009 को कमान अधिकारी 23 फील्ड वर्कशाप
मार्फत 56 APO के समक्ष दफ्तर में परामर्श के बाद
हम सब मिलकर इस निर्णय पहुंचे है।

{क} कि हम दोनों पक्ष वाले जितने भी
अदालत में केस चल रहे वो सभी वापिस लेने को तैयार
है। इस तलाक के उपर अभी तक।

{ख} फौज में भी हमने जो दरखास्त दिया
है। वो तभी हमने वापिस लेने का निर्णय लिया है।

{ग} श्रीमती पिकी देवी और cfn -
पुष्पेन्द्र कुमार की प्रार्थना है कि हमें एक साथ रहने के
लिए घर दिया जाये।

{घ} श्रीमती पिकी देवी के परिवार की
तरफ से और पुष्पेन्द्र के परिवार की तरफ से इनके निजी
पारिवारिक जीवन में कोई दखलंदाजी नहीं करेंगे।

{ण} cfn पुष्पेन्द्र कुमार और श्रीमती
पिकी देवी की शादी तारीख 02 फरवरी 2006 में
हुआ था। उस शादी में ना ही cfn पुष्पेन्द्र कुमार के
परिवार ने दहेज लिया है और ना ही श्रीमती पिकी देवी
के परिवार ने दहेज दिया है। और नाही cfn - पृष्पेन्द्र
के परिवार ने दहेज मांगा है।

{च} आज तक जो भी समस्याएँ इस
तलाक के विषय पर हुआ है। उसको हम इधर ही खत्म
करके एक नया शुरुआत करना चाहते हैं। जिसमें cfn
पुष्पेन्द्र और उनकी पत्नी श्रीमती पिकी देवी अपने
शादीशुदा जिन्दगी को बरकरार रखे।

{छ} अब से कुछ महीनों तक जब तक
इस तलाक के उपर जो अदालत में केस खत्म नहीं होता
है और पिकी देवी के ससुराल पक्ष और उसके मायके
पक्षधर परिवार सब सामाजिक परिस्थियाँ सामान्य नहीं
हो जाती तब तक वो ना ससुराल जायेगी। और ना
मायके जायेगी।

{ज} यदि साथसाथ रहते समय cfn
पुष्पेन्द्र कुमार और श्रीमती पिकी देवी कोई गलती करता
है तो उसका पूर्ण रूप से उत्तरदायित्व पति पत्नी ही होंगे
। और विभागीय कार्यवाही इनको मान्य होगी ।

ह०/- पी कुमार

ह०/- अस्पष्ट

14663289 डब्लू

17-11-09

श्री वीरपाल सिंह

गाँव के सदस्य {गवाह}

नं० 14663289 डब्लू

ह०/- अस्पष्ट

सीएफएन पुष्पेन्द्र कुमार

पुनिया

एस एस 42121 एच

केप्टेन - दिनेश कुमार

ह०/- पिकी

ह० अस्पष्ट श्रीमती पिकी देवी

जेसी 758369 एच

सुबेदार एम एम रोय

ह०/- सत्माल सिंह

ह० अस्पष्ट

श्री सत्माल सिंह

14598953 पी

एच०ए० वाई वी.एस. उन रेड्डी

ह०/- उदयवीर सिंह

श्री उदयवीर सिंह

ह० अस्पष्ट"

9. Besides the above, the appellant had further filed certain documents to establish - neither she suffered from infertility nor it was true that no children were born to the parties. Her oral statement and documents on record indicate – she twice conceived and two children were born to her - on 7.2.2008 and 12.10.2010.

10. Thus, the appellant sought to contest the divorce proceedings - on the strength of her second Written Statement

filed on 30.7.2010 and on the strength of evidence led by her.

11. The respondent raised objection that the second Written Statement filed by the appellant was not maintainable. He relied on Order VIII Rule 9, Code of Civil Procedure, 1908. In that status of the proceedings, the below quoted order dated 23.03.2011 was passed by the learned Court below:

"22-3-2011 आज पेश हुआ। पुकार पर पक्षकार हाजिर है। बहस विद्वान अधिवक्तागण पक्षकार सुनी गयी। वास्ते निर्णय दिनांक 29-3-11 को पेश हो।"

12. On the next date - on 28.3.2011, instead of delivering the order, the learned Court below passed the following order:

"आज निर्णय लिखाते समय पत्रावली के अवलोकन से यह तथ्य संज्ञान में आया कि विपक्षी पिकी द्वारा तामील के उपरान्त प्रतिवाद पत्र 9A न्यायालय में दाखिल किया गया था तथा समझौता केन्द्र की रिपोर्ट भी दाखिल हुई लेकिन पेशकार द्वारा आदेश पत्र लिखा गया तथा पत्रावली को बाद विन्दु हेतु नियत किया गया।

तत्पश्चात पुनः प्रतिवाद पत्र विपक्षी पिकी की ओर से उनके दूसरे अधिवक्ता द्वारा 40A दाखिल किया गया। अतः परिस्थितियों में न्यायालय के समक्ष यह विधिक प्रश्न है कि क्या पुनः दाखिल किया गया प्रतिवाद पत्र 40A पोषणीय है?"

क्या उक्त प्रतिवाद पत्र न्यायालय की अनुमति से दाखिल किया गया है? अतः दि० 29-3-11 को पक्षकार उक्त विधिक विन्दु पर अपने तर्क न्यायालय के समक्ष प्रस्तुत करें।"

13. Clearly, the date 29.03.2011 was fixed for hearing on the objection raised as to the maintainability of the second Written Statement filed by the

appellant (on 30.07.2010). However, on that date fixed, the learned court below not only proceeded to sustain the objection raised by the respondent and thus rejected the second Written Statement filed by the appellant (dated 30.7.2010), but it also proceeded to hear the divorce suit on merits. It has decreed the same.

14. In such circumstances, learned counsel for the appellant would submit, in the first place, the learned court below has committed an error in sustaining the objection raised by the respondent, as to the maintainability of the second Written Statement. Second, the learned court below has erred in proceeding to deal with the divorce suit proceedings on merits, on 30.03.2011, without fixing another date for hearing the divorce suit proceedings, on merits. Third, in any case, the learned court below has completely erred in decreeing the divorce suit proceeding.

15. Having heard learned counsel for the appellant and having perused the record, it is true - a Written Statement was first filed by the appellant on 01.04.2008. In that, consent was expressed by the appellant to the divorce being granted. However, it must be maintained that the instant divorce case proceeding had not arisen under Section 13-B of the Act. Rather, the divorce case was instituted by the respondent - husband under Section 13 of the Act. It may have been decided/decreed, after evidence. Allegations made were of impotency and that the appellant was a free willed person who used to go out of her home, on her own. No other fact was pleaded to assert either that the appellant had deserted her matrimonial home and/or that she had formed any immoral

or adulterous relationship or that she had offered cruel behaviour.

16. Perusal of the record (as has been referred to above), clearly indicates, not once but twice mediation took place during the pendency of the divorce case. While the first mediation proceeding has been referred to by the learned court below, it has completely escaped the attention of the learned court below that on the second occasion, vide report dated 20.08.2010 (as extracted above), mediation failed. Then, the learned Court below completely erred in overlooking the oral statement recorded by the appellant and the documents that were on record - to establish that mediation had also been attempted before the army authorities (employer of the respondent). In that, a clear joint-statement appears to have been recorded by the parties on 27.11.2009 - to cohabit and revive their matrimonial relationship, well after filing the first Written Statement and well after conclusion of the first mediation, on 25.04.2008.

17. Learned court below has also completely erred in overlooking the fact that after filing of the first Written Statement dated 01.04.2008 and the alleged settlement reached between the parties - to dissolve their marriage apart, not only another/contrary settlement was also reached, but two children were born to the parties, one just after the institution of the divorce suit proceedings and the other, two years thereafter, on 12.10.2010 i.e. well after the alleged settlement reached between them. That status of the pleadings and evidence clearly contradicted the stand that may have existed with the parties at the time of filing of the first Written Statement on 01.04.2008.

18. Seen in that light, first, Order VIII Rule 9 of the CPC reads as below:

9. *Subsequent pleadings.- No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties cut and fix a time of not more than thirty days for presenting the same.*"

(emphasis supplied)

19. Thus, it is true that after filing of a Written Statement, no further Written Statement may arise (at the instance of the defendant), by way of a procedural right - except with the leave of the Court and upon such terms as the Court may provide. At the same time, that fetter placed on the procedural right of the parties, did not prevent the learned Court below from itself requiring additional Written Statement to be filed - if that appeared necessary to it to dispense true justice.

20. In the present facts, the learned Court below may not have proceeded to dissolve the (Hindu) marriage between the parties by solely considering the fact situation that existed up to the stage of filing of the first Written Statement on 01.04.2008 and the first mediation proceeding concluded on 28.04.2008. Subsequent conduct of the parties and their marital relationship as existed over the next three years could not have been ignored. To the extent it had material bearing on the relief sought by the respondent, demands of

justice merited another course to be adopted by the learned Court below.

21. Being obligated to dispense justice, the learned court below could not have turned a blind eye to the fact assertion (made by the appellant) of revival of the marriage between the parties. It ought to have exercised its discretion - to call for Additional Written Statement of the appellant, to explain the subsequent developments. Unless that power had been exercised, the learned Court below may have felt disabled from delivering justice, in the status of pleadings and evidence existing.

22. The nature of power of the trial Court (under Order VIII Rule 9) was considered by Justice Mohan M. Shantanagoudar in his separate (partly dissenting) opinion expressed in **Ashok Kumar Kalra Vs. Wing CDR Surendra Agnihotri and Others (2020) 2 SCC 394**, wherein with reference to Order VIII Rule 9 CPC, it was observed as below:

"33. A plain reading of Order 8 Rule 9 makes it clear that the court has the discretion to allow any subsequent pleading upon such terms as it thinks fit. It is important to appreciate here that such subsequent pleading or additional written statement may include a counterclaim. This is because Rule 9 does not create a bar on the nature of claims that can be raised as subsequent pleadings. As long as the court considers that it would be proper to allow a counterclaim by way of a subsequent pleading, it is possible to file a counterclaim after filing the written statement."

23. In **River Valley Tea Co. Pvt. Ltd. v. Assam Gas Co. Ltd, 2018 SCC OnLine Gau 1168**, the Gauhati High Court had the occasion to consider the same provision wherein it observed as below:

“18. Having perused the judgments cited by the learned counsel for the petitioner, it leaves this court with no doubt that the trial court must record its satisfaction to the nature of subsequent pleading which is sought to be introduced. If the court is satisfied that the subsequent pleadings are required for the just and fair decision of the case, in such an event, the trial court even has suo motu inherent powers under order VIII, rule 9, CPC to direct that a rejoinder/replication be filed. However, if the rejoinder/replication is sought to be filed at the instance of the party, in that event the proposed replication is required to accompany the leave petition envisaged under rule 9, order VIII, CPC.”

24. Also, in **Kantipudi Adinarayana v. Putta Venkata Satya Subba Rao and Others 2024, SCC OnLine AP 1503**, the Andhra Pradesh High Court also had the occasion to consider the same provision. It specifically dealt with the suo motu nature of power vested in Courts, to call for additional Written Statement. In that, it has been observed as below:

“5. The situation contemplated under the first limb of the provisions of Rule 9 of CPC, is not attracted in the present case; the second limb of the provisions of

Rule 9 of CPC, deals with the Suo moto discretion of the court alone, to call for an additional written statement, and not otherwise. In other words, the same is not allowable on an application filed by a party to the suit.”

25. Second, it also merits acceptance, once the learned court below had fixed the date 30.3.2011 to deal with the objections to the filing of the second Written Statement (by the appellant), it may not have proceeded to pass the order on merits on the divorce petition, on the same date, without the consent of the appellant to thus proceed in the matter. In view of the earlier order dated 28.03.2011, in normal course, another date for hearing may have been fixed (on 30.03.2011), after the learned court below sustained the objection raised by the respondent to the second Written Statement filed by the appellant.

26. Last, even technically, in deciding any proceedings under Section 13 of the Act, the learned Court below may only have acted on proven facts. No ground of divorce pressed by the respondent was proven. The respondent did not prove the plaint pleadings, and the appellant did not support her first Written Statement, in her oral evidence. Rather, she disproved it. Hence, there was no proven fact before the learned Court below to dissolve the marriage between the parties, strictly in terms of section 13 (1) of the Act.

27. To the extent, the learned court below has dissolved the marriage solely on the strength of the alleged consent given by the appellant, after three years of it being recorded, clearly, a grave error of law has crept in the impugned order. In that the learned court below has failed to take note

of the changed circumstances; of settlement reached between the parties before the army authorities; the consequential revival of their marriage and birth of their second child. In view of passage of time-more than eighteen months and subsequent events seen to exist, the learned Court below has erred in blindly acting on the consent recorded on 28.4.2008.

28. Though Section 13 of the Act contemplates divorce/dissolution of Hindu marriage after full-fledged contested proceedings, at times those proceeding may be concluded on the strength of mutual consent/settlement/mediation, as well. Yet, Courts may remain reminded of the statutory principle contained in Section 13-B of the Act. For ready reference, it reads as below:

"(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied,

after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.]"

(emphasis supplied)

29. In **Sureshta Devi Vs. Om Prakash**, (1991) 2 SCC 25, it was observed as below :

"At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that 'on the motion of both the parties ... if the petition is not withdrawn in the meantime, the court shall ... pass a decree of divorce ...'. What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."

(emphasis supplied)

30. Then, in **Smruti Pahariya Vs. Sanjay Pahariya, (2009) 13 SCC 338**, the principle discussed in **Sureshta Devi (supra)** was further considered by a three-judge bench of the Supreme Court. It was further observed as below:

"40. In the Constitution Bench decision of this Court in Rupa Ashok Hurra, (2002) 4 SCC 388 this Court did not express any view contrary to the views of this Court in Sureshta Devi, (1991) 2 SCC 25. We endorse the views taken by this Court in Sureshta Devi (supra) as we find that on a proper construction of the provision in Sections 13-B(1) and 13-B(2), there is no scope of doubting the views taken in Sureshta Devi (supra). In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra (supra) has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

41. None of the counsel for the parties argued for reconsideration of the ratio in Sureshta Devi (supra).

42. We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days,

the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.

43. In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent."

(emphasis supplied)

31. Last, the above principle was again reiterated in **Hitesh Bhatnagar Vs. Deepa Bhatnagar, (2011) 5 SCC 234**. After, considering its own power under Article 142 of the Constitution of India, the Supreme Court made the following pertinent observation:

"23. It is settled law that this Court grants a decree of divorce only in those situations in which the Court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is broken beyond repair. Even if the chances are infinitesimal for the marriage to survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having

broken down irretrievably. We may make it clear that we have not finally expressed any opinion on this issue.

24. *In the present case, time and again, the respondent has stated that she wants this marriage to continue, especially in order to secure the future of their minor daughter, though her husband wants it to end. She has stated that from the beginning, she never wanted the marriage to be dissolved. Even now, she states that she is willing to live with her husband putting away all the bitterness that has existed between the parties. In the light of these facts and circumstances, it would be travesty of justice to dissolve this marriage as having broken down. Though there is bitterness amongst the parties and they have not even lived as husband and wife for the past about 11 years, we hope that they will give this union another chance, if not for themselves, for the future of their daughter. We conclude by quoting the great poet George Eliot.*

“What greater thing is there for two human souls than to feel that they are joined for life -- to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting.””

32. Thus, by way of a guiding principle, the learned Court below should have examined and verified, on 30.03.2011, if the consent of the appellant (as noted by it on the strength of the first Written

Statement filed on 01.04.2008 and as recorded before the Mediator on 25.04.2008), continued to exist without any change of mind made by the parties.

33. In granting the divorce on the strength of mutual consent, the learned Court below may have dissolved the marriage between the parties only in the event of that consent continuing to exist on the date of the order being passed. Once the appellant claimed to have withdrawn her consent and that fact was on the record, it never became open to the learned court below to act on that (withdrawn) consent, belatedly. In any case, it never became open to the learned court below to force the appellant to abide by the original consent given by her that too almost three years later. To do that would be travesty of justice. Here, it may be noted, no money was paid to the appellant by way of permanent alimony etc., in lieu of her consent.

34. Thus, even if these were Section 13-B proceedings, the learned court below could not have ignored the statutory principle enshrined therein – that other thing apart, free consent to dissolve the marriage must not only arise at the stage of first motion of a proceeding under Section 13-B of the Act but it must survive and sustain at the stage of second motion. In that, the learned court below may presume that the consent may not continue to exist after expiry of 18 months from the date of it being given, unless the party giving such consent specifically maintains it, after expiry of eighteen months period.

35. Here, the appellant gave consent on 01.04.2008 and 25.04.2008. Eighteen months therefrom elapsed in the October 2009. She certainly withdrew from

her consent in February 2011, at the stage of oral evidence. Therefore, no consent (to dissolve the marriage between the parties) existed on 30.03.2011 - when the learned court below first relied on the same to dissolve the marriage between the parties.

36. It requires no elaboration that a Hindu marriage is not to be dissolved or terminated as a contract. The sacrament based Hindu marriage may be dissolved (in law), in limited circumstances. In the first place, a Hindu marriage may be declared void on an allegation of impotency suffered by either spouse only on the strength of evidence led. To that extent the learned court below has completely ignored that such ground pressed in the plaint, was not proven.

37. As to the other ground if any, the learned court below ought to have examined the matter holistically. The divorce suit having been instituted in the year 2008 and it having remained pending for three years, an over simplistic approach has been adopted-in relying only on the bald (first) Written Statement filed by the appellant, and the consent dated 28.04.2008, as recorded in the proceedings before the mediation centre attached to the learned court below while ignoring subsequent developments brought on record. We may have attempted to help the parties to resolve their dispute at this stage. However, since respondent had not appeared, that course is not available to us.

38. Seen in that light, the impugned judgement and order dated 30.03.2011 and the consequential decree cannot stand. Those are set aside. Matter is remitted to the learned court below to proceed in accordance with law. If no mediation may arise or be successful,

necessarily the appellant may be allowed to rely on the second Written Statement in terms of later part of Order VIII Rule 9 of the C.P.C., with corresponding right to the respondent to file Replication Statement. Thus, the present appeal is **allowed**. No order as to costs.

(2024) 9 ILRA 1267
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 461 of 2014

The Catholic Diocese of Gorakhpur
...Appellant
Versus
Bhola & Ors. **...Respondents**

Counsel for the Appellant:

Sri Sanjiv Singh, Sri A.P. Tiwari, Sri Namwar Singh, Sri S.S. Tripathi, Sri Subhash Ghosh, Sri Raghvendra Nayar, Ms. Saraswati Yadav, Sri Navin Sinha (Sr. Adv.)

Counsel for the Respondents:

Sri S.P.K. Tripathi, Sri Arvind Srivastava III, Sri Ashish Kumar Srivastava, Sri Manish Kumar Nigam, Sri Pramod Kumar Singh, Sri Praveen Kumar, Sri Sri Sanjay Goswami, Sri Vinod Kumar Sahu (Addl. C.S.C.)

Civil Law - Civil Procedure Code, 1908 - Sections - 9 & 100 - Order 41- Rule 27- Order 41 - Rule 33 - Order 42 - Rule 1 - Urban Land Ceiling and Regulations Act, 1976 - Sections 10, 10(3), 10(5), 8(4), 26 & 26(2) - U.P. Zamindari Abolition & Land Reforms Act, 1950 - Sections 161, 183, 184, 185, 186, 190, 191, 192, 193 & 194 - Specific Relief Act, 1963 - Sections 41(g) & 41(i) - Transfer of Property Act, 1882 - Sections 54 & 118 -

Second appeal, by the defendants - original suit - dismissed - first appeal - allowed - leading a

decree in favour of plaintiff - dispute involving the Catholic Diocese of Gorakhpur appellant-defendant and plaintiff, concerning a plot of land (No. 26) in Gorakhpur - Initially, plaintiff suit was dismissed by the trial court, - but the appellate court later decreed in his favour, ordering the Diocese to remove constructions on the land and declaring the lease deed void - The Diocese appealed, on the ground that the land was lawfully leased to them by the St. in exchange for another plot (No. 197) declared surplus - court finds that - plaintiff share in plot No. 197 was never declared surplus, and the lease deed for plot No. 26 lacked legal sanction - held, the defendants' actions constituted unlawful possession and trespass, emphasizing that the lease deed and the purported transfer of land were not valid under the law thus, court U.P.held plaintiff's ownership and dismissed the Diocese's appeal by imposing a cost of Rs. 10,00,000 on the Diocese and the St. for trespassing and property grabbing - direction issued for recovery of cost, - and to pay to plaintiff for unlawful occU.P.ation of his property, accordingly.(Para - 40, 41, 42, 43)

Second Appeal Allowed. (E-11)

List of Cases cited:

1. Nagubai Ammal & ors.Vs B. Shama Rao & ors., AIR 1956 SC 593,
2. K. S. Srinivasan Vs U.O.I. - AIR 1958 SC 419,
3. St. of U.P. Vs Hari Ram, 2013 (4) SCC 280.

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

THE APPEAL

1. This is defendants' second appeal arising out of non-concurrent judgments. The Original Suit No. 307 of 2011 (Bhola vs. DIOCESE and another) was dismissed by the trial court, however, the Civil Appeal No. 37 of 2011 filed by the plaintiff-respondents has been allowed by the First Appellate Court and, consequently, the suit has been decreed.

PLAINT CASE

2. The aforesaid suit was filed stating that the plaintiff was Bhumidhar in possession over plot No. 26 measuring 93 decimals situated at Mauza Jangal Salikram, District Gorakhpur. A statement No. 3234 filed by him before the Competent Authority under Urban Land (Ceiling and Regulation) Act, 1976 was pending and when the defendants, 1.5 months prior to institution of suit, started en-covering the land by raising constructions of boundary wall and the plaintiff objected to the same, the defendants threatened him to raise constructions of a hospital over the land. It was alleged through amendment that a lease deed was said to have been executed by defendant No. 2, (State of U.P.) in favour of defendant No. 1 (appellant herein), though the State had no right to execute a lease. Further pleading was that the land of the plaintiff had not been declared vacant and, consequently, a decree was prayed for directing the defendants to remove constructions raised over the portion marked by letters “अ ब स द” in the plaint map and deliver possession of the land to the plaintiff and, on their failure to do so, possession through process of the Court be delivered and the lease deed be also cancelled. Further, a decree restraining the respondents from raising any constructions over the land bearing No. 26 measuring 93 decimals was also claimed.

**IMPLEADMENT OF PARTIES
AND AMENDMENT IN PLAINT**

3. The Original Suit was initially filed against the DIOCESE of Gorakhpur, i.e. the present appellant only. The plaint was, later on, amended and averments were added based upon the lease deed filed by

the defendant-appellant before the trial court asserting rights in the land in dispute in its favour. Pursuant to an order dated 19.02.2001, State of U.P. through District Magistrate, Gorakhpur was impleaded as defendant No. 2. The relief No. v was amended incorporating a prayer for cancellation of the lease deed too.

DEFENCE IN WRITTEN STATEMENT

4. The defendant No. 1 (appellant) filed a written statement taking a stand that it was a registered Society and under a proposal to construct Fatima Hospital in Gorakhpur, land was required by it. On the request of the said defendant, the State officials allotted a vacant land to the appellant under the provisions of Urban Land (Ceiling and Regulation) Act, 1976 (herein-after referred to as “the Act of 1976”) and over the said land, possession was delivered to appellant. The appellant also filed additional written statement stating therein facts regarding execution of lease in its favour by the State Government. The State of U.P., (defendant No. 2) also filed written statement stating that the plaintiff had submitted an application dated 05.02.1991 alongwith notarized affidavit dated 21.02.1991 to the effect that he had sold the entire property covered by land No. 197, which had been declared as vacant under section 10(5) of the Act, 1976 and, in exchange thereof, an area measuring 2805.90 Sq.Mts. covered by land bearing No. 26 was handed over by the plaintiff to the District Magistrate, Gorakhpur and, on the basis of such written consent of the plaintiff, the State Government had allotted the land to the appellant. It was further pleaded that after coming into force of Repeal Act No. 15 of 1999, the proceedings under the Act of 1976 had stood abated and

a registered lease deed having already been executed in favour of appellant, the construction of boundary wall raised over the land was lawful.

TRIAL COURT’S JUDGMENT

5. The trial court framed 15 issues out of which relevant issues relate to right, title, interest and possession of the respective parties pursuant to the ceiling proceedings and also lease deed relied upon by the defendants. After the parties led documentary and oral evidence, the trial court decided issues No. 1, 2, 3, 6, 9 and 13 by observing that since the plaintiff himself had submitted application 157-A and affidavit 160-C before the District Magistrate, Gorakhpur relinquishing his rights over plot No. 26, over which possession was delivered to the District Magistrate and, thereafter, a lease deed was executed by the State in favour of the defendant-appellant, the possession based upon admission and consent would bar the suit for any relief. Consequently, the trial court dismissed the suit by judgment and order dated 22.11.2011 observing that in view of Sections 41(g) and 41(i) of the Specific Relief Act, 1963, neither mandatory nor prohibitory injunction could be granted in favour of the plaintiff.

APPELLATE COURT’S JUDGMENT

6. Aggrieved, the plaintiff-respondent No.1 filed Civil Appeal No. 47 of 2011, during the pendency whereof he died and was substituted by his heirs and legal representatives. The first Appellate Court allowed the appeal by judgment and order dated 13.03.2014 and decreed the suit directing the defendant-appellant to remove boundary wall constructed by it over the

land shown by letters “v c l n” in the plaint map within a period of 60 days. A further decree has been drawn directing the defendants not to cause any interference in the plaintiff’s possession over the land. Simultaneously, lease deed dated 13.01.1993 registered before the Sub Registrar-I, Gorakhpur, to the extent it relates to plot No. 26, has been declared as void and ineffective.

FINDINGS RECORDED BY FIRST APPELLATE COURT

7. The first Appellate Court framed following points for determination in the Civil Appeal : -

“1- क्या अवर न्यायालय का यह निष्कर्ष कि आराजी सं० 197 में अपीलार्थी/वादी का कोई हिस्सा अधिनियम के तहत सरप्लस घोषित हुआ था, हस्तक्षेप योग्य है?

2- क्या अवर न्यायालय का यह निष्कर्ष कि कथित शपथ पत्र जो वादी/अपीलार्थी द्वारा जिलाधिकारी के समक्ष दिनांक 21.02.1991 को दिया जाना कहा जाता है, से प्रत्यर्थी/प्रतिवादी सं० 2 को विवादित आराजी में कोई स्वत्व एवं स्वामित्व प्राप्त हुआ, विधि की दृष्टि से सही है ?

3- क्या प्रत्यर्थी संख्या 2 को प्रत्यर्थी संख्या 1 के पक्ष में विवादित भूमि का कोई पट्टा या कोई अन्तरण करने का अधिकार प्राप्त था ?

4- क्या 1976 के अधिनियम संख्या 33 की धारा 4 के तहत यह वाद उपशमित हो गया था ?”

8. The first Appellate Court observed that the plaintiff-Bhola was a co-sharer of the land bearing No. 197 alongwith one Lallan and recorded a finding that share of Lallan alone was declared as vacant. It also observed that Statement No. 3234 concerning plaintiff-Bhola relating to the ceiling proceedings, despite being available in their office, had

not been brought on record by the defendants that would lead to adverse inference against them. The Appellate Court also observed that since it was not proved that any share of the plaintiff-Bhola in plot No. 197 had been declared as vacant, any application or affidavit submitted by him before the District Magistrate would be deemed to be under some mistaken belief and not voluntarily and, even otherwise, the alleged surrender of land of plot No. 26 in favour of State, being in teeth of provisions of sections 183, 184, 185, 186, 190, 191, 192, 193 and 194 of the Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950, would not be treated as in accordance with law.

ADMISSION/STAY ORDER IN THE INSTANT APPEAL

9. In the instant appeal, an interim order of status quo was passed on 02.05.2014 before admission. It was extended from time to time. On 25.08.2015, parties were in clash before this Court as regards declaration of land of plot No. 197 as surplus. This Court, therefore, deemed it necessary to call upon the District Magistrate concerned alongwith relevant records relating to ceiling proceedings so as to appreciate the rival contentions. The District Magistrate appeared alongwith record on 08.09.2015, on which date, after noting down contentions of both sides, the instant appeal was admitted on the following substantial questions of law:-

“(i) Whether the lower Appellate Court was justified in decreeing the plaintiff’s suit notwithstanding his admission that Plot No. 26 is being offered in lieu of his having sold the entire land of

Plot No. 197 including the land, which had been declared surplus?

(ii) Whether the judgment and decree of the lower Appellate Court reversing and invalidating the proceedings under Urban Ceiling Act are without jurisdiction?

(iii) Whether the suit of the plaintiff-respondent is barred by the principles of estoppel and acquiescence, inasmuch as, the defendant-appellant has raised boundary wall constructed the Hospital at the disputed plot and has invested huge amount?"

COUNSEL HEARD

10. Heard at length Shri Navin Sinha, learned Senior Advocate assisted by Shri Subhash Ghosh, Shri Raghvendra Nayar and Ms. Saraswati Yadav, learned counsel for the appellant as well as Shri Sanjay Goswami, learned counsel assisted by Shri Pramod Kumar Singh, learned counsel for the plaintiff-respondents and Shri Vinod Kumar Sahu, learned Additional Chief Standing Counsel for respondent No.2 (State of U.P.).

SUBMISSIONS ON BEHALF OF THE APPELLANT

11. Shri Navin Sinha, learned senior counsel argued with vehemence that the proceedings under the Act of 1976 for declaration of land of plot No. 197 as surplus or vacant had been undertaken and once the plaintiff himself admitted that the entire land of plot No. 197 that was declared surplus, had been sold by him and once he had given written consent in the form of application 157-ka alongwith affidavit 160-C before the District Magistrate relinquishing his rights in

his other holding covered by plot No. 26, i.e. the subject land, and handed over its possession to the District Magistrate, consequential lease deed executed by the State in favour of the appellant would be valid for all purposes and title once vested in the said manner, neither the registered lease deed could be declared as null and void nor could a decree for injunction be drawn in favour of the plaintiff-respondents and, therefore, the first Appellate Court has grossly erred in reversing the decision of the trial court. Shri Sinha referred to the lease deed dated 11.01.1991, which was executed by the Governor of the State in favour of the appellant and by referring to the schedule of property attached to the deed, it was contended that the land of plot No. 26 was given in lieu of plot No. 197 under Order No. 1611 dated 13.03.1991 (a date subsequent to preparation of lease deed) passed by the District Magistrate, Gorakhpur and for the purpose of maintenance by the allottee Society, i.e. the present appellant. Shri Sinha also referred to an order dated 10.11.1980 annexed as Annexure CA-1 to the counter affidavit filed on behalf of State of U.P. The said order, apart from containing various recitals, mentions that 4354.76 Sq. Mts. of land covered by plot No. 197 was treated as surplus land. The entire thrust of Shri Sinha is, therefore, to the effect that the plaintiff had voluntarily surrendered his right, title, interest and possession qua plot No. 26 in favour of the State in exchange of his holdings covered by plot No. 197 that was declared vacant/surplus but illegally sold by the plaintiff to third parties.

SUBMISSIONS ON BEHALF OF THE PLAINTIFF-RESPONDENTS

12. Per contra, Shri Sanjay Goswami, learned counsel for the plaintiff-respondents vehemently submits that the

plaintiff's share in plot No. 197 was never declared surplus and whatever proceedings were held, the same related to Lallan, the other co-sharer and, therefore, no question of alleged exchange of other holdings of the plaintiff, could arise. It is contended that the plaintiff-Bhola was the original owner of plot No. 26, area 93 decimals and had half share in plot No. 197 (area 2.64 acres) with 1.32 acres in his share. Remaining 1.32 acres of plot No. 197 belonged to one Lallan. After the commencement of Act of 1976, both Bhola and Lallan submitted separate returns under Section 6(1) of the Act. The return submitted by Bhola was numbered as 3234, whereas the return submitted by Lallan was numbered as 3235. The Competent Authority under the said Act prepared a draft statement on the basis of return No. 3234 and issued a notice under Section 8(3) of Act to plaintiff-Bhola, who filed his objections to the draft statement, mainly on the ground that most of his land was agricultural in nature and that area of the vacant land in other plot was less than the ceiling limit. The Competent Authority allowed the objections vide his order dated 18.12.1980 under Section 8(4) of the Act and cancelled the draft statement holding that returnee held the land within his ceiling limits. However, a direction was issued by the Competent Authority to his office to find out the land use of the land in the master plan and, in case any land was found in excess of the ceiling limit, a notice be issued to the returnee to submit statement. He submits that nothing was done after the draft statement was cancelled by order dated 18.12.1980 and no proceedings were held against the plaintiff-Bhola under the Act of 1976 and, therefore, he continued to hold the land in his own rights. Further submission is that the Competent Authority proceeded against

Lallan and declared 1.08 acres land in plot No. 197 from his share and that, at the most, State could exercise its rights only in respect of part of the land to the extent of share of Lallan alone and had no right over the share of plaintiff-Bhola against whom notice/draft statement was cancelled. Khatauni pertaining to 1416 F to 1420 F annexed alongwith counter affidavit was referred demonstrating that the Competent Authority directed recording the name of State of U.P. over plot No. 197 area 1.08 acres in the revenue records and the same still continues therein and, hence, once it is established that land of Bhola covered by plot No. 197 was not declared surplus/vacant and the land did not vest in the State, the plea of exchange of land of plot No. 26 at the strength of a bare application and affidavit allegedly submitted by plaintiff-Bhola before the District Magistrate and consequential grant of lease by the State in favour of appellant would be a mode of grabbing the property of the tenure holder without any mode of transfer recognized under the law of either transfer of property or vesting of the same in the State under the Act of 1976.

13. Shri Goswami seriously disputes the validity of the lease deed by contending that though the deed was executed on 11.01.1991, it was signed by the witnesses and executants on 28.12.1992 and 30.12.1992 and the same was registered in the office of Sub-Registrar in the year 1993. The lease deed runs and ends in twelve pages, however, a letter dated 29.10.1991 sent by the District Magistrate to the Deputy Secretary, Awass Anubhag-6, U.P. Government, Lucknow through special messenger is attached to it. Just below this letter, a table finds place in which various plots have been shown, but there is no mention of plot No. 197 or plot

No. 26. After the table, a Note signed by three persons, i.e. Surveyor, Junior Engineer and Assistant Engineer on 24.05.1991 is found mentioning that plot No. 26 was given in lieu of plot No. 197 under Order No. 1611 dated 13.03.1991 passed by the District Magistrate, Gorakhpur and for the purpose of maintenance by the allottee-Society, i.e. the present appellant. Submission is that the Act of 1976 does not contemplate any such provision, by which such a transfer of land or handing over possession thereof is permissible. He submits that section 26 of the Act being a provision as regards transfer of vacant land within the ceiling limit, even no such procedure was followed and though submission of the application 157-A or the affidavit forming part thereto was not proved by cogent oral and documentary evidence, even if the same are treated to have been submitted on behalf of plaintiff or other co-sharers, the same would be in teeth of any recognized mode of transfer of immovable property and contrary to the provisions of the Act of 1976 and, hence, no rights in the property would vest either in the State Government or in the appellant. He also submits that once the State of U.P. being defendant No. 2 in the suit, respondent No. 2 in the Civil Appeal as well as in the instant second appeal, has accepted the appellate judgment by not assailing it by filing its own second appeal, the alleged rights of the present appellant being subservient to the alleged rights, if any, held by the State Government, the same would stand nullified in absence of a challenge.

SUBMISSIONS ON BEHALF OF
THE STATE-RESPONDENT

14. Learned Additional Chief Standing Counsel submits that the State has

not filed appeal against judgment of the First Appellate Court as the main decree has been drawn against the appellant and, further, the District Magistrate was earlier summoned by this Court alongwith record of ceiling proceedings and he has already passed an order dated 27.07.2022 by which allotment of disputed plot No. 26 in favour of the appellant for maintenance purposes has been recalled subject to the final decision in the present second appeal.

ANALYSIS OF RIVAL
CONTENTIONS IN THE LIGHT OF
RECORD OF PROCEEDINGS AND
SUBSTANTIAL QUESTIONS OF LAW
FRAMED

15. Having heard learned counsel for both sides, what the Court notices from record is that a counter affidavit has been filed by the then Tehsildar (Judicial), Sadar Gorakhpur in the instant second appeal and in paragraph No. 13 thereof, it is stated that the plaintiff had submitted a return No. 3234 before the Competent Authority in respect of plot No. 197 stating that he was the owner of half share of the said plot and Lallan was owner of rest half share. Further statement is that Lallan had also filed return No. 3235 before the Competent Authority, whereafter the Authority passed an order dated 10.11.1980 in respect of certain area of plot Nos. 24, 25 and 197 declaring the same as surplus. It is further stated that plot No. 197 measuring 1 acre and 8 decimal vested with the State Government, but the plaintiff-respondent and Lallan, being joint owners of the said plot, sold the land that was declared surplus and also the land that was not declared surplus and when this fact came to the knowledge of the District Magistrate, Gorakhpur, he took cognizance against the plaintiff and heirs of Lallan for illegal transfer of the Government land. At

the same time, land owners and other persons filed affidavit before the District Magistrate in respect of plot No. 26 to be declared as State land in place of plot No. 197, whereafter possession of plot No. 26 had been taken by the District Magistrate as surplus land and the same stood vested in the State Government and possession thereof had also been handed over to the State Government.

16. In the supplementary counter affidavit filed on behalf of plaintiff-respondent, it is stated that the land of Bhola covered by plot No. 197 was never declared surplus in ceiling proceedings. As a matter of fact, the proceedings registered as return No. 3234 were dropped by order dated 18.12.1980 filed as Annexure CA-1 to the counter affidavit. The Competent Authority proceeded against co-share holder Lallan and declared 1.08 acres of land in plot No. 197 from his share as surplus. As regards the order dated 18.12.1980, it is stated in the affidavit that the said order was filed by the plaintiff alongwith an application 38-C under Order XLI Rule 27 of Code of Civil Procedure before the first Appellate Court. The said application was allowed by the Appellate Court by order dated 08.11.2013, which has attained finality. The same order is also annexed as Annexure No. 12 to the affidavit filed alongwith stay application by the appellant himself as paper No. 42-C/2. The entire order is reproduced as under:-

"न्यायालय सक्षम प्राधिकारी/संयुक्त निदेशक, नगर भूमि सीमारोपम, गोरखपुर
अन्तर्गत धारा 8(4)- नगर भूमि
(अधिकतम सीमा एवं विनियमन) अधिनियम, 1976

1. नगर भूमि (अधिकतम सीमा एवं विनियमन) अधिनियम, 1976 की धारा 6(1) के अन्तर्गत भोला पुत्र श्यामलाल ने विवरणी संख्या

3234 प्रस्तुत किया जिसमें उन्होंने जंगल सालिक राम के खसरा-नम्बर 26(0-92-0), 172(0-71-0) पूरा, 18(1-81-0), 81(0-23-0), 141(2-08-0), 197(2-64-0) में आधा, 62(0-16-0), 63(0-60-0), 67(0-32-0), 77(0-08-0), 79(0-04-0), 82(0-09-0), 83(0-13-0), 85(0-06-0), 89(0-03-0), 158(0-04-0) में 1/8 भाग कहा और यह भी कहा कि उनके पास आवासीय भवन सहित भूमि भी है। प्रारूपिक विवरणी 20-11-78 को जारी की गई जिसके विरुद्ध आपत्ति प्राप्त हुई। आपत्ति के समर्थन में इंतखाब खतौनी 1383 से 85फ, उद्धरण खसरा 1382, 1383, 1386 और 1387फ प्रस्तुत किया गया। मैंने अधिवक्ता को सुना और पत्रावली का अवलोकन किया।

2. पत्रावली पर उपलब्ध इंतखाब खतौनी 1383 से 85फ खाता संख्या 242,258,263/5 के अवलोकन से स्पष्ट होता है कि विवरणी में जिन गाटों में जो-जो विवरण लिखा गया है वह सही है। इसके अतिरिक्त जंगल सालिकराम के खसरा नम्बर 58मि(0-67-0) में विवरणी प्रस्तुतकर्ता का हिस्सा आधा है। इस गाटे को विवरण में नहीं दिखाया गया है। पत्रावली पर उपलब्ध उद्धरण खसरा 1382, 1383, 1386 और 1387फ को देखने से स्पष्ट होता है कि खसरा नम्बर 81(0-23-0) में से 0-17-0 1382 और 83फ में आबादी किन्तु 86 और 87फ में पूरा 0-23-0 आबादी लिखा गया है, खसरा नम्बर 82(0-09-0), 83(0-13-0), 85(0-06-0), 158(0-08-0) लगातार आबादी 1382, 1383, 1386 और 1387फ अंकित किया गया है और शेष भूखण्डों पर फसलें, मक्का, धान अथवा बाग को प्रविष्टि 28-1-76 से पूर्व तथा कालान्तर में की गई है। अतएव विवरणी में आये हुए भूखण्डों में से केवल खसरा नम्बर 81(0-23-0) का आधा अर्थात् 0-11-5, 82, 83, 85 और 158 के कुल क्षेत्रफल 0-32-0 का 1/8 अर्थात् 0-04-0 यानी कुल 0-15-5 रिक्त भूमि के रूप में है और शेष भूखण्ड कृषि भूमि के अन्तर्गत है। विवरणी में आवासीय भवन सहित भूमि 315.07 वर्गमीटर है। इसमें रिक्त भूमि 0-15-5 अर्थात् 627.28 वर्ग मीटर छोड़ने पर रिक्त भूमि का

विस्तार 2000 वर्ग मीटर से कम होता है। अतः विवरणी में सीमा से अधिक रिक्त भूमि नहीं है। जारी की गई प्रारूपिक विवरणी निरस्त की जाती है।

3. गोरखपुर की महायोजना 27-11-80 से प्रभाव में आ गई है। महायोजना में जंगल सालिकराम के खसरा नम्बर 18, 141, 197, 26, 172, 58, 62, 63, 67, 77, 79 और 89 का भू-उपयोग ज्ञात किया जाय और यदि भूधारक के पास सीमा से अधिक भूमि हो तो विवरणी प्रस्तुतकर्ता को नोटिस जारी की जाय कि विवरणी प्रस्तुत करें।

दिनांक: दिसम्बर 18, 1980”

(emphasis supplied)

17. Annexure CA-1 forming part of the counter affidavit filed on behalf of respondent No. 2 State of U.P., being order dated 10.11.1980, as referred to by Shri Navin Sinha during the course of arguments, does not find place on original record of proceedings and, therefore, the same cannot be read while deciding the second appeal. It was neither on record of the trial court nor was even admitted in additional evidence at the first appellate stage. Even otherwise, in view of subsequent order dated 18.12.1980 cancelling the statement of vacant land, the said order, if at all had been in existence, would be deemed to have been nullified so as to conclude that plaintiff's share in plot No. 197 was never declared surplus under the proceedings of the Act of 1976. The order dated 18.12.1980 would, thereafter, attach finality to the ceiling proceedings by which only this much was observed regarding plot No. 197 that since master plan of Gorakhpur had come into force w.e.f. 27.11.1980, the land use of various Khasra numbers including Khasra No. 197 be determined and, in case the land holder was having land in excess, notice be issued to him for submitting statement. It is, therefore, established on record that the proceedings, initiated against plaintiff-

Bhola were dropped by the ceiling authorities vide order dated 18.12.1980 under Section 8(4) of the Act of 1976 and the share of Lallan in plot No. 197, which was declared vacant stood vested in State and also recorded as such in the name of State of U.P. in the revenue records. It is also established that plot No. 26 was never subject matter of ceiling proceedings and by mere application or affidavit alleged to have been submitted by plaintiff-Bhola, land in dispute covered by plot No. 26 cannot be deemed to have vested in favour of State especially when no share of plaintiff-Bhola in plot No. 197 was ever declared surplus. Hence, the lease deed dated 11.01.1991 registered on 13.01.1993, would not confer any right upon the defendant-appellant. Further, the lease deed was executed in pursuance of Government Order dated 29.04.1989, which mentioned plot Nos. 189, 190, 207, 208, 198, 117, 110, 107, 103 and 121. Neither plot No. 197 nor plot No. 26 was included in the aforesaid Government Order.

18. Now carefully examining the lease deed executed by the State of U.P. in favour of the appellant, being paper No. 41-C/2 it is found that though the deed was executed/prepared on 11.01.1991, it was signed by the witnesses and executants on 28.12.1992 and 30.12.1992 and was registered in the office of Sub-Registrar on 13.01.1993. The lease deed runs and ends in twelve (12) pages, however, alongwith the same, a letter dated 29.10.1991 sent by the District Magistrate to the Deputy Secretary, Awas Anubhag-6, U.P. Government, Lucknow through special messenger is attached. The letter reads as under:

“महोदय,

कृपया उर्पयुक्त विषयक शासन के आदेश पत्र सं० 1947/9-व०भू० 91-385 यू०सी०/86 दिनांक 17 सितम्बर 1991 का सन्दर्भ ग्रहण करें। कैथोलिक डायोसिस ऑफ गोरखपुर को आवंटित भूमि तथा मौके पर वास्तविक कब्जे वाली भूमि का विवरण चार्ट के रूप में संलग्न करते हुए अनुरोध है कि वास्तविक कब्जे वाली भूमि के सम्बन्ध में पट्टा अभिलेख का निष्पादन कराने का कष्ट करें।”

(emphasis supplied)

Just below this letter, a table is attached, which is titled as “कैथोलिक डायोसिस ऑफ गोरखपुर को आवंटित भूमि, जो उन्हें वास्तविक रूप में मौके पर प्राप्त है का विवरणः.” In it, various plots have been shown, but there is no mention of plot No. 197 or plot No. 26. Below the table, a NOTE signed by three persons, i.e. Surveyor, Junior Engineer and Assistant Engineer on 24.05.1991 is contained. The NOTE reads as under:

“नोट:- 1- आराजी संख्या 24, 25 व ग 28 सीमाधिक्य

घोषित तथा राज्य सरकार में निहित भूमि है।

2- आराजी संख्या 26 जिलाधिकारी, गोरखपुर के आदेश संख्या 1611 दिनांक 13.3.91 द्वारा आराजी संख्या 197 के स्थान पर लिया गया है जो आवंटी संस्था के कब्जे में रख रखाव हेतु दिया गया है।

3- आ० सं० 128 स्थित मौजा शिवपुर आ० सं० 121 के स्थान पर जिलाधिकारी के आदेश दिनांक 13.3.91 द्वारा लिया गया है।”

(emphasis supplied)

19. The lease deed was signed by Shri Subhash Chandra Bankhandi, Joint Secretary, Government of U.P., Awas Anubhag on behalf of the State Government. The aforequoted 2 pages added to the deed do not bear signatures of Shri Bankhandi. The letter appended to the deed recites that plot No. 26 has been taken in pursuance of letter of the District Magistrate dated 13.03.1991 in exchange of plot No. 197 and its possession has been handed over to the appellant for its maintenance (RAKH RAKHAO). The said

letter cannot be termed as “lease” or “part of lease deed”, which was only in respect of land detailed in the Government Order dated 29.04.1989 as recited in the lease deed. The Court also finds that when the certified copy of the lease deed was issued from the office of Sub Registrar, the aforesaid letter dated 29.10.1991 and chart dated 24.03.1991 were also surprisingly made part of the lease deed, but, in view of the fact that plot No. 26 did not find mention in the table/chart, mere mention of plots No. 197 and 26 in Note No. 2 written at the bottom of the table/chart, would not mean that the land stood vested in the State or that it became part of lease deed.

20. Testing the submission of Shri Sinha that once the plaintiff-respondent, by submitting application and affidavit before the District Magistrate, himself transferred right, title, interest and possession of his plot No. 26 to the District Magistrate and, therefore, he would have no right to challenge the action of the State or the lease deed, the same does not hold any water in it, inasmuch as, title in immovable property does not vest by mere admission. Even otherwise, the admission, if any, is never a conclusive evidence as to the truth of the matter stated therein and it is only a piece of evidence, weight to be attached to which must depend on the circumstances under which it is made. Admission can also be shown to be erroneous or untrue, so long as the person to whom it was made acted upon it to his detriment. Reference in this regard can be made to the judgments of the Supreme Court in the case of *Nagubai Ammal and others vs. B. Shama Rao and others*, AIR 1956 SC 593 and *K.S. Srinivasan vs. Union of India* AIR 1958 SC 419. Significantly, plaintiff-Bhola, who appeared as PW-1 before the trial court, stated in his cross-examination that he had

sold his land covered by plot No. 197 and that the plot No. 26 being a grove, had been surrounded by the present appellant. Raising of boundary wall by the appellant was also alleged. As regards submitting application or affidavit before the ceiling department, when suggestion was put to PW-1, he stated that-

“यह कहना गलत है कि मैंने सीलिंग विभाग में इस आशय का कोई शपथ पत्र दिया था कि मेरी आराजी नं० 197 जो कि मैं बेच चुका था के बदले में 26 नं० ले लिया जाए” (emphasis supplied)

21. Now, to understand the documents allegedly conferring title in favour of State qua disputed plot No. 26, it is noteworthy that the entire case of both the defendants is based upon application No. 157-क and supporting affidavits 158-ग, 159-ग, 160-ग, and 161-ग, by which rights in disputed plot No. 26 were allegedly surrendered or relinquished by the plaintiff in favour of the defendants. The application 157-क contains thumb impression of Bhola, Shri Ram and Smt. Khirni and affidavit 158-x was sworn by Smt. Khirni, wife of late Sudama, affidavit 159-ग was sworn by Mauzam, son of Sudama, affidavit 160-x was sworn by plaintiff-Bhola and affidavit 161-x was sworn by Shri Ram, son of Lallan. Except the plaintiff-Bhola, deponents of all other affidavits are heirs of late Lallan. In the cross examination of plaintiff-Bhola (PW-1) as regards affidavit 158-C, he stated that he could not identify as to whether it contained thumb impression of Smt. Khirni, who was illiterate. Similar was the stand with respect to other affidavits except affidavit of Mauzam over which his

signatures were identified by plaintiff-Bhola. However, since the dispute in the present case is as to whether any share of Bhola held in plot No. 197 was or was not declared surplus under the Act of 1976, only affidavit 160-x is relevant and there appears to be no dispute that remaining part of the said plot No. 197 was declared as surplus, however, the same related to Lallan succeeded by his heirs and not to the plaintiff. As regards affidavit 160-x plaintiff-Bhola stated that:-

“मुझे याद नहीं है कि पत्रावली पर उपलब्ध कागज़ सं० 160 ग शपथ पत्र मेरे द्वारा दिया गया है या नहीं”

(emphasis supplied)

22. From the entire cross-examination of PW-1, it cannot be inferred that he ever proved the affidavit 160-x as having been submitted by him. Surprisingly, no suggestion was put to him as regards his thumb impression on application 157-क. Therefore, in absence of such suggestion, contents of the application or his thumb impression over document No. 157-क, could not be read in evidence against the plaintiff-respondent.

23. At the appellate stage, pursuant to an order passed on an application under Order XLI Rule 27 read with Section 151 of Code of Civil Procedure, various documents alongwith list Paper No. 40-C were admitted in additional evidence. A certified copy of the lease deed being paper No. 41-C/1 to C/13, letter dated 29.10.1991 being paper No. 41-C/14 and schedule/table being paper No. 41/15 are included in such documents. The order dated 18.12.1980 passed by the Competent Authority establishing that plaintiff's land covered by plot No. 197 was never

declared surplus was also admitted as paper No. 42-C/2. Paper No. 43-C/2 on record is a map drawn by the Inspector/Surveyor, which also shows that 4354.76 Sq. Mts. of land covered by plot No. 197 was declared as surplus vide return No. 3235 relating to Lallan and there is no mention of the land belonging to plaintiff-Bhola or his share in plot No. 197. The documentary evidence produced by the appellant before the courts below, therefore, reads against the appellant and cannot infer that the land belonging to the plaintiff-respondent was ever declared as vacant/surplus. Therefore, no question, either factual or legal, as regards exchange of plot No. 26 corresponding to share of the plaintiff in plot No. 197 would arise.

24. There is also on record an information sought from the Assistant Commissioner Stamps/Sub Registrar, Sadar-I, Gorakhpur under the Right to Information Act by application dated 03.04.2023, being paper No. 44-C/2 and 44-C/3, by which various objections and queries were raised as regards issuance of certified copy of lease deed, which initially contained 24 pages (both sides), but as to under what circumstances the remaining pages not signed by the executants of the lease deed were made part thereof while issuing certified copy of the said deed. On such application, the Sub Registrar-I, Gorakhpur informed on 20.04.2013 that the deed contained pages No. 1 to 12 duly signed by the executants thereof and, due to clerical error, the Government letter might have become part of it. As regards issuance of certified copy, Rule 241 of the Registration Manual was appended stating that the typographical error so occurred would not affect validity of the lease deed that is a question within jurisdiction of competent Court. In that connection, a letter dated 30.04.2013 issued by the

Competent Authority, Urban Land Ceiling, Gorakhpur also forms part of the record as paper No. 45-C/1. alongwith which, a three member report, paper No. 45-C/2 is attached. These three members were Office Assistant, Peshkar and Nodal Officer and they responded to the query raised under Right to Information Act in the manner that against every question raised, a remark: 'copy of registered document received in the office is attached as Annexure No. 1' is mentioned. It is, therefore, clear that all officers, who were involved in responding to the RTI query, avoided answering the question that was germane to the controversy as to in what manner Government could treat plot No. 26 as part of the lease deed executed in 1991-1992 and registered in the year 1993.

(emphasis supplied)

25. This Court would also not ignore a letter dated 26.11.1991, paper No. 46-C/10, issued by Shri Subhash Chandra Bankhandi, Joint Secretary of U.P. Government to the District Magistrate, Gorakhpur, clearly mentioning that plot No. 26, that was allotted to the appellant-Society in lieu of plot No. 197 for the purposes of maintenance, was not affected by ceiling operations and, therefore, since plot No. 26 had not vested in the State under the Ceiling Act, as to under which provision of law it could be allotted to the Society. Clarification was sought from the District Magistrate on this line. On similar lines, an earlier letter dated 10.04.1991 (46-C/7) was written by the Joint Secretary asking the District Magistrate as to under which provision of law land unaffected by ceiling operations could be released. The District Magistrate, on 21.05.1991, responded to the letter dated 10.04.1991 and, instead of answering the query raised, it attacked on the sale made by the tenure

holders of plot Nos. 197 and 121 and, as regards release of unaffected land, it was mentioned that there was no provision under the Ceiling Act, however, on the alternative of change of land holders, consideration can be made at the level of the Government.

26. As regards right of Govt./competent Authority to purchase a vacant land in excess of ceiling limit, it would now be quite necessary to refer Section 26 of the Act of 1976, which reads as under:

“26. Notice to be given before transfer of vacant lands.

(1) Notwithstanding anything contained in any other law for the time being in force, no person holding vacant land within the ceiling limit shall transfer such land by way of sale, mortgage, gift, lease or otherwise except after giving notice in writing of the intended transfer to the competent authority.

(2) Where a notice given under sub-section (1) is for the transfer of the land by way of sale, the competent authority shall have the first option to purchase such land on behalf of the State Government at a price calculated in accordance with the provisions of the Land Acquisition Act, 1894 (1 of 1894) or of any other corresponding law for the time being in force and if such option is not exercised within a period of sixty days from the date of receipt of the notice, it shall be presumed that the competent authority has no intention to purchase such land on behalf of the State Government and

it shall be lawful for such person to transfer the land to whomsoever he may like: Provided that where the competent authority exercises within the period aforesaid the option to purchase such land the execution of the sale deed shall be completed and the payment of the purchase price thereof shall be made within a period of three months from the date on which such option is exercised.

(3)”

(emphasis supplied)

27. Section 26(2) quoted above, though gives first option to the Competent Authority to purchase land on behalf of State Government, in order to exercise such an option, compliance of sub-Section (1) of Section 26 is a prerequisite and further requirement is calculation of a price of the land in accordance with the provisions of the Land Acquisition Act, 1894 or any other corresponding law for the time being in force. The provision further clarifies that if such option is not exercised within a period of 60 days from the date of receipt of the notice, it shall be presumed that the Competent Authority has no intention to purchase such land on the behalf of the State Government. Section 26(1) of the Act, therefore, recognises mode of transfer by way of sale, mortgage, gift, lease or otherwise but it does not contemplate any transfer by submitting a letter by the vendor or filing of affidavit by him.

(emphasis supplied)

28. Transfer of Property Act, 1882 recognizes only five (5) modes of transfer of property viz, sale, gift, lease, mortgage and exchange. The appellants' case is based upon exchange of land made by the plaintiff through application 157-d and the

affidavits forming part thereto. No case of sale, gift, lease or mortgage was set up by the appellant-Society or the State of U.P. Therefore, even going to the extent of examining the case of exchange, it would be apt to refer Section 118 of the Act, 1882 as contained under Chapter VI thereof. “Exchange” has been defined as under:

“118. “Exchange” defined.—

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an “exchange”.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.”

(emphasis supplied)

29. It is thus clear that even if two persons mutually transfer ownership of an immovable property, in order to the transaction being termed as “exchange”, it has to be only in the manner provided for transfer of such property by sale. Therefore, “exchange” is permissible only when it has ingredients of a “sale” covered by Section 54 of the Act. In the present case, such ingredients are completely missing and, therefore, alleged handing over possession by the plaintiff to the State/District Magistrate cannot be termed as “exchange” of plot(s). (emphasis supplied)

30. Even if the provision of “exchange”, as contained in Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950, qua agricultural land is examined, as per section 161, “exchange” means as follows:

“161. Exchange.- (1) A bhumidhar may exchange with-

(a) any other bhumidhar land held by him; or

(b) any [Gaon Sabha] or local authority, lands for the time being vested in it under Section 117:

Provided that no exchange shall be made except with the permission of an Assistant Collector who shall refuse permission if the difference between the rental value of land given in exchange and of land received in exchange calculated at hereditary rates is more than 10 per cent of the lower rental value.

(1-A) Where the Assistant Collector permits exchange he shall also order the relevant annual registers to be corrected accordingly.

(2) On exchange made in accordance with sub-section (1) they shall have the same rights in the land so received in exchange as they had in the land given exchange.”

31. This Court is conscious of the situation that if transfer of immovable property by a citizen to the State or inter-se two citizens is permitted through exchange of letters or affidavits, it would lay down an unprecedented and unique but absolutely illegal mode of transfer of property and immovable property would, then, become capable of being transferred completely dehors the provisions of the Transfer of Property Act, Registration Act or any other law governing creation of rights in immovable property. In the instant case, the lease created in favour of the appellant is for a period of 90 years and, therefore, it had to be through any recognized mode of transfer qua the disputed plot in clear terms

and, even before that, it must have been established on record that initial transfer by plaintiff-Bhola in favour of State/District Magistrate was having a sanction of law, which is not found here.

32. Now, in order to ascertain as to whether any law actually permits taking over possession on the basis of alleged voluntary surrender by the tenure holder and whether this Court is proceeding in right direction while deciding the instant appeal, this Court went through entire file to find anything substantial which could read in support of the appellant's plea. The Court found on record written submissions filed earlier on behalf of appellant through which it is contended that "voluntarily surrendering and delivering possession" is included in "vesting" under Section 10 (3) of the Act of 1976 and reliance in this regard has been placed upon a judgement of Supreme Court in ***State of U.P. vs Hari Ram, 2013 (4) SCC 280***, in paragraphs 28 and 29 whereof it is observed as follows:

"28. The 'vesting' in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The court in ***Maharaj Singh v. State of UP and Others*** (1977) 1 SCC 155, while interpreting Section 117(1) of U.P. Zamindari Abolition and Land Reform Act, 1950 held that 'vesting' is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The court in

Rajendra Kumar v. Kalyan (dead) by Lrs. (2000) 8 SCC 99 held as follows:

"We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. "To vest, generally means to give a property in." (Per Brett, L.J. Coverdale v. Charlton. Stroud's Judicial Dictionary, 5th edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To "vest", cannot be termed to be an executor devise. Be it noted however, that "vested" does not necessarily and always mean "vest in possession" but includes "vest in interest" as well.

29. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act."

(emphasis supplied)

33. The argument of the appellant as contained in the written submissions and also pressed before the Court is that once plaintiff had, by application and affidavit, agreed for acquisition and taking possession of plot No. 26 in lieu of plot No. 197, he would be deemed to have abandoned his right and interest in the land in the year 1991 and the said conduct of

plaintiff would operate as estoppel against him and, therefore, in view of provisions of Section 41(g) and 41(i) of the Specific Relief Act, his conduct would dis-entitle him from claiming any reliefs.

34. This Court is of the view that the judgment in *Hari Ram* (supra) would be of no help to the appellant, inasmuch as, therein, voluntary surrender was discussed in the light of Section 10(3) of the Act, 1976 and it was observed that vesting under the said provisions means absolute vesting of title and nothing stands in the way of a person voluntarily surrendering or delivering possession. It would be quite significant to reproduce here section 10 of the Act of 1976 and its relevant sub-sections for a ready reference:

“10. Acquisition of vacant land in excess of ceiling limit.-(1)

As soon as may be after the service of the statement under section 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit and stating that-

(i) such vacant land is to be acquired by the concerned State Government; and

(ii) the claims of all persons interested in such vacant land may be made by them personally or by their agents giving particulars of the nature of their interests in such land, to be published for the information of the general public in the Official Gazette of the State concerned and in such other manner as may be prescribed.

(2) After considering the claims of the persons interested in the vacant land, made to the competent authority in pursuance of the notification published under sub-section (1), the competent authority shall determine the nature and extent of such claims and pass such orders as it deems fit.

(3) At any time after the publication of the notification under sub-section (1), the competent authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land referred to in the notification published under sub-section (1) shall, with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government and upon the publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

(4)”
(emphasis supplied)

35. A bare perusal of sub-section (3) of Section 10 would reveal that it speaks of deemed vesting absolutely in the State Government, but uses words “**such land**”, which means that the land which, being in excess of the ceiling limit, had been declared as vacant. By no stretch of imagination, vesting or deemed vesting or absolute vesting or voluntary surrender can be understood in respect of land, which was exempted from ceiling proceedings, which exactly is the situation in the present case. As held above, no part of plaintiff’s share

in plot No. 197 was ever declared as surplus/vacant, rather, under the order dated 18.12.1980 passed by the Competent Authority, statement No. 3234 furnished by the plaintiff was accepted and the said order had attained finality.

(emphasis supplied)

36. The Court now considers the order dated 27.07.2022 passed by the District Magistrate, Gorakhpur, which has been admitted as additional evidence in the instant appeal vide order dated 21.08.2024 passed on Civil Misc. Application No. 24 of 2022 under the provisions of Order XLI Rule 27 of Code of Civil Procedure by consent of parties. The order dated 27.07.2022 came into existence during the pendency of the instant second appeal and it refers to the proceedings held under the Act of 1976 in relation to plot No. 197 alongwith other plots, institution of Original Suit No. 307 of 1991 giving rise to the instant appeal, proceedings of first Appellate Court and its decision and it is mentioned in the order that in view of order dated 13.03.2014, i.e. the first Appellate Court's judgment, being effective and the fact that plot No. 26 was given to the appellant only for the purposes of maintenance and was not allotted to it and that shortfall of the land allotted to appellant becomes complete from the land covered by plots No. 24 and 25, the order dated 13.03.1991 by which disputed plot No. 26 had been allotted to the appellant for maintenance purposes, is recalled. It is also mentioned that the order dated 27.07.2022 would remain subject to the final decision to be pronounced in the present second appeal. Once it is held that the disputed plot No. 26 had never lawfully vested either in State or in District Magistrate nor did it form part of the lease deed executed in favour of appellant nor

was transfer of its possession otherwise lawful having support of any statutory provision, the order dated 27.07.2022 recalling the previous order of giving the property to the appellant for maintenance, is hereby upheld.

37. It is also found that the Original Suit was contested both by the appellant, who was defendant No. 1 and State of U.P. that was defendant No. 2, however, no second appeal has been filed by the State of U.P. against the impugned appellate decree and, therefore, it has attained finality against State of U.P. For this additional reason, challenge made by the present appellant to the appellate decree can be said to be quite weak if not baseless, inasmuch as, the appellant was, at the best, a mere caretaker or Manager of the property as per Note No. 2 contained in Annexure which, as aforesaid, did not form part of the lease deed. It is also significant to mention that the original suit was filed in the year 1991, the lease deed was written on 11.01.1991, it was signed by the witnesses and executants on 28.12.1992 and 30.12.1992 and the same was registered in the office of Sub Registrar on 13.01.1993, i.e. during the pendency of the suit. The said dates are self explanatory to demonstrate that things were managed to the detriment of the interest of the plaintiff-respondent. The action *lis pendens* would certainly be subject to final decision in the *lis* covered by the suit and the appeal(s).

38. From perusal of entire record, it becomes crystal clear that settlement or allotment or even coming into possession over the disputed plot No. 26 was not through any mode recognized under any law. Even the District Magistrate did not find any provision under which a land unaffected by ceiling proceedings could be

allotted or settled in favour of the Society and everything was left at the discretion of the State Government. Interestingly, by the time when the aforesaid correspondence was being exchanged inter-se District Magistrate and the State Government, the lease deed had been executed or at least prepared on 11.01.1991. As noted above, executants of the deed, i.e. Finance Secretary of the appellant and the Joint Secretary of the State Government as well as witnesses signed the deed in December, 1992, i.e. after about 23 months. The deed was, thereafter, registered in the office of the Sub-Registrar on 13.01.1993. There is no decision of the State Government on record, in consonance with the provisions of Act of 1976 so as to justify taking over rights and possession over plot No. 26. Therefore, the action of the respondents is nothing, but apparently property grabbing by the State officials to the detriment of the interest of a rustic tenure holder, who fell as a prey in the sharp and deadly jaws of giant administrative machinery run by the State in collusion with the appellant and this Court can safely reach to a conclusion that even the application 157-Ka and the affidavits enclosed thereto might have been obtained from the tenure holders including the plaintiff-respondent under coercion in order to grab the land covered by plot No. 26, which might suit to the proposal of raising some constructions by the appellant-Society over the disputed land or the land adjoining thereto. This Court cannot approve such a property grabbing by the State or the appellant, particularly when it has no statutory or otherwise sanction of law. The office of the Sub-Registrar too is under the supervision of the District Magistrate being head of the Collectorate and in the circumstances elaborated above, it can safely be concluded that all the officials and their

team members joined hands together to design and engineer transactions and actions that had no legal foundation or sanctity and, therefore, irresistible conclusion drawn by this Court is that raising of boundary wall over the disputed land or any other constructions thereon or taking over possession of the same is a clear act of trespass.

SUBSTANTIAL QUESTIONS OF LAW ANSWERED

39. In view of above discussion, once it is found that the alleged admission made by the plaintiff-Bhola in application and affidavit allegedly submitted by him is of no consequence, significance or legal sanctity and cannot be termed as documents conferring right, title, interest or possession in favour of the appellant or the State of U.P., and having further found that share of plaintiff-Bhola in plot No. 197 was never declared surplus, the first question, on which the instant second appeal was admitted, is answered in the manner that the first Appellate Court was perfectly justified in decreeing the suit and no factual or legal error is found in its order. The second question directly/indirectly relates to jurisdiction of the civil court in upsetting the ceiling proceedings. Although no argument was advanced from the appellant side in this regard, since the Court has to answer the said question, it itself went through the entire Act of 1976 and did not find any provision which may either expressly or impliedly bar jurisdiction of civil court. Even if sections 7, 11, 12, 32 and 33 are examined, the same relate to the land which is declared vacant under the Act and the proceedings before the Competent Authority, Tribunal, Appellate Court, State Government and also this Court in the form of second appeal against the decision of a

Tribunal under Section 12, which refers to Section 11 that is a provision for payment of amount for vacant land acquired. In the instant case, once first Appellate Court as well as this Court has found that no share of plaintiff-Bhola in plot No. 197 was ever declared surplus and finality to this fact was attached by the order dated 18.12.1980 passed by the Competent Authority with no further proceedings thereafter except unlawful and artificial vesting of property covered by plot No. 26 in alleged exchange of plot No. 197, which had no concern with the Government as far as plaintiff-Bhola's share is concerned, none of the provisions under the Act of 1976 would create an express or implied bar against exercise of jurisdiction by civil court so as to protect individual civil right to property, which the plaintiff asserted in his favour. In this view of the matter, it is held that civil suit was perfectly maintainable as per Section 9 of the Code of Civil Procedure. Hence, the judgment and decree drawn by the first Appellate Court is well within jurisdiction as the suit property covered by plot No. 26 had no concern with the appellant or the State and was alien to ceiling proceedings. As regards third question, even if the defendant-appellant had raised constructions over the said plot by investing huge amount, it is held that the suit was not barred by principles of estoppel and acquiescence as there was neither any voluntary surrender of property nor a transfer having legal sanction in favour of defendants. Consequently, all the three questions are answered in favour of the plaintiff-respondents and against the appellant as well as the State and its functionaries.

40. This Court, therefore, does not find any factual or legal error in the first Appellate Court's judgment except that

heavy cost and damages should also have been imposed on the appellant and the State. Once this Court has arrived at a conclusion that the action of the State as well as appellant did not have any sanction of law, rather it amounted to grabbing land of a rustic villager and committing trespass over it, the instant appeal deserves to be dismissed with heavy cost.

41. This Court may observe that third relief claimed in the plaint was with respect to award of cost and fourth relief was in the form of "*any other relief which the Court may deem fit and proper in the facts of the case*". The Court may take aid of Rule 33 of Order XLI of Code of Civil Procedure where the Appellate Court shall have power to pass any decree and make any order which ought to have been passed as the case may require and the said power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. These provisions do apply to Second Appeals also in view of Order XLII Rule 1 of Code of Civil Procedure. The Court finds that the first appeal was dismissed with cost, but without quantifying the same.

42. This Court deems it appropriate to refer latin legal phrase ***fiat justitia ruat caelum*** that means "*Let justice be done though the heavens fall.*" The maxim signifies the belief that justice must be realized regardless of consequences. Considering the length of trespass and also applying doctrine of ***ex debito justitiae*** which applies for rendering complete justice in accordance with the requirement of justice in the given facts of a case, since

taking over possession over the plaintiff's land by the State and the appellant, joining hands together and with the aid of the entire State machinery at district and secretariate level by manipulating documents, one after another, has resulted in depriving the plaintiff and his legal heirs of user, occupation, possession and utilisation of their immovable property for a period of more than 32 years, this Court thinks it just and proper to award exemplary cost and damages against both the defendants. The Court quantifies the same as Rs.10,00,000/- (rupees ten lacs).

43. The second appeal, accordingly, stands **dismissed with cost of Rs.10,00,000/- (Rupees ten lacs)** to be jointly borne by the appellant and the State Government and its functionaries in equal share. The cost shall be deposited before the Executing Court within a period of three months from the date of this decision and the same shall be immediately released by the Executing Court in favour of legal representatives of plaintiff-Bhola without furnishing any security. It shall be open for the State Government to fix liability and responsibility upon any individual official(s) to bear cost but, in any case, it shall be deposited and paid in the manner as directed above. The Executing Court shall, within six months henceforth, execute the decree in toto alongwith decree of cost, if not deposited by the judgment debtors, as directed above.

44. All pending applications stand disposed off.

45. Office to forthwith prepare decree based upon this judgment.

(2024) 9 ILRA 1286
APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 12.09.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

First Appeal No. 495 of 2024

Smt. Hasina Bano ...Appellant
Versus
Mohammad Ehsan ...Respondents

Counsel for the Appellant:
Bhrguram Ji, Shashi Shekhar Maurya

Counsel for the Respondents:
Nilesh Kumar Dubey

Civil Law - Family Court Act, 1984 - Section 19, - Criminal Procedure Code, 1973 - Sections 125 & 127 - Limitation Act, 1963 - Section - 29(3) - Evidence Act, 1872 - Sections 54 & 58 - Dissolution of Muslim Marriages Act, 1939 - Section 2(ix)
- Appeal - against dismissal of - suit for declaration of the 'matrimonial status' as Divorce by way of *mubara* - court finds that, - the marriage between the appellant and the respondent, solemnized on 18.12.1984, and their subsequent separation on 16.07.1990 - they mutually agreed to divorce on 15.11.1999, which was formalized in a notarized document titled "Talaqnama Tehreer" on 07.03.2000 - the Family Court dismissed their suit for declaration of their matrimonial status due to the non-filing of the original "Talaqnama" as well as the delay in filing the suit - held, the Family Court's decision was unwarranted and not in accordance with the law, as there is no prescribed limitation period for such suits under the Family Courts Act, 1984 - hence, impugned order & decreed are hereby quashed - and with the mutual consent of the parties, the suit for declaration of the matrimonial status of the parties is hereby declared as 'divorced' - the appeal is allowed. (Para - 30, 30-1, 30-3)
First Appeal Allowed. (E-11)

List of Cases cited:

1. Shayara Bano Vs U.O.I., reported in (2017) 9 SCC 1,

2. Skh. Hafiz Skh. Habib Vs St. of Mah. - 2009 (1) AIR Bom R 345,

3. St. of Punjab & ors.Vs Bhatinda District Cooperative Milk Producers Union - (2007) 11 SCC 363,

4. M/S North Eastern Chemicals Industries (P) Ltd. & anr.Vs M/S Ashok Paper Mill (Assam) Ltd. & anr.- AIR 2024 SU.P.reme Court 436,

5. Asbi .K.N Vs Hashim M.U. - 2021 SCC Online Ker 3945,

6. Ajaib Singh Vs The Sir hind Cooperative Marketing Cum-Processing Service Society Limited & ors.- in (1999) 6 SCC 82.

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

On the application for condonation of delay

As per the report submitted by the Registry, the present appeal under Section 19 of the Family Court Act, 1984 is barred by limitation as the same has been preferred by the appellant beyond 148 days of the prescribed limitation period. The cause of delay as explained by the appellant in the present application for condonation of delay duly supported by an affidavit is found satisfactory. The learned counsel appearing on behalf of the respondent has no objection against the aforesaid condonation of delay. Accordingly, delay in filing this appeal is condoned.

The present application for condonation of delay having application No. 01 of 2024 is **allowed**.

On the Memo of Appeal

1. Heard Sri Bhiguram Ji Pandey along with Sri Shashi Shekhar Maurya, learned counsels for the appellant and Sri Niles Kumar Dubey, learned counsel appearing for the respondent.

2. The present appeal under section 19 of the Family Court Act, 1984 has been filed, inter alia, praying for setting aside the impugned judgment and order dated 10.10.2023 and also the decree dated 19.10.2023 passed by the Additional Principal Judge, Family Court, Jhansi in Declaration Case No. 687/2021 whereby the 'Suit for declaration of the matrimonial status' of the parties has been dismissed. It has also been prayed that this Court may, in exercise of its appellate jurisdiction allow the said Suit, by declaring the matrimonial status of the parties as 'divorced' by way of mubara'at, as recognised under the Muslim Personal Law.

3. Facts of the case that are culled out from the material available on record is that the marriage between the appellant and the respondent was solemnised on 18.12.1984 in accordance with the recognised rites and customs of the Hanafi Muslim school of thought. The appellant in support of her stand filed a copy of the 'nikahnama' as Annexure No. 1 along with the stay application duly supported by an affidavit.

4. There is no dispute of the fact that out of their wedlock, a child was born in the year 1991 but due to some matrimonial dispute the parties preferred staying separately, giving rise to litigation. From the pleadings, it transpires that a case under section 125 Cr.P.C. was filed by the appellant which was registered as Case No. 194/1990 and a case under Section 127 Cr.P.C. was also registered as Case No.

43/1994. Further, a criminal case under Sections 498A, 323, 504, 506 I.P.C. was also filed in the Court of Chief Judicial Magistrate, Jhansi which was registered as Case No. 2454 of 1997 (Haseena Bano versus Ehsan). However, after a lapse of time, a settlement took place between the parties, out of Court and the aforesaid litigation came to an end. It is the admitted case of the parties to the present appeal that they are living separately since 16.07.1990 and on the intervention and persuasion of some respected persons of the society, the parties resorted to put an end to their marital tie and finally on 15.11.1999, they decided to accord divorce on the basis of mutual consent and dissolved their marriage by way of *mubara'at* as per the established principles under the Muslim Personal Law. Thereafter, on 07.03.2000 the appellant and the respondent reduced the aforesaid divorce in writing by means of a jointly signed notarised document titled as "*Talaqnama Tehreer*".

5. The parties to this appeal jointly filed a Suit being Declaration Case No.687 of 2021 before the competent Family Court at Jhansi, seeking declaration of their matrimonial status. However, the said Suit was dismissed by the learned Additional Principal Judge, Family Court, Jhansi, vide order dated 10.10.2023, on the ground of default of non-filing of the said '*Talaqnama*' in-original by the plaintiffs along with the list of documents submitted in the Suit proceeding and also on the ground of delay in filing the Suit that having being instituted after a lapse of about 20 years from the date of its commencement of the dissolution of marriage.

6. We have heard the learned Counsels for the parties and perused the record.

7. It is submitted by the learned counsel for the appellant that since 16.07.1990, the appellant has been living separately. The divorce between the parties, by way of mutual consent (*mubara'at*) on 07.03.2000 is undisputed as the same has never been challenged before any court of law. But the authorities at different forum, unnecessarily demands a formal declaration of the said dissolved matrimonial status (divorce) issued from the competent court of law. Having no other option but to approach the court of law for redressal of the said grievance, appellant and the respondent jointly filed a Suit being Declaration Case No. 687 of 2021 before the competent Family Court at Jhansi seeking declaration of the aforesaid duly dissolved marriage. However, the said Suit has been illegally dismissed by the learned Additional Principal Judge, Family Court, Jhansi, vide order dated 10.10.2023.

8. The contention of learned counsel for the appellant is that the learned Court below, although, has neither disbelieved the solemnisation of the marriage between the parties that took place on 18.12.1984 nor their separation since 16.07.1990. The dissolution of marriage by way of *mubara'at* (divorce by mutual consent) on 15.11.1999 which was reduced in writing in the form of '*Talaqnama Tehreer*' on 07.03.2000 is not in dispute; but the learned court below dismissed the said Suit in the most mechanical manner, vide impugned judgement and order dated 10.10.2023 on the unwarranted/technical grounds of non-availability of the '*Talaqnama*' in-original on record and the Suit in question having been instituted after a lapse of about 20 years from the date of commencement of the dissolution of marriage.

9. It has also been asserted on behalf of the appellant that the learned Court below did not appreciate the statements of the witnesses who were examined before the Court on 22.11.2021, evidence as placed by the appellant and the factual matrix of the case, in as much as, the fact that the Suit has been jointly filed by the parties seeking declaration of their matrimonial status as 'divorced' where the same is not at all disputed. The next submission advanced by the learned counsel appearing on behalf of the appellant is that since the factum of divorce is not disputed in the instant case and under the Muslim Law, there is no legal mandate of a written divorce (mubara'at) the Talaqnama dated 07.03.2000 in the instant case, is at the best a memorial, further the same is not a disputed document, as such, under the facts of the case there is no requirement of Talaqnama in-original as per Section 54 of the Indian Evidence Act, 1872, but the learned Court below has dismissed the said Suit without taking into consideration the settled legal position of law. Further, the provisions of the Indian Limitation Act are not attracted in the instant case and the learned court below has misconstrued the law on the subject.

10. The aforesaid facts as narrated on behalf of the appellant-plaintiff have not been disputed by the learned counsel for the respondent.

11. For better appreciation of the case, it would be apt to go through the law on the subject matter i.e. divorce by way of mubara'at as provided under the Muslim Personal law.

12. Under the Mohammadan Law, divorce by mutual consent is called *mubara'at*; and it may take place as an out-

of-court divorce. The word *mubara'at* is in a linguistic form indicates mutual and joint or common initiative of the parties. The Muslim Personal Law (Shariat) Application Act, 1937 refers to this form of divorce where the parties to a Muslim marriage, may by their joint initiative and mutual consent decide to put an end to the marital tie, either unconditionally or subject to conditions mutually agreed upon. Both the parties, so agreeing to a divorce by mutual consent should be major and sane and both should be acting by their own free will. There is no condition that the marriage should have lasted for a particular duration. The *ijab* (proposal) for *mubara'at* may emanates from either party; and the other party's *qubul* (acceptance) of the same will make the transaction complete. It is pertinent to mention here that *mubara'at* may be effected orally or by writing and with or without a qazi's intervention. No reason for separation need be mentioned in the oral or written agreement entered into, between the parties, for the said purpose. A *mubara'at* agreement cannot incorporate any such condition that affects the right of any person than the parties to marriage. For convenience the relevant provision of The Muslim Personal Law (Shariat) Application Act, 1937 is quoted below:

2. Application of Personal Law to Muslims.—*Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property properly inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian,*

khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

13. The Hon'ble Supreme Court of India while dealing with the issue of rights of Muslim women regarding the dissolution of marriage, in the case of ***Shayara Bano*** versus ***Union of India***, reported in **(2017) 9 SCC 1**, has been pleased to elaborate the provisions of the Section 2 (ix) of The Dissolution of Muslim Marriages Act, 1939 (Act VIII of 1939) which provides that a woman married under the Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on the ground which is recognised as valid for the dissolution of marriages under Muslim Law.

For ready reference, the relevant paragraph of the said judgment is quoted hereinafter:

145. A close examination of Section 2, extracted above, leaves no room for any doubt, that custom and usage, as it existed amongst Muslims, were sought to be expressly done away with, to the extent the same were contrary to Muslim Personal Law. Section 2 also mandated, that Muslim Personal Law (Shariat) would be exclusively adopted as "... the rule of decision..." in matters of intestate succession, special property of females, including all questions pertaining to "...

personal property inherited or obtained under contract or gift or any other provision of "Personal Law", marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, gifts, trusts and trust properties, and wakfs...". Section 3 added to the above list, "... adoption, wills and legacies...", subject to the declaration expressed in Section 3.

.....

.....

291. If the Muslim Personal Law (Shariat) Application Act, 1937, had incorporated the manner in which questions regarding intestate succession, special property of females including personal property inherited or obtained under contract or gift or matters such as marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (as in Section 2 thereof), had to be dealt with, as per Muslim Personal Law—"Shariat" according to the petitioners, it would be quite a different matter. All the same, the Shariat Act did not describe how the above questions and subjects had to be dealt with. And, therefore, for settlement of disputes amongst Muslims, it would need to be first determined what the Muslim Personal Law, with reference to the disputation, was. Whatever it was, would in terms of Section 2 of the 1937 Act, constitute "the rule of decision".

14. It is worth mentioning that 'The Dissolution of Muslim Marriages Act,

1939 was enacted to give Muslim women the right to divorce on certain conditions, besides the Muslim Personal Law (Shariat) Application Act, 1937 was legislated so that specific personal law be made applicable to the Muslims, in certain matters, eliminating the customary usages of localised nature.

15. The Dissolution of Muslim Marriages Act, 1939 assimilates principles of Muslim Personal Law in codified form. It would not be out of place to say that the Holy Quran has provided ample safeguards to women who are commanded to be dealt with fairly on 'equitable terms', when a dispute of some sort arises between husband and wife. It is notable that prior to the coming into force of 'The Dissolution of Muslim Marriages Act, 1939'; Muslim woman had a right to file a Suit before a qazi or a judge, having authority and sanction from the State or governing agency in the area.

16. It is pertinent to flag at this stage that the Family Court, in exercise of its jurisdiction as per Explanation (b) of S.7 of the Family Courts Act, 1984, is duly competent to endorse an extra-judicial divorce and declare matrimonial status of a person. Therefore, in the case of mubara'at, the Family Court is competent to declare 'divorce', on being satisfied that both the parties, so agreeing to dissolve their marital-tie by mutual consent are major and sane are acting by their own free will. The declaration of the matrimonial status of the parties by the Family Court as contemplated under Section 7 of the Family Courts Act, 1984, is a judicial endorsement of even the extra-judicial divorce.

17. The extra-judicial divorce by way of mubara'at is complete, the moment

spouses enter into a lawful mutual agreement to put an end to their matrimonial tie. In the case of mubara'at, if the Court is prima-facie satisfied that the parties have duly entered into a mubara'at agreement, it shall endorse the same and declare the status of the parties as divorced by passing an order to that effect as provided under Section 7 of the Family Courts Act, 1984. Needless to observe that it is always open to the parties to challenge the validity of the aforesaid divorce in accordance with law before the competent forum and in the event where the divorce itself is held legally unsustainable by competent authority the declaration endorsing the extra-judicial divorce made under Section 7 of the Family Courts Act, 1984 shall abide the said decision.

18. The said issue has been dealt with in detail by the High Court of Kerala at Ernakulam in the case of **Asbi .K.N** versus **Hashim M.U.** reported in **2021 SCC OnLine Ker 3945**. For ready reference, paragraphs 4 and 5 of the said judgment is reproduced hereinbelow:

“4. The Division Bench of this Court in X v. Y (2021 (2) KHC 709) has held that the Family Court in exercise of the jurisdiction under Explanation (d) of S.7 of the Act is competent to endorse an extrajudicial divorce to declare the marital status of a person. It was made clear in the said judgment that in the matter of unilateral dissolution of marriage invoking khula and talaq, the scope of enquiry before the Family Court is limited and in such proceedings, the Court shall record the khula or talaq to declare the marital status of the parties after

due notice to other party. In the matter of mubaraat, the Family Court shall declare the marital status without further enquiry on being satisfied that the dissolution was effected on mutual consent. It was observed that such matter shall be disposed treating it as uncontested matter without any delay by passing a formal order declaring the marital status. It was further held that if any person wants to contest the effectiveness of khula or talaq, it is open for such person to contest the same in appropriate manner known under the law.

5. The unilateral extrajudicial divorce under Muslim Personal law is complete when either of the spouse pronounce/declare talaq, talaq-e-tafweez or khula, as the case may be, in accordance with Muslim Personal Law. So also extrajudicial divorce by mubaarat mode is complete as and when both spouses enter into mutual agreement. The seal of the Court is not necessary to the validity of any of these modes of extra judicial divorce. The endorsement of extrajudicial divorce and consequential declaration of the status of the parties by the Family Court invoking S.7(d) of the Act is contemplated only to have a public record of the extrajudicial divorce. Hence, detailed enquiry is neither essential nor desirable in a proceeding initiated by either of the parties to endorse an extrajudicial divorce and to declare the marital status. The Family Court has to simply ascertain whether a valid

pronouncement/declaration of talaq or khula was made and it was preceded by effective attempt of conciliation. In the case of khula, it has to be further ascertained whether there was an offer by the wife to return the "dower". It could be ascertained by perusal of the recitals in talaq nama/khula nama or its communication (if it is in writing) or by recording the statement of the parties. No further enquiry as in the case of an adversarial litigation like chief examination and cross-examination of the parties are not at all contemplated in such a proceedings. If the Court is prima facie satisfied that there was valid pronouncement

of talaq/khula/talaq-e-tafweez, it shall endorse the same and declare the status of the parties. In the case of mubaarat, if the Court is prima facie satisfied

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

Family Court in a petition filed u/s 7(d) of the Act to endorse an extrajudicial divorce under Muslim Personal Law and to declare the marital status of the parties to the marriage.

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

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

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

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

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

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

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

19. Now, having dealt with the legal aspect of mubara'at under the Muslim Personal Law, it would be apt to deal with the findings as recorded by the learned Additional Principal Judge, Family Court, Jhansi, vide the impugned judgment and order dated 10.10.2023, regarding the delay in filing the Suit for declaration of the dissolution of marriage. From a bare perusal of The Family Courts Act, 1984, it is abundantly clear that no period of limitation is prescribed for a Suit or proceeding for declaration of matrimonial status of the parties as provided under the Explanation appended to Section 7 of the Family Courts Act, 1984. For convenience, Section 7 of the Family Courts Act, 1984 is quoted below:

“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 purpose 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.

Explanation -- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code

of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.”

20. Looking into the factual matrix of the case, this Court is of the view that when the dissolution of marriage between the parties by way of mubara'at to put an end to their marital tie, by mutually agreeing on their own free will is not in dispute; the appellant and the respondent were duly examined by the learned Trial Court on 22.11.2021 as Witnesses (PW-1 & PW-2) wherein they admitted the dissolution of their marriage as well as the execution of a jointly signed notarised “Talaqnama Tehreer” dated 07.03.2000, the finding recorded by the learned Additional Principal Judge, Family Court, Jhansi to the effect that the said ‘Talaqnama’ in-original has not been filed by the appellant-plaintiff along with the list of documents, is totally unwarranted, and not sustainable in the light of Section 58 of the Indian Evidence Act, 1872, which provides as under:

“58. Facts admitted need not be proved- No fact need not be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

21. Here it is also relevant to mention that the 'Talaqnama Tehreer' dated 07.03.2000 in-original has been filed by the appellant as additional evidence before this Court through an application dated 27.05.2023, which has been allowed vide order dated 29.05.2024, as the same has not been disputed by the respondent.

22. Now, coming to the other finding returned by the learned Additional Principal Judge, Family Court Jhansi, leading to the dismissal of the Suit that the Suit in question is barred by limitation as the same was instituted after a lapse of about 20 years from the date of commencement of the dissolution of marriage is concerned, it would be apposite to quote the relevant portion of the impugned judgement and order dated 10.10.2023, which are reproduced as under:

“3. याचीगण ने अपना अपना शपथ पत्र प्रस्तुत कर कथन किया कि मध्य तलाक हो चुकी है। यह वादिया सं० 1 को 1,10,035/- रु. प्राप्त हो चुके हैं अब उनके मध्य किसी प्रकार का लेन देन शेष नहीं है।

4. याचीगण के बयान अंकित किए गए एवं उन्हें सुना गया।

5. घोषणात्मक वाद तथा याचीगण के द्वारा शपथपत्र व मौखिक साक्ष्य पर किये गये कथन के अवलोकन से यह विदित होता है कि याचीगण का विवाह मुस्लिम रीति रिवाज के अनुसार दिनांक 18.12.1984 को सम्पन्न हुआ था। याचीगण दिनांक 16.07.1990 से अलग अलग रह रहे हैं। याचीगण के मध्य अब कोई लेन देन बकाया नहीं है। जिरह में भी पी.डब्ल्यू-1, पी.डब्ल्यू-2 ने कहा है कि याचीगण के मध्य दिनांक 07.03.2000 को मुस्लिम रीति रिवाज के अनुसार तलाक हो गयी जिसके संबंध में याचीगण ने तलाक नामा तहरीर की छायाप्रति प्रस्तुत की है जो न सूची से दाखिल है और न ही प्रमाणित है। तलाक नामों की छाया प्रति इस स्तर पर ग्राह्य नहीं है। याचीगण के अनुसार उभयपक्ष का दिनांक 7.3.2000 को तलाक हो चुका है। तथा उसी दिन तहरीर नामा बनवा लिया गया। उक्त

उद्घोषणात्मक वाद दिनांक 24.08.2021 को तलाक होने की तिथि से लगभग 20 वर्ष बाद संस्थित किया गया है जो परिसीमा अधिनियम 1963 से बाधित है। अतः उक्त वाद परिसीमा विधि से बाधित व अभिप्रमाणित साक्ष्य न होने के कारण स्वीकार किए जाने योग्य नहीं है।

आदेश

याचीगण द्वारा प्रस्तुत घोषणात्मक वाद निरस्त किया जाता है। पत्रावली नियमानुसार दाखिल दफ्तर हो।”

23. The aforesaid finding regarding the delay in seeking the relief of declaration, leading to the dismissal of Suit is unsustainable in view of the fact that the Suit was instituted on the joint initiative of the appellant and the respondent, wherein it is the admitted case of the appellant as well as the respondent that they are living separately since 16.07.1990 and there survives no conjugal relationship between them. They decided to dissolve their marriage on 15.11.1999, with their mutual consent, by way of *mubara'at* as per the Muslim Personal Law. Thereafter, on 07.03.2000, the appellant and the respondent executed a jointly signed notarised document as “*Talaqnama Tehreer*”.

24. The Explanation appended to the Section 7 of The Family Courts Act, 1984 bestows jurisdiction upon the concerned Family Court to entertain the suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of person concerned. The Family court Act, 1984 does not prescribe any period of Limitation in respect of the suit or proceeding for declaration of the matrimonial status of the parties. Further, Section 29(3) of the Limitation Act, 1963 very categorically stipulates that ‘save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in

this Act shall apply to any suit or other proceeding under any such law'. For ready reference Section 29 of the Limitation Act, 1963 is quoted below:

“29- Savings.-(1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (9 of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Sections 25 and 26 and the definition of “easement” in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882(5 of 1882), may for the time being extend.”

25. The present case being a claim for declaration of matrimonial status of the

parties as ‘divorced’ is undisputed, it is a well settled law that where the legal status of the parties is a continuing course of event, a continuing and recurring cause of action accrues each day. As has been addressed in the preceding paragraphs the declaration of the matrimonial status of the parties by the Family Court as contemplated under Section 7 of the Family Courts Act, 1984, is a judicial endorsement of the extra-judicial divorce. In the case of *mubara’at*, if the Court is prima-facie satisfied that the parties with their free will have duly entered a *mubara’at* agreement, it shall endorse the same and declare the divorced status of the parties by passing an appropriate order to that effect. Such a proceeding is not akin to the adversarial litigation. The claim for the declaration of the parties’ marital-status, strikes at the very core of society and if such an undisputed declaratory claim is elongated and haunted by the technical ground of delay, the aim, object and the very spirit of the said welfare legislation shall be adversely sacrificed. It is settled principle of law that when substantial justice and technical consideration are pitted against each other, the substantial justice shall prevail over the technical consideration. However, it goes without saying that the courts are not to take a liberal approach in condonation of delay in the absence of sufficient cause. In any case, it would be unnecessary to delve into this debate any further in the light of the categorical provision as stipulated under Section 29(3) of the Limitation Act, 1963 that deals with the extent of applicability of Limitation Act to any suit or proceeding under any law with respect to marriage and divorce. Accordingly, in view of the deliberations made herein above it is apparent that in view of the express restriction as contemplated under the said

Section 29(3) no provision of The Limitation Act, 1963 shall come in the way to put any bar in respect of the suit or proceeding for declaration of matrimonial status as provided under Section 7 of the Family Courts Act, 1984.

26. It would be appropriate at this stage to note that the Hon'ble Supreme Court in the case of **Ajaib Singh versus The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Others**, reported in (1999) 6 SCC 82, has been pleased to observe that,

"11... It is not the function of the court to prescribe the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding the court cannot be stretched to authorise them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature..."

*The High Court of Bombay (Nagpur Bench) in the case of **Skh. Hafiz Skh. Habib versus State of Maharashtra**, reported in 2009 (1) AIR Bom R 345, has held as under:*

"26. If the law intends not to prescribe limitation, it means so, and this omission will have to be respected as conscious omission and there are no grounds coming forward permitting to fill in the alleged omission taking shelter of Article 137 of the Limitation Act. The law of Limitation has no application to the right of a Muslim Woman filing an application u/s. 3(1)(a) of the Muslim Women

(Protection of Rights on Divorce) Act, 1986, it being a right of recurring nature, and bar of limitation is not laid down.

27. In these premises, this Court holds that the Law of Limitation has no application to the right of a Muslim woman filing an application under Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986, it being a right of recurring nature, and bar of limitation is not laid down."

27. Having come to the conclusion that The Family Courts Act, 1984 does not prescribe any specific limitation for filing a suit or proceeding for declaration as to the matrimonial status of any person, it would be apt to consider whether the length of delay as noticed by the learned Court below, in filing the Suit in question could be a valid ground for rejection of the same.

28. On the question as to whether in the absence of an expressly prescribed limitation under the Statute, can a suit or proceeding be entertained, irrespective of any passage of time? The Hon'ble Supreme Court dealing with such a situation has held that in the absence of a prescribed statutory limitation, approaching the court, is to be done within 'reasonable time'. There is a catena of judgments where the Hon'ble Supreme Court has been pleased to hold that where the concerned Statute does not prescribe the limitation, the rights conferred therein must be exercised within a 'reasonable time'. The issue of no express limitation being provided under the statute has captured the attention of the Hon'ble Apex Court in the case of **State of Punjab and others versus Bhatinda District Cooperative Milk Producers Union,**

reported in (2007) 11 SCC 363, wherein the Hon'ble Apex Court has been pleased to observe as under:

“18. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.”

29. For the purpose of determination of time period to be the 'reasonable period' the Hon'ble Apex Court has provided the yard stick, in the case of **M/S North Eastern Chemicals Industries (P) Ltd. and another** versus **M/S Ashok Paper Mill (Assam) Ltd. and another**, reported in AIR 2024 Supreme Court 436, wherein the Hon'ble Supreme Court has been pleased to hold that in the absence of a particular period of time being prescribed under the statute, the same would be governed by the principle of 'reasonable time', for which, by virtue of its very nature, no straitjacket formula can be laid down and it is to be determined as per case and circumstances of each case. The parameter for determining the 'reasonable time' in a particular case has been laid down by the Hon'ble Supreme Court in the following manner:

“In light of above discussion, it is clear that when a Court is seized of a situation where no limitation stands provided either by specific applicability of the Limitation Act or the special statute governing the dispute, the Court must undertake a holistic

assessment of the facts and circumstances of the case to examine the possibility of delay causing prejudice to a party. When no limitation stands prescribed it would be inappropriate for a Court to supplant the legislature's wisdom by its own and provide a limitation, more so in accordance with what it believes to be the appropriate period. A court should, in such a situation consider in the facts and circumstances of the case at hand, the conduct of the parties, the nature of the proceeding, the length of delay, the possibility of prejudice being caused, and the scheme of the statute in question. It may be underscored here that when a party to a dispute raises a plea of delay despite no specific period being prescribed in the statute, such a party also bears the burden of demonstrating how the delay in itself would cause the party additional prejudice or loss as opposed to, the claim subject matter of dispute, being raised at an earlier point in time.” (emphasis supplied by us)

30. In the present case, having regard to the factual matrix of the case, as taken note of above, the parties to the suit cannot be said to have transgressed the boundaries of reasonable time in approaching the learned Family Court having jurisdiction by jointly filing the suit for declaration as to their matrimonial status, for the obvious reason that the parties by way of mubara'at put an end to their marital-tie by mutually agreeing on their own free will, all the more the factum of divorce in the instant case is not in dispute giving rise to the cause of action being of recurring nature.

Thus, the prayer sought for by the parties by jointly filing the Suit for declaration of their matrimonial status as divorced ought to have been granted by the learned Family Court. The finding recorded by the learned Additional Principal Judge, Family Court, Jhansi that Suit in question is barred by limitation having being instituted after a lapse of about 20 years from the date of commencement of the dissolution of marital-tie, is unsustainable in the eyes of law, in the teeth of the categorical provision as stipulated under Section 29(3) of the Limitation Act, 1963 and also not being in consonance with the parameters laid down by the Hon'ble Supreme Court of India, as narrated in the preceding paragraphs, regarding the assessment of the reasonableness of the length of delay, if any. Accordingly, the order of dismissal of the Suit dated 10.10.2023 based upon the unwarranted findings recorded in the impugned judgment is liable to be set-aside.

Order

1. The appeal is **allowed**. The impugned judgment and order dated 10.10.2023 and the decree dated 19.10.2023 passed by the Additional Principal Judge, Family Court, Jhansi in Declaration Case No.687 of 2021, are hereby set-aside. The Suit for declaration of the matrimonial status is decreed. Accordingly, the matrimonial status of the parties is hereby declared as 'divorced'.

2. However, the parties to bear respective cost.

3. Since this appeal has been decided with the mutual consent of the parties, hence no useful purpose would be served to retain the original '*Talaqnama Tehreer*' dated 07.03.2000 on record. Accordingly, the Registry is directed to

return the same in-original to the appellant after retaining a photocopy of the same on record, in accordance with the Rules.

4. The Registry is further directed to return the lower court record to the court concerned.

(2024) 9 ILRA 1299
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.09.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 509 of 1987

Pitamber		...Appellant
	Versus	
Ram Milan		...Respondent

Counsel for the Appellant:

B. Nath, Anand Giri, Manoj Kr. Gupta, Pradeep Kumar Singh, Raghaw Ram Upadhyay, S.K. Pandey

Counsel for the Respondents:

A.N. Verma, Anil Kumar Pandey, Gyanendra Kumar Pandey

Civil Law - Civil Procedure Code, 1908 - Section - 100 - U.P. Zamindari Abolition & Land Reforms Act, 1950 - Sections 7(aa) & 9 - Limitation Act, 1963 - Sections 3 & 27 - Article - 65 of Schedule - I - Easement Act, 1882 - Sections 4 & 12 - Second Appeal - challenging the judgments and decrees regarding a land dispute - the plaintiff-respondent claimed ownership and possession of the land, used for agricultural purposes since before the abolition of zamindari, and sought a permanent injunction against the defendant-appellant, who allegedly constructed on the land during the suit's pendency - The trial court as well as the first appellate court, found that the plaintiff-respondent has proved his title and possession on the land in dispute but the defendant-appellant has failed to prove the same - this court finds that (i) there is no illegality or error in the finding recorded by the

trial court as well as first appellant court, - (ii) the 'adverse possession' can be claimed only if the person claiming it is in actual possession of the property and such possession is open and undisturbed, - (iii) the 'easementary right' and 'adverse possession' can be set U.P. totally on different footings, therefore they cannot be pleaded together - held, concurrent findings of fact recorded by the two court below are not liable to be set aside in second appeal unless and until the findings are perverse - hence substantial question of law is decided accordingly and the appeal is dismissed, affirming the plaintiff-respondent's title and possession. (Para - 25, 26, 31, 32, 33, 35)

Appeal Dismissed. (E-11)

List of Cases cited:

1. Ramchandra Sakhamahajan Vs Damodar Trimbak Tanksale (D) & ors.- 2007(25) LCD 1515,

2. Gurunath Manohar Pavaskar & ors. Vs Nagesh Siddappa Naval Gund & ors.- 2008(26) LCD 225,

3. T.K. Mohammed Abubucker (D) Thr. L. Rs. & ors. Vs P.S.M. Ahamed Abdul Khader & ors.- AIR 2009 SC 2966.

4. Damodar Lal Vs Sohan Devi & ors.; 2016(34) LCD 303 and Ambika Savaria & ors. Vs Sanjay Sharma & ors.; 2016(34) LCD 2500.

5. Harnam Singh Vs Bhikimbar Singh; AIR 1980, All 50,

6. Ram Sukh Vs Gaya Din & anr.; 1994(12) LCD 733,

7. Maharaj Singh Vs St. of U.P. & ors.; (1976) 1 SCC 155

8. Budhan Singh Vs Nabi Bux & anr.; 1970 ALJ 903

9. Gafoor Vs Abdul Rashid & ors.- 1980 SCC Online All 442,

10. Bashir Ahmad (Dead) Through LRS Vs Taiyab Husain (Dead) Through LRS & ors.- 2012(6) AWC 6259

11. Bachhaj Nahar Vs Nilima Mandal & anr.; (2008) 17 SCC 491,

12. Karnataka Board of Wakf Vs Govt. of India & ors.; (2004) 10 SCC 779,

13. Ravinder Kaur Grewal & ors. Vs Manjit Kaur & ors.; (2019) 8 SCC 729,

14. Kapil Kumar Vs Raj Kumar; (2022) 10 SCC 281,

15. Suryakunwari Vs Nanhu & ors.; 2019(37) LCD 2346.

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

1. Heard, Sri Raghav Ram Upadhyay, learned counsel for the appellant and Sri Anil Kumar Pandey, learned counsel for the respondent.

2. The instant second appeal has been filed for setting aside the judgment and decree dated 29.03.1985 passed in Regular Suit No.304 of 1982 by Munsif Hawali, Faizabad now Ayodhya and judgment and decree dated 14.05.1987 passed in Civil Appeal No.89 of 1985 by VIth Additional District Judge, Faizabad, now Ayodhya.

3. The following substantial questions of law have been formulated in this second appeal:-

“(1) Whether on the facts and circumstances of the case, the Courts below would have decreed the suit in absence of specific findings with regard to the essential conditions required under Section 9 of the U.P. Zamindari Abolition Act in favour of the plaintiff?”

“(2) Whether mere use of the land is sufficient to hold that the land had been settled under Section

9 of the U.P. Zamindari Abolition Act?

(3) Whether essementary right and the adverse possession can be pleaded together and if not the suit is liable to be rejected?

(4) Whether the land lying after the public path and not adjoining the house of the plaintiff could be treated as land appurtenant to the house of the plaintiff under Section 9 of the U.P. Z.A. & L.R. Act?"

4. Learned counsel for the defendant-appellant submitted that the plaintiff-respondent has failed to prove his possession on the land in dispute, therefore the suit could not have been decreed. The suit can be decreed only if the plaintiff is able to prove his case and not on the weakness of the defence of the defendant, whereas learned trial court and the appellate court have decreed the suit and dismissed the appeal on the ground that defendant-appellant has failed to prove his right on the land in dispute. He further submitted that the defendant-appellant was in possession of the land in dispute and it was admitted by the witnesses of the plaintiff-respondents also that thatch of the defendant-appellant is on the land in dispute. The drainage of the defendant-appellant, as per evidence adduced by the parties, was also going from the house of the defendant-appellant towards east, then north and then to the south in the pond. He further submitted that there is overwriting in the evidence of D.W.3 at page no.2 as 20 has been made 30.

5. On the basis of above, submission of learned counsel for the defendant-appellant is that the learned trial court as well as the first appellate court

have wrongly and illegally decreed the suit and dismissed the appeal, therefore the appeal is liable to be allowed and the judgment and decree passed by the first appellate court and the trial court are liable to be set aside. He relied on **Ramchandra Sakharam Mahajan versus Damodar Trimbak Tanksale(D) and others;2007(25) LCD 1515, Gurunath Manohar Pavaskar and Others versus Nagesh Siddappa Naval Gund and Others;2008(26) LCD 225 and T.K. Mohammed Abubucker (D) Thr. L. Rs. And Ors. Versus P.S.M. Ahamed Abdul Khader and Others;AIR 2009 SC 2966.**

6. Per contra, learned counsel for the plaintiff-respondents submitted that the suit for permanent injunction was filed by the plaintiff-respondent. After filing of the suit, the defendant-appellant had raised construction and put thatch on the land in dispute, therefore, the suit was amended and prayer for mandatory injunction for removal of construction made by the defendant-appellant was made. Learned trial court, after considering the pleadings of the parties, framing the issues and affording opportunity of evidence to the parties decreed the suit by a reasoned and speaking order. The first appeal filed by the defendant-appellant has also rightly been dismissed in accordance with law after considering the pleadings of the parties and evidence. He further submitted that case set up at the trial stage was changed at the appellate stage by the defendant-appellant and a defence was taken that the land in dispute is recorded as talab. He further submitted that the land in dispute is not appurtenant land of the defendant-appellant and it is an appurtenant land of the plaintiff-respondent and it is in front of the house of the plaintiff-respondent. He further submitted that the claim of the defendant-appellant that he had purchased

the land in dispute from the then zamindar could not be proved by him, therefore learned trial court as well as the first appellate court have rightly and in accordance with law decreed the suit and dismissed the appeal, which does not suffer from any illegality or error and call for any interference by this Court.

7. On the basis of above, submission of learned counsel for the plaintiff- respondent is that he is in possession of the land in dispute since the time of their ancestors and they are using it as their sahan land, therefore merely because it is in front of the house of the plaintiff-respondent after the public path, it cannot be said that the land in dispute is not appurtenant to the house of the plaintiff-respondent and it is being used for beneficial enjoyment of the house of the plaintiff-respondent. He relied on ***Damodar Lal versus Sohan Devi and Others; 2016(34) LCD 303 and Ambika Savaria and Others versus Sanjay Sharma and Others; 2016(34) LCD 2500.***

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

9. The suit for permanent injunction was filed by the plaintiff-respondent claiming that the land in dispute is his sahan land, on which he used to sit and keep his animals and also use it for agricultural purposes. He is in possession of the land in dispute since the time of his ancestors prior to abolition of zamindari, therefore he has become owner of the land in dispute under Section 9 of the U.P. Zamindari Abolition & Land Reforms Act 1950(hereinafter referred to as the Act of 1950). It has further been alleged that the defendant-appellant is a muscle man of the

village, who has also been elected as Pradhan. Since the plaintiff-respondent had not helped him in the election, therefore he has become angry and trying to forcibly make possession and raise construction in the sahan land of the plaintiff-respondent. During pendency of the suit, the defendant-appellant raised certain constructions on the land in dispute and put a thatch, therefore the suit was amended and plea of mandatory injunction for removal of the construction raised by the defendant-appellant and for a direction to hand over the possession to the plaintiff-respondent was made.

10. The written statement was filed by the defendant-appellant admitting that he has been elected as Pradhan and denying the averments made in the suit. It has also been stated that the plaintiff-respondent had never been in possession of the land in dispute. It has also been stated that the land in dispute is made of land No.600 having an area of 1 biswa and land No.601 having an area of 5 dhur and land No.602 having an area of 15 dhur and land no.603 having an area of 15 dhur. It was purchased by him from the then Zamindar Ravi Nandan Singh in consideration of Rs.90/- and since then he is in possession of land in dispute. It has further been stated that after purchasing the said land from the then zamindar, Saria, Baithaka and Wall of bricks have been erected and thatch has been kept. The Saria has not been shown by the plaintiff-respondent in the site plan annexed with the plaint. It has also been stated that the land in dispute is being used for various house hold purposes and also he used to sow vegetables and tree of neem is also there. It has also been stated that the drainage of the house of the defendant-appellant goes from the house of the defendant-appellant and plaintiff-

respondent towards east and from the side of his saria towards north in the pond. A plea was also taken that the land in dispute is recorded as talab in the government records, which is deemed to be of the Gaon Sabha and since the Gaon Sabha has not been impleaded, therefore the suit is liable to be dismissed for non-joinder of parties. The site plan was annexed alongwith the written statement showing that the drainage of the defendant-appellant goes towards north from his house, then east, then north and then towards east to the pond. After amendment, the additional written statement was filed denying the averments as amended in the plaint. Thereafter amendment was also made in the written statement admitting the site plan as prepared by the Commissioner, which shows that the drainage of the house of the defendant-appellant goes towards north and then through passage between the houses of defendant-appellant and plaintiff-respondent towards east and then after passage in front of the house of both the parties in the east side towards north and then towards east in the pond.

11. After exchange of pleadings, the trial court framed 6 issues. Thereafter opportunity of evidence was afforded, in which some documentary evidence were filed and plaintiff-respondent Ram Milan appeared as P.W.1 and one Ram Sukh as P.W.2. From the side of the defendant-appellant Shobha Nath Srivastava, Lekhpal appeared as D.W.1 and defendant-appellant Pitambar as D.W.2 and Ram Shabd as D.W.3. After considering the pleadings of the parties, material and evidence on record and after affording opportunity of hearing to the parties, the trial court decreed the suit by means of the judgment and order dated 29.03.1985 holding that the land in dispute is the sahan land of the plaintiff-respondent and he is using it as

appurtenant land to his house and the defendant-appellant has failed to prove his case. It has further been held that a plea has been taken that the land in dispute was taken from the then zamindar and in the written statement it has been stated that the land in dispute has been purchased from the then Zamindar Raghu Nandan Singh, whereas in the evidence on oath it has been stated that it has been purchased from Ravi Nandan Singh and receipt of payment of Rs.90/- as claimed or any documentary evidence in regard to purchase of land has not been placed on record, rather it has been admitted in the oral evidence that there is no such documentary evidence. It has also been observed that despite admission that the sons of the then zamindar are alive by D.W.3, none has been produced in evidence. The learned trial court also found that the defendant-appellant has raised construction and kept his thatch on the land in dispute during pendency of the suit and accordingly directed to remove it. Being aggrieved, the defendant-appellant filed first appeal. The first appeal has been dismissed holding that the plaintiff-respondent is the owner and in possession of the land in dispute and the defendant-appellant has failed to prove his possession on the land in dispute and the plaintiff-respondent has proved his better title on the land in dispute in comparison to the defendant-appellant. The appeal has been dismissed by means of the judgment and order dated 14.05.1987. Therefore the present second appeal has been filed and the aforesaid substantial questions of law have been formulated in it.

12. Section 7(aa) and 9 of the Act of 1950, relevant for consideration of this case are extracted hereinbelow:

7.Saving in respect of certain rights-- Nothing contained

in this chapter shall in any way affect the right of any person-

(aa) being a bhumidhar, sirdar, adhivasi or asami of any land, to continue to enjoy any easement or any similar right for the more beneficial enjoyment of the land, as he was enjoying on the date immediately preceding the date of vesting;]

9. Private wells, trees in abadi and buildings to be settled with the existing owners or occupiers thereof.

- [All wells] [Substituted by U.P. Act No. 16 of 1953 (w.e.f. 01.07.1952).], trees in abadi and all buildings situate within the limits of an estate belonging to or held by an intermediary or tenant or other person whether residing in the village or not, shall continue to belong to or be held by such intermediary tenant or person, as the case may be, and the site of the wells or the buildings within the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed.

13. Under the aforesaid Section 7(aa), if a person was enjoying the right of easement or any similar right for more beneficial enjoyment of any land prior to date of vesting, he shall continue to enjoy the same after abolition of Zamindari and date of vesting. Under the aforesaid Section 9, the site of wells or the buildings within the area appurtenant thereto shall be deemed to be settled with the person who is holding it since prior to the abolition of the Zamindari. Thus Section 9 provides for conceptualizing

the area appurtenant to buildings to have settled with the owners of the buildings etc.

14. 'Appurtenant' is dependence of the building on what appertain to it for its use as a building. The meaning of the word 'appurtenant' as given in the 'Mariam Webster Dictionary' is constituting a legal accompaniment and 'appurtenance' is an incidental right attached to a principle property right and passing in possession with it. According to the 'Law Lexican Dictionary', the word 'appurtenant' means appertaining or belonging to; accessory; pertaining, incident or relating to, as a legal right, interest or property subsidiary to one more valuable or important. 'Oxford Dictionary' defines the 'appurtenant' as a thing appertaining, a belonging, belonging as a property or legal right(to); specify in law, constituting a property or right subsidiary to one which is more important.

15. This Court, in the case of **Harnam Singh versus Bhikimbar Singh; AIR 1980, All 50**, has held that literally the word 'appurtenant' means pertaining to or belonging to. It does not mean adjacent to.

16. This Court, in the case of **Ram Sukh versus Gaya Din & Another; 1994(12) LCD 733**, relied on the judgment of the Chief Court of Oudh in the case of Special Manager Court of Wards, Balrampur Estate versus Shyam Lal; AIR 1936 Oudh 324, in which it has been held that land appurtenant to residential house need not be actually adjoining the house and the user of the land for the enjoyment of the house by the claimant or by person is necessary to

be proved with certain length of period. The relevant paragraphs 28 and 29 are extracted herein-below:

“28. It is also well settled that a Riaya may have the Sahan Darwaza on all the sides of a house. It is user of the land on the date of vesting and prior thereto is material. The passing of a galiyara or Rasta or drain in between the building or house and the land over which in relation to a building or house, the rights of appurtenance is claimed, does not adversely affect the sahan darwaza right or rights involving rights of a person to a land as land appurtenant. In the case of Special Manager Court of Wards. Balrampur Estate v. Shyam Lal (AIR 1936 Oudh 324) it has been held by the Chief Court of Oudh, that land appurtenant to residential house need not be actually adjoining the house and the user of the land for the enjoyment of the house by the claimant or by person is necessary to be proved with certain length of period may be of 12 years as held by Chief Court of Oudh in the case of S. Murtaza Ali v. Emperor, reported in (AIR 1947 Oudh page 131).

29. The material observation of the Hon'ble Chief Court of Oudh in the case of Balrampur Estate (Supra) reads as under:

"As to the argument that the land in question cannot be treated as appurtenant to house because there is a public road interven- ing I do not think there is any force in the contention. No

authority has been cited for the view that appurtenant land must actually be adjoining the residential house, prima facie, I do not see why a tenant should not use land opposite his house but on the other side of public way for the purpose of tethering his cattle and why such land should not be regarded as appurtenant to his house. In absence of any authority to the contrary I think it may be held that the land is appurtenant."

17. The 'appurtenance' has been considered by the Hon'ble Supreme Court, in the case of **Maharaj Singh versus State of U.P. and others; (1976) 1 SCC 155**, and has held that the 'appurtenance' is dependence of the building on what appertains to it for its use as a building. The relevant paragraphs 27 and 28 are extracted here-in-below:-

27. "Appurtenance', in relation to a dwelling, or to a school, college includes all land occupied therewith and used for the purpose thereof (Words and Phrases Legally Defined--- Butterworths, 2nd edn).

"The word 'appurtenances' has a distinct and definite meaning Prima facie it imports nothing more than what is strictly appertaining to the subject-matter of the devise or grant, and which would, in truth, pass without being specially mentioned: Ordinarily, what is necessary for the enjoyment and has been used for the purpose of the building, such as easements, alone will be appurtenant. Therefore, what is necessary for the enjoy- ment of the building is alone

covered by the expression 'appurtenance'. If some other purpose was being fulfilled by the building and the lands, it is not possible to contend that those lands are covered by the expression 'appurtenances'. Indeed 'it is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land. The word 'appurtenances' includes all the incorporeal hereditaments attached to the land granted or demised, such as rights of way, of common ...but it does not include lands in addition to that granted'. (Words and Phrase, supra).

28. In short, the touchstone of 'appurtenance' is dependence of the building on what appertains to it for its use as a building. Obviously, the hat, bazar or mela is not an appurtenance to the building. The law thus leads to the clear conclusion that even if the buildings were used and enjoyed in the past with the whole stretch of vacant space for a hat or mela, the land is not appurtenant to the principal subject granted by s. 9, viz., buildings. This conclusion is inevitable, although the contrary argument may be ingenious. What the High Court has granted, viz., 5 yards of surrounding space, is sound in law although based on guess-work in fact. The appeal fails and is dismissed but, in the circumstances, without costs.

18. The Hon'ble Supreme Court, in the case of **Budhan Singh Vs. Nabi Bux and Another**; 1970 ALJ 903, has held that it is true that the legislature could have used

the word "lawfully held" in place of the word "held" in section 9 but as mentioned earlier one of the dictionary meanings given to the word "held" is, "lawfully held". The expression "held" has been used in various other sections to connote possession by legal title.

19. A coordinate Bench of this Court, in the case of **Gafoor versus Abdul Rashid and Others**, 1980 SCC Online All 442, has held that before a person is entitled to claim settlement of land under Section 9 of the U.P. Act 1 of 1951 it must be found that the land was necessary for the enjoyment of the building of which it was claimed to be appurtenant.

20. This Court, in the case of **Bashir Ahmad (Dead) Through LRS versus Taiyab Husain (Dead) Through LRS and others**; 2012(6) AWC 6259, has held that under Section 9 of the U.P. Z.A. & L.R. Act, land may be settled only if it is appurtenant to the claimant's house, essential to be used for the beneficial enjoyment of the claimant's house, actually being used for the beneficial enjoyment of the claimant's house and has got a reasonable ratio with the constructed portion which under no circumstance can be double the area of the constructed portion.

21. In view of above a claim for settlement of any land under Section 9 of Act of 1950 is tenable and can succeed only if the land in question is appurtenant to house of claimant, however it need not be just adjacent to the house of the claimant but in close proximity and may be in front of house of claimant after public path so that it is essential for beneficial enjoyment of house of claimant and it is actually being used for beneficial enjoyment of house of

claimant i.e. for household and agricultural purposes since prior to abolition of zamindari and date of vesting under the Act.

22. Adverting to the facts of the present case, this Court finds that plaintiff-respondent claimed that the land in dispute is the appurtenant land to his house, which is being used by him, since the time of his ancestors and prior to abolition of zamindari, for various purposes including agricultural purposes, therefore it is settled under Section 9 of the Act of 1950 with him and it has been proved by the plaintiff-respondent by appearing himself as P.W.1 and adducing evidence of P.W.2 Ram Sukh who admitted that the land in dispute is in possession of the plaintiff-respondent since the time of his memory and the defendant-appellant is not in possession of the land in dispute. His drainage also does not pass in the land in dispute, it goes to east. He also admitted that he is of the caste of the defendant-appellant. He also admitted that he is seeing the saria of the defendant-appellant for the last 6-7 years whereas the khute on the land in dispute are of the plaintiff-respondent. Sri Shobha Ram Srivastava, Lekhpal appeared as D.W.1. He admitted that he does not know the land in dispute. He also admitted that he does not know on which number it is situated. The defendant-appellant-Pitamber appeared as D.W.2 but he could not prove his possession. The evidence of D.W.3-Ram Shabd has not been found reliable by the trial court as according to his evidence he was not residing at the place as stated by him since prior to abolition of zamindari. So far as the plea of manipulation in the years of living of the D.W.3 in his in-laws house is concerned, it cannot be said to be correct as no such plea was ever taken, even before the court's below. If it would have been, this plea must have been

taken before the trial court, where the evidence was recorded in presence of counsels or before the first appellate court when the finding of the trial court had come on it.

23. The learned trial court, after considering the pleadings of the parties and evidence on record, held that the plaintiff-respondent is the owner of the land in dispute and he is in possession of the same and the defendant-appellant has evicted the plaintiff-respondent and kept his thatch on the land in dispute which is liable to be removed. The learned trial court also found that the defendant-appellant, though claimed in the written statement that land in dispute was purchased by him from Ravi Nandan Singh, the then Zamindar in consideration of Rs.90/- but in the evidence adduced before the trial court he stated that it was purchased from the then Zamindar Raghu Nandan Singh therefore there is contradiction in the name of the then zamindar and no documentary evidence of purchasing has also been placed on record including the receipt of Rs.90/- as claimed by the defendant-appellant. This Court does not find any illegality or error in the findings recorded by the trial court.

24. So far as the judgment relied by learned counsel for the appellant are concerned they are on the point that the burden to establish title is on the plaintiff but the weakness of the defence or the failure of the defendants to establish the title set up by them would not enable the plaintiff to a decree, which are not applicable on the facts and circumstances of the case in hand because the plaintiff-respondent has proved his title whereas the defendant-appellant has failed to demolish his case and prove the case set up by him.

25. The learned trial court, after considering the rival claim of the parties in

the present case, has held that the plaintiff-respondent has proved his title and possession on the land in dispute but the defendant-appellant has failed to prove the same. On being challenged before the first appellate court, the first appellate court also considered the grounds raised by the defendant-appellant and the pleadings and evidence on record making the point of determination as to whether the plaintiff-respondent has been the owner and in possession of the land in dispute or the defendant-appellant. The learned first appellate court also, after considering the pleadings and evidence on record, found that the plaintiff-respondent has proved his title better than the defendant-appellant as is apparent from the evidence on record. It is proved from the evidence on record that the plaintiff-respondent was in peaceful possession on the land in dispute and the defendant-appellant has made possession on the land in dispute by raising constructions and putting thatch on the land in dispute during pendency of the suit. The learned first appellate court came to the said conclusion after considering the respective pleadings and evidence of the parties. The Hon'ble Supreme Court, in the case of **Ramchandra Sakharam Mahajan versus Damodar Trimbak Tansksale (D) and others(supra)**, has held that obviously the burden is on the plaintiff to establish the title but no doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. Thus the rival claims of the parties are to be considered by the court.

26. In view of above, this Court does not find any illegality or error in the

findings recorded by the trial court as well as the first appellate court. The substantial questions of law no.1,2 and 4 are decided accordingly.

27. The 'easementary right' can be claimed under the Easements Act 1882. Section 4 defines the easement, which is extracted herein-below:-

“4. Easement defined-An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners- The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner”

*Explanation-*In the first and second clauses of this section, the expression land includes also things permanently attached to the earth; the expression beneficial enjoyment includes also possible convenience, remote advantage and even a mere amenity; and the expression to do something includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient

heritage or anything growing or subsisting thereon.”

28. Section 12 provides as to who may acquire easements, which is extracted here-in-below:-

“12. Who may acquire easements.—An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created or on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.”

29. In view of above, the ‘easementary right’ may be acquired by the owner or occupier of an immovable property for the beneficial enjoyment of that property i.e. to do or to continue to do something or to prevent or continue to prevent something being done that something is in or upon or in respect of certain other property, which is not his own. The land for the beneficial enjoyment of which the right exists is called the dominant heritage and the owner or occupier thereof, the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof, the servient owner.

Thus, the right of easement is claimed by owner or occupier of an immovable property for the beneficial enjoyment of that property on the other property or land which is not owned by him and in his possession. The Hon’ble Supreme Court has held as under in paragraph 19 of *Bachhaj Nahar versus Nilima Mandal and Another*; (2008) 17 SCC 491:-

“19. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a watercourse, etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.”

30. The law of ‘adverse possession’ finds its roots in the law of Limitation Act 1963. Section 3 of the Limitation Act 1963 provides the bar of limitation, according to which no cognizance can be taken by the court if the suit is barred by limitation whether the defence is taken by the defendant or not. However, the said provision bars only remedy of the person filing the suit and not his right as available to him under law. Section 27 of the Act provides that in case the person has not taken any action for recovery of possession during the period of limitation then his right gets extinguished. Article 65 of

Schedule 1 of the Limitation Act, 1963 prescribes a limitation of 12 years for a suit for possession of an immovable property or any interest therein based on title and after passing of the period of limitation, the possession of the defendant becomes adverse to the plaintiff. Article 65 of Schedule 1 of Limitation Act is extracted hereinbelow:-

Description of suit	Period of limitation	Time from which period begins to run
For possession of immovable property or any interest therein based on title explanation – for purpose of this article (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devise, as the case may be, falls into possession ; (b) where is suit is by a hindu or	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff.

muslim entitled to the possession of immovable property on death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;
 (c) where the suit is by a purchaser at a sale in execution of a decree when the judgment debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession

31. In view of above, the ‘adverse possession’ can be claimed only if the person claiming it is in actual possession of the property and such possession is open and undisturbed. It is well settled principle that the party claiming adverse possession must prove that his possession is ‘nec vi, nec clam, nec precario’ i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the

statutory period. Therefore whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property and it is open and within his knowledge. The Hon'ble Supreme Court, in the case of **Karnataka Board of Wakf versus Government of India and others;**(2004) 10 SCC 779, has held that it is a well settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. The relevant paragraphs 11 and 12 are extracted hereinbelow:-

11. *In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of*

the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See :S M Karim v. Bibi Sakinal AIR 1964 SC 1254, Parsinni v. Sukhi(1993) 4 SCC 375 and D N Venkatarayappa v. State of Karnataka (1997) 7 SCC 567). Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.(Dr. Mahesh Chand Sharma v. Raj Kumari Sharma).

12. *A plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See: S M Karim v. Bibi Sakinal AIR 1964 SC 1254). In P Periasami v. P Periathambi (1995) 6 SCC 523 this Court ruled that –*

"Whenever the plea of adverse possession is projected,

inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held:

"As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

Similar view has been taken by a three Hon'ble Judges Bench of Hon'ble Supreme Court in the case of Ravinder Kaur Grewal and others versus Manjit Kaur & Others; (2019) 8 SCC 729.

32. In view of above, the 'easementary right' and 'adverse possession' are totally different in regard to the property because the easementary right is

claimed and can be acquired by owner or occupier of a property for beneficial enjoyment of his property on the other land, which is not his own and he is not in possession thereof and it may be of different kinds as provided under the Act, whereas the 'adverse possession' can be claimed and proved only if the person claiming it is in possession of the land/property in question continuously for the requisite period peacefully and in the knowledge of public and owner. Therefore both the claims can be set up totally on different footing, therefore they cannot be pleaded together. Even otherwise, both the claims can be set up only after admitting the ownership of other on the land in dispute and impleading him party but in the present case, the plaintiff-respondent has not admitted the ownership of the respondents. Thus the substantial question of law number 3 is decided accordingly.

33. It is settled law that concurrent findings of fact recorded by the two courts below are not liable to be set aside in second appeal unless and until the findings are perverse. The Hon'ble Supreme Court, in the case of **Kapil Kumar versus Raj Kumar; (2022) 10 SCC 281**, has held that unless the concurrent findings recorded by the courts below were found to be perverse, the same were not required to be interfered with by the High Court in exercise of powers under Section 100 CPC. Similar view has been taken by the Hon'ble Supreme Court in the case of **Damodar Lal versus Sohan Devi and Others(supra) and Ambika Savaria and Others versus Sanjay Sharma and Others(supra)**.

34. This Court, in the case of **Suryakunwari versus Nanhu and others;2019(37) LCD 2346**, considering several judgments has held that concurrent

findings of fact recorded by the two courts below are not liable to be set aside unless and until the findings are perverse. The relevant paragraphs 11 to 16 are extracted hereinbelow:-

"11. In this case, there are concurrent findings on facts by both the courts below. The Hon'ble Apex Court in catena of judgments has laid down the law that the concurrent findings of fact recorded by two courts below should not be interfered by the High Court in Second Appeal, unless and until the findings are perverse.

12. In a recent case of Shivah Balram Haibatti Vs. Avinash Maruthi Pawar (2018)11 SCC 652 the Apex Court has held as under:-

"..... These findings being concurrent findings of fact were binding on the High Court and, therefore, the second appeal should have been dismissed in limine as involving no substantial question of law."

13. In another recent case of Narendra and others Vs. Ajabrao S/o Narayan Katare (dead) through legal representatives, (2018) 11 SCC 564 the Hon'ble Apex Court held as under:-

"...interference in second appeal with finding of fact is permissible where such finding is found to be wholly perverse to the extent that no judicial person could ever record such finding or where that finding is found to be against any settled principle of law or pleadings or evidence. Such errors constitute a question of law

permitting interference in Second Appeal."

14. In one more recent case Dalip Singh Vs. Bhupinder Kaur, (2018) 3 SCC 677 the Hon'ble Apex Court has held that if there is no perversity in concurrent findings of fact, interference by the High Court in Second Appeal is not permissible.

15. In Gautam Sarup v. Leela Jetly and Ors. [(2008) 7 SCC 85], the Apex Court held that a party is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

16. In State Bank of India and others Vs. S.N. Goyal; (2008) 8 SCC 92 the Hon'ble Supreme Court has held as under :-

"Second appeals would lie in cases which involve substantial questions of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties. In the context of section 100 CPC, any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing in the final outcome, will not be a

substantial question of law. Where there is a clear and settled enunciation on a question of law, by this Court or by the High Court concerned, it cannot be said that the case involves a substantial question of law."

35. In view of above and considering the overall facts and circumstances of the case, this Court is of the view that trial court as well as the first appellate court have recorded finding of facts on the basis of the pleadings and evidence, which does not suffer from any illegality, error or perversity, which may require any interference by this Court. This second appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

36. The second appeal is, accordingly, **dismissed**. No order as to costs. .

(2024) 9 ILRA 1314
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 528 of 2010
 With
 Second Appeal No. 527 of 2010

P.N.B. ...Appellant
Versus
M/S Allen & Alvan Pvt. Ltd. & Ors.
...Respondents

Counsel for the Appellant:
 Ashok Bhatnagar

Counsel for the Respondents:
 Ishir Sripat

Civil Law - Civil Procedure Code, 1908 - Sections 34 & 100 - Order 2- Rule 2- Order 2 - Rule 3 - Negotiable Instruments Act, 1881- Sections 7, 82, 85, 85(2) & 131 - Evidence Act, 1872 - Sections 45 & 73 - Indian Penal Code, 1860 - Sections 420, 467, 468 & 471 - Two consolidated appeals - arising from judgments in two civil suits - filed by plaintiff-respondents - trial court dismissed both suits, citing insufficient evidence to establish forgery, particularly the lack of expert testimony on signature comparison - but the first appellate court reversed the decision, finding the bank negligent and awarding a money decree to the plaintiff - substantial question of law was framed regarding the lower appellate court's finding and the applicability of procedural rules - court finds that, the suits involved allegations of wrongful cheque clearance due to forged signatures by a company employee, in conspiracy with bank officials - and the appellate court's judgment was based on comparing disputed signatures without expert evidence, which was later contested - and separate causes of action existed for each cheque, thus negating the bar of Order 2 Rule 2 CPC - held, - the first appellate court erred in its findings, and U.P.held the trial court's dismissal of both suits, ruling that the bank had not acted negligently and that the second suit was indeed barred by Order 2 Rule 2 CPC - consequently, both appeals are succeed and are, accordingly, allowed - impugned consolidated judgment and decree drawn on that basis in both appeals is set-aside and the trial court's judgement dismissing both suits is U.P.held - any amount lying deposited, either pursuant to the interim order or otherwise, is directed to be refunded to and credited in the concerned account of the appellant bank along with accrued interest U.P.to date and the executing court shall facilitate such refund forthwith. (Para - 39, 40, 41, 42)

Second Appeal Allowed. (E-11)

List of Cases cited:

1. Zila Parishad Vs Shanti Devi, AIR 1965 All 590,
2. State (Delhi Administration) Vs Pali Ram: AIR 1979 SC 14,

3. The Haryana Co-operative Sugar Mills Ltd., Rohtak Vs Joint Hindu Family Firm Styled as GU.P.ta Drum SU.P.ply Company: AIR 1976 P&H 117,

4. Murari Lal Vs St. of M.P.: AIR 1980 SC 531,

5. Shriniwas Pansari Vs Hari Prasad Mehra & ors.: AIR 1983 Pat 321,

6. Canara Bank Vs Canara Sales Corporation & ors.: AIR 1987 SC 1603,

7. Babulal Agarwalla Vs St. of Bikaner and Jaipur: AIR 1989 Cal 92,

8. Syndicate Bank Vs West Bengal Cements Lts. & ors.: AIR 1989 Delhi 107,

9. Mahabir Prasad Bubna Vs United Bank of India: AIR 1992 Cal 270,

10. Mathew Jacob Vs Salestine Jacob & ors.: AIR 1998 Delhi 390,

11. Jyoti H. Mehta & ors. Vs Kishore J. Janani & ors.: MANU/MH/0133/2019,

12. Mrugendra Indravadan Mehta & ors. Vs Ahmedabad Municipal Corporation: MANU/SC/0420/2024,

13. O. Bharathan Vs K. Sudhakaran & anr., AIR 1996 S.U.P.reme Court 1140,

14. Shyam Sundar Chowkhani @ Chandan & ors. Vs Kajal Kanti Biswas & ors., AIR 1999 Gauhati 101,

15. St. of Mah. Vs Sukhdeo Singh & anr., AIR 1992 SC 2100,

16. Laxmi Bai Vs A. Chandravati, AIR 1995 Orissa 131,

17. Mrs. Rosali Vs M/s Syndicate Bank, Luz, Mylapore Madras-4, 2018 (1) CTC 441,

18. The Karnataka High Court, in Ashit Roy Vs Syndicate Bank, 2000 (101) CC 178,

19. S.B.I. Vs Kerala St. Co-operative Marketing Federation & ors., O.S. No. 252 of 1988 decided on 05.10.1995,

20. S.B.I. Vs Kerala St. Co-operative Marketing Federation & ors., O.S. No. 252 of 1988 decided on 05.10.1995.

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

THE TWO APPEALS

1. These two second appeals arise out of consolidated judgment passed by the trial court and the first appellate court in the following proceedings:-

(i) Original Suit No.143 of 1991 (M/s Allen and Alvan Private Ltd Vs. Punjab National Bank and two others) giving rise to Civil Appeal No.147 of 2002 (M/s Allen and Alvan Private Ltd Vs. Punjab National Bank and two others); and

(ii) Original Suit No.176 of 1991 (M/s Allen and Alvan Private Ltd Vs. Punjab National Bank and two others) giving rise to Civil Appeal No.146 of 2002 (M/s Allen and Alvan Private Ltd Vs. Punjab National Bank and two others).

RESULT OF TRIAL PROCEEDINGS AND THE DECREE DRAWN

2. The trial court dismissed both the civil suits by a consolidated judgment dated 28.08.2002, however, two civil appeals were allowed by the first appellate court by consolidated judgment dated 07.08.2009. The decree impugned in these two appeals is a money decree drawn in favour of the plaintiff-respondent against the defendant-appellant bank.

PLAINT OF THE FIRST SUIT

3. Original Suit No.143 of 1991 (hereinafter referred to as the 'first suit')

was filed claiming a decree for a sum of Rs.41,986.25 along with 24% interest per annum stating that the plaintiff, being a private company through Devinder Jit Singh Vadara (hereinafter referred to as the 'Managing Director/M.D.') was having current account No.4869 with the defendant-bank and a cheque bearing No. PYC 883200 dated 05.02.1988 covering a sum of Rs.24,410.60 had been wrongly cleared by the bank. Signatures of the Managing Director on the cheque were stated to be forged with a statement that an employee of the company, namely, Indrapal, in conspiracy with the bank officials, was instrumental in such clearance. A first information report was lodged by the Managing Director of the Company against Indrapal in July, 1988, later on, matter was transferred to the Crime Branch, Meerut. Negligence of the bank in clearing the cheque without comparing the signatures of the drawer was pleaded and the suit was instituted based upon a notice dated 19.08.1990 sent by registered post with a further statement that since limitation concerning the aforesaid cheque was going to expire, the suit was filed. In paragraph no. 4 of the plaint, fraudulent encashment of six more cheques was pleaded with a statement that the plaintiff reserved its rights to subsequently claim the amount of the said cheques together with interest.

PARTIES, INITIAL AND
SUBSEQUENTLY IMPEADED AND
THE SECOND SUIT

4. The first suit was filed initially only against the bank. Later on, the aforesaid employee of the bank, namely, Indrapal, and the payee of the cheque, namely 'Investment Corporation' were impleaded as defendants no.2 and 3

sometime in the year 1995. In the meantime, another suit being Original Suit No.176 of 1991 (hereinafter referred to as the 'second suit') was instituted by the plaintiff-company, that too, initially only against the bank and, later on, the employee Indrapal and two payees, namely, 'Ayodhya Investment Syndicate' and 'Investment Corporation' were respectively impleaded as defendants no.2, 3 and 4 in the year 1995. The second suit was in respect of following six cheques:

S r. N o.	Che que No.	Dat e	Amou nt (Rs.)	Payee 's Name	Endor semen t in favour of
1	QE M 878 600	17.0 2.88	50,00 0.00	Self- Withd rawal by Indra pal	
2	QE M 878 578	25.0 2.88	40,00 0.00	Self- Withd rawal by Indra pal	
3	PY C 883 400	27.0 2.88	23,64 1.00	M/s KP Box Make rs	M/s Ayodh ya Invest ment Syndic ate
4.	PY C 883 399	01.0 3.88	22,75 1.00	Mune sh Kuma r	M/s Ayodh ya Invest ment Syndic ate
5.	PY	13.0	26,95	Asho	M/s

	C 883 699	6.88	3.00	k Kuma r	Ayodh ya Invest ment Syndic ate
6.	PY C 883 700	03.0 6.88	26,58 1.00	K.P. Box Make rs	Invest ment Corpo ration
Total Amount			2,14,3 36.60		

THE DEFENCE

5. The bank contested the suits by filing written statement denying wrongful encashment of cheques stating that signatures of the Managing Director thereon were not forged and that the payment was made after comparing the signatures of the Managing Director with his specimen signatures. Plea of non-impleadment of the payees (before their impleadment), was also taken with various other statements defending action of the bank as regards encashment of cheques in normal course of business transactions. The employee Indrapal and the payees also filed their separate written statements in both the suits. Whereas Indrapal denied any conspiracy or fraud and stated that cheques were rightly encashed and also took a plea that he had demanded salary, bonus and others perks from the company but his request was rejected against which he moved some application before the Labour Commissioner and that he was also removed from service in December, 1987 and, therefore, institution of suit was a result of malice of the employer. The payees took a defence that cheques were rightly presented and credited into their accounts. Bar of Order 2 Rule 2 CPC as regards second suit was also pleaded

praying for dismissal of both the suits as barred by the provisions of Limitation Act, CPC as well as Sections 82 and 85 of the Negotiable Instruments Act.

6. Both the suits were consolidated by the trial court by order dated 11.11.1992 and the Original Suit No.143 of 1991 (first suit) was made the leading case.

THE TRIAL COURT'S JUDGMENT

7. The trial court, by judgment and decree dated 28.08.2002, dismissed both the suits. It held the second suit as barred by Order 2 Rule 2 CPC on the ground that on the date of filing first suit, cause of action to institute the second suit had already arisen, particularly in view of notice dated 19.08.1990 (Exhibit-1), paper No.22-C and observed that non-claiming relief in the first suit as regards six cheques forming subject matter of second suit would be fatal to plaintiff's case. As regards negligence of the bank officials towards clearing cheques, the trial court observed that the plaintiff had failed to lead sufficient evidence to establish forgery in signatures of the Managing Director, particularly when no expert was ever called for. It also observed that the plaintiff was a company of high repute involved in everyday transactions of lacs of rupees where 20-25 cheques were issued on daily basis.

THE FIRST APPELLATE COURT'S JUDGMENT

8. Two civil appeals arising out of consolidated dismissal of two suits have been allowed by the first appellate court by the impugned judgment dated 07.08.2009 holding the bank as guilty of negligence.

The first appellate court found the trial court having erred in not comparing the disputed signatures of the Managing Director with those available on record, i.e. the plaint and other documents and observed that even in absence of expert evidence under Section 45 of the Evidence Act, the court had ample power conferred under Section 73 of the Act to compare signatures with any other signatures available on record; that there were separate and distinct dates of cause of action in relation to filing of two separate civil suits and, therefore, bar of Order 2 Rule 2 CPC did not stand attracted; that PW-1 had succeeded to establish forgery in the cheques; that specimen signature of the Managing Director were available on paper No.29-C/1 (Exhibit 8), an introduction letter issued by PNB to its another branch at Railway Road, Aligarh; that specimen signatures available in the bank were not produced by the bank and that the statement of DW-1 Amar Deo, being secondary evidence in absence of production of the officials working at the relevant point of time of clearance of cheques, was not admissible. Though the appellate court did not record a finding that the defendants acted in collusion with each other or that there was some conspiracy in between them, it found the bank negligent in discharging its duties and drew the money decree. A significant feature of the first appellate court's judgment is that original file concerning criminal case lodged by the company against Indrapal, i.e. Sessions Trial No.1908 of 1994, under Sections, 420, 467, 468, 471 IPC (State Vs. Indrapal), P.S. Banna Devi, District Aligarh was summoned and it was observed that the Managing Director of the plaintiff-company had, after perusing original cheques available on record of the criminal case, proved

his signatures on the cheques to be forged.

ADMISSION ORDER IN THE INSTANT APPEAL

9. The instant second appeal was admitted by a co-ordinate bench of this Court by order dated 08.02.2023, framing following four substantial questions of law:-

“1. Whether the lower appellate court has erred in law in accepting the case of plaintiff by comparing the signatures on the cheques with the signature of the plaintiff on the plaint, his testimony and Exhibit-8 as well as on different correspondences between the bank and the plaintiff regarding transactions which were the subject matter of the original suits?

2. Whether the findings of the lower appellate court regarding negligence of the bank in encashing the cheques and its liability to return the amount involved in the cheques is supported by evidence and findings on record and whether, in any case, the appellant-bank was liable to refund the amount involved in the cheques?

3. Whether original suit no.143 of 1991 was barred by Order 2 Rule 2 C.P.C?

4. Whether the interest awarded by the lower appellate court to the plaintiff is in accordance with Section 34 of Code of Civil Procedure, 1908?”

10. The Court may observe an inadvertent error in question No.3 as regards number of the original suit. As the

question relates to bar under Order 2 Rule 2 CPC, it was raised and decided by two courts differently in relation to Original Suit No.176 of 1991 (second suit) and not in respect of Original Suit No.143 of 1991 (first suit). Hence, third question would be understood and decided qua bar associated with the “second suit” and not the “first suit”. The said inadvertent error, in the opinion of the Court, being borne out from the record, need not be corrected at this stage of writing final judgment. It is also apparent that the appellant-bank, in pursuance of the interim order dated 06.09.2022 passed in these proceedings, has deposited the decretal amount and although certain dispute has been raised by the decree holder by filing an application to the effect that there is a shortfall in making deposit as per the interim order, since this Court is finally deciding both the appeals on consent of both sides, the question of compliance/non-compliance/partial compliance of the interim order would be no significance at this stage and, therefore, the Court is not entering into the said controversy.

LEARNED COUNSEL HEARD

11. I have heard Sri Ashok Bhatnagar, learned counsel for the appellant and Sri Rahul Sripat, learned Senior Counsel, assisted by Sri Ishir Sripat, learned counsel for the respondents.

APPELLANTS’ ARGUMENTS

12. Sri Bhatnagar vehemently argues that the plaintiff had raised dispute regarding seven cheques in toto. The first suit, admittedly, was filed on the basis of notice dated 19.08.1990, paper No.22-C-1/1 on record, which contained details of all the seven cheques and asking the

Chairman, Zonal Manager and the Chief Manager of the Bank to credit total amount of Rs.2,14,336/- in the account of the plaintiff. He submits that the plaintiff chose to file first suit based upon cause of action arising out of clearance of first cheque No. PYC 883200 covering a sum of Rs.24,410.60 and there being no leave obtained from the civil court before institution of the second suit, Original Suit No.176 of 1991 was barred by provisions of Order 2 Rule 2 CPC. He further submits that though the appellate court summoned the record of criminal trial containing original cheques but, instead of calling for an expert evidence, if required to examine the plea of forgery, it, in itself, acted as an expert and findings recorded in paragraph no.26 of the appellate court’s judgment are wholly un-called for. Contention is that though Section 73 of the Evidence Act has no application in the facts of the present case as it applies in case of admitted signatures in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made to the satisfaction of the Court, since the Managing Director of the plaintiff-company had denied his signatures on the cheques, nothing was there as “admitted signatures” on record but it was a case where the signatures were “not admitted” by the plaintiff. Alternate submission of Sri Bhatnagar is that even if Section 73 could be invoked by the first appellate court, it was not a case where analysis of signatures of the Managing Director could be done in the manner it has been done in the judgment and the findings on trimmer, pen-lift, pen-pass, pen-hall, sharpness of words, speed and alienation etc have been recorded as if the Court was a qualified handwriting or signature expert. As regards evidence from the side of the bank, it is submitted that officials posted at

the time of clearance of the disputed cheques (Exhibits No.12 to 18) had already left services of the bank after availing Voluntary Retirement Scheme (VRS) due to which Amar Deo, a current employee of the bank, was produced as the defence witness. Further submission is that as far as alleged non-production of specimen signatures, there was already on record letter dated 10.09.1988 (Exhibit-8) by which the bank had introduced the Managing Director of the plaintiff-company to the other branch of the bank. He further submits that once both the courts below have not recorded finding that the bank officials had acted in conspiracy with other defendants, holding the bank as liable to pay the amount covered by the cheques which sum was not retained by the bank but was paid to the payees, i.e. Investment Corporation and M/s Ayodhya Investment Syndicate, the decree drawn against the bank is wholly unsustainable.

13. Sri Bhatnagar further submits that the plea raised by the plaintiff-respondent that some of the defendants were different which required leading of different evidence and for this reason two separate suits were filed, is fallacious, far-fetched and not tenable in the eyes of law inasmuch as no relief was ever claimed against other defendants. Moreover, a perusal of both the plaints would reveal that the defendants no. 1, 2 and 3 in the first suit are common and only the defendant no. 3 in the second suit i.e. M/s Ayodhya Investment Syndicate was not made party in the first suit as it was not the payee of the first cheque. However, M/s Investment Corporation is defendant in both the suits. Explaining the cause of action, it is urged that a plaintiff cannot create a cause of action solely by his own effort. It must be created for him by some act of the

defendant that must be a part of the cause of action. In the instant case, the cause of action in relation to all seven cheques arose only on 19.10.1990 when the defendant-bank refused to pay the plaintiff the amount claimed in the legal notice dated 19.08.1990. Therefore, the first suit filed claiming the amount mentioned in the first cheque would infer that the plaintiff failed to include the whole of the claim which it was entitled to make in respect to the cause of action, thereby relinquishing its claim for the remaining 6 cheques, hence the second suit was barred under Order 2 Rule 2 CPC. Reliance has been placed upon paragraph no.11 of the Full Bench decision of this Court in **Zila Parishad Vs. Shanti Devi, AIR 1965 All 590**. As regards incompetence of a court to act as a handwriting or signatures expert in itself, Sri Bhatnagar placed reliance upon the judgment of Hon'ble Supreme Court in **State (Delhi Administration) Vs. Pali Ram: AIR 1979 SC 14** and referred to paragraph no.29 whereof, which reads as under:-

“29. The matter can be viewed from another angle, also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence solely on comparison made by himself. It is, therefore, not advisable that a Judge should take upon himself the task of comparing

the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert.”

RESPONDENTS’ ARGUMENTS

14. Per contra, Sri Rahul Sripat, learned Senior Counsel, submits that the bar of Order 2 Rule 2 does not at all stand attracted in the facts of the case as rightly held by the first appellate court, inasmuch as all cheques of different dates were presented in different points of time and, therefore, wrongful credit thereof in the bank accounts of the payees would give rise to separate causes of action. In addition to Order 2 Rule 2 CPC, Rule 3 thereof was also referred as regards joinder of several causes of action and it was contended that separate dates, separates payees, separate amounts and separate clearance of every cheque giving rise to separate cause of action, if the plaintiff filed first suit in respect of one cheque and joined causes of action of remaining six cheques in the second suit, bar of Order 2 Rule 2 CPC would not be attracted. He further submits that although no expert evidence was brought on record, certainly there was an order of conviction of Indrapal and also the original cheques before the first appellate court pursuant to summoning of the file of the criminal trial and for invocation of Section 73 of the Evidence Act, it is not required to exercise such power only when there are two conflicting expert reports. He submits that in the facts of the case the first appellate court has rightly compared the signatures of the Managing Director as available on various documents on record and rightly arrived at a conclusion that the

bank was negligent in not comparing the same with the specimen signatures available with it. In support of his submissions, learned Senior Counsel has placed reliance upon following authorities:-

(i) The Haryana Co-operative Sugar Mills Ltd., Rohtak Vs. Joint Hindu Family Firm Styled as Gupta Drum Supply Company: **AIR 1976 P&H 117**;

(ii) Murari Lal Vs. State of M.P.: **AIR 1980 SC 531**;

(iii) Shriniwas Pansari Vs. Hari Prasad Mehra and others: **AIR 1983 Pat 321**;

(iv) Canara Bank Vs. Canara Sales Corporation and others: **AIR 1987 SC 1603**;

(v) Babulal Agarwalla Vs. State of Bikaner and Jaipur: **AIR 1989 Cal 92**;

(vi) Syndicate Bank Vs. West Bengal Cements Ltd. and others: **AIR 1989 Delhi 107**;

(vii) Mahabir Prasad Bubna Vs. United Bank of India: **AIR 1992 Cal 270**;

(viii) Mathew Jacob Vs. Salestine Jacob and others: **AIR 1998 Delhi 390**;

(ix) Jyoti H. Mehta and others Vs. Kishore J. Janani and others: **MANU/MH/0133/2019**; and

(x) Mrugendra Indravadan Mehta and others Vs. Ahemdabad Municipal Corporation: **MANU/SC/0420/2024**.

ANALYSIS OF RIVAL CONTENTIONS Re:- Order 2 Rule 2 CPC

15. Having heard learned counsel for the parties, I find it established on record that the plaint of first suit filed on 05.02.1991 disclosed sending of notice dated 19.08.1990 and non-compliance thereof by the bank. The said notice being

on record as Exhibit-1, paper No.22-C-1/1, contains details of all the seven cheques out of which four were issued on different dates in February, 1988, one cheque in March, 1988 and two cheques in June, 1988. The second suit was filed on 16.02.1991 in respect of remaining six cheques. From the statement contained in paragraph nos.4, 9 and 10 of the first suit, it appears that since three years period from the date of encashment of first cheque, i.e. 05.02.1988, was going to expire, the plaintiff-company reserved its right to claim amount of remaining six cheques and cause of action behind filing of the first suit was alleged to have arisen on 06.03.1988, i.e. the date of fraudulent encashment of the cheque and payment made negligently. Paragraphs no.4 and 10 of the plaint of first suit read as under:-

“4. That in addition to the said cheque, six more cheques were also fraudulently encashed and negligently paid by the defendant Bank from the said account on different dates bearing forged signatures of the Managing Director and the plaintiff reserves its right to claim the amount of those cheques together with interest subsequently.

10. That the cause of action for the present suit arose on 6.3.1988, the date of fraudulent encashment of the cheque and payment made negligently by the defendant Bank, on different dates, the defendant Bank was requested to make good the loss, on 19.8.1990, the date of notice, on 19.10.1990, the date of reply notice and lastly about a week ago, when the defendant Bank was personally approached to settle the matter

amicably, but to no fruitful result or effect, hence this suit, which lies within the jurisdiction of this Court and the Hon'ble Court is competent to try the same.”

16. The submission of Sri Rahul Sripat that relinquishment to institute a lis in relation to six cheques would not create a bar to institute a second suit, when examined from the bare statements contained in the plaint of first suit, it would reveal that the plaintiff itself had alleged arising of cause of action in relation to first suit on 06.03.1988, the date of fraudulent encashment of the cheque and payment made negligently by the defendant Bank on different dates and when the defendant Bank was requested to make good the loss, on 19.8.1990, i.e., the date of notice, on 19.10.1990, i.e., the date of reply notice and, lastly, when the defendant-Bank was personally approached to settle the matter amicably. It appears that the plaintiff took shelter of plea of limitation of three years from the date of arising of cause of action and, according to the plaintiff, at the best, its plea was that as the limitation was about to expire in March, 1991, the first suit was filed. Interestingly, second suit was also filed in February, 1991, i.e. after 11 days from the date of filing of first suit. By that time, obviously limitation to file either of the two suits had not expired, if, at all, computation of period of limitation is understood in the manner in which it has been sought to be explained vide the statements contained in both the plaints. As per law, limitation to file a suit for recovery of money would be three years computed either from the date when the amount became payable/due or from the date when demand was made or it was not satisfied, as the case may be. In both the suits, issue of bar of limitation was framed and has been

decided by the first appellate court in favour of the plaintiff-respondent and against the bank. There is no challenge to the said finding by the appellant-bank. Even otherwise, this Court is satisfied that both the suits were well within period of limitation.

17. In view of the above, it is now to be seen as to whether the first appellate court was right in holding the suit as not barred by the provisions of Order 2 Rule 2 CPC. For a ready reference, Order 2 Rules 2 and 3 CPC are reproduced as under:-

“2. Suit to include the whole claim.—(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) *Relinquishment of part of claim.*—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) *Omission to sue for one of several reliefs.*—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation

shall be deemed respectively to constitute but one cause of action.

3. Joinder of causes of action.—(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.”

(emphasis supplied)

18. The provisions, as extracted above, show that the plaintiff has to include whole of the claim which he is entitled to make in respect of cause of action but he can relinquish any part of his claim in order to bring the suit within the jurisdiction of Court. The omission or intentional relinquishment of any part of his claim would certainly bar the plaintiff to sue afterwards in respect of portion so omitted or relinquished. The subsequent suit can be saved by the rigours of Rule 2 only when the plaintiff obtains a leave of the Court at the time of relinquishment or omission of part of his claim. In the instant case, no leave as regards institution of the second suit in respect of remaining six cheques was obtained by the plaintiff, although it was not only well aware of the wrongful credit of the accounts of the payees but it itself had sent composite notice dated 19.08.1990 and received reply dated 19.10.1990 in respect of all seven cheques

and mentioned this fact in the plaint of the first suit itself. The submission of Sri Sripat that in paragraph no.4 of the plaint of first suit, the plaintiff had reserved its right to subsequently claim the amount of remaining six cheques together with interest, does not impress the Court, inasmuch as Order 2 Rule 2 or 3 CPC does not contemplate any such reservation by the plaintiff himself. If interpretation of the aforesaid provision, as suggested by Sri Sripat, is accepted, it would demolish the very statutory bar contained in CPC and negate the legislative intent and would give leverage to any plaintiff to omit or relinquish any part of his claim or its portion according to his own whims and wishes, whereas such a reservation is provided in clear words “except with the leave of the Court” as per sub-rule (3) of Rule 2 of Order 2 CPC.

19. Joinder of causes of action, as argued by Sri Sripat while referring to Rule 3 of Order 2, in the facts of the case, would be read only in respect of joinder of causes of action based upon payment concerning six cheques and the Court does not find any defect in the frame of second suit on individual or separate basis but when read with the first suit and the composite notice, the second suit was certainly barred by the provisions of Order 2 Rule 2 CPC. Further, joinder is contemplated in respect of several causes of action in the same suit and not joining of causes in two suits. In the facts of the case, nothing prevented the plaintiff to join grievance and relief in relation to all the seven cheques in the first suit, as the record position at the time of institution of both the suits was the same, i.e. payment of all the cheques had been released in favour of all the payees and a composite notice Exhibit-1 describing a joint cause of action was very much there. One should not forget that the

plea of different defendants as raised by Shri Sripat while arguing against the bar of Order 2 Rule 2 is of no avail inasmuch as the payees were added after 4 years of institution of both the suits and no relief was ever claimed against them.

20. The judgment in **Haryana Co-operative Sugar Mills Ltd. (supra)**, cited by Sri Sripat, cannot be read in favour of the plaintiff, inasmuch as the Punjab and Haryana High Court had laid down the correct test falling under Order 2 Rule 2 CPC stating that the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation in the former suit. It explained the cause of action as every fact which will be necessary for the plaintiff to prove in order to support his right to judgment and observed that if the evidence to support the two claims is different, then the causes of action are also different. There is no dispute about the proposition laid down in the said judgment, however, as to how it can help the plaintiff in the facts of the present case, is not understandable. As observed above, single cause of action in relation to all the seven cheques had arisen at the time of filing of the first suit itself and no distinction is found in any of the parameters or components, either qua pleadings or evidence in both the cases. It is, therefore, held that the second suit was clearly barred by Order 2 Rule 2 CPC as rightly held by the trial court and wrongly decided by the first appellate court. Hence, third question framed by this Court in the admission order is answered in favour of the defendant-appellant (bank).

Re:- Section 73 of Evidence Act

21. On merits of the plaintiff's case as regards wrongful payment of cheques, the only dispute was as regards genuineness of signatures of the Managing

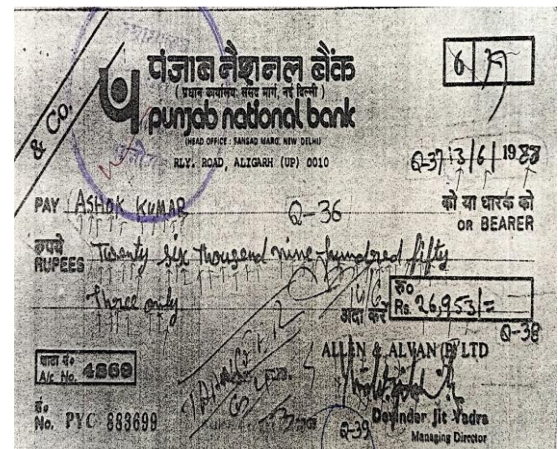
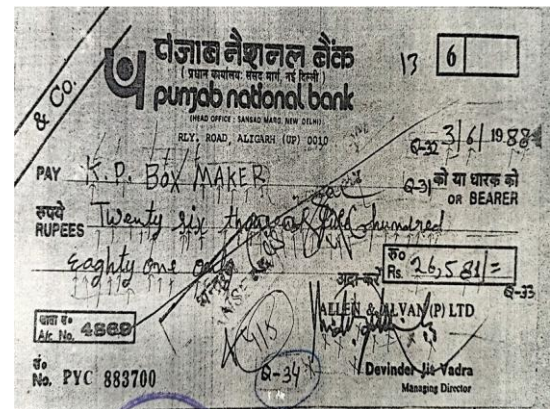
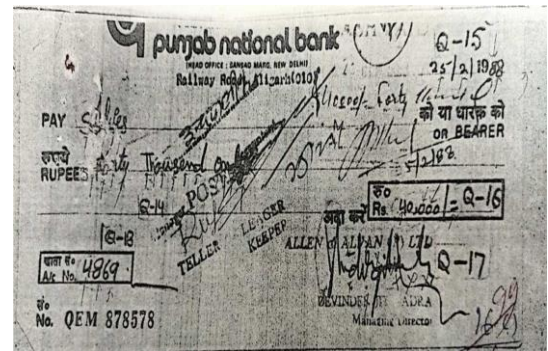
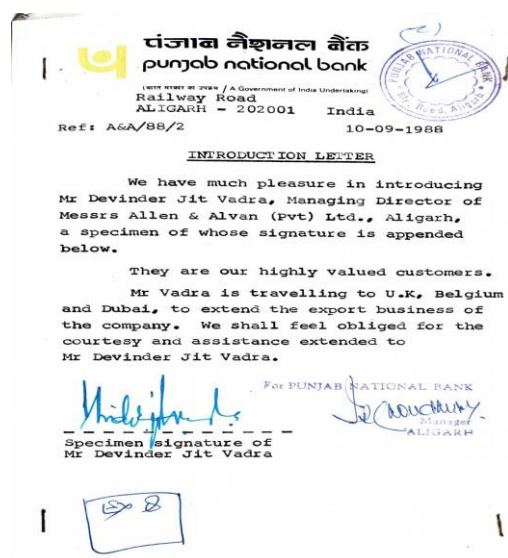
Director of the plaintiff-company on the cheques. Admittedly, neither before the trial court nor before the first appellate court any expert evidence in terms of Section 45 of the Evidence Act was brought on record. What the Court notices from the record is that FIR was registered by the Managing Director of the plaintiff-company against the accused Indrapal on 29.07.1988. During the pendency of the original suit, charge sheet was submitted against the accused and he was being tried by the court of competent criminal jurisdiction in S.T. No.1908 of 1994. Suits were dismissed in the year 2002 by which time the sessions trial was not over. Accused Indrapal was convicted by the Chief Judicial Magistrate, Aligarh on 29.03.2006, i.e. during the pendency of civil appeals. Admittedly, the original cheques were never brought on record of the proceedings of civil suit, however, the same formed part of the record of the criminal trial. The trial court observed about lodging of the FIR, transfer of investigation to the Crime Branch and also perused Exhibit Ka-5, i.e. the first information report registered at Case Crime No.254 of 1988. The first appellate court observed about summoning of the file of the criminal case by the trial court itself. The first appellate court perused the original cheques or their certified copies on record and observed that though there were various documents such as plaint, statement of PW-1 and certain correspondences entered into between the parties, the trial court did not make any efforts to compare the said signatures before deciding the suits. As regards Exhibit-8, in relation where to first question has been framed in the admission order, the first appellate court observed that it being an introduction letter issued by the bank to its Railway Road Branch, it would be deemed to be "admitted signatures" of the Managing

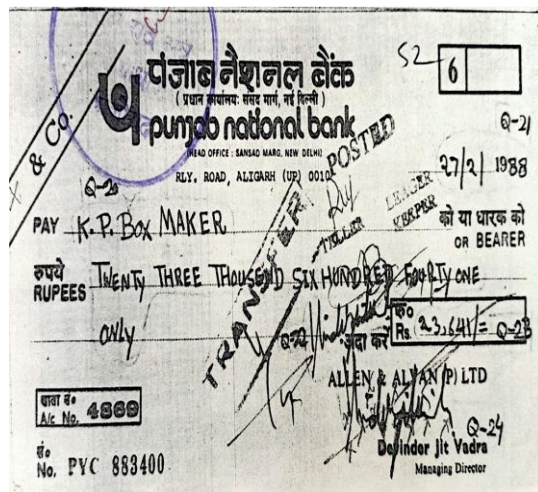
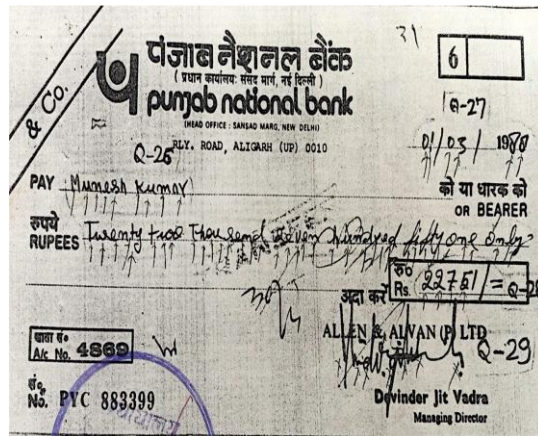
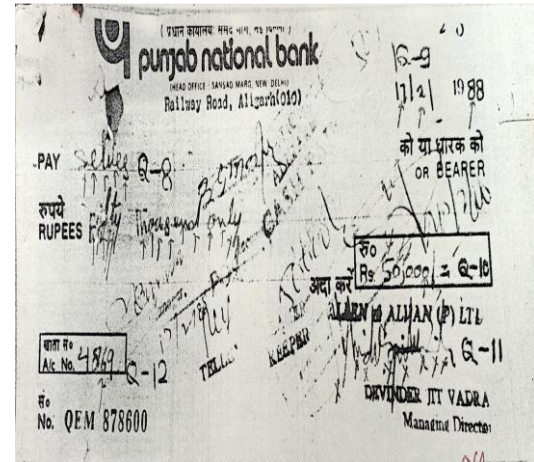
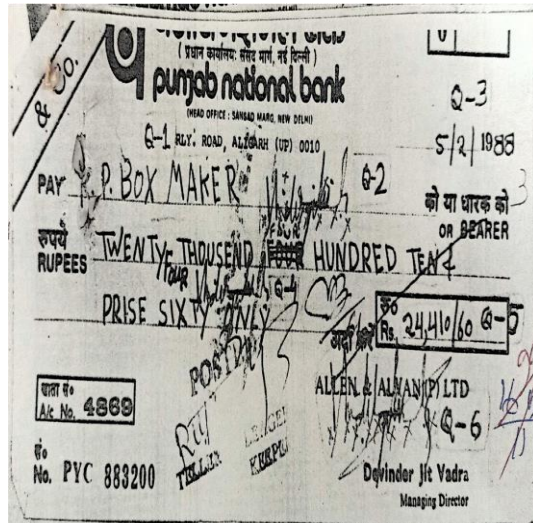
Director. The appellate court, thereafter, proceeded to observe that the bank had not produced specimen signatures on record and then recorded following findings in paragraph no.26 of the judgment:-

"२६. इस उद्देश्य से मैंने फौजदारी पत्रावली में उपलब्ध मूल विवादित चेकों जिनकी प्रमाणित फोटो प्रतियाँ प्रदर्श-१२ लगायत १८ विचारण न्यायालय की पत्रावली पर उपलब्ध है। देवेन्द्रजीत वाडरा के हस्ताक्षरों की मिलान अभिलेख पर उपलब्ध दावे, ब्यानात एवं प्रदर्श क-८ लगायत क-११ पर देवेन्द्रजीत वाडरा के हस्ताक्षर और विशेषकर प्रदर्श-८ पर उपलब्ध देवेन्द्रजीत वाडरा के नमूने के बैंक के द्वारा सत्यापित हस्ताक्षर, से अत्यन्त सूक्ष्मतापूर्वक एवं गम्भीरतापूर्वक की। चैक दिनांक १३-६-८८ सं० पी० वाई० सी० ८८३६९९ धनराशि २६,९५३/- चैक सं० पी० वाई० सी० ८८३७०० दिनांक ३-६-८८ धनराशि २६,५८१/-, चैक सं० पी० वाई० सी० ८८३४०० दिनांक २७-२-८८ धनराशि २३६४१/-, चैक सं० पी० वाई० सी० ८८३३९९ दिनांक १-३-८८ धनराशि २२,७५१/-, चैक सं० क्यू० ई० एम० ८७८५७८ दिनांक २५-२-८८ धनराशि ४०,०००/-, चैक सं० पी० वाई० सी० ८८३२०० दिनांक ५-२-८८ धनराशि २४,४१०.६०, चैक सं० क्यू० ई० एम० ८७८६०० दिनांक १७-२-८८ धनराशि ५०,०००/- पर उपलब्ध देवेन्द्रजीत वाडरा के हस्ताक्षर खुली आँख से देखने पर ही प्रदर्श-८ पर देवेन्द्रजीत वाडरा के हस्ताक्षरों से किसी भी लेखीय विशेषताओं के परिप्रेक्ष्य में मेल नहीं खाते हैं। बिना किसी गहन परीक्षण या प्रयोगशाला परीक्षण पर आधारित मिलान के भी ये सभी हस्ताक्षर फर्जी बनाये गये दर्शित हो रहे हैं जिसमें तमाम लाइन क्वालिटी डिफेक्ट्स यथा ट्रेमर अस्वाभाविक पेनलिफ्ट पेनपास एवं पेनहाल उपस्थित है। लिखे गये शब्दों की शार्पनेस, गति तथा झुकाव में इतने स्पष्ट अंतर दिखाई दे रहे हैं कि किसी भी स्थिति में इन्हें एक व्यक्ति के लेख का नहीं माना जा सकता। हस्ताक्षर के अतिरिक्त कतिपय चेकों में धारक जिनके नाम चैक जारी किये गये हैं तथा धनराशि की हिज्जे में ऐसे चौकाने वाले दोष हैं जो इतनी प्रतिष्ठित कम्पनी के द्वारा अपने व्यापार के सामान्य अनुक्रम में जारी चेकों में नहीं हो सकते। उदाहरण के

लिये चैक सं० पी० वाई० सी० ८८३२०० दिनांक ५-२-८८ में पैसे को प्राइस लिखा गया है, टवेन्टी व थाउजेन्ड के बीच नीचे ओर फोर अलग कलम से बढ़ाया गया है। थाउजेन्ड के आगे के फोर को काटा गया है फिर उसके ऊपर फोर लिखा गया है। यहाँ भी देवेन्द्रजीत वाडरा के जो हस्ताक्षर है उनका विभिन्न तथा तुरन्त प्रकार में आ जाने पर विभिन्नता स्पष्ट रूप से उजागर है। इसी तरह चैक पी० वाई० सी० ८८३४०० में फोरटी की स्पेलिंग गलत है तथा सेल्फ को लेल्ज लिखा गया है।"

22. The above findings demonstrate that the appellate court apparently acted as a well qualified expert of comparing handwriting as well as signatures. The component and parameters, like trimmer, pen-lift, pen-pass, pen-hall, sharpness of words, speed and alienation etc have been described in the manner in which a well qualified expert explains the same. The Court may also reproduce here the nature of the signatures of the Managing Director which are found on different documents on record. Scanned copy of the signatures of the Managing Director, both undisputed (On Exhibit-8) and disputed (On 7 cheques), are reproduced as below:-





23. A perusal of the signatures would show that the same being highly complicated, in order to arrive at a definite conclusion by a court of law as to whether they were forged or genuine, expert evidence was required and it is beyond the competence of a judge to arrive at such a conclusion in purported exercise of power under Section 73 of the Evidence Act. It may be noted that there is on record an expert report accompanied by various cheques, both disputed in the civil litigation and undisputed but the same was on the record of the criminal case and the expert had given opinion which, ultimately, resulted into conviction of the accused Indrapal. As to what happened to the conviction, either in appeal or otherwise, is not on record. Even otherwise, none of the courts below has, in fact, treated either the expert report of criminal proceedings or even the findings recorded by the investigating officer or the learned Magistrate as an evidence in the civil proceedings and rightly so, inasmuch as record of criminal proceedings cannot be treated as evidence in civil proceedings. Hence, what is there before the court is the oral and documentary evidence led before the civil court but to answer issues arisen

and questions framed by this Court, it has to be seen as to whether the evidence was sufficient to hold the bank negligent as regards discharge of its duties in clearance of cheques.

24. The Court may refer to Section 73 of the Evidence Act that reads as under:-

“73. Comparison of signature, writing or seal with others admitted or proved.- In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.”

25. The Supreme Court in **O. Bharathan vs. K. Sudhakaran and another**, AIR 1996 Supreme Court 1140, condemned the judgment of the High Court of Kerala in an election petition where the High Court had compared the signatures on two counterfoils alleged to be related to certain witnesses without the aid of an expert or the evidence of persons conversant with the disputed signatures. The Supreme Court held that the High Court had erred in taking upon itself the task of making comparison and found the

approach of the High Court not in conformity with the spirit of Section 73 of the Evidence Act.

26. Gauhati High Court in **Shyam Sundar Chowkhani alias Chandan and others vs. Kajal Kanti Biswas and others**, AIR 1999 Gauhati 101, after referring to judgment in **State of Maharashtra vs. Sukhdeo Singh and another**, AIR 1992 SC 2100, observed that although Section 73 empowers the Court to compare the disputed writing with the specimen/admitted writing shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of comparison, more so, when the quality of evidence in respect of specimen/admitted writing is not of high standard.

27. The Orissa High Court in **Laxmi Bai vs. A. Chandravati**, AIR 1995 Orissa 131, held that under Section 73 of the Evidence Act, a Court is competent to make comparison of disputed writings, it would, however, be too hazardous for a Court to use his own eyes and merely on the basis of personal comparison decide a very vital issue between the parties centering round the handwriting or signatures of a person.

28. As far as the judgment of Patna High Court in **Shriniwas Pansari (supra)**, cited by Sri Sripat, it was held that there is no bar to the judge using his own eyes to compare the disputed writing with the admitted writing even without the aid of the evidence of any handwriting expert. There is no dispute about the said proposition but the same would not be applicable in the present case as the first appellate court has not simply compared the signatures with his open eyes but has acted as a well

qualified expert having specialized knowledge when it used words like trimmer, pen-lift, pen-pass, pen-hall, sharpness of words, speed and alienation etc.

29. The third judgment relied upon by Sri Sripat in **Canara Bank (supra)** deals with the liability of the bank to make good the payment. In that case, the Hon'ble Supreme Court upheld the judgment of the trial court and the first appellate court which had held the bank liable to pay amount covered by the disputed cheques. The Hon'ble Supreme Court discussed the relationship of the bank with its customers and the terms of the contract between the two and also observed that the bank's business depends upon the trust and whenever a cheque purported to be by a customer is presented before a bank, it carries a mandate to the bank to pay. If the cheque is forged, there is no such mandate and the bank can escape liability only when it can establish knowledge to the customers of the forgery in the cheques. In the instant case, admittedly, the first information report was lodged by the Managing Director against Indrapal in 1988 itself, i.e. immediately after the cheques were cleared and alleged forgery came to the knowledge of the Managing Director. The suits were filed just before the third year was going to lapse in 1991. During this period of time, the plaintiff-company was prosecuting its own employee. After institution of suits, whatever evidence was brought on record, as discussed above, the same is sufficient for this Court to form an opinion that the Bank had successfully established its defence of no negligence and non-conspiracy with the accused and also of taking reasonable care in clearing the cheques considering the large number of transactions by the company and the nature

of forgery alleged by the plaintiff. Further, knowledge of alleged forgery to the plaintiff was also established in view of prosecution lodged by plaintiff immediately in 1988. Therefore, with due respect, the judgment in **Canara Bank (supra)** would also not be helpful to the plaintiff-respondent.

30. The judgment of Calcutta High Court in **Babulal Agarwalla (supra)**, with due respect, does not lay down any law so as to dislodge the bank's defence. The said judgment was delivered in an original suit with no discussion of oral or documentary evidence. Single cheque was presumed to be forged without any discussion and just a passing reference of Supreme Court's judgment in **Canara Bank (supra)** was given with a further observation that Section 85(2) of the N.I. Act would not stand attracted in case of a forged cheque. In the facts of the instant case, oral and documentary evidence read as a whole, want of expert evidence under Section 45 of the Evidence Act and improper and illegal exercise of power under Section 73 of the Evidence Act by the first appellate court does not persuade this Court to read the judgment in **Babulal Agarwalla (supra)** in favour of the appellant. Another judgment in **Syndicate Bank (supra)** is on payment of interest which, with due regards to Delhi High Court, is of insignificant value in the present case as this Court has arrived at a conclusion that the bank was not liable to pay any amount to the plaintiff and, hence, question of interest would not arise.

31. The judgment of Calcutta High Court in **Mahabir Prasad Bubna (supra)** and Delhi High Court in **Mathew Jackob (supra)**, on the interpretation of Section 73 of the Evidence Act, are also not helpful for

the plaintiff-respondent, for the same reasons stated above. Bombay High Court in **Jyoti H. Mehta (supra)** on the point that the plaintiff is entitled for refund as the bank is a custodian of the amount is also of no help to the plaintiff as facts of the said case were different from the one involved in the present lis where initially the suit was instituted against the bank but, later on, the accused of the forgery, i.e. the employee of the plaintiff as well as the payees were impleaded as defendants without amending the plaint. No decree having been claimed against the payees, suit could not be decreed against the bank merely on the ground that it was custodian of the amount kept by the customers. The last judgment in **Mrugendra Indravadan (supra)** is on the proposition laid down by Hon'ble Supreme Court in relation to Order 41 Rule 31 CPC which having not been argued from either side and, even otherwise, not being significantly involved in view of analysis of every aspect of the matter, the same has no application in the facts of the present case.

Re:- Liability of Bank to refund the amount

32. Here, the Court would like to refer oral testimony of PW-1 Devinder Jit Singh Vadara, i.e. the Managing Director. In his cross examination, he stated Indrapal as his peon. As regards payees 'M/s Ayodhya Investor Syndicate' and 'Investment Corporation', it was stated that there had never been any commercial transaction in between the plaintiff-company and the said payees. He also stated that he had not claimed any decree against the said payees. He stated his qualification as MA (Economics) and LL.B and stated that his company did not trade in India and explained his transactions in

relation to foreign countries. Acquaintance with the payees 'Investment Corporation' and 'M/s Ayodhya Investor Syndicate' was clearly stated by him but he expressed his ignorance as to why despite their impleadment, no relief was claimed against them. From the overall testimony of PW-1, though it is clear that he denied issuance of cheques and also termed his signatures thereon as forged, the bare statement to that effect would not suffice drawing a decree for payment of money against the bank and in favour of the plaintiff. The reason is that the bank was neither a wrongful gainer of the money nor can it otherwise be stated to be a case of undue enrichment of the bank. If Indrapal, an employee of the plaintiff-company, was convicted and it is assumed that his conviction has attained finality, he being a party to both the original suits, decree might have been drawn against him but since no relief was claimed by the plaintiff to that effect, there is no such decree. Similar is the position with respect to additionally impleaded payees in both the suits and it is clear that though PW-1 denied business transactions with the said payees, ultimately the amount covered by all the cheques was credited in their bank accounts. Therefore, it is the payees who were rightly or wrongly benefited with the amount credited with them and in such situation, there could be a decree against the said payees but, for the reasons best known to the plaintiff, neither any relief was claimed despite subsequent impleadment of the payees, nor did the first appellate court look into this aspect. The appellate court has simply held the bank negligent in discharge of its duties and has drawn a decree against it. It may also not be forgotten that it is not a case arising out of deficiency in service under Consumer Protection Act, 1986 or Legal Services Authorities Act, 1987 where respectively

Consumer Redressal Forum or a Permanent Lok Adalat under Sections 22-A and 22-C of the Act of 1987 may or may not adjudicate liability of the bank in relation to services rendered by it. The appeal arises out of a civil suit where liability to pay would accrue when all components affecting civil rights of the parties have to be adjudicated upon as a court exercising civil jurisdiction in relation to parameters of civil procedural law and Specific Relief Act, 1963.

Re:- Negotiable Instruments Act

33. While discussing the arguments based upon Section 85 of the N.I. Act, the appellate court observed that the cheques being forged in the present case, they would not fall within the parameters of a 'negotiable instrument' and, hence, benefit under sub-section (2) of Section 85 of the N.I. Act would not be available to the bank. Here, the Court deems it appropriate to refer to the provisions of Sections 7 and 85 of the N.I. Act, which are as under:-

“7. **“Drawer”**, **“Drawee”**.—The maker of a bill of exchange or cheque is called the “drawer”; the person thereby directed to pay is called the “drawee”.

“drawee in case of need”.—When in the bill or in any indorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need such person is called a “drawee in case of need.”

“acceptor”.—After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon

one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the “acceptor”.

“acceptor for honour”.— [When a bill of exchange has been noted or protested for non-acceptance or for better security], and any person accepts it supra protest for honour of the drawer or of any one of the indorsers, such person is called an “acceptor for honour”.

“Payee”.—The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the “payee”.

“85. Cheque payable to order.— [(1)] Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course.

(2) Where a cheque is originally expressed to be payable to bearer, the drawee is discharged by payment in due course to the bearer thereof, notwithstanding any endorsement whether in full or in blank appearing thereon, and notwithstanding that any such endorsement purports to restrict or exclude further negotiation.”

34. It appears from the record that protection of sub-section (2) of Section 85 was claimed by the bank on the ground that the cheques originally expressed to be payable to bearer, once the same were cleared in due course, the bank would be discharged from its liability. In the instant case, the plaintiff-company was the drawer and the bank was drawee. Even if the

cheques were termed as containing forged signatures of the Managing Director so as to take them away from the definition of a negotiable instrument, the appellate court should have examined the significance of sub-section (2) of Section 85 so as to appreciate as to whether the bank had discharged its obligation in its normal course of business, particularly when it had come on record that the plaintiff-company, being a reputed one, presented 20-25 cheques per day in the bank.

35. In addition to it, Section 131 of Negotiable Instruments Act, 1881 indicates the circumstances when the Bankers are not liable for consequences of wrongful payment. The provision reads as under:

“131. Non-liability of banker receiving payment of cheque.—A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

Explanation I.—A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

Explanation II.— It shall be the duty of the banker who receives payment based on an electronic image of a truncated cheque held with him, to verify the prima facie genuineness of the

cheque to be truncated and any fraud, forgery or tampering apparent on the face of the instrument that can be verified with due diligence and ordinary care.”

36. Although, the Explanations I and II were added or replaced by the amendments brought in the Act in the year 2002-03, by which time the trial in the aforesaid suits was over, even if the same are seen in view of the fact that the matter was pending before the first Appellate Court, a plain reading of the provision and the Explanations appended to it would indicate that the bankers shall not be liable to the true owner for receiving payment of a cheque crossed generally or specially in good faith and without negligence in case the title of the cheque proves defective. The provision protects bankers who, in good faith and without negligence, receive payment for a customer of a crossed cheque when the title to the cheque proves defective. Proof of good faith and no negligence depends on the facts and circumstances of the case. The said provision has been explained by Madras High Court in **Mrs. Rosali vs. M/s Syndicate Bank, Luz, Mylapore Madras-4, 2018 (1) CTC 441.**

37. The Karnataka High Court, in **Ashit Roy vs. Syndicate Bank, 2000 (101) CC 178**, after placing reliance upon the judgment of Hon'ble Supreme Court in **Canara Bank (supra)** and **Mahabir Prasad Bubna (supra)** held that the banks have a mandate to pay only when a cheque is genuine and signed by the customer and they cannot escape liability unless they can establish knowledge to the customer of the forgery in the cheques. Meaning thereby that in a given case, if bank is able to establish that as regards forgery committed

in cheque, the customer had knowledge, it can put a defence to avoid its liability otherwise situation might be different. In the instant case, immediately after the dispute cheques were cleared, the Managing Director of the plaintiff-company lodged first information report against its own employee Indrapal and it instituted suit only after a period of three years, by which time charge sheet had already been filed against the accused. Significantly, none of the bank officials was made an accused in the criminal case and the plaintiff succeeded to get its own employee convicted.

38. The Division Bench of Kerala High Court, in **State Bank of India vs. Kerala State Co-operative Marketing Federation and others**, O.S. No. 252 of 1988 decided on 05.10.1995 held that in order that a payment should be held to be made in due course, it should be, firstly, in accordance with the apparent tenor of the instrument; secondly, it must be made in good faith and without negligence; thirdly, payment must be made to a person in possession of the instrument; and fourthly, while making the payment care should be taken to see that no circumstances exist which afford a reasonable ground for believing that the instrument-holder is not entitled to receive payment of the amount mentioned in the instrument. The phrase "apparent tenor" seems to indicate the information available on the face of the instrument itself. Factors such as the identity of the payee or of the drawee, the figure of the amount or the date on which or after which the amount becomes payable must be deemed to have been conveyed by the apparent tenor of the instrument.

(emphasis supplied)

CONCLUSION

39. When the entire material on record is examined in the light of the questions framed in the admission order, this Court safely comes to a conclusion that the first appellate court has grossly erred in accepting the plaintiff's case by comparing the signatures on the cheques with the signature on the plaint, oral testimony, Exhibit-8 and on different correspondences and that liability to pay and credit the amount covered by the cheques in the bank account of the plaintiff-company out of alleged negligence in clearing the cheques has been wrongly decided by the first appellate court. Therefore, first two questions are answered in favour of the appellant-bank.

40. As far as fourth question relating to interest with reference to Section 34 CPC, since this Court has arrived at a conclusion that the decree drawn against the bank is unsustainable, no question of awarding any interest arises and, therefore, fourth question is also answered in favour of the bank. Third question as regards bar of second suit under Order 2 Rule 2 CPC has already been answered in favour of the bank.

41. In view of the above discussion, both the second appeals succeed and are, accordingly, allowed. The impugned consolidated judgment dated 07.08.2009 and the decree drawn on that basis in both the Civil Appeals No. 147 of 2002 and 146 of 2002 is set aside and the trial court's judgment dismissing both the Original Suits No.143 of 1991 and 176 of 1991 is upheld.

42. Any amount lying deposited, either pursuant to the interim order of this Court or otherwise, is directed to be refunded to and credited in the concerned

43. This Court records all its appreciation for both the learned counsel in very ably assisting the Court in deciding these old appeals.

(2024) 9 ILRA 1334
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 716 of 2024
With
Second Appeal No. 717 of 2024

Ramautar & Ors. ...Appellants
Versus
Awadhesh Narayan Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri Akhilesh Kumar, Sri Suresh Chandra
Srivastava

Counsel for the Respondents:
Sri Ishir Sripat

Civil Law - Civil Procedure Code, 1908 - Section 100 - Order 22 - Rule 10 - U.P. consolidation of Holdings Act, 1953 Section - 53(b) - U.P. Zamindari Abolition & Land Reforms Act, 1950 - Sections 158 & 164 - U.P. Zamindari Abolition & Land Reforms Rules, 1952 - Rule 148 & 149 - Specific Relief Act, 1963 - Section - 31, - Transfer of Property Act, 1882 - Section 107 - Registration Act, 1908 - Sections 17 & 17(1)(e) - Limitation Act, 1963 - Section - 5 - Two second appeals arise from two civil suits and appeals - Original Suit of year 2012 was filed by plaintiff-appellants challenging a registered sale deed executed by respondent

No. 1 in favour of respondent Nos. 2, 3, and 4 - & anr. Suit of year 2013 was filed by purchasers from respondent No. 4, claiming a decree for permanent injunction - Both suits were decided by separate judgments - Two civil appeals - were filed by the appellants - dismissed by separate judgments - court finds that, the appellants claimed that Laxmi Devi, the original owner, transferred possession to them in 2006, making the 2011 sale deed invalid, - and the defendants plea that the appellants failed to provide sufficient evidence of this transfer - held, finding recorded by both of the court below on all disputed aspects involved in the lis, being pure finding of fact, the same do not require any interference in second appellate jurisdiction u/s 100 of CPC - Accordingly, appeals are dismissed - stating that no substantial question of law arises for consideration by this court. (Para - 13, 15, 19, 20)

Second Appeal Dismissed. (E-11)

List of Cases cited:

1. Amresh Chandra Pandey Vs Deputy Director of Consolidation, Mirzapur Camp. Robertsganj, Sonbhadra & ors., 2007 (102) RD 440,
2. Umesh Chand & ors.Vs Board of Revenue, U.P. Allahabad, 2002 All LJ 680,
3. Ram Sunder & ors.Vs Joint Director of Consolidation, Sultanpur & ors., 2021 (6) ADJ 141,
4. Ramanad & ors.Vs Deputy Director of Consolidation, Basti & ors., 1993 RD 90,
5. Rikhvev & ors.Vs A.D.M. (Finance), Azamgarh & ors., 2011 (1)) ADJ 629,
6. Mohd. Fasih Vs Munir Khan, 1987 R.D. 36,
7. Kamti Devi (Smt.) & anr.. Vs Poshi Ram (2001) 5 SCC 311,
8. Thiagarajan Vs Sri Venugopalaswamy B. Koil, (2004) 5 SCC 762,
9. Kondiba Dagadu Kadam Vs Savitribai Sopan Gujar & ors., (1999) 3 SCC 722,

10. Commissioner, Hindu Religious & Charitable Endowments Vs P. Shanmugama (2005) 9 SCC 232,

11. St. of Kerala Vs Mohd. Kunhi (2005) 10 SCC 139,

12. Madhavan Nair Vs Bhaskar Pillai (2005) 10 SCC 553,

13. Harjeet Singh Vs Amrik Singh (2005) 12 SCC 270,

14. Gurdev Kaur & ors. Vs Kaki & ors., 2007 (1) SCC 546.

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

The Appeal

1. These two second appeals arise out of two civil suits and two civil appeals. Original Suit No. 176 of 2012 was filed by plaintiff-appellants challenging the registered sale deed dated 16.12.2011 executed by respondent No. 1 in favour of respondent Nos. 2, 3 and 4. The other original suit being Original Suit No. 318 of 2013 was filed by the purchasers from respondent No. 4, claiming a decree for permanent prohibitory injunction. Both the aforesaid suits were decided by separate judgments dated 01.10.2021 and 22.10.2021 respectively. Two civil appeals respectively being Civil Appeal No. 8 of 2022 and Civil Appeal No. 4 of 2022 were filed by the present appellants. Both the civil appeals have been dismissed by separate judgments dated 25.07.2024.

Counsel Heard

2. I have heard Shri Akhilesh Kumar, learned counsel for the appellants in both the appeals and Shri Rahul Sripat, learned Senior Counsel assisted by Shri Ishir Sripat, learned counsel appearing

through caveat for respondent No. 5 in Second Appeal No. 717 of 2024 and respondent No. 2 in Second Appeal No. 716 of 2024.

Fact of the case

3. The case of the present appellants is that one Laxmi Devi was bhumidhar of the property in dispute and by executing a document dated 25.04.2006, she delivered possession of the same to the appellants in lieu of Rs. 3,00,000/- (rupees three lac) and the appellants raised constructions thereon and are residing therein. The sale deed of 2011 was challenged on the ground that Laxmi Devi, after delivering possession to the appellants, ceased to be owner of the property and, therefore, sale deed executed by her in favour of the vendees was invalid for want of title. It is not in dispute that one of the purchasers from Laxmi Devi also executed a sale deed in favour of contesting-respondent, who is represented before this Court through Shri Sripat and that the said purchaser sought his impleadment under Order XXII Rule 10 of Code of Civil Procedure. The impleadment was allowed and, consequently, the suit was contested in between the ultimate purchaser as well as the present appellants.

Submissions on behalf of Appellants

4. The precise submission of learned counsel for the appellants in both the appeals is that transfer of possession by Laxmi Devi in their favour would be a "deemed sale" as per Section 164 of Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950. In support of his submission, learned counsel for appellants has placed reliance upon judgment of this

Court in ***Amresh Chandra Pandey vs. Deputy Director of Consolidation, Mirzapur Camp. Robertsganj, Sonbhadra and others***, 2007 (102) RD 440. Further submission is that Laxmi Devi never appeared in witness box, therefore, the defence of the defendants would be deemed as "not proved" and, hence, the transaction of sale would become invalid.

Submissions on behalf of
Respondents

5. Per contra, Shri Sripat submits that except a photostat copy of a document dated 25.04.2006 brought on record as paper No. 12-C, no evidence was led from the appellants side to prove alleged vesting of title in them. He submits that the document 12-C was neither a piece of primary evidence nor secondary evidence as per provisions of Indian Evidence Act, 1872 and, even if it is read, it recites some understanding as regards delivery of possession in between Laxmi Devi and the present appellants, which would not fall in the definition, meaning and import of "deemed sale" even as per Section 164 of Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950. He further submits that non-appearance of Laxmi Devi in witness box would be of no significance when the transferees filed separate written statements and proved the sale deed executed in their favour. Further submission is that the disputed sale deed has been recognized by mutation courts and names of the purchasers have been recorded in the revenue records, which were dealt with by courts below. Further submission is that the revenue entries being sufficient to establish title and possession and having not being set aside, the appellants would have no case.

6. In support of his submission, Shri Sripat has placed reliance upon the judgement

of this Court in the case of ***Umesh Chand and others vs. Board of Revenue, U.P. Allahabad***, 2002 All LJ 680. He further submits that even for establishing a case of deemed sale under Section 164 of Act of 1950, compliance of Rules 148 and 149 of Uttar Pradesh Zamindari Abolition & Land Reforms Rules, 1952 is a statutory mandate, however, the procedure contained therein has not been followed in the present case.

7. Learned Senior Counsel has also placed reliance upon the judgment of this Court in ***Ram Sunder and others vs. Joint Director of Consolidation, Sultanpur and others***, 2021 (6) ADJ 141 and submits that placing reliance upon the judgment of ***Umesh Chand*** (supra), this Court has taken a view that transfer of an agricultural land cannot be made by a mode, except as provided under law, which may be by way of sale, gift etc.

8. Learned Senior Counsel further submits that judgment of this Court in the case of ***Amresh Chandra Pandey*** (supra) as cited on behalf of appellant was in fact a follow up of another judgment in ***Ramanad and others vs Deputy Director of Consolidation, Basti and others***, 1993 RD 90, however, subsequently, this Court in ***Rikhvev and others vs A.D.M. (Finance), Azamgarh and others***, 2011 (1)) ADJ 629 has discussed the judgment in ***Ramanand*** (supra) and has taken a view that in the said judgment there was no discussion as to why the provisions of Registration Act were not applicable and the only reason given in the judgment was that Section 5 of the Limitation Act had been made applicable in view of Section 53-B of Uttar Pradesh Consolidation of Holdings Act, 1953.

Analysis of rival contentions in the
light of statutory provisions and authorities
cited at the bar

9. Having heard the learned counsel for the parties, this Court finds it appropriate to refer Section 164 of Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 as well as Rules 148 and 149 of Uttar Pradesh Zamindari Abolition & Land Reforms Rules, 1952. The same are reproduced as under:

"164. Transfer with possession by a bhumidhar to be deemed a sale. - Any transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose of securing any payment of money advanced or to be advanced by way of loan and existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, shall, notwithstanding anything contained in the document of transfer or any law for the time being in force, be deemed at all times and for all purposes to be a sale to the transferee and to every such sale the provisions of Sections 154 and 163 shall apply."

"148. Section 164.- The Lekhpal shall as soon as he learns of a transfer mentioned in Section 164 submit a report to the Assistant Collector in-charge of the Sub-Division mentioning therein-

- (a) the name, parentage and address of the transferor and the transferee,
- (b) the number and area of the plots transferred,
- (c) the date of the transfer of possession, and
- (d) the nature of the transfer."

149. (1) On receipt of the report from the Lekhpal or information from any interested party the Assistant Collector in-charge of the Sub-Division shall call upon the parties to show cause why action under Section 164 should not be taken in respect of the land in question.

(2) After hearing the parties and making such further inquiry as he considers necessary, the Assistant Collector shall pass suitable orders and shall also order the Correction of papers accordingly."

10. This Court, in paragraph 23 of the judgment in **Umesh Chand** (supra), after considering various authorities dealing with Section 164 of the Act of 1950, has laid down as follows:

"In view of what has been stated above, the aforesaid judgment of learned single Judge does not support the contention of the petitioners since the decisions relied in the aforesaid case do not lay down any proposition as referred to in the judgment of learned single Judge. It is true that a document which purports to transfer of immovable property and is not registered, will attract the provisions of Section 164 and will be deemed to be sale but only when the value of the Immovable property is not Rs. 100 or more. Thus, the aforesaid law laid down by learned single Judge in Bashishtha Pandey's case has to be confined to cases in which the value of property is not more than Rs. 100. If the value of property is

more than Rs. 100 a transfer can be effected only by a registered instrument as laid down in **Data Ram v. Additional Civil Judge**, 1978 ALJ 840 : **Kedar v. District Judge**, 1978 RD 307, as noted above. In the present case admittedly the amount "in question is Rs. 6,750. hence the interest could have been transferred only by registered deed."

11. Further, this Court in paragraph 21 of judgment in **Ram Sunder** (supra) observed as follows:

"21. This court is of the considered view that the transfer of an agricultural land cannot be made by a mode, except as provided under law, which may be by way of sale, gift etc. It is also apparent from reference made in various Sections of Act of 1950, such as section 154 provides that no bhumidhar shall have the right to transfer by sale or gift, section 155 provides that no bhumidhar shall have the right to mortgage any land belonging to him as such where possession of the mortgaged land is transferred or is agreed to be transferred in future to the mortgagee as security for the money advanced or to be advanced. Similarly in Section 157-A and 157-AA, the transfer of the land by way of sale, gift, mortgage or lease has been referred. The alleged mode by which the name of opposite party no.3 was recorded is not provided anywhere. Therefore the transfer of an agricultural land, being an immovable property, can be made by a bhumidhar with

transferable rights only in accordance with the Transfer of Property Act and Indian Registration Act and not otherwise. Learned counsel for the respondents no.3/1 and 3/2 could also not show any other mode of transfer and validity of the alleged transfer under any law. This court in the case of, Umesh Chand and others Versus Board of Revenue, Allahabad and others; 2002(2) AWC 932, has held as under in paragraph 15:-

"15. No right or interest can pass in immovable property in a manner contrary to provisions of Transfer of Property Act and Indian Registration Act....."

12. As far as judgment cited on behalf of appellants, reference to paragraph Nos. 43, 44, 45, 46, 47, 48 and 49 of judgment of this Court in Rikhvev (supra) can be made. The same are extracted below:-

"43. Contention of the learned counsel for the petitioners is that in view of the decision of this Court in **Ramanand & others vs. Deputy Director of Consolidation, Basti & others** 1993 RD 90 (H), non-registration of the document will not affect the sale-deed.

44. In the case of **Ramanand** (supra) it has been laid down that if a bhumidhar has taken some money from some one and in this regard possession on some land has been given to such a person, this type of transaction would be deemed to be valid transfer and the

provisions of Registration Act or Evidence Act cannot be applied in consolidation proceedings, particularly in transaction under Section 164 of the U.P.Z.A. & L.R. Act. A reading of the judgment would show that there is no discussion at all as to why the provisions of Registration Act are not applicable. The only reason given is that under Section 53-B of U.P.C.H. Act, only Section 5 of the Limitation Act has been made applicable and there is no mention of either Registration Act or Evidence Act.

45. Except making a reference to Section 53-B of U.P.C.H. Act, there is absolutely no discussion in the judgment. In my considered view, there is no ratio in the aforesaid judgment. The Court has jumped to the conclusion without any discussion that the provisions of Registration Act or Evidence Act are not applicable. Attention of the Court was not drawn to anyone of the earlier decisions on the point. Its attention was not drawn towards earlier judgment in **Ajeet & another vs. Deputy Director of Consolidation & others**, 1982 RR 50. In this case, a dispute arose whether an unregistered mortgage deed attracts Section 164 of the U.P.Z.A. & L.R. Act or not. After considering the earlier judgments of this Court including **Kedar v. District Judge, Banda**, 1978 RD 307 and **Data Ram v. Additional Civil Judge Bulandshahr and another**, 1978 ALJ 840, it has been held that *transfer of possession under unregistered mortgage deed will*

*not amount 'sale' under Section 164 of the U.P.Z.A. & L.R. Act. The transfer of immovable property for a value of Rs.100/- either by sale or by mortgage necessarily requires registration under the Registration Act otherwise such a transfer is invalid. These decisions were not brought to the notice of the Hon'ble Judge who delivered the judgment in the case of **Ramanand** (supra). The judgment given in the case of **Ramanand** (supra) is therefore per incuriam, as it was given in ignorance of the earlier binding precedents. Except a solitary decision in the case of **Ramanand** (supra), all other decisions have taken different view i.e. registration of document of transfer for a value more than Rs.100/- is necessary, under the Registration Act, even for agricultural land. There is good deal of discussion in Umesh Chand and others vs. Board of Revenue, U.P., at Allahabad and others, 2002 (93) R.D. 264. In this case, after noticing the various provisions of U.P.Z.A. & L.R. Act and that of the Transfer of Property Act, the Court has laid down as follows:*

"16. Thus it is clear that the provisions of Transfer of Property Act are fully applicable while effecting a transfer of holding by bhumidhar. In the Act wherever it is mentioned that particular meaning given in Transfer of Property Act or Indian Registration Act be not given to a transaction. Specific provision has been made in U.P. Zamindari Abolition and Land Reforms Act. Reference has been made to Section 158 of U.P. Zamindari Abolition and Land

Reforms Act which provides that lease for a term exceeding one year or from year to year may be made either by a registered instrument or in the prescribed manner. Section 158 of U.P. Zamindari Abolition and Land Reforms Act has overriding effects to the provisions of Transfer of Property Act and Indian Registration Act whereas Section 107 of Transfer of Properties Act provides that a lease of immovable property from year to year, or for any term exceeding one year can be made only by the registered instrument. Section 158 clearly contemplates that applicability of Transfer of Property Act as well as Indian Registration Act is not ruled out in application to U.P. Zamindari Abolition and Land Reforms Act and the provisions are overridden in specific case. Apart from section 59 of Transfer of Property Act, Section 17 of Indian Registration Act also provides that registration of instruments of value of more than 100 Rupees or more of immovable property is required when such instrument purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent. Section 17(1) of Indian Registration Act is quoted below:

17. Document of which registration is compulsory.--(1)

The following documents shall be registered if the property to which they relate is situate in a district in which, or if they have been executed on or after the date on which, Act No. XVI of 1964, or the

Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :

(a) instrument of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment limitation or extinction of any such right, title or interest; and

(d) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

Provided that the State Government may, by order published in the official Gazette except from the operation of this sub-section any lease executed in any district, or part of a district, the

terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees."

46. Thereafter, the Court has noticed a Division Bench decision in **Mohd. Fasih v. Munir Khan**, 1987 R.D. 36, wherein it has been laid down that transfer of possession alone is not sufficient to attract such Section 164 of the U.P.Z.A. & L.R. Act.

47. The object of registration a document is to give notice to the world that such a document has been executed, to prevent fraud and forgery and to secure a reliable and complete account of all transactions effecting the title to the property.

48. The Registration Act strikes a document and not a transaction. It extends to the whole of India except State of Jammu & Kashmir. Its Section 17 provides a document of which registration is compulsory. Section 17(1)(e) provides that non-testamentary instruments transferring or assigning any any right, title or interest of the value of one hundred rupees and upwards, to or in immovable property shall be considered.

49. Viewed as above, on the admitted case of the petitioners that deed in question is unregistered document, the provisions of Section 164 of the U.P.Z.A. & L.R. Act, assuming

what the petitioners are saying is correct, will not be attracted."

13. This Court is of the considered opinion that except photostat copy of some alleged document relied upon by the appellants but denied by Laxmi Devi by filing her written statement, there is no document conferring title upon the present appellants. Even if, photostat copy is read for any purpose in the present case, there is nothing on record to establish that the procedure provided under Rules 148 and 149 of Uttar Pradesh Zamindari Abolition & Land Reforms Rules, 1952 was followed. Under such circumstances and following the ratio laid down in authorities discussed above, the ingredients of a deemed sale covered by Section 164 of Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 were not proved in accordance with law. The judgment in Ramanand (supra) has already been held "per incurium" and, hence, its follow up in **Amresh Chandra Pandey** (supra) would be of no avail.

14. This Court further records that in order to sustain a claim for cancellation of a sale deed, as per statutory mandate contained under Section 31 of the Specific Relief Act, 1963, it has to be found as a void or voidable document. In the instant case, none of the pleas raised by the appellants is sufficient to hold the sale deed of 2011 either void or voidable. The revenue entries being also subsisting in favour of the purchasers, this Court is of the considered opinion that right, title, interest and possession of the property forming subject matter of lis vested lawfully in favour of purchasers from Laxmi Devi. Even if, there was some understanding between Laxmi Devi and the present appellants, at the best there could be a lis between them as

regards refund of money allegedly paid by the appellants to Laxmi Devi, but even no such lis came into existence.

15. In view of above discussion, the findings recorded by both the courts below on all disputed aspects involved in the lis, being pure findings of fact, the same do not require any interference in second appellate jurisdiction under Section 100 of Code of Civil Procedure.

16. In *Kamti Devi (Smt.) and Anr. v. Poshi Ram* (2001) 5 SCC 311, the Supreme Court came to the conclusion that the finding reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding. In *Thiagarajan v. Sri Venugopalaswamy B. Koil*, (2004) 5 SCC 762, the Supreme Court has held that the High Court in its jurisdiction under Section 100 C.P.C. is not justified in interfering with the findings of fact and that it is the obligation of the courts of law to further clear intendment of the legislature and not frustrate it by excluding the same and where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappraisal of evidence merely on the ground that another view was possible.

17. Similar view has been taken in *Kondiba Dagadu Kadam vs Savitribai Sopan Gujar and others*, (1999) 3 SCC 722 by observing that disturbance in findings of fact would be contrary to limitations imposed by section 100 C.P.C. The Supreme Court again reminded in *Commissioner, Hindu Religious & Charitable Endowments vs. P. Shanmugama* (2005) 9 SCC 232 that the High Court has no jurisdiction in second appeal to interfere with the findings of fact. The Apex Court, in *State of Kerala v. Mohd. Kunhi*

(2005) 10 SCC 139 reiterated the same principle by observing that by such interference, the High Court would go beyond the scope of Section 100 of the Code of Civil Procedure.

18. In *Madhavan Nair v. Bhaskar Pillai* (2005) 10 SCC 553, the Supreme Court observed that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same. In *Harjeet Singh v. Amrik Singh* (2005) 12 SCC 270, the Apex Court, with anguish, observed that the High Court had no jurisdiction to interfere with the findings of fact arrived at by the trial Court and the lower appellate Court regarding readiness and willingness to perform part of contract in its jurisdiction under Section 100 C.P.C.

19. The view taken in the aforesaid decisions has been reiterated by the Apex Court in *Gurdev Kaur and others vs. Kaki and others*, 2007 (1) SCC 546.

20. No substantial question of law arises for consideration by this Court in both the second appeals.

21. Both the second appeals fail and are, accordingly, **dismissed**.

(2024) 9 ILRA 1342
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.09.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Government Appeal No. 306 of 1993

State of U.P.		...Appellant
	Versus	
Ishaq & Ors.		...Respondents

Counsel for the Appellant:

Govt. Advocate

Counsel for the Respondent:Sri Kr. Shanti Prakash, S. Malik-E-Ashtar Rizvi,
Syed Ahmad Jamal, Syed Fazal Abbas Rizvi

Criminal Law - Indian Penal Code, 1860 - Sections 147 & 302/149 - Appeal against acquittal - Code of Criminal Procedure, 1973 - Sections 161, 162 & 313 - Indian Evidence Act, 1872 - Section 32 - Testimonies of witnesses - P.W.-1, informant and son of deceased St.d he had not seen incident himself, St.ment was based on information provided to him by his father and witnesses, who had witnessed incident - He did not disclose names of witnesses, who had informed him about incident. (Para 47)

P.W.-3, eye-witness declared hostile - Not clear as to who had seen occurrence in its entirety and on whose specific information, P.W.-1 had dictated written report to person who was not examined by prosecution. (Para 48, 49)

In St.ment u/s 161 Cr.P.C. the deceased before his death has given names of accused persons in same seriatum in which they were mentioned in FIR, proved by P.W.-7. - Such a mechanical similarity lends support to contention of accused/respondents that said St.ment was not outcome of own volition of deceased, rather it was Investigating Officer himself, who had reproduced names of accused persons from FIR - In absence of any medical evidence that deceased was in a position to understand and give, his St.ment u/s 161 Cr.P.C. cannot be attached any weightage that too akin to dying declaration. (Para 51, 52, 53)

Summoning of P.W.-10 by trial court was according to Section 311, Cr.P.C - If P.W.-10 had not seen any incident himself then testimony of P.W.-2 difficult to believe, who reached place of occurrence on hearing shouts of P.W.-10 - Appeal lacks merit, dismissed. (Para 57)

Appeal dismissed. (E-13)**List of Cases cited:**

1. Narayan Vs St. of UP, 1984, Allahabad Law Journal 1241
2. Harez Ali Vs St. of Assam, 1981 Criminal Law Journal 1745
3. Aziz Ahmed Vs St. 1982, Allahabad Law Journal 140
4. Balak Ram Vs St. of U.P., 1974 Criminal Law Journal 1486
5. M0anno Raja Vs St. of M.P., 1976 Criminal Law Journal 1718
6. Dilip Singh Vs St. of Pun., AIR 1979, SC 1173
7. Mohar Singh & ors. Vs St. of Pun., 1981 SCC (Crl.) 638
8. Darshan Singh & ors. Vs St. of Pun., AIR 1983 SC 554
9. Ramesh & ors. Vs St. of Har. reported in (2017) 1 SCC 529, (Para 24 and 26)
10. Anwar Ali & anr. Vs St. of H.P. reported in (2020) 10 SCC 166, [Para 14(1)]
11. Zahira Habibulla H. Sheikh & anr. Vs St. of Guj. & ors. reported in (2004) 4 SCC 158

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard Shri Pawan Kumar Mishra, learned A.G.A.-I for the State-appellant, Shri S. Malik-E-Ashtar Rizvi, learned counsel for the respondent nos.1 and 3 and perused the material available on record.

2. By means of the present government appeal, after seeking leave to appeal under Section 378 (3) of Cr.P.C., the State has assailed the impugned judgment and order dated 13.04.1993 passed by IInd

Additional Sessions Judge, Barabanki in Sessions Trial No.120 of 1989 as well as Sessions Trial No.29 of 1991, under Sections 147 and 302/149 of the Indian Penal Code¹, Police Station Mawai, District Barabanki, whereby the accused/respondents were acquitted of the charges under Sections 147 and 302/149 I.P.C.

3. From a perusal of record, it transpires that the instant Government Appeal was filed against six accused-respondents, namely, Ishaq, Ishtiaq, Rahan, Nasiuddin, Saleem and Ishtiaq Khan, out of which, respondent nos.2, 4, 5 and 6, namely, Istiaq, Nasiruddin, Saleem and Ishtiaq Khan, have died. The instant appeal in respect of respondent nos., 2, 4, 5 and 6 has already been abated. Therefore, the appeal survives only with regard to the respondent nos.1 and 3, namely, Ishaq and Rehan Khan, respectively.

4. The case of the prosecution in nutshell is that on 13.06.1987 at about 6:45 P.M., the deceased, Mohammad Arif Khan along with one Aiyoob s/o Latif was coming back from his tubewell. As soon as they reached near the dry Naala of Village Mawai, the accused-respondents, namely, Ishaq and Ishtiaq, sons of Jannu Nanihar, Rehan and Ishtiaq Khan, sons of Iqbal Khan, and Nasiruddin appeared from behind a bush carrying lathis and dandas in their hands and, committed murderous assault on Arif Khan on the exhorting of the accused-respondent, Saleem. On alarm being raised by Aiyoob, Khalil Pathan, Newaz, Phalau and other villagers reached the place of incident, who saw the assailants. Arif Khan fell down after receiving a number of injuries. On being challenged by the witnesses, the assailants ran away towards the Eidgah. The informant, Mohammed Rashid Khan, S/o

Arif Khan also reached the crime scene. The witnesses and the deceased, Arif Khan told him about the occurrence. He took Arif Khan on a cot to the grove of one Imam Ali, where on the basis of details given by injured Arif, Rashid Khan dictated the F.I.R. to his younger brother. The informant then reached the Police Station Mawai along with other villagers carrying injured Arif Khan on a cot and got an first information report, Ext. Ka-6 lodged on the basis of written report, Ext. Ka-1.

5. On the basis of the aforesaid written report, Ext. Ka-1, first information report as Case Crime No.52 of 1987, under Sections 147, 323, 307 I.P.C. came to be registered against the accused-respondents at Police Station Mawai, District Barabanki.

6. P.W.-5, Dr. P. K. Tiwari, the In-charge Medical Officer, Primary Health Centre, Ramsanehi Ghat, Barabanki had examined the deceased, Arif Khan at about 10:30 P.M. on 13.06.1987, when Arif Khan was alive. The following injuries described by P.W.-5, Dr. P. K. Tiwari were found on the body of the deceased, Arif Khan :-

1.	Lacerated wound 3.0 cm x 2.0 cm muscle deep on the left side of scalp, about 13 cm above the left ear.
2.	Lacerated wound 2.5 cm x 0.5 cm on the back of left side of scalp, about 8 cm below the behind left ear.
3.	Lacerated wound 2.0 cm x 1.0 cm on the left side of chin below the right tip X muscle deep.
4.	Contusion swelling 9.0 cm x 3.0 cm on the Rt. side of face just below the right eye.
5.	Contusion 5.0 cm x 3.0 cm on the

	back of left forearm, just behind the elbow joint.
6.	Lacerated wound 2.0 cm x 0.5 cm muscle deep on the right lower leg about 7.0 cm above the Rt. ankle joint.
7.	Contusion traumatic swelling on the right side upper leg 5.0 cm x 3.0 cm, painful and tender advice X-Ray.

7. The postmortem of the deceased, Arif Khan was conducted by P.W.-4, Dr. Dinesh Chandra and the report has been duly proved by him as Ex. Ka-2.

8. According to postmortem report of the deceased, Arif Khan, Ex. Ka-2, the cause of the death is reported to be shock and haemorrhage as a result of ante mortem injuries and following ante mortem injuries were reported on the body of the deceased :-

1.	Abraded contusion 2.5 cm x 2 cm on Lt. side of head, 6.5 cm above from Lt. ear.
2.	Stitched wound 3 cm x 1 cm on left side of forehead, 6 cm above from upper margin of left eye.
3.	Abrasion 5 cm x 3 cm on Rt. side of face just below Rt. lateral margin of Rt. eye.
4.	Abrasion 2.5 cm x 2 cm on Rt. side of chin.
5.	Multiple linear contusion on back of chest and abdomen size ranging from 21 cm x 2.5 cm x 1 cm about.
6.	Abrasion 5 cm x 1 cm on Lt. arm just above Lt. elbow joint on lateral aspect.
7.	Abrasion on back of Lt. forearm 6 x 1 cm, 5 cm above Lt. wrist.
8.	Abrasion 2 cm x 1 cm on tip of Lt. ring finger.

9.	Stitched wound 2 cm x 0.5 cm on Rt. lower leg 6 cm above from Rt. medial Malleolus.
10.	Multiple contusion on back of Rt. leg size ranging from 6 cm x 2 cm to 2 x 2 cm in calf region.

9. The Investigating Officer recorded the statements of witnesses under Section 161 Cr.P.C. He also visited the place of occurrence and prepared site plan as Ext. Ka-10. Upon conclusion of the investigation, he submitted charge sheets as Ext. Ka-12 and Ext. Ka-18 against the accused-respondents.

10. In order to prove its case, the prosecution has examined ten prosecution witnesses i.e. P.W.-1, Rashid Khan, P.W.-2, Khalil Pathan, P.W.-3, Newaz, P.W.-4, Dr. Dinesh Chandra, P.W.-5, Dr. P. K. Tiwari, P.W.-6, Santosh Kumar Upadhyay, P.W.-7, Atar Singh Yadav, P.W.-8, A. K. Bajpai, P.W.-9, R. P. Saroj and P.W.-10, Mohd. Aiyob Khan.

11. The accused-respondents were charged under Sections 147 and 302/149 I.P.C., who denied the charges and claimed to be tried.

12. Ram Tirath has been examined as D.W.-1 from the side of defence.

13. After the conclusion of prosecution evidence, the statements of accused-respondents were recorded under Section 313 Cr.P.C., wherein they have stated the prosecution story to be false and concocted and also stated themselves to be innocent, who have been falsely implicated in this case.

14. The learned trial Court vide impugned judgment and order dated

13.04.1993 has acquitted the accused-respondents of all the charges.

15. Aggrieved by the aforesaid impugned judgment and order whereby the accused-respondents were acquitted, the State has sought to leave to appeal as aforesaid.

16. P.W.-1, Rashid Khan has stated that about four years ago his father was returning from the tubewell and when he reached near the Naala, the accused-respondents, namely, Salim, Ishaq and Ishtiaq, sons of Jannu, Rehan and Ishtiyahq sons of Iqbal and Nasiruddin had assaulted his father with lathis. On alarm being raised by Aiyoob and his father, P.W.-2, Khalil Pathan, Phalau and P.W.-3, Newaz had reached there and accused-respondents had run away. P.W.-1, Rashid Khan admitted that he had not seen the occurrence but was told about it by the witnesses and his father when he reached there.

17. P.W.-2, Khalil Pathan has stated that about four and half years ago at about 7:00 P.M., he was returning from Digambarapur and when he reached near the Naala, he heard shouts. Phalau and Newaz were also with him, and Aiyoob was following them. They saw that Arif Khan was being assaulted by the accused-respondents. When they challenged the accused-respondents, they ran away. In the meantime, P.W.-1, Rashid Khan also reached there with Arif's other son, namely Saleem. Arif Khan was taken on a cot to the grove where Saleem had written the report on the dictation of Rashid Khan.

18. P.W.-3, Newaz, who is said to be an eye witness of the occurrence, has stated that the murder of Arif Khan had not taken place in his presence. He also stated

that he had seen nothing and was declared hostile.

19. P.W.-4, Dr. Dinesh Chandra conducted the autopsy on the body of the deceased, Arif Khan, at about 3:30 P.M. on 14.06.1987. He prepared the post-mortem report and proved its genuineness in Court. The details of the injuries sustained by the deceased were mentioned in the statement of P.W.-4, Dr. Chandra, who only stated that the death of the deceased was caused due to ante-mortem injuries. The injuries were described by P.W.-4, Dr. Dinesh Chandra and also by P.W.-5, Dr. P. K. Tiwari, the In-charge Medical Officer, Primary Health Centre, Ramsanehi Ghat, Barabanki, who had examined Mohammed Arif Khan at about 10:30 P.M. on 13.06.1987, when Arif Khan was alive.

20. P.W.-5, Dr. P. K. Tiwari also stated that the deceased died in hospital at about 10:40 P.M. and he had sent the information to the Station House Officer, Police Station Ramsanehi Ghat immediately thereafter.

21. P.W.-6, Constable, Santosh Kumar Upadhyay is a formal prosecution witness. Atar Singh Yadav, Sub Inspector posted at Police Station Mawai, who had conducted the investigation and who stated that after receipt of the F.I.R. at the police station, he had immediately started the investigation and recorded the statement of the deceased, Arif Khan under section 161 Cr.P.C. was examined as P.W.-7. The true copy of the statement recorded by him is Ext. Ka-9. He also prepared the site plan of the place of occurrence and collected blood-stained and plain soil from the place of the occurrence. On 22.06.1987, the investigation was transferred to Station House Officer, Sri Hari Shankar Singh,

who submitted the charge sheet against the accused-respondents, Ishtiyag S/o Januu, Ishaq S/o Januu, Rehan, Nasirudin and Saleem.

22. P.W.-8, A. K. Bajpai, the then Station House Officer of Ramsanehi Ghat, who prepared the Punchnama and P.W.-9, R. P. Saroj, the then Station House Officer of Police Station Mawai, who submitted the charge sheet against the accused-respondents, Ishtiaq Khan S/o Iqbal Khan were all examined as official witnesses.

23. Mohammad Aiyoob Khan, who was stated to have accompanied the deceased, Arif Khan at the time of occurrence was examined under section 311 of the Cr.P.C. as P.W.-10. He stated that on the day of the occurrence, he had gone to Mawai and was returning at about 7:30 P.M., and on the way, there was a tubewell of Arif Khan, where he had seen Arif Khan and then proceeded towards his village. When he had crossed the Naala, he heard some shouts on his backside and returned to the Naala. It was around 8:30 P.M. at the time. He found Arif lying in the Naala in an injured condition and unconscious. He did not see anybody either hitting Arif Khan or present on the spot. He went to the village and informed P.W.-1, Rashid Khan and returned along with P.W.-1, Rashid Khan and other persons of the village to where Arif Khan was lying unconscious. Arif Khan was taken to the police station and PW 10 then went back to his house.

24. Ram Tirath Pradhan of village Mawai was examined as D.W.-1. D.W.-1 has stated that in the year 1987, the accused-respondent, Ishaq was the Block Pramukh of Mawai. On 13.06.1987, he had gone to the Block, at about 5:00 P.M., but was informed that the Block Pramukh had

gone to Lucknow. He went to the old market and by that time the Block Pramukh had arrived at about 6:00 P.M. He along with the Block Pramukh and other persons sat on a cot in the Islamia school and discussed up to 8:30 P.M. At 8:30 P.M., Rashid Khan came shouting and told that his father had been killed by somebody.

25. It has been argued by the learned A.G.A., Shri Pawan Kumar Mishra that trial court has committed manifest and patent illegality in summoning and examining as a witness P.W.-10, Mohammed Aiyoob Khan under section 311 of the Cr.P.C., in spite of the fact that the said witness was already discharged by the prosecution and it was mentioned in the discharge application dated 05.08.1992 that the said witness, Mohammad Aiyoob Khan had turned hostile to the prosecution, and that is why his discharge was necessary. The accused persons had not raised any objections against the discharge of Mohammad Aiyoob Khan as a witness, but due to reasons best known to the trial court, the said witness was summoned all of a sudden after fixation of date for announcement of judgement and also after adjournment of the case once for the purpose of delivery of judgement. Mohammad Aiyoob Khan damaged the whole prosecution case after submission of evidence of the prosecution.

26. Also, the trial court failed to consider the evidence of witness P.W.-2, Khalil Pathan, who proved the whole prosecution case. The trial court failed to appreciate that Arif Khan was carried to the police station on a cot and he was present during lodging of the F.I.R. by the informant and his statement under section 161 Cr.P.C. was recorded in the presence of witnesses i.e. P.W.-1, Rashid Khan and

P.W.-2, Khalil Pathan. Such statement was in fact, a dying declaration as Arif Khan died soon thereafter. On the basis of said dying declaration and the deposition of two prosecution witnesses, the finding of guilt and consequent conviction alone was possible and the trial court committed a patent error in not accepting the evidence already on record and believing the evidence of two hostile witnesses i.e. P.W.-3 Newaz, and P.W.-10, Aiyoob Khan.

27. It has also been argued that the trial court seriously prejudiced the prosecution case by summoning Mohammad Aiyoob Khan as court witness under section 311 Cr.P.C. suo Moto as no application on behalf of the prosecution was filed. The trial court compelled the prosecution to examine the said witness as P.W.-10.

28. Per contra, learned counsel for the surviving accused-respondents has vehemently submitted that the appellate court possesses power to re-appreciate the evidence available on record while dealing with an appeal against acquittal. However, such power of appellate court is circumscribed by the fact that while re-appreciating evidence available on record, the appellate court is expected to bear in mind that the presumption of innocence gets strengthened by the judgment of acquittal recorded in favour of the accused-respondents.

29. His further submission is that the prosecution has miserably failed to establish its case beyond reasonable doubt against the surviving accused-respondents. The trial Court has rightly disbelieved the testimonies of witnesses of facts, namely, P.W.-1, Rashid Khan, P.W.-2, Khalil Pathan

and P.W.-3, Newaz and P.W.-10, Aiyoob Khan.

30. His next submission is that the impugned judgment and order dated 13.04.1993 is well discussed and reasoned which is based on proper appreciation of evidence available on record which cannot be said to be perverse. Therefore, no interference with the same is warranted in exercise of power of this Court under Section 386 Cr.P.C.

31. His further submission is that after careful analysis of prosecution evidence, the trial Court has recorded the finding of acquittal of accused-respondents which is the only possible view which could be formed on the basis of evidence available on record. Therefore also, no interference with the impugned judgment and order dated 13.04.1993 is warranted by this Court.

32. We have gone through the judgement and order under appeal and carefully examined the record of the case, including statement of the deceased, Ext. Ka-9 and also the F.I.R., Ext. Ka-6 and matched the same with written report by P.W.-1, Ext. Ka-1. We have also examined carefully the post-mortem report, Ext. Ka-2 and the injury report, Ext. Ka-4.

33. A careful perusal of impugned judgment and order dated 13.04.1993 reveals that the trial court after summarizing the evidence of the prosecution witnesses and the defence witnesses and the accused examined the report of the occurrence, Ext. Ka-1 which was submitted by P.W.-1, Rashid Khan, S/o the deceased, Arif Khan. The trial judge has noted that P.W.-1 had stated that he had not seen the occurrence, but he was told by

other villagers and when he reached there, the assailants had already run away. The report that was submitted by him in the police station was on the basis of details given to him by his father and other witnesses. It was not stated by P.W.-1 that which part of the occurrence as mentioned in the report, and the F.I.R. had been told to him by his father, and which part was told by the witnesses. Unless there was a specific description by P.W.-1, as to what was told to him by his father, the written report of Rashid Khan could not be treated to be a dying declaration. Moreover, Ext. Ka-1 did not mention anywhere that P.W.-1 was told about the occurrence by Arif Khan, the deceased.

34. The trial court noted the judgement cited by the prosecution, namely, **1. Narayan versus state of UP, 1984, Allahabad law journal 1241 ; 2. Harez Ali versus state of Assam, 1981 criminal law journal 1745 ; 3. Aziz Ahmed versus state 1982, Allahabad Law journal 140** and has observed that in all these cases, it has been held that where, after making the statement before the police, the victim succumbed to his injuries, his statement could be treated as a dying declaration and was admissible under section 32 (1) of the Indian Evidence Act and would be protected by section 162 (2) of the Cr.P.C. and accepted the legal position that a statement recorded under section 161 of the Cr.P.C. can be read as a dying declaration if the maker of the statement dies soon afterwards, but looking into the facts and circumstances of the case, the trial judge was doubtful if any such statement as had been proved to be Ext. Ka-9 was recorded by the Investigating Officer, Atar Singh Yadav. When the statement itself was doubtful, it could not

be relied upon to convict the accused persons.

35. The trial judge has also noted the judgements of the Supreme Court in **Balak Ram Vs. State of UP, 1974 Criminal Law Journal 1486; Manno Raja Vs. state of M.P., 1976 Criminal Law Journal 1718; Dilip Singh Vs. State of Punjab, AIR 1979, SC 1173; Mohar Singh and others Vs. State of Punjab, 1981 SCC (Crl.) 638 and Darshan Singh and Others Vs. State of Punjab, AIR 1983 SC 554** and noted that in all such cases, the Supreme Court had observed that the investigating officers are keenly interested in fruition of their case and although no assumption can be made against their veracity, it is not prudent to base the conviction on a dying declaration made to an Investigating Officer. It was observed that if an Investigating Officer thought that the victim was in a precarious condition, he ought to have requisitioned the services of a Magistrate for recording the dying declaration or tried to get a certificate from the Medical Officer treating the patient that he was in a fit condition to make such a statement once such procedure is not followed, it is better to leave such a dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a doctor. The practice of the Investigating Officer himself recording a dying declaration during the course of investigation is not to be encouraged. It is not that such dying declarations are always untrustworthy, but better and more reliable methods of recording dying declaration of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no

time or facility available to the prosecution for adopting any better method.

36. The trial court noted the observations made by the Supreme Court that a very detailed and coherent dying declaration recorded by the investigating officer without attestation of the same by the witnesses present should not be ordinarily relied upon. When it is said that a conviction can rest on a dying declaration, it is implied that it must inspire confidence so as to make it safe to act upon it. Hence, when from the medical evidence on record, it was found that the vital organs of the deceased were completely smashed, he could not be said to be in a fit state of mind and body to make any kind of coherent or credible statement relating to the circumstances which resulted in his death. Therefore, his dying declaration could not be relied upon for any purpose and had to be excluded from consideration.

37. The learned trial court thereafter has quoted section 32 of the Indian Evidence Act and also section 162 of the Cr.P.C. and the Exception carved out regarding any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act. A statement recorded under section 161 of the Cr.P.C. can be read in evidence under section 162 (2) of the Cr.P.C. if it falls within the provisions of clause (1) of section 32 of the Indian Evidence Act. The trial judge examined the statement of the deceased recorded under section 161 Cr.P.C. marked as Ext. Ka-9, and noted that it mentioned serially the names of the accused, which serial numbers matched with the serial numbers of the accused as given in the FIR.

38. It also noted that the statement under section 161 Cr.P.C. was recorded by

Atar Singh Yadav, the Investigating Officer, purportedly at the police station in the presence of P.W.-1, Rashid Khan, P.W.-2, Khalil Pathan, and also several other villagers, at a time when the deceased was seriously injured and in an extremely precarious condition. The statement was a detailed and coherent narration of the occurrence running into two pages. The Sub Inspector, however, did not take care to follow the provisions of para 115 of the Police Regulations and did not try to get such statement recorded by learned Magistrate. He also did not try to get a certificate from a Medical Officer regarding the fitness of the injured to get his statement recorded. The Investigating Officer did not also get the thumb impression of the deceased or of any other witnesses present at the police station at the time of recording of such statement under section 161 Cr.P.C., knowing fully well that the condition of the deceased was precarious/very serious as mentioned at the very beginning of such statement by the Investigating Officer in his own handwriting. The Investigating Officer in such alleged statement under section 161 Cr.P.C. has mentioned the names of the accused in exactly the same order, at the same serial numbers as mentioned in the FIR. Not only the procedural niceties were not followed by the investigating officer while recording such statement under section 161 Cr.P.C., the trial court has also noted that the medical condition of the injured, Arif Khan was not such as would allow him to make such a detailed and coherent statement under section 161 Cr.P.C.. The trial court has noted that injury report showed at least two very serious injuries on the back of the head of the deceased and several other injuries on his body. The temporal bone was fractured. The membranes of the brain were congested.

39. It was also noted that when the deceased was brought on a cot to the Police Station Mawai at about 7:30 P.M. and his

statement recorded soon thereafter, he was referred to the Primary Health Centre at Ramsanehi Ghat, Barabanki, where the doctor on duty, P.W.-5, Dr P. K. Tiwari has recorded that the patient was brought at 10:30 P.M. and he died at about 10:45 P.M. The trial judge noted that the deceased died within three hours of being injured. His medical condition was precarious. His speech, would not have been so clear as has been mentioned by the sub inspector Attar Singh in Ext. Ka-9.

40. The trial judge has noted the observations made by Dr R. M. Jhala in his book on Medical Jurisprudence, (Fourth Edition at page 200) that speech is affected or lost after injury to the wind pipe, larynx or to the brain in the area covering speech. In case of injuries to the heart, the size and direction of the injuries entering the heart prove helpful in arriving at a conclusion. The injury report, Ext. Ka-4 showed that the deceased had sustained injuries on his head, besides other parts of his body. His temporal bone had been fractured, his brain membranes were congested with haematoma on the left temporal region and observed that the brain of the deceased was congested and he had two wounds on the head and his temporal bone was fractured, and in these circumstances, it was impossible to give a long detailed and coherent statement as has been recorded by the Investigating Officer. The trial judge, found that the deceased was not in a fit condition to make any statement.

41. The trial judge noted that the Investigating Officer, Atar Singh Yadav may have copied the F.I.R. in the Case Diary as a statement under section 161 of the Cr.P.C. He has further observed that he was fortified in such a conclusion by careful examination of the statements of the

prosecution witnesses. The ocular testimony on record of P.W.-1, Rashid Khan, the son of the deceased stated that P.W.-10, Aiyooob Khan was accompanying the deceased when the occurrence had taken place. It was P.W.-10, Aiyooob Khan, who had shouted out/raised an alarm and on hearing him, P.W.-2, Khalil Pathan and P.W.-3, Newaz had reached the spot. On the other hand, P.W.-10, Aiyooob Khan had stated that he was not accompanying the deceased but was going alone to his village and when he had crossed the Naala, he had heard some noises and had turned back and when he reached the place of the occurrence, Arif Khan was lying unconscious in an injured condition. No one else was present there. He was the first person to have reached the place of occurrence. If Aiyooob Khan did not see the assailants, there was no question of any other witness seeing the occurrence. P.W.-3, Newaz had also stated that he did not see the assailants injuring Arif Khan and he had reached there only once an alarm was raised by Aiyooob Khan. P.W.-2, Khalil Pathan had also stated that he had reached the place of occurrence on hearing the shouts of Aiyooob Khan. P.W.-10, Aiyooob Khan, having already mentioned in his statement that he had not seen the assailants and also that he did not see anyone injuring the deceased, there was a reasonable doubt regarding the correctness of the statements of P.W.-2 and P.W.-3 alleged witnesses. P.W.-2 had also stated that there was a heavy growth of Sarpat and Moonj, (high wild grasses) almost in the form of a jungle near the Naala. The trial judge therefore did not believe the ocular testimony of P.W.-2 and P.W.-3. P.W.-1 had admitted that he had reached the place only after sometime that is after Mohammad Aiyooob Khan, Khalil Pathan, Newaz and Phalau , had already reached the place of occurrence.

42. The trial court also noted that in his statement under Section 313 Cr.P.C. the accused-respondent, Ishtiaq Khan had stated that he was the Block Pramukh of Mawai Block, and one Marhoob Ahmad was the M.L.A. of the same area and the case had been fabricated against him at the instance of Marhoob Ahmad out of political enmity. Tariq Khan, the real nephew of Marhoob Ahmad had contested the election of Block Pramukh against Ishtiaq Khan, but Ishtiaq Khan had won the same. One Shifat Ahmad Khan, who is an advocate and also nephew of Marhoob Ahmad Khan was also found to have accompanied Mohammed Rashid Khan to the police station. P.W.-1 and P.W.-2 had not mentioned the names of Tariq Khan and Shifat Ahmad Khan amongst the villagers who accompanied them to the police station, but the General Diary of the police spoke otherwise showing that both Shifat Ahmad Khan and Tariq Khan nephews of Marhoob Ahmad Khan had accompanied Rashid Khan to the police station when he went there to lodge the report. It was evident that P.W.-1, Rashid Khan and P.W.2, Khalil Pathan had intentionally spoken lies and suppressed the fact that both nephews of Marhoob Ahmad Khan MLA, had also gone to the police station with them to lodge the report. The possibility of the case having been framed, against the accused, under the influence of Marhoob Ahmad Khan could not be ruled out.

43. Before we undertake appreciation of prosecution evidence as discussed above in the light of submissions advanced by learned counsel for the parties, we deem it appropriate to refer to judgments rendered by Hon'ble Supreme Court in **Ramesh and others vs. State of Haryana** reported in (2017) 1 SCC 529 and **Anwar Ali and another vs. State of**

Himachal Pradesh reported in (2020) 10 SCC 166 pertaining to appreciation of evidence in an appeal against an acquittal.

44. The Hon'ble Supreme Court in **Ramesh and others (Supra)**, in paragraphs 24 and 26, has held as under:-

“24. We have duly appreciated the submissions advanced by the counsel for the parties on both sides. No doubt, the High Court was dealing with the appeal against the judgment of the trial court which had acquitted the appellants herein. The scope of interference in an appeal against acquittal is undoubtedly narrower than the scope of appeal against conviction. Section 378 of the Code of Criminal Procedure, 1973 confers upon the State a right to prefer an appeal to the High Court against the order of acquittal. At the same time, sub-section (3) thereof mandates that such an appeal is not to be entertained except with the leave of the High Court. Thus, before an appeal is entertained on merits, leave of the High Court is to be obtained which means that normally judgment of acquittal of the trial court is attached a definite value which is not to be ignored by the High Court. In other words, presumption of innocence in favour of an accused gets further fortified or reinforced by an order of acquittal. At the same time, while exercising its appellate power, the High Court is empowered to reappraise, review and reconsider the evidence before it. However, this exercise is to be

undertaken in order to come to an independent conclusion and unless there are substantial and compelling reasons or very strong reasons to differ from the findings of acquittal recorded by the trial court, the High Court, as an appellate court in an appeal against the acquittal, is not supposed to substitute its findings in case the findings recorded by the trial court are equally plausible.

26. This legal position is reiterated in *Govindaraju v. State* [*Govindaraju v. State*, (2012) 4 SCC 722 : (2012) 2 SCC (Cri) 533] and the following passage therefrom needs to be extracted: (SCC p. 732, paras 12-13)

“12. The legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 CrPC. This is an indication that appeal from acquittal is placed on a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 CrPC has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate court on merits as in the case of a regular

appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-section (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the courts.

13. Under the scheme of CrPC, acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the appellate court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law.”

(Emphasis supplied by us)

45. The Hon'ble Supreme Court in **Anwar Ali (Supra)**, in paragraphs 14(1), has held as under:-

“14.1. In *Babu [Babu v. State of Kerala]*, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179, this Court had reiterated the principles to be followed in an appeal against

acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under : (SCC pp. 196-99)

“12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. [Balak Ram v. State of U.P., (1975) 3 SCC 219 : 1974 SCC (Cri) 837] , Shambhoo Missir v. State of Bihar [Shambhoo Missir v. State of Bihar, (1990) 4 SCC 17 : 1990 SCC (Cri) 518] , Shailendra Pratap v. State of U.P. [Shailendra Pratap v. State of U.P., (2003) 1 SCC 761 : 2003 SCC (Cri) 432] , Narendra Singh v. State of M.P. [Narendra Singh v. State of M.P., (2004) 10 SCC 699 : 2004 SCC (Cri) 1893] , Budh Singh v.

State of U.P. [Budh Singh v. State of U.P., (2006) 9 SCC 731 : (2006) 3 SCC (Cri) 377] , State of U.P. v. Ram Veer Singh [State of U.P. v. Ram Veer Singh, (2007) 13 SCC 102 : (2009) 2 SCC (Cri) 363] , S. Rama Krishna v. S. Rami Reddy [S. Rama Krishna v. S. Rami Reddy, (2008) 5 SCC 535 : (2008) 2 SCC (Cri) 645] , Arulveluv. State [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] , Perla Somasekhara Reddy v. State of A.P. [Perla Somasekhara Reddy v. State of A.P., (2009) 16 SCC 98 : (2010) 2 SCC (Cri) 176] and Ram Singh v. State of H.P. [Ram Singh v. State of H.P., (2010) 2 SCC 445 : (2010) 1 SCC (Cri) 1496])”

13. In Sheo Swarup v. King Emperor [Sheo Swarup v. King Emperor, 1934 SCC OnLine PC 42 : (1933-34) 61 IA 398 : AIR 1934 PC 227 (2)] , the Privy Council observed as under : (SCC Online PC : IA p. 404)

‘... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.’

14. The aforesaid principle of law has consistently been followed by this Court. (See

Tulsiram Kanu v. State [*Tulsiram Kanu v. State*, 1951 SCC 92 : AIR 1954 SC 1] , *Balbir Singh v. State of Punjab* [*Balbir Singh v. State of Punjab*, AIR 1957 SC 216 : 1957 Cri LJ 481] , *M.G. Agarwal v. State of Maharashtra* [*M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200 : (1963) 1 Cri LJ 235] , *Khedu Mohton v. State of Bihar* [*Khedu Mohton v. State of Bihar*, (1970) 2 SCC 450 : 1970 SCC (Cri) 479] , *Sambasivan v. State of Kerala* [*Sambasivan v. State of Kerala*, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320] , *Bhagwan Singh v. State of M.P.* [*Bhagwan Singh v. State of M.P.*, (2002) 4 SCC 85 : 2002 SCC (Cri) 736] and *State of Goa v. Sanjay Thakran* [*State of Goa v. Sanjay Thakran*, (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162] .)

15. In *Chandrappa v. State of Karnataka* [*Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325] , this Court reiterated the legal position as under : (SCC p. 432, para 42)

‘(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong

circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused.

Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.’

16. In *Ghurey Lal v. State of U.P.* [*Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450 : (2009) 1 SCC (Cri) 60] , this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's

acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In *State of Rajasthan v. Naresh* [State of Rajasthan v. Naresh, (2009) 9 SCC 368 : (2009) 3 SCC (Cri) 1069] , the Court again examined the earlier judgments of this Court and laid down that : (SCC p. 374, para 20)

‘20. ... An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.’

18. In *State of U.P. v. Banne* [State of U.P. v. Banne, (2009) 4 SCC 271 : (2009) 2 SCC (Cri) 260] , this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include : (SCC p. 286, para 28)

‘(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.’

A similar view has been reiterated by this Court in *Dhanapal v. State* [Dhanapal v. State, (2009) 10 SCC 401 : (2010) 1 SCC (Cri) 336] .

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.”

(Emphasis supplied by us)

46. A close scrutiny of testimonies of P.W.-1, Rashid Khan, P.W.-2, Khalil Pathan and P.W.-3, Newaz would reveal that P.W.-3, Newaz, who is also stated to be an eye-witness of the occurrence, has not supported the prosecution case and who, therefore, was declared hostile. It thus

leaves us with the testimonies of two prosecution witnesses, namely, P.W.-1, Rashid Khan, who is the first informant and P.W.-2, Khalil Pathan.

47. P.W.-1, Rashid Khan, who is the first informant and son of the deceased, Arif Khan, has stated that he had not seen the incident himself rather whatever he has stated in his examination-in-chief was based on the information provided to him by his father, the deceased, Arif Khan and the witnesses, who had witnessed the incident. However, he did not disclose names of such witnesses, who had informed him about the said incident.

48. As stated above, P.W.-3, Newaz, who was sought to be projected as an eye-witness of the occurrence has not supported the prosecution case and has been declared hostile. P.W.-10, Aiyoob Khan has not supported the prosecution case in its entirety who was summoned by the trial Court in exercise of power under Section 311 Cr.P.C. Now we come to testimony of P.W.-2, Khali Pathan, who has stated in his testimony that about four and a half year ago at about 7:00 P.M., he was returning from Digambarapur and when he reached near the Naala, he heard shouts. Phalau and Newaz were also with him, and Aiyoob was following them. They saw that Arif Khan was being assaulted by the accused-respondents. When they challenged the accused-respondents, they ran away. In the meantime, P.W.-1, Rashid Khan also reached there with Arif's other son, namely Saleem. P.W.-3, Newaz has stated that written report, Ext. Ka-1 was scribed by Saleem on the dictation of P.W.-1, Rashid Khan.

49. It, thus, does not make it clear as to who had seen the occurrence in its

entirety and on whose specific information, P.W.-1, Rashid Khan had dictated the written report, Ext. Ka-1, which was scribed by Saleem, who has not been examined by the prosecution. Though, no specific number of witnesses is required to prove the prosecution case beyond reasonable doubt, it is trite that the prosecution has to prove its case beyond reasonable doubt on the basis of cogent and reliable testimony (s) of prosecution witness (s).

50. Much emphasis has been laid on the statement of the deceased, Arif Khan, which was recorded under Section 161 of Cr.P.C. and was proved by P.W.-7, Attar Singh Yadav, Ext. Ka-9.

51. While appreciating its veracity we notice that in the statement recorded under Section 161 Cr.P.C. the deceased, Arif Khan before his death has given names of accused persons in the same seriatum in which they were mentioned in the first information report.

52. Such a mechanical similarity lends support to the contention of learned counsel for the accused-respondents that the said statement was not the outcome of own volition of the deceased, rather perhaps it was the Investigating Officer himself, who had reproduced the names of accused persons from the first information report.

53. Having regard to the various injuries reported on the body of the deceased, who was examined on 13.06.1987 at about 10:30 P.M. and who, according to P.W.-5, Dr. P. K. Tiwari, died at about 10:40 P.M. on the same day because of injuries reported on his body, the time of incident, according to written

report, Ext. Ka-1, is about 6:45 P.M. and the report was lodged at 7:30 P.M. In absence of any medical evidence to the effect that the deceased was in a position to understand and give, his statement as recorded under Section 161 Cr.P.C. by the Investigating Officer, therefore, the same cannot be attached any extra weightage that too akin to dying declaration.

54. So far as the testimony of P.W.-10, Aiyoob Khan is concerned, we do not find any substance in contention of learned counsel for the State that once he was discharged by the prosecution, it was not open to the learned trial Court to have summoned him and examined him as prosecution witness. In this regard, the wide import of Section 311 Cr.P.C. particularly its concluding part is to be seen.

55. For ready reference, Section 311 of Cr.P.C., being relevant, is quoted herein below :-

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

56. Power of such summoning of any material witness is vested with the courts power under Section 311 Cr.P.C..

Summoning of P.W.-10, Aiyoob Khan in the facts of this case in our considered view is strengthened by a judgment rendered by Hon'ble Supreme Court in **Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others** reported in (2004) 4 SCC 158.

57. Thus, we notice that if P.W.-10, Aiyoob Khan had not seen any incident himself then it is difficult to believe the testimony of P.W.-2, Khalil Pathan also, who is said to have reached the place of occurrence on hearing shouts of Ayooob Khan, P.W.-10.

58. Having considered the matter in its entirety in the light of evidence adduced by the prosecution and in view of the law laid down by Hon'ble the Supreme Court in **Ramesh and others (supra), Anwar Ali (supra) and Zahira Habibulla H. Sheikh (supra)**, we find that the learned trial court's findings regarding acquittal of surviving accused/respondents herein, are based on proper appreciation and analysis of evidence available on record which do not, in any manner, appear to be improbable or perverse. The order of acquittal of the surviving accused/ respondents on the face of evidence appears to be probable view which does not suffer from any infirmity.

59. In the light of what has been discussed above, we are of the considered view that the appeal lacks merit, which deserves to be dismissed and the same is hereby **dismissed**.

60. The accused/ respondent nos.1 and 3 are on bail. Their bail bonds are cancelled. Sureties are discharged.

61. In compliance with the provision contained in Section 437-A Cr.P.C. the accused/ respondent nos.1 and 3

are directed to furnish the personal bonds and two sureties each to the satisfaction of the court concerned within a period of eight weeks from today.

62. Let the trial court record along with a copy of this judgment be transmitted forthwith to the learned trial Court for information and necessary compliance.

(2024) 9 ILRA 1359
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

S.C.C. Revision No. 1 of 2023

Santosh Singh ...Revisionist
Versus
Smt. Suman Shukla & Anr. ...Respondents

Counsel for the Revisionist:
 Km. Vishwa Mohini, Vimal Kumar

Counsel for the Respondents:
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A. Civil Law - Provincial Small Cause Court Act, 1887-Section 25-dispute over the execution of an ejectment decree for a shop-The revisionist filed an ejectment suit claiming landlord-tenant relations with the defendant, who failed to pay rent from May 2009-the trial court passed an ex-parte decree in favour of the revisionist in 2013-wife of the defendant claimed ownership of the shop based on a sale deed executed by Shyam Lal in 2012-the defendant's contested the revisionist's ownership and denied landlord-tenant relations-the wife of defendant filed objection-The court held that SCC can incidentally decide title disputes arising during execution proceedings as per Order XXI Rule 97 CPC, but such findings do not have res judicata effect-The executing

court accepted defendant's wife ownership claim based on her registered sale deed, setting aside the revisionist's decree-SCCs have limited jurisdiction to address incidental title disputes during ejectment suits-A decision on title by SCCs is subject to further adjudication by competent civil courts-The High Court dismissed the revision petition affirming the lower court's decision, while clarifying that it does not bar the revisionist from filing a regular civil suit to establish title.(Para 1 to 25)

The revision is dismissed. (E-6)

List of Cases cited:

1. Mohd. Hamid Vs Mohdd Moin (2018)AIR Online Alld 2663 (Neutral Citation No:- 2018 : AHC 104118)
2. Budhu Mal Vs Mahabir Prasad (1988) 4 SCC 194
3. Nooruddin Vs K.L. Anand (Dr)(1995) 1 SCC 242
4. Nirmal Jeet Singh Hoon Vs Irtiza Hussain (2010) 14 SCC 564

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

1. By means of the instant revision filed under Section 25 of the Provincial Small Cause Court Act, 1887, the revision-petitioner has prayed for setting aside the judgment and an order dated 21.05.2022 passed by the learned Additional District Judge/Special Judge, P.C. Act, Court no. 3, Lucknow in Miscellaneous Case No. 39-C of 2013, which was registered upon an application under Order XXI Rules 97, 98, 99 read with 101 of Civil Procedure Code filed in Execution Case No. 01 of 2013, which execution case was filed for execution of the ejectment decree passed by the learned Additional District Judge, Court no. 13, Lucknow in SCC Suit No. 72 of 2010.

2. The aforesaid SCC Suit was filed by the revision-petitioner against the opposite party no. 2 - Santosh Shukla pleading that the petitioner was the owner and landlord of House 294/90 situated at Mohalla Bazar Khala, Lucknow. The defendant was his tenant in respect of one of the shops situated on the ground floor of the building at Rs 3,000/- per month rent. The defendant did not pay rent to the plaintiff-revisionist after April, 2009 and he was in arrears of rent since 01.05.2009. On 11.06.2010, the plaintiff had sent a notice under Section 106 of the Transfer of Property Act which was served upon the defendant but the defendant did not pay rent of the premises to the plaintiff and he did not vacate the shop in his tenancy. As there was a typographical error in the notice dated 11.06.2010, inasmuch instead of a single door shop, a two door shop was wrongly been mentioned in the notice, the plaintiff sent another notice dated 12.07.2010. The defendant sent a reply dated 03.07.2010 denying the averments made in the plaintiff's notice.

3. The trial court has recorded in the judgment and order dated 12.04.2013 that the summons of the Suit was deemed to be sufficient on 03.02.2012 as the defendant had declined to receive the notice and on 30.03.2012 the Suit was ordered to proceed ex-parte. The trial court has made a narration of the documentary evidence filed by the plaintiff and his affidavit filed in evidence. The trial court reproduced the plaint averments and noted that in the reply dated 03.07.2010 sent in response to the notice under Section 106 of the Transfer of Property Act, the defendant had denied the relationship of landlord and tenant between him and the plaintiff. The trial court mentioned that the plaintiff had filed counterfoils of receipts for payment of

rent dated 01.07.2008, 01.08.2008, 03.09.2008, 02.01.2009, 02.02.2009, 04.03.2009 and 01.04.2009 alongwith a list of documents filed with the plaint and held that the defendant has not filed any evidence to rebut the plaintiff's evidence and, therefore, the plaintiff's case was proved ex-parte. Accordingly, the plaintiff's suit was decreed.

4. The opposite party filed an application under Order IX Rule 13 C.P.C., which was registered as Miscellaneous Case No. 28-C of 2013. However, it was dismissed by means of an order dated 07.10.2016 wherein it is recorded that the applicant's counsel stated that he did not want to press the application.

5. The plaintiff-revisionist filed Execution Case No. 1 of 2023 for execution of the decree dated 12.04.2013 passed in S.C.C. Suit No. 72 of 2010.

6. The opposite party no. 1 - Suman Shukla filed an application under Order XXI Rules 97, 98, 99 read with 101 C.P.C. in Execution Case No. 1 of 2023. This application was registered as Miscellaneous Case No. 39-C of 2013. The opposite party no. 1 stated in the application that she has purchased the shop in question from Shyam Lal son of Sunder Lal through a sale deed dated 14.03.2012, which was registered in the office of Sub Registrar-V, Lucknow in Book No. 1, Volume 7518 at pages from 197 to 234 at Serial No. 2797. House No. 294/90 Mohalla Bazar Khala is a big house, a portion whereof has been sold by Shyam Lal to opposite party no. 1. Shyam Lal has sold another portion of the house to Sayeed Ahmad and Smt. Radha Agarwal and some other tenants are in occupation of a third portion of the house of Shyam Lal for the

past several years. The opposite party no. 1 further stated that her husband Santosh Shukla (opposite party no. 2) is a person of low intellect and she bears the responsibility of bringing up and educating her children. Upon coming to know that the opposite party no. 1 has purchased the shop from Shyam Lal, the revisionist Santosh Singh started harassing her, due to which she had filed Regular Suit No. 320 of 2012 in the court of Civil Judge (Senior Division), Mohanlalganj, Lucknow for a decree of perpetual injunction. From the documents filed by the revisionist in the aforesaid Suit, the opposite party no. 1 came to know about S.C.C. Suit No. 72 of 2010 and the ex-parte judgment and decree dated 12.04.2013 passed therein as also the Execution Case No. 1 of 2023. She stated that the revisionist had filed the Suit against the husband of the opposite party no. 1 - who is a person of low intellect and had obtained the ex-parte judgment and decree dated 12.04.2013 fraudulently, whereas Santosh Singh is neither owner of the shop in question nor is he the landlord. She stated that the house in which the shop in question is situated, was ancestral property of Shyam Lal and having purchased the shop from Shyam Lal, the opposite party no. 1 is the owner and in possession of the shop. The opposite party no. 1 prayed that an order be passed on the points raised by her, the ex-parte decree dated 12.04.2013 passed in S.C.C. Suit No. 72 of 2010 be set aside and the revisionist be restrained from interfering in her possession of the shop.

7. The revisionist filed objections against the aforesaid application inter alia stating that the opposite party no. 1 has obtained a sale deed from a person, who has never been the owner of the property in question. The opposite party no. 1 was not a party to the Suit in which the decree has

been passed and, therefore, she cannot file any objection in the execution proceeding. The opposite party no. 1 could have filed a separate Suit for adjudication of her rights. The revisionist claimed that he was the owner of the property in question by virtue of the last will deed dated 15.03.1980 executed by its previous owner Sri Kedarnath.

8. The learned Additional District Judge/Special Judge, PC Act, Court no. 3, Lucknow has allowed the aforesaid application filed by opposite party no. 1 by the impugned judgment and order dated 21.05.2022 wherein as many as 12 issues were framed, including the issue as to whether opposite party no. 1 is the owner and in possession of the property in dispute. The parties had filed only documentary evidence in support of their respective claims. The Court held that on the strength of the sale deed dated 14.03.2012 executed by Shyam Lal, the opposite party no. 1 is the owner of the property in question and, accordingly, the Court set aside the judgment and decree dated 12.04.2013 passed in S.C.C. Suit No. 72 of 2010.

9. The learned counsel for the revision-petitioner has submitted that a Judge Small Cause Court has no jurisdiction to decide the question of title and when such questions cannot be decided by the Small Cause Court in a Suit, those questions cannot be decided in execution proceedings also. In deciding the question of title and returning a finding that the opposite party no. 1 is the owner of the premises in question, the trial court has acted without jurisdiction. The learned counsel for the petitioner has relied upon a decision rendered by a Co-ordinate Bench of this Court in Mohd. Hamid Vs. Mohd.

Moin: AIR Online 2018 Alld 2663 (Neutral Citation No. - 2018:AHC:104118), in which the case of the revisionists in their objection under Order 21 Rule 97 C.P.C., was that they had acquired title to the house on the basis of oral Hiba made by their father and father-in-law on 13.10.2002 whereas the opposite party claimed title through a registered sale deed in his favour executed by the father and father-in-law of the revisionist. In this factual background, a coordinate Bench of this Court held that: -

“It is settled law that any dispute of title in proceedings for arrears of rent and eviction is beyond the scope of the proceedings. Now a dispute of title is being raised through the objection under Order 21 Rule 97 C.P.C. at the execution stage.

10. In my considered opinion, a question, which was beyond the scope of the proceedings, the decree whereof is sought to be executed would also be beyond the scope of the execution proceedings because the dispute of title could not have been decided by the SCC Court itself. ”

10. The jurisdiction of Small Cause Courts is provided in Chapter III of the Provincial Small Cause Courts Act, 1887 (which will hereinafter be referred to as ‘the Act of 1887’). Section 15 of the Act of 1887, as it applies to the State of Uttar Pradesh, provides as follows: -

“15. Cognizance of suits by Courts of Small Cause.—

(1) A Court of Small Cause shall not take cognizance of the suits specified in the second schedule as suits excepted from the

cognizance of a Court of Small Cause.

(2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a Civil nature of which the value does not exceed twenty five thousand rupees shall be cognizable by a court of Small Cause.

Provided that in relation to suits by the lessor for the eviction of a lessee from a building after the determination of his lease, or for recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease, or of compensation for the use and occupation thereof after such determination of lease, the reference in this sub-section to one lakh rupees shall be constructed as a reference to five thousand rupees.

Explanation.—For the purposes of this sub-section, the expression “building has the same meaning as in Article (4) in the Second Schedule.

(3) Subject as aforesaid, the State Government may, by order in writing direct that all suits of a civil nature of which the value does not exceed three thousand rupees shall be cognizable by a court of Small Cause mentioned in the order.”

11. The suits excepted from the cognizance of a Court of Small Cause are mentioned in the Second Schedule appended to the Act of 1887 and Article (4) of the said Schedule, as it applies to the State of Uttar Pradesh, is as follows: -

“(4) a suit for the possession of immovable property or for the recovery of an interest in such property, but not include a suit by a lessor for the eviction of a lessee from a building after the determination of his lease, and for the recovery from him of compensation for the use and occupation of that building after such determination of lease.

Explanation.—For the purposes of this Article, the expression ‘building’ means a residential or non-residential roofed structure, and includes any land (including any garden), garages and out-houses, appurtenant to such building and also includes any fittings and fixtures affixed to the building for the more beneficial enjoyment thereof.”

12. Therefore, Small Cause Courts in the State of Uttar Pradesh have jurisdiction to entertain a suit by a lessor for the eviction of a lessee from a building after the determination of his lease and for the recovery from him of compensation for the use and occupation of that building after such determination of lease.

13. Section 23 of the Provincial Small Cause Courts Act, 1887 provides that: -

“23. Return of complaints in suits involving questions of title.—

(1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Cause depend upon the proof or disproof of a title to immovable

property or other title which such a court cannot finally determine, the court may at any stage of the proceedings return the plaint to be presented to a court having jurisdiction to determine the title.

(2)***”

14. In **Budhu Mal v. Mahabir Prasad**: (1988) 4 SCC 194, the Hon’ble Supreme Court held that: -

“10. It is true that Section 23 does not make it obligatory on the Court of Small Cause to invariably return the plaint once a question of title is raised by the tenant. It is also true that in a suit instituted by the landlord against his tenant on the basis of contract of tenancy, a question of title could also incidentally be gone into and that any finding recorded by a Judge, Small Cause in this behalf could not be res judicata in a suit based on title. It cannot, however, be gainsaid that in enacting Section 23 the legislature must have had in contemplation some cases in which the discretion to return the plaint ought to be exercised in order to do complete justice between the parties. On the facts of the instant cases we feel that these are such cases in which in order to do complete justice between the parties the plaints ought to have been returned for presentation to a court having jurisdiction to determine the title. In case the plea set up by the appellants that by the deed dated December 8, 1966 the benefit arising out of immovable property which itself constituted immovable

property was transferred and in pursuance of the information conveyed in this behalf by Mahabir Prasad to them the appellants started paying rent to Smt Sulochna Devi and that the said deed could not be unilaterally cancelled, is accepted, it is likely not only to affect the title of Mahabir Prasad to realise rent from the appellants but will also have the effect of snapping even the relationship of landlord and tenant, between Mahabir Prasad and the appellants which could not be revived by the subsequent unilateral cancellation by Mahabir Prasad of the said deed dated December 8, 1966. In that event it may not be possible to treat the suits filed by Mahabir Prasad against the appellants to be suits between landlord and tenant simpliciter based on contract of tenancy in which an issue of title was incidentally raised. If the suits cannot be construed to be one between landlord and tenant they would not be cognizable by a Court of Small Cause and it is for these reasons that we are of the opinion that these are such cases where the plaints ought to have been returned for presentation to appropriate court so that none of the parties was prejudiced."

(Emphasis added)

15. When the suit filed by the revision-petitioner against the alleged tenant Santosh Shukla already stands decreed and the opposite party claims to have acquired ownership of the property in dispute through a sale-deed executed by its previous owner, the adjudication of the claim of the opposite party becomes

incidental to adjudication of the plaintiff's claim for a decree for ejectment and its execution, which question can be decided by the Small Cause Court. Therefore, in my considered opinion, the Small Cause Court has not acted without jurisdiction in deciding this incidental question as per the law laid down by the Hon'ble Supreme Court in **Budhu Mal** (Supra).

16. In **Mohd. Hamid** (Supra), the case of the revisionists in their objection under Order XXI Rule 97 C.P.C. was that they had acquired title to the house on the basis of oral Hiba made by their father and father-in-law on 13.10.2002 whereas the opposite party claimed title through a registered sale-deed in his favour executed by the father and father-in-law of the revisionist. In the present case, the tenant – defendant did not claim title in himself, but it is his wife, who claimed a title independent to that of her husband, stating that she has acquired ownership of the house through a registered sale-deed executed by the previous owner of the property, whereas the landlord is claiming title on the basis of a will. There is no averment regarding the will being registered. There is a presumption regarding a correctness of the endorsements made on a registered sale deed but a will would stand proved by the statements of its attesting witnesses only. The facts of the present case are different from the facts of **Mohd. Hamid** (Supra) and, therefore, the ratio of law laid down in **Mohd. Hamid** (Supra) will not apply to the facts of the present case.

17. The learned counsel for the revision-petitioner has next submitted that the opposite party no. 1 was not a party to the Suit or the execution proceedings. Therefore, she had no locus to file any

application under Order XXI Rules 97, 98, 99 and 101 and the relief sought by opposite party no. 1 through her application was also beyond the scope of the aforesaid Rules.

18. Rules 97, 98, 99 and 101 C.P.C. provide as follows: -

“97. Resistance or obstruction to possession of immovable property.— (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

98. Orders after adjudication.— (1) Upon the determination of the questions referred to in Rule 101, the court shall, in accordance with such determination and subject to the provisions of sub-rule (2);—

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the court is satisfied

that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment-debtor or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

99. Dispossession by decree-holder or purchaser.—(1)

Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

* * *

101. Question to be determined.— All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and

relevant to the adjudication of the application, shall be determined by the court dealing with the application and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."

19. The scope of Order XXI Rule 97 C.P.C. was explained by the Hon'ble Supreme Court in **Noorduddin v. K. L. Anand (Dr)**: (1995) 1 SCC 242, in the following words: -

"8. Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21, Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or

interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution.

9. Adjudication before execution is an efficacious remedy to prevent fraud, oppression, abuse of the process of the court or miscarriage of justice. The object of law is to mete out justice. Right to the right, title or interest of a party in the immovable property is a substantive right. But the right to an adjudication of the dispute in that behalf is a procedural right to which no one has a vested right. The faith of the people in the efficacy of law is the saviour and succour for the sustenance of the rule of law. Any weakening like (sic) in the judicial process would rip apart the edifice of justice and create a feeling of disillusionment in the minds of the people of the very law and courts. The rules of procedure have been devised as a channel or a means to render substantive or at best substantial justice which is the highest interest of man and almaneter (sic) for the mankind. It is a foundation for orderly human relations. Equally the judicial process should never become an instrument of oppression or abuse or a means in the process of the court to subvert justice. The court has, therefore, to wisely evolve its process to aid expeditious adjudication and

would preserve the possession of the property in the interregnum based on factual situation. Adjudication under Order 21, Rules 98, 100 and 101 and its successive rules is sine qua non to a finality of the adjudication of the right, title or interest in the immovable property under execution.

10. The question is whether the executing court was right in dismissing the application on the ground that the dispute was adjudicated in RFA No. 305 of 1986 or as held by the High Court that the dispute was decided in the writ proceedings referred to earlier. **The execution court is enjoined to adjudicate the claim or the objection or the claim to resistance. As seen, Rule 97 enables such a person to make an application which must be independent of the judgment-debtor or a person having derivate right from the judgment-debtor. The applicant in his own right must be in possession of the property. Admittedly, neither the appellant nor his father was a party to the suit or appeal. Therefore, the decree per force does not bind him.** In the writ proceedings, though Nanu was impleaded as 5th respondent, no relief was claimed against him nor a finding adverse to him has been recorded. Thereby, there is no adverse finding recorded either in the suit or in the writ proceedings against the appellant or his father. Under these circumstances, **when the appellant has been claiming right, title and interest in Khasra No. 179 from which he is now**

sought to be dispossessed in execution of the decree by the respondent in respect of Khasra Sakni Nos. 13 and 14, the executing court necessarily has to go into the question whether the property in Khasra No. 179 is part of Khasra Sakni Nos. 13 and 14 and if so, whether the respondent while executing the decree trespassed upon his property and sought to dispossess him. The appellant's possession, pending adjudication, needs to be protected by interim orders. Unfortunately, the courts below had not adverted to these crucial aspects of the matter. When the appellant claimed independent right, title and interest and resisted the execution, the decree-holder or the appellant should make an application under Rule 97(1) and the court, in that event, is enjoined to adjudicate the claim and record a finding, allowing or rejecting the claim. It should be remembered that Parliament intended to shorten the litigation and to give effect to it, a simplified procedure was devised for adjudication. On the basis of the fact situation and the nature of the controversy, the claim has to be adjudicated expeditiously in a period not exceeding six months and preferably on day to day basis by putting an end to the tendentious conduct of prolonging the proceedings by suitable orders."

(Emphasis added)

20. Therefore, when the opposite party no. 1 claimed that the property in question had been purchased by her from its previous owner through a registered

sale-deed, she had locus standi to claim that she had the right to resist her ejectment through execution proceedings instituted for execution of a decree which was passed in a suit in which she was not a party. Executing Court has rightly gone into the question in exercise of jurisdiction conferred by Order XXI Rule 97 C.P.C. The order passed by the executing Court cannot be said to be without jurisdiction.

21. The learned counsel for the petitioner has lastly submitted that the trial court has decided the intricate question of title merely after looking into the documentary evidence and without giving any opportunity to the parties to adduce any oral evidence to prove their case whereas there was nothing on record to prove the title of Shyam Lal from whom the opposite party no. 1 claims to derived title in respect of the property in question and, therefore, the title of the opposite party no. 1 was not established.

22. In **Nirmal Jeet Singh Hoon v. Irtiza Hussain**, (2010) 14 SCC 564, the Hon'ble Supreme Court explained the scope and effect of Section 23 of the Act of 1887 by relying upon the precedent in the case of *Budhu Mal (Supra)* and reiterated that *“the finding on the issue of title recorded by the Small Cause Court does not operate as res judicata and ultimately the issue of title has to be adjudicated upon by the competent civil court.”*

23. When we reconcile the ratio of law laid down in **Noorduiddin and Nirmal Jeet Singh Hoon** (Supra), the correct position of law which emerges is that the Small Cause Courts has limited jurisdiction to go into the question of title incidentally for deciding the claim of the landlord for a decree of ejectment and execution thereof. However, the Small Cause Courts decide the cases in a summary

manner and the finding returned by a Small Cause Court regarding title of the rival parties will not operate as res judicata in a subsequent suit filed by the landlord in regular Civil Court claiming a decree on the basis of his title.

24. Therefore, the finding returned by the executing Court in proceedings for execution of a decree of a Small Cause Court will not affect the revision-petitioner's right to file a suit for recovery of possession of the property after establishing his right thereto on the basis of his claim to title of the property, which claim shall be decided by the Civil Court after adjudicating the rival claims to title of the property and the findings returned by the Small Cause Court in the impugned order will not operate as res judicata in that suit.

25. In view of the foregoing discussion, this Court is of the considered view that there is no illegality in the judgment and an order dated 21.05.2022 passed by the learned Additional District Judge/Special Judge, P.C. Act, Court no. 3, Lucknow in Miscellaneous Case No. 39-C of 2013 warranting any interference by this Court in exercise of its revisional jurisdiction conferred by Section 25 of the Act of 1887. The revision lacks merits and it is *dismissed*, subject to the observations made in this judgment.

(2024) 9 ILRA 1368

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 06.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

S.C.C. Revision No. 12 of 2024

Rakesh Gupta

...Revisionist

Versus

Smt. Shail Kumari Gupta

...Respondent

Counsel for the Revisionist:

Pritish Kumar, Amal Rastogi

Counsel for the Respondent:

Abhay Kumar Srivastava

A. Civil Law - Provincial Small Causes Court Act, 1887-Section 25-Determination of the rate of rent payable by the tenant- legality of eviction order against the tenant- the opposite party(landlady) sought the revisionist's eviction and claimed rent arrears of Rs. 6600 per month-the trial court decreeing eviction and setting the rent at Rs. 6600 per month-The revisionist claimed rent was Rs. 500 per month based on agreement-the trial court relied on evidence including an unpressed agreement and previous proceedings, to fix the rent at Rs. 6600 per month-the revisionist agreement was admitted even though not properly stamped, as the revisionist himself avoided paying the duty-Held a trial court erred in determining the rent Rs 6600 per month based on an unpressed rent agreement and unsubstantiated findings by the prescribed authority-the rent was fixed at Rs.500 per month as per agreement filed by the tenant-The eviction of the tenant was upheld as the tenancy had expired-The revision was partly allowed, setting aside the trial court's finding on the rent amount.(Para 1 to 33)

The revision is allowed. (E-6)

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

1. Heard Sri Pritish Kumar and Sri. Amal Rastogi, the learned counsel for the revisionist and Shri Abhay Kumar Srivastava, the learned counsel for the sole opposite party. With the consent of the learned Counsel for the parties, the revision is being decided finally at the admission stage itself.

2. By means of the instant revision filed under Section 25 of the Provincial Small Causes Court Act, the revisionist has challenged validity of a judgment and order

dated 29.05.2024 passed by the learned Additional District and Sessions Judge, Court No. 16, Lucknow in SCC Suit No. 14 of 2014, whereby the SCC Suit filed by the opposite party for the revisionist's ejectment from a shop in his tenancy and for recovery of rent at the rate of Rs.6,600/- per month, has been decreed.

3. The aforesaid suit was filed by the opposite party on 07.02.2014 inter alia stating that she is the owner of building No.133/211 situated in Mohalla Takiya Ganeshganj, Aminabad Road, P.S. Naka, District- Lucknow. The defendant-revisionist is her tenant in respect of one of the shops situated in the building which is bounded as below: -

East- Aminabad Road,
West- House of the
plaintiff,
North- shop being run
under the name and style of Gupta
Kirana Store,
South- Shop being run
under the name and style of Shivam
Medical Store.

4. It was pleaded in the plaint that initially the revisionist's father Mangal Prasad was a tenant of the shop in question, who died on 30.07.2011. Thereafter, the revisionist entered into a tenancy agreement with the opposite party for a period of 11 months, at a monthly rent of Rs.6,600/- for the same shop which was previously in his father's tenancy. When the revisionist did not vacate the shop in spite of termination of his tenancy rights by efflux of time, she sent a legal notice dated 01.01.2014 to the revisionist but he declined to receive the same. The opposite party further stated that the revisionist has not paid rent since 01.09.2011.

5. The opposite party had filed an agreement dated 20.09.2011 allegedly executed between her and the revisionist.

6. The revisionist filed a written statement of his defense denying the plaint averments and he pleaded that he was a lawful tenant in occupation of the shop in question, at the monthly rent of Rs.500/-. The revisionist denied that the rent of shop in question is Rs.6,600/- per month and he specifically stated that the rent at the aforesaid rate has not been paid at any point of time. The revisionist further stated that when the opposite party did not receive rent from him after the death of his father, he had started depositing the rent in Misc. Case No.75 of 2013 under Section 30 (1) of the U.P. Act No.13 of 1972. The revisionist denied having received any notice sent by the opposite party or to have declined to receive the same. In additional pleas, the revisionist pleaded that the opposite party had filed an application under Section 21 of the U. P. Act No. 13 of 1972, wherein she had pleaded that rent of the shop in question was Rs.6,600/- per month . As the premises fell outside the purview of U.P. Act No.13 of 1972 as per pleadings made in the application under Section 21 of U.P. Act No.13 of 1972, the application had been dismissed as not maintainable.

7. The revisionist filed a rent agreement dated 21.09.2011 executed between the parties wherein the agreed rent was said to be Rs.500/- per month and the period of tenancy was agreed to be 11 months with effect from 31.07.2011. It was specifically stated in this agreement that the period of tenancy will expire on 31.05.2012 whereafter the tenancy will stand terminated automatically.

8. The opposite party filed her affidavit as her examination-in-chief wherein she reiterated the plaint averments.

She stated that a rent agreement had been executed between the parties for giving the shop in question on rent to the revisionist for a period of 11 months at the agreed monthly rate of Rs.6,600/- and that the revisionist had not paid rent since 01.09.2011 in spite of notice and he has not vacated the shop.

9. In her cross-examination, the opposite party stated that earlier the revisionist's father was tenant of the shop. No written agreement had been executed between the opposite party and the revisionist's father and she did not issue any receipt for the rent from the revisionist's father. After death of revisionist's father, the opposite party had asked the revisionist to vacate the shop but thereafter a rent agreement for 11 months was executed between the parties in the year 2011 and the agreed rent was Rs.6,600/- per month. The opposite party denied that the agreed rent of the shop in question was Rs.500/- per month.

10. PW-2 Rajesh Kumar Shukla had also put his signatures on the agreement and he gave his statement to prove the tenancy agreement dated 20.09.2011.

11. The revisionist filed his affidavit as his examination-in-chief in support of his defense wherein he stated that he is a statutory tenant of the shop in question and the rent payable by him is Rs.500/- per month. He denied that rent of the premises is Rs.6,600/- per month. He denied having received any notice sent by the opposite party or to have declined to receive the notice. He stated that earlier he was depositing rent of the shop in proceedings under Section 30 of U.P. Act No.13 of 1972 and after filing of the suit

for ejectment, he was depositing the same under Order XV Rule 5 C.P.C. The revisionist denied having entered into any written agreement of tenancy and he stated that the alleged agreement is forged and fictitious and the revisionist has never put his signatures on any agreement. In his cross-examination also, the revisionist asserted that no written agreement was executed between the parties and rent payable by him is Rs.500/- per month only.

12. Initially, upon an application filed by the landlady – opposite party, the trial Court had passed an order dated 19.10.2016 for getting a hand writing expert's report regarding the signatures made on the agreement dated 20.09.2011 but subsequently, the opposite party filed an application (C-57) stating that since the expert's report was not received in spite of expiry of a period of two years and the opposite party wanted disposal of the suit expeditiously, she had decided to not press the written agreement. The Court accepted the opposite party's aforesaid application and passed an order dated 02.1.2020 holding that the rent agreement (Paper No.C6/2 to C6/5) will not be treated as a part of the plaintiff's evidence.

13. The trial Court formulated the following points for determination: -

(1) Whether there is a relationship of landlady and tenant between the parties in respect of the shop in question?

(2) Whether the defendant has inherited the tenancy from his father or a new tenancy has come into existence?

(3) Whether rent of the shop after death of the revisionist's

father is Rs.6,600/- per month or it is Rs.500/- per month?

(4) Whether a notice under Section 106 of the Transfer of Property Act had been adequately served on the defendant?

(5) Whether the plaintiff is entitled to get possession of the property in question and arrears of rent and damages from the defendant?

14. On the first point, the learned trial Court held that the defendant himself has pleaded in the written statement that he is a tenant of the plaintiff in respect of the shop in question. Therefore, the defendant is a tenant of the plaintiff.

15. While deciding the second point, the trial Court held that the plaintiff has contended that after death of the defendant's father, a rent agreement was executed at the request of the defendant, for giving the shop on rent for a period of 11 months at the monthly rent of Rs.6,600/- per month. Although the plaintiff had not pressed this agreement, PW-2 has stated in his examination-in-chief that an agreement had been executed between the parties on 20.09.2011 for giving the shop in question on rent for a period of 11 month at the monthly rent of Rs.6,600/-, in his presence and he had also had put his signatures on the agreement as a witness of its execution. In his cross-examination, PW-2 stated that when he had reached, the agreement had already been prepared and he had signed the same after reading it. Another witness Satyam Pandey had also signed the agreement in his presence after reading it. The trial Court held that although the plaintiff had not pressed the agreement dated 20.09.2011 and accordingly it had been ordered on 02.01.2020 that the

agreement will not be treated as a part of the plaintiff's evidence, the testimony of PW-2, who is an independent witness, proves that a rent agreement had been executed between the parties on 20.09.2011. Therefore, the trial Court held that a new relationship of tenant and landlord came into being between the parties and the tenant was not continuing under the tenancy inherited from his father.

16. Regarding the rate of rent, the trial Court held that the Prescribed Authority had dismissed the application filed under Section 21 of U. P. Act No. 13 of 1972 by an order dated 04.02.2016 holding that rent of the premises exceeded Rs.2,000/- per month and it had no jurisdiction to entertain the application. This order has attained finality and is binding on the parties. PW-1 and PW-2 both have stated the rate of rent to be Rs.6,600/- and, therefore, the plaintiff has proved the rate of rent to be Rs.6,600/-.

17. While deciding the forth point which was framed regarding service of notice, the trial Court held that plaintiff has filed the notice, the postal receipt and the unserved envelop which mentions the correct address of the revisionist and which contains an endorsement made by the postman that the addressee had declined to receive it. No question was put to the plaintiff on this point during her cross-examination. Therefore, service of notice by refusal by the revisionist was proved.

18. In view of the findings of the trial Court on the aforesaid four points, the suit was decreed by the impugned judgment dated 29.05.2024 holding the revisionist liable to pay arrears of rent and damages at the rate of Rs.6,600/- per month.

19. While assailing validity of the judgment and decree dated 29.05.2024, Sri. Pritish Kumar, the learned counsel for the petitioner has submitted that no oral evidence is admissible to prove the contents of the written agreement and when the plaintiff herself had given an application (Paper no. A57) stating that she did not want to press the tenancy agreement as a part of her evidence, which application had been allowed by an order dated 02.01.2020, the trial court could not have relied upon any evidence to prove the terms of the agreement which was not to be treated as a part of the plaintiff's evidence.

20. The second submission of the learned counsel for the petitioner is that in P.A. Case No. 14 of 2014 filed by the opposite party-landlady under Section 21(1) of the U.P. Act No. 13 of 1972, the landlady had claimed that rent of the shop in question was Rs.6,600/- per month. The petitioner had disputed this fact and he had contended that rent of the premises was merely Rs.500/- per month. The Prescribed Authority rejected the application as not maintainable by holding that when the landlady herself contends the rate of rent to be Rs.6,600/-, the premises falls outside the purview of Rent Control Act. Relying upon this decision of the Prescribed Authority, the trial court has taken the rate of rent to be Rs.6,600/- whereas rate of rent of Rs.6,600/- was recorded in the order passed by the Prescribed Authority merely on the basis of the contention of the landlady, which was denied by the petitioner-tenant. The Prescribed Authority has dismissed the application as not maintainable and no finding regarding rate of rent has been recorded by the Prescribed Authority.

21. Opposing the revision, the learned counsel for the opposite party has

submitted that the petitioner had not pleaded in his written statement that he had not executed the rent agreement dated 20.09.2011. He has submitted that since the pleading in respect of execution of rent agreement dated 20.09.2011 remain uncontroverted, there was no requirement to prove the uncontroverted pleading.

22. The learned counsel for the opposite party next submitted that the Prescribed Authority has recorded a finding that it is undisputed that the rent of the shop in question was Rs.6,600/-.

23. I have considered the submissions of the learned counsel for the parties.

24. What appears from the material available on record is that the opposite party claims to have entered into an agreement dated 20.09.2011 under which the revisionist had agreed to pay the rent of the shop at the rate of Rs.6,600/- per month and that the period of tenancy would expire on 19.08.2012. The petitioner disputed having agreed to pay rent at the rate of Rs.6,600/-. There is force in the submission of the learned Counsel for the petitioner that after the order dated 02.01.2020 was passed allowing the plaintiff's application C-57 and providing that the rent agreement dated 20.09.2011 will not be treated as a part of the plaintiff's evidence, the finding of the Trial Court regarding that agreement is unsustainable in law.

25. The learned trial Court has also erred in relying upon the order passed by the Prescribed Authority to fix the rate of rent of the shop at Rs.6,600/-, when the Prescribed Authority had not adjudicated the matter on merits and it had not recorded

any finding of fact. The Prescribed Authority had merely dismissed the application under Section 21 of the U. P. Act No. 13 of 1972 as not maintainable, keeping in view the pleading of opposite party- land lady that rent of the shop in question was Rs.6,600/-, which plea had been disputed by the revisionist-tenant, who had contended that rent was Rs.500/-.

26. When the Prescribed Authority had dismissed the application as not maintainable, without recording any finding, the trial Court could not have relied upon the order passed by the Prescribed Authority to hold that rent of the premises is Rs.6,600/- per month.

27. In para 9 of the revisionist's affidavit filed before this Court, he has stated on oath that "*the revisionist also specifically submitted that the rent of the tenanted premises is Rs.500/- per month and not Rs.6,600/- as alleged by the Respondent. That in support of this contention the Revisionist placed on record rent receipts, and also an agreement, dated 21.09.2011 executed by Respondent in favour of the Revisionist which stated the rent to be Rs.500/- only. Copy of the agreement, dated 21.09.2011 is being annexed hereto as ANNEXURE NO. 4 to this affidavit.*" A copy of the agreement dated 21.09.2011 filed by the revisionist as Annexure No. 4 to the affidavit states that the parties had agreed that rent of the premises will be Rs.500/- per month and period of tenancy will be till 30.05.2011. The tenancy will stand terminated automatically on 31.05.2012.

28. Regarding this agreement, learned counsel for the petitioner has submitted that this is an agreement executed on a stamp paper worth merely

Rs.100/- and it has not been registered and, therefore, it is not admissible in evidence.

29. It is true that this agreement is not duly stamped but the liability to pay stamp duty on this agreement was of the revisionist himself. The revisionist himself has evaded payment of proper stamp duty on this agreement. It is a settled principle of law that no person can be allowed to take advantage of his own wrong. When the revisionist himself had avoided payment of stamp duty on the agreement dated 21.09.2011, he cannot take the plea that the agreement dated 21.09.2011 not being duly stamped, is not admissible in evidence although it has been filed by the revisionist himself. Therefore, this Court finds no reason to disbelieve the agreement filed by the revisionist-defendant alongwith his affidavit filed before this Court.

30. The learned Counsel for the petitioner next submitted that the opposite party – plaintiff had not taken any plea based on the agreement dated 21.09.2011 and, therefore, no decision has been given by the trial Court on this point. In these circumstances, it would be proper to remand the matter to the trial Court for being decided afresh.

31. In Jagdish Prasad v. Angoori Devi: (1984) 2 SCC 590, the Hon'ble Supreme Court had held that: -

“2. ...This was not an attempt to reassess evidence but to take into consideration the evidence which had not been looked into by the trial court. The revisional jurisdiction under Section 25 of the Provincial Small Cause Court Act is not as wide as the appellate jurisdiction under Section 96 of the Code of Civil Procedure; yet in a case of this type we do not think fault could be found with the revisional court

for pointing out the legal error committed by the trial court in its approach to this material aspect....”

32. In the present case also, the revisionist – defendant had himself filed an agreement dated 21.09.2011, as per which, his tenancy stands expired with effect from 31.05.2012, but it was not taken into consideration by the learned trial Court. This Court is well within its jurisdiction to correct the legal error committed by the trial Court by ignoring this material evidence placed by the revisionist.

33. In view of the foregoing discussion, the revision is **allowed** in part. The judgment and order dated 29.05.2024 passed by the learned Additional District and Sessions Judge, Court No. 16, Lucknow in SCC Suit No. 14 of 2014 is set aside to the extent that it holds the rate of rent of the shop in question to be Rs.6,600/- per month and it is held that the rate of rent of the shop in question was Rs.500/- only. The remaining part of the judgment and decree so far as it orders ejectment of the revisionist-defendant, does not suffer from any illegality calling for interference in exercise of this Court's revisional jurisdiction and the revision in respect of this relief is dismissed. The parties will bear their own costs of litigation.

(2024) 9 ILRA 1374
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ -B No. 853 of 2024

Keshav Prasad & Ors. ...Petitioners
Versus
Consolidation Commissioner, Lko. & Ors.
...Respondents

Counsel for the Petitioners:

Rahul Roshan Dubey

Counsel for the Respondents:

C.S.C., Mohan Singh

A. Land Law – Concealment and non-disclosure – U.P. Consolidation of Holdings Act, 1953 - Section 4(2), 48(3) - It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood.

The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants.

The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts".

The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed u/Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from

unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misSt.ment or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case. (Para 26)

In the entire present petition there is not a whisper of the fact as to how the petitioners had any personal cause or what is their personal right in respect of any plot. (Para 29)

The petitioners have definitely not disclosed the fact regarding their right to file the instant petition. Moreover, multiple petitions filed by the petitioners were not disclosed in this writ petition but were mentioned by the St./Garam Sabha in their counter-affidavit. It is only when the rejoinder-affidavit was filed that the same has been accepted by the petitioner as a conformation of the averments made in the counter-affidavit but there was no effort of the petitioners to bring the facts which were there in their knowledge at the time of filing of the instant petition including its outcome. (Para 28)

It prima facie appears from the record that the petitioners no.1 and 4 have already been held to be the beneficiaries of fraudulent entries against whom action has been taken and the fraudulent entries have been expunged. This aspect of the matter and the background of the litigation has been deliberately suppressed. (Para 30, 32)

The petition suffers gross concealment of material facts. The petition is vague, no personal cause of action of the petitioners has been made out coupled with the fact that the petition suffers from concealment of material fact and is an attempt to waste the precious time of the court by resorting to filing a frivolous petition and if the St. Counsel and the Gaon Sabha would not have brought the facts to the notice of the Court, the petitioners would have had a leverage by getting away with concealment and non disclosure of material facts. (Para 36)

B. There is a great sanctity attached to the proceedings conducted in the court. Every Advocate putting his signatures on the Vakalatnamas and on the documents to be

filed in the Courts, and every Advocate appearing for a party in the courts, particularly in the Supreme Court, the highest court of the country is presumed to have filed the proceedings and put his/her appearance with all sense of responsibility and seriousness. No professional much less legal professional, is immuned from being prosecuted for his/her criminal misdeeds. (Para 35)

The role of an advocate in the justice dispensation system is of crucial importance. The counsel representing a case of his client is first an officer of the Court and then he pleads the case for his client fearlessly. In the instant case, the counsel for the petitioner, who has been representing them in various petitions appears to have lost sight of his duties as an officer of the Court.

Writ petition dismissed. (E-4)

Precedent followed:

1. Bhagwan Das Chela Balram Das Vs District Magistrate Ambedkarnagar & ors., 2023 (1) ADJ 342 [LB] (Para 26)
2. All India EPF Staff Federation Vs U.O.I. & ors., 2024 SCC OnLine SC 1629 (Para 27)
3. Kusha Duruka Vs The St. of Odisha, (2024) 4 SCC 432 (Para 27)
4. Bhagwan Singh Vs St. of U.P. & ors., 2024 SCC OnLine SC 2599 (Para 35)

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Shri Rahul Roshan Dubey, the learned counsel for the petitioners, Dr. Krishna Kumar Singh, learned Standing Counsel for the State and Shri Mohan Singh, learned counsel appearing for the Gaon Sabha.

2. Shri Rahul Roshan Dubey, learned counsel for the petitioners has filed

the rejoinder-affidavit which is taken on record.

3. To put the matter in a prespective, certain facts giving rise to the instant petition are being noticed hereinafter.

4. Eight petitioners have approached this Court seeking the following relief's which reads as under:-

"Issue a writ order or direction in the nature of mandamus directing the opposite parties particularly opposite party no.1 to call for the record in respect of consolidation proceedings commenced during covid-19 pandemic year 2019-2020 of Gram Jamkhuri, Post Jamkhuri, Pargana Chanda, Tehsil Lambhuwa, District Sultanpur and initiate a proceedings under Section 48 of U.P. Consolidation and Holdings Act 1953 and decide after hearing the tenure holders and further be pleased to set aside the orders passed in under Section 9(ka) and section 20 and 42 of U.P. Consolidation of Holdings Act 1953 and CH-41 & CH-45 to meets the ends of justice annexed hereiwith as Annexure No.5 dated 09.08.2021."

5. The writ petition runs in 14 paragraphs. However, paragraphs 4 to 12 are being reproduced hereinafter for better appreciation of the contention as well as the response of the respective parties.

4. That by means of the present writ petition the petitioner is challenging the entire

consolidation proceedings commenced in the year 2019-20 in village Jamkhuri, Pargana-Chanda, Tehsil Lambhuwa, District Sultanpur in which several irregularities have been committed and further no action has been taken by the opp. party no.-1 & upon several representation made by the petitioners.

5. That in the mid of corona (covid-19) in year 2020 without given any notice to any villagers the authorities passed Dhara 9, Dhara-20, Dhara-21 and Dhara-42 opp. party no.4 has passed the order ex parte which is illegal and arbitrary because that time Hon'ble Supreme Court has passed the interim order in whole country which was extended till 2021. The copy of order of Hon'ble Apex Court is being annexed herewith as Annexure No.2 to this writ petition.

6. That the brief facts of the case is that during the Covid-19 pandemic in village Jamkhuri, Pargana-Chanda Tehsil Lambhuwa, District-Sultanpur consolidation proceedings have been commenced and during consolidation proceedings several irregularities have been made in which orders under Section 9(ka) and Section 20 and 42 of U.P. consolidation of Holdings Act 1953 without giving any notice/information to the concern tenure holder and without giving opportunity to lead evidence CH-41 and CH-45 has been finalized some of the irregularities have been mentioned as below:-

a- In CH-41 and CH-45 the consolidation officer has rejected

the entire area and chaks and there are several irregularities in chaks are has been mentioned wrongly and even parentage of tenure holders have been wrongly mentioned and there is no number mentioned in final map.

b. Chak No.643 in CH-23 has been recorded in favour of Ram Nayan in which old gate No.1170 has been left for Panchayat Bhawan but in order to grab that land nail and chak marg has been proposed while there is a chak marg existed.

c. Gata No.22/18. 2/4 and 2/8 was recorded as Naveen Parti but while making CH-41 and 45 without informing to the tenure holders that has been rejected and old gata no.2/2 area 0.632, 2/4 are 0.0063, 2/6 area 0.063, 2/16 area 0.151, 2/20 area 0.262, 63/2 area 0.358 and 23 mi area 0.208 from the tenure holders has been recorded as Naveen parti without even notice to the tenure holders.

d. In CH-11, recorded khata no.51 gata no.-63 Mi, 67, 69, 1031 has been rejected from the khata and recorded as Naveen parti and in gata no.63 name of Jai Narayan son of Chandrika and in gata no.67 Rajendra son of Krishna Chandra and in 69 Makhdom son of Jhuri wrongly and double recorded without even notice to the tenure holder.

e. In CH-45 parentage of several persons have been wrongly recorded like in CH-23 at Khata no.999 Adha Prasad son of Ramnath has been recorded and in 45 in khata no.155 Adha Prasad

and others son of Ram Nayak has been recorded.

f. Chak of Ram Yug son of Girja Shankar was proposed nearby his house but at the time of preparing CH-41 and 45 chak has been shown far away and no notice has been issued to the tenure holder.

g. The entire map of village is wrongly made which is not in accordance with the sanctioned map. Copies of Nakal Khatauni Gram Jhamkhuri alongwith akar patra are collectively annexed herewith as Annexure No.3 to this writ petition.

7. That in respect of above irregularities the tenure holders of the above Gram Jhamkhuri Pargana Chanda, Tehsil Lambhuwa, District Sultanpur has given on 25.08.2021 in before the opposite party no.1 in which opposite party no.1 has directed the Assistant Consolidation Officer to present his report after enquiry. A copy of application dated 25.08.2021 and postal order alongwith endorsement order is being annexed herewith as Annexure No.4 to this writ petition.

8 That upon that application the Settlement Officer Consolidation has directed the Consolidation Officer Lambhuwa and Consolidation Officer Lambhuwa has directed to Assistant Consolidation Officer, Lambhuwa but till date no any report has been presented.

9. That again on 09.08.2021 the petitioners again submitted an application before the

opposite party no.1 but nothing concrete has come out neither any report has been sent in respect of above mentioned irregularities. A copy of application dated 09.08.2021 is being annexed herewith as Annexure no.5 to this writ petition.

10. That during commencement of consolidation proceedings in covid-19 pandemic several irregularities have been committed due to which the poor tenure holders have to face multiplicity of litigations for their life time.

11. That the proceedings of consolidation has been commenced during the year 2019-20 without giving notice to the tenure holders and without providing any opportunity of hearing and Ch-41 and CH-45 has been made in most illegal and arbitrary manner.

12. That the authorities/opposite parties are turning deaf ear into the matter despite no report has been presented in respect of above mentioned irregularities which leads multiplicity of litigations to the poor tenure holders.

6. Taking note of the aforesaid facts which are pleaded, the Court had required the learned Standing Counsel to seek instructions. Once the instructions were placed before the Court, this Court had passed the order dated 03.09.2024 as under:-

Heard learned counsel for the petitioners as well as Dr. Krishna Singh, learned Standing Counsel for the State-respondents

who has provided a copy of the written instructions for perusal of the Court and the same is taken on record.

As per the instructions, it has been informed that the entire petition suffers from material concealment of fact.

It has been further pointed out that even earlier few of the present petitioners including the petitioner no. (i) and (iv) amongst others had filed a Writ Petition bearing No. 943 (Consolidation) of 2005 which came to be dismissed on 21.03.2007 relating to the same property.

It has further been pointed out that it was noticed that the petitioners were involved in falsification of the records and a First Information Report was lodged against them on 27.12.2012 and this fact has also been concealed.

It has also been submitted that the proceedings under the Uttar Pradesh Consolidation of Holdings Act, 1953 were duly proceeded and complied with so much so that the notification under Section 52 of the Act of 1953 was made on 19.10.2020.

Since the petitioners are responsible for encroaching and falsely occupying the government land, hence, without disclosing the aforesaid facts, the instant petition has been filed.

The matter is serious.

The learned counsel for the petitioners is directed to file their response and clearly indicating by bringing on record the complete pleadings of W.P. No. 943

(Consolidation) of 2005 including the fact whether any First Information Report was lodged against them on 27.12.2012 and what is the status as to whether the matter has gone to the trial and whether at any point of time, the petitioners were apprehended in context with the said First Information Report. Sri Mohan Singh, learned counsel who usually appears for the Gaon Sabha has informed the Court that other than the matter which has been brought to the notice of the Court by the learned Standing counsel, there is further material concealment, inasmuch as, the Gaon Sabha concerned had also filed a writ petition against the fraudulent entries of which the petitioners are the beneficiaries wherein the Court had required the petitioners to file a counter affidavit which was not done, however, in order to avoid the same, the petitioners are allegedly said to have filed the subsequent petitions which are connected with the petition filed by the Gaon Sabha and this fact has also not been disclosed.

The learned counsel for the petitioner is directed to implead the Gaon Sabha concerned as a party-respondent no. 5 during the course of the day.

Sri Mohan Singh, learned counsel for the Gaon Sabha is directed to bring the details of all the pending litigations within the aforesaid period of one week.

The learned Standing counsel is directed to bring the material filed along with the written instructions on record by

way of a short counter affidavit and as noticed above, the petitioner shall also file the affidavit as called for within a period of one week.

List this matter on 12th September, 2024, as fresh showing the name of Sri Mohan Singh, as counsel for the Gaon Sabha.

7. On 12.09.2024, the Court had passed the following order which reads as under:-

This Court had passed a detailed order on 03.09.2024 and in terms whereof the learned counsel for the petitioners was required to file his response regarding the earlier petitions filed by him, the reference of which has not been mentioned in the instant petition and it has come to light only in light of the instructions available with the learned Standing Counsel as well as the learned counsel for the Gaon Sabha.

The learned counsel for the Gaon Sabha as well as the learned Standing Counsel have filed their short counter affidavits bringing the material on record as required in terms of the order dated 03.09.2024.

The learned counsel for the petitioner submits that since he has received a copy of the short counter affidavit filed by the State as well as the Gaon Sabha today itself, he requires some short time to respond to that and he further submits that, though, he has collected all the materials as is required in terms of the earlier order but the affidavit could not be sworn, hence, he may be granted some liberty so that the

compliance of the order dated 03.09.2024 is made also referring to the short counter affidavits filed by the learned counsel for the Gaon Sabha as well as the learned Standing Counsel.

Let the same be done by 18th September, 2024.

The learned counsel for the petitioners shall provide an advance copy of his affidavit in the aforesaid context both to the learned counsel for the Gaon Sabha as well as the learned Standing Counsel.

List this matter shall come up before this Court on 23rd September, 2024, as fresh.

8. Thereafter the matter was listed on 23.09.2024 and on the said date a rejoinder-affidavit has been filed by the learned counsel for the petitioners.

9. The State had filed a short counter-affidavit on 11.09.2024 under the signatures of Shri Shivanand Singh Rathaur, who is posted as the Consolidation Officer, Lambhua, District Sultanpur wherein several documents were brought on record indicating the manner in which the consolidation proceedings were held as well as the facts that the writ petition suffered from gross concealment of material facts. The short counter-affidavit filed by the State also had various annexures including orders which have been passed earlier against which the present petitioners had availed their rights of challenging the said orders and final orders in such proceedings were passed which arose from consolidation proceedings.

10. Shri Mohan Singh, learned counsel for the Gaon Sabha on 10.09.2024 had filed their short counter-affidavit also

reflecting the aforesaid facts as narrated by the State counsel including multiple writ petitions filed by the petitioners at different point of time relating to the property in question as well as copies of the FIR which were lodged against the petitioners for falsification of the government documents.

11. It is in the aforesaid context, the Court had required the counsel for the petitioners to give his response and while filing the rejoinder-affidavit the counsel for the petitioners has primarily not disputed the factual scenario regarding filing of multiple petitions at different point of time. It is also not disputed that the FIR had been lodged against some of the petitioners where they have been chargesheeted and for some time they remained under judicial custody as well.

12. In the aforesaid factual backdrop and the pleadings which are now before this Court, the issue arises regarding the bonafities of the petitioners while filing petitions and as to whether they have concealed material facts from the Court while instituting the instant petition or whether the facts which have been brought on record by the State counsel as well as counsel for the Gaon Sabha can be treated to be not relevant for the purposes of adjudicating the controversy raised in the instant petition, hence the petition be entertained on its own strength.

13. Learned counsel for the petitioners Shri Rahul Roshan Dubey has attempted to submit that the issue raised in the writ petition is regarding the anomalies, irregularities committed by the Consolidation Authorities. Moreover, the writ petitions, filed by the some of the petitioners earlier, which have been referred to by the State Counsel as well as

by the Gaon Sabha relates to different plots number, hence the same has no nexus with the facts of the instant case vis a vis the relief's which have been claimed in the instant petition.

14. It is also urged that the writ petition filed by the petitioners on earlier occasion were based on different cause of action which has nothing to do with the averments made in the instant petition, hence the petitioners cannot be held to be guilty of suppression of material facts nor the petition suffers from any vice of misrepresentation.

15. Per contra, Dr. Krishna Kumar Singh as well as Shri Mohan Singh counsel for the State and the Gaon Sabha respectively has pointed out that the entire text of the averments made in the writ petition are based on an incorrect premise. What has not been indicated by the petitioners in the writ petition is the fact that the notification under section 4(2) of the U.P. Consolidation of Holdings Act, 1953 was published on 15.07.1981 and the notification under section 52 of the U.P. Consolidation of Holdings Act was made on 19.10.2020.

16. It is also submitted that the alleged non-compliance of various provisions of the U.P. Consolidation of Holdings Act as alleged by the petitioners is patently false; inasmuch as the publication in terms of Section 10 was made on 31.12.1984, publication in terms of Section 20 was done on 15.10.1985. Publication in terms of Section 20 was done on 30.11.1994, publication in terms of Section 23 was done on 21.09.1988 and the delivery of possession as contemplated under Section 24 of the Act was done on 27.10.1998.

17. It is also submitted that certain complaints had been made to the Hon'ble the Chief Minister, upon which an inquiry was held which revealed that in the village in question i.e. Jamkhari Form C.H. 45 was issued and the objections in this regard which were received was decided. These are acts and function which are done in the official line of duty and there is presumption in law that all official acts are in accordance with law unless contrary is proved.

18. It is further submitted that reference was initiated bearing No.419 /51 under Section 48 (3) of the U.P. C H. Act 1953 which revealed that fraudulent entries were existing in the name of certain persons which included the petitioners and thereafter the same were corrected and the fraudulent entries were expunged on 18.08.2005. The then Deputy Director of Consolidation also directed the Settlement Officer of Consolidation concerned to lodge an FIR against erring persons which inter alia included the petitioners no.1 and 4. They were also apprehended and later enlarged on bail. In respect of Plot no.65, the Gaon Sabha had proposed construction of a water tank and this was opposed and interfered with by the family members of the petitioner no.1 and an FIR was lodged bearing no.170/23 under sections 186, 353, 323, 504, 506 IPC and 2/3 Prevention of Damages to Public Property Act by the Laekhpal concerned.

19. It is in this context that the petitioners no.1 and 5 filed multiple petitions. The petitioner no.1 Keshav Prasad alongwith two others had filed writ petition No.943 (Cons.) of 2005 against the order dated 18.08.2005 (i.e. the order by which the Deputy Director of Consolidation in reference had expunged

the fraudulent entries and directed the Settlement Officer of Consolidation to lodged an FIR.) Needless to say that the said writ petition came to be dismissed on merits on 21.03.2017.

20. The Gaon Sabha had also filed a petition bearing Writ-C No.15987 of 2021 stating therein that the Gram Panchayat had reserved the plot for constructing of Gram Panchayat Bhawan and since there was certain fraudulent entries which were made the subject matter of judicial proceedings and the entries were corrected but the private respondents of the said petition No.15987 of 2021 were creating interference who are none other than the petitioners of this petition while Writ-C No.15987 of 2021 is still pending.

21. It is further urged that for the cause of action as agitated in the instant petition, first the petitioners had filed Writ-C No.2626 of 2024 before the Division Bench of this Court and the said petition was dismissed by the Division Bench granting liberty to the petitioners to assail the order before the appropriate court. It is also pointed out that the counsel for the present petition in the instant case merely Shri Rahul Roshan Dubey, was representing the petitioners in Writ-C No.2626 of 2024 as well as in another petition preferred under Article 227 of the Constitution of India bearing No.1547 of 2024 which also came to be dismissed by means of order dated 28.03.2024. Another petition Writ-C No.2882 of 2024 was filed before another Single Judge of this Court which was directed to be connected with Writ-C No.15987 of 2021 (which was filed by the Gaon Sabha) by means of order dated 01.04.2024. However, there is no disclosure of the aforesaid petition either in the instant petition nor the relevant orders

have been brought on record by ways of annexures.

relating to the issue of concealment of material facts had noticed as under:-

22. What has been brought on record is an order passed by a Division Bench of this Court wherein the present petitioners had filed a PIL bearing No.667 of 2024 and the Division Bench of this Court by means of order dated 07.08.2024 noticing that the present petitioners had not filed their objections to the basic year Khatauni, hence their case in the shape of a PIL was not maintainable. However, liberty was granted to seek remedy as may be prescribed in law. It is thus urged that all the aforesaid facts which gave a cause of action ought to have been disclosed, hence non-disclosure leads to misrepresentation and petitioners have definitely not come before the Court with clean hands. Accordingly, the petition deserves to be rejected.

23. Shri Mohan Singh, learned counsel has also adopted the aforesaid arguments of Dr. Krishna Kumar Singh.

24. The Court has heard the learned counsel for the parties and also perused the material on record.

25. Before advertng to the aforesaid submissions, it will be worthwhile to take a look at the law relating to concealment of the material facts and suppression vis a vis the duty of the courts especially Constitutional Courts while dealing with the writ petition.

26. This Court had the opportunity to examine such an issue in **Bhagwan Das Chela Balram Das Vs. District Magistrate Ambedkarnagar and others, 2023 (1) ADJ 342 [LB]** wherein this Court with the aid of decision rendered by the Apex Court

"In Ram Chandra Singh Vs. Savitri Devi and others; (2003) 8 SCC 319 the Hon'ble Supreme Court has held as under:

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

19. In *Derry v. Peek*, [1889] 14 A.C. 337, it was held:

In an 'action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief

in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit."

20. In *Kerr on Fraud and Mistake*, at page 23, it is stated:

"The true and only sound principle to be derived from the cases represented by *Slim v. Croucher* is this: that a representation is fraudulent not only when the person making it knows it to be false, but also when, as *Jessel, M.R.*, pointed out, he ought to have known, or must be taken to have known, that it was false. This is a sound and intelligible principle, and is, moreover, not inconsistent with *Derry v. Peek*. A false statement which a person ought to have known was false, and which he must therefore be taken to have known was false, cannot be said to be honestly believed in. "A consideration of the grounds of belief", said Lord Herschell, "is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so."

21. In *Bigelow on Fraudulent Conveyances* at page 1, it is stated:

"If on the facts the average man would have intended wrong, that is enough."

It was further opined:

"This conception of fraud (and since it is not the writer's, he may speak of it without diffidence), steadily kept in view, will render the administration of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much of the prevalent confusion in regard to 'moral' fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such convenient and indeed useful but often obscure language as 'fraud upon the law'. What is fraud upon the law? Fraud can be committed only against a being capable of rights, and 'fraud upon the law' darkens counsel. What is really aimed at in most cases by this obscure contrast between moral fraud and fraud upon the law, is a contrast between fraud in the individual's intention to commit the wrong and fraud as seen in the obvious tendency of the act in question."

22. Recently this Court by an order dated 3rd September, 2003 in *Ram Preeti Yadav vs. U.P. Board of High School & Intermediate Education & Ors.* reported in *JT 2003 (Supp. 1) SC 25* held:

"Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by words or letter. Although negligence is not fraud

but it can be evidence on fraud. (See *Derry vs. Peek* [1889] 14 A.C. 337) In *Lazarus Estate vs. Berly* [1971] 2 W.L.R. 1149 the Court of Appeal stated the law thus:

"I cannot accede to this argument for a moment "no Court in this land will allow a person to keep an advantage which 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 judgments, contracts and all transactions whatsoever."

In *S.P. Chengalvaraya Naidu vs. Jagannath* 1994 (1) SCC 1 this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

24. In *Arlidge & Parry on Fraud*, it is stated at page 21:

"Indeed, the word sometime appears to be virtually synonymous with "deception", as in the offence (now repealed) of obtaining credit by fraud. It is true that in this context "fraud" included certain kind of conduct which did not amount to false pretences, since the definition referred to an obtaining of credit "under false pretences, or by means of any other fraud". In

Jones, for example, a man who ordered a meal without pointing out that he had no money was held to be guilty of obtaining credit by fraud but not of obtaining the meal by false pretences: his conduct, though fraudulent, did not amount to a false pretence. Similarly it has been suggested that a charge of conspiracy to defraud may be used where a "false front" has been presented to the public (e.g. a business appears to be reputable and creditworthy when in fact it is neither) but there has been nothing so concrete as a false pretence. However, the concept of deception (as defined in the Theft Act 1968) is broader than that of a false pretence in that (inter alia) it includes a misrepresentation as to the defendant's intentions; both *Jones* and the "false front" could now be treated as cases of obtaining property by deception."

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.

26. In *Smt. Shrisht Dhawan vss. M/s. Shaw Brothers* 1992 AIR(SC) 1555], it has been held that:

"Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct."

27. In *S.P. Chengalvaraya vs. Jagannath* [1994 (1) SCC 1]

this Court in no uncertain terms observed:

"...The principles of "finality of litigation" cannot be passed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.... A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

28. In *Indian Bank vs. Satyam Fibers (India) Pvt. Ltd.* [1996 (5) SCC 550], this Court after referring to *Lazarus Estates*

(*supra*) and other cases observed that 'since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order'.

It was further held:

"The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers, which are resident in all Courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business."

29. In *Chittaranjan Das vs. Durgapore Project Limited & Ors.* 99 CWN 897, it has been held:

"Suppression of a material document which affects the

condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied within such a situation.

It is now well known that a fraud vitiates all solemn acts. Thus, even if the date of birth of the petitioner had been recorded in the service returns on the basis of the certificate produced by the petitioner, the same is not sacrosanct nor the respondent company would be bound thereby."

In A.V. Papayya Sastry and others Vs. Government of A.P. and others; (2007) 4 SCC 221 the Hon'ble Supreme Court has held as under:

"21. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed; "Fraud avoids all judicial acts, ecclesiastical or temporal".

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order by the first Court or by the final Court has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of *Lazarus Estates Ltd. v. Beasley*,

(1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502, Lord Denning observed:

"No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."

24. In *Duchess of Kingstone*, Smith's Leading Cases, 13th Edn., p.644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said; Fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is

thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.

27. In *S.P. Chengalvaraya Naidu (dead) by LRs. V. Jagannath (dead) by LRs. & Ors.* (1994) 1 SCC 1 : JT 1994 (6) SC 331, this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that "there was no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". B approached this Court.

28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as 'wholly perverse', Kuldip Singh, J. stated:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan- dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation".

(emphasis supplied)

29. The Court proceeded to state: "A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party".

30. The Court concluded: "The principle of 'finality of litigation' cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants".

31. In *Indian Bank v. Satyam Fibres (India) Pvt. Ltd.* (1996) 5 SCC 550 : JT 1996 (7) SC 135, referring to *Lazarus Estates and Smith v. East Elloe Rural District Council*, 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888, this Court stated;

"22. The judiciary in India also possesses inherent power, specially under Section 151 C.P.C., to recall its judgment or order if it is obtained by Fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the Decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the Constitution of the Tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business".

(emphasis supplied)

32. In *United India Insurance Co. Ltd. v. Rajendra Singh and others.*, (2000) 3 SCC 581 : JT 2000 (3) SC 151, by practising fraud upon the Insurance Company, the claimant obtained an award of compensation from the Motor Accident Claims Tribunal. On coming to know of fraud, the Insurance Company applied for recalling of the award. The Tribunal, however, dismissed the petition on the ground that it had no power to review its own award. The High Court confirmed the order. The Company approached this Court."

In **K.D. Sharma Vs. Steel Authority of India Limited and others**; (2008 12 SCC 481, the

Hon'ble Apex Court has held as under:

"34. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.

35. The underlying object has been succinctly stated by Scrutton, L.J., in the leading case of *R.V. Kensington Income Tax Commissioners*, (1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136 in the following words:

"...it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts- it says facts, not law. He must not misstate the law if he can help it; the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts; and the penalty by which the Court

enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it the Court will set aside any action which it has taken on the faith of the imperfect statement".

(emphasis supplied)

36. A prerogative remedy is not a matter of course. While exercising extraordinary power a Writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the Court, the Court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating "We will not listen to your application because of what you have done". The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it.

37. In *Kensington Income Tax Commissioner*, Viscount Reading, C.J. observed:

"...Where an *ex parte* application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the applicant was not candid and did not fairly state the facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before

coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that this Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit".

(emphasis supplied)

38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play 'hide and seek' or to 'pick and choose' the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification.

This is because, "the Court knows law but not facts".

In Dalip Singh Vs. State of Uttar Pradesh and others; (2010) 2 SCC 114 Hon'ble the Supreme Court has held as under:

"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with

tainted hands, is not entitled to any relief, interim or final.

3. In Hari Narain v. Badri Das AIR 1963 SC 1558, this Court adverted to the aforesaid rule and revoked the leave granted to the appellant by making the following observations:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution, care must be taken not to make any statements which are inaccurate, untrue and misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterizes as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."

4. In Welcome Hotel and others v. State of Andhra Pradesh and others etc. AIR 1983 SC 1015, the Court held that a party which

has misled the Court in passing an order in its favour is not entitled to be heard on the merits of the case.

5. In *G.Narayanswamy Reddi and other v. Governor of Karnataka* and another AIR 1991 SC 1726, the Court denied relief to the appellant who had concealed the fact that the award was not made by the Land Acquisition Officer within the time specified in Section 11-A of the Land Acquisition Act because of the stay order passed by the High Court. While dismissing the special leave petition, the Court observed:

"2....Curiously enough, there is no reference in the Special Leave Petitions to any of the stay orders and we came to know about these orders only when the respondents appeared in response to the notice and filed their counter affidavit. In our view, the said interim orders have a direct bearing on the question raised and the non-disclosure of the same certainly amounts to suppression of material facts. On this ground alone, the Special Leave Petitions are liable to be rejected. It is well settled in law that the relief under Article 136 of the Constitution is discretionary and a petitioner who approaches this Court for such relief must come with frank and full disclosure of facts. If he fails to do so and suppresses material facts, his application is liable to be dismissed. We accordingly dismiss the Special Leave Petitions."

6. In *S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others* JT 1993 (6) SC 331, the Court held that

where a preliminary decree was obtained by withholding an important document from the court, the party concerned deserves to be thrown out at any stage of the litigation.

7. In *Prestige Lights Ltd. v. State Bank of India* (2007) 8 SCC 449, it was held that in exercising power under Article 226 of the Constitution of India the High Court is not just a court of law, but is also a court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution is duty bound to place all the facts before the court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain petition filed under Article 226 of the Constitution. This Court referred to the judgment of Scrutton, L.J. in *R v Kensington Income Tax Commissioners* (1917) 1 K.B. 486, and observed:

"In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure

of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

In **Bhaskar Laxman Jadhav and others Vs. Karamveer Kakasaheb Wagh Education Society and others; (2013) 11 SCC 531** the Hon'ble Supreme Court has held as under:

"42. While dealing with the conduct of the parties, we may also notice the submission of learned counsel for respondent No.1 to the effect that the petitioners are guilty of suppression of a material fact from this Court, namely, the rejection on 2nd May 2003 of the first application for extension of time filed by the trustees and the finality attached to it. These facts have not been clearly disclosed to this Court by the petitioners. It was submitted that in view of the suppression, special leave to appeal should not be granted to the petitioners.

43. Learned counsel for the petitioners submitted that no material facts have been withheld from this Court. It was submitted that while the order dated 2nd May 2003 was undoubtedly not filed, its existence was not material in view of subsequent developments that had taken place. We cannot agree.

44. It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of a case and leave the decision making to the Court. True, there is a

mention of the order dated 2nd May 2003 in the order dated 24th July 2006 passed by the JCC, but that is not enough disclosure. The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2nd May 2003 was passed or that it has attained finality.

45. We may only refer to two cases on this subject. In *Hari Narain v. Badri Das*, AIR 1963 SC 1558 stress was laid on litigants eschewing inaccurate, untrue or misleading statements, otherwise leave granted to an appellant may be revoked. It was observed as follows:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case, special leave granted to the appellant ought to be revoked. Accordingly, special leave is revoked and the appeal is dismissed. The appellant will pay the costs of the respondent."

46. More recently, in *Ramjas Foundation vs. Union of India*, (2010) 14 SCC 38 the case law on the subject was discussed. It

was held that if a litigant does not come to the Court with clean hands, he is not entitled to be heard and indeed, such a person is not entitled to any relief from any judicial forum. It was said:

“The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case.”

27. The aforesaid propositions have been very recently reiterated by the Apex Court in **2024 SCC OnLine SC 1629, All India EPF Staff Federation Vs. Union of India & others** and similar sentiment has been echoed by the Apex Court in **Kusha Duruka Vs. The State of Odisha (2024) 4 SCC 432** wherein the petitioners before the Apex Court were dismissed with costs for the reason of concealment and non-disclosure.

28. Having taken note of the aforesaid legal spectrum relating to the issue of concealment and misrepresentation and non-disclosure of and in light thereof if the

facts of the instant case are examined, it would reveal that the petitioners in the writ petition has definitely not disclosed the fact regarding their right to file the instant petition. Moreover, multiple petitions filed by the petitioners were not disclosed in this writ petition but were mentioned by the State/Garam Sabha in their counter-affidavit. It is only when the rejoinder-affidavit was filed that the same has been accepted by the petitioner as a conformation of the averments made in the counter-affidavit but there was no effort of the petitioners to bring the facts which were there in their knowledge at the time of filing of the instant petition including its outcome.

29. The contents of the writ petition which have been quoted hereinabove, would reveal that in the entire petition there is not a whisper of the fact as to how the petitioners had any personal cause or what is their personal right in respect of any plot. Vague and disjuncted averments have been made. Reference has been made relating to one Shri Ram Nain in paragraph 6-(b), Jai Narain, Makdoom, Adha Prasad, Ram Yug, in paras 6(d)(e)(f) but there is no mention regarding the right of any of the petitioners in respect of any of the plots. In absence of the aforesaid coupled with the fact that there has been deliberate concealment of the earlier petition and most importantly order passed by the Deputy Director of Consolidation in exercise of his powers conferred under reference in terms of Section 48(3) of the U.P. Consolidation of Holdings Act including passing of the order dated 18.08.2005 wherein the petitioners no.1 and 4 inter alia alongwith one Shri Bhagwant Prasad, son of Achchaibar were prima facie found guilty of usurping the public utility land by fabricating documents and in pursuance of the FIR lodged Keshav

Prasad remained in jail since 03.06.2015 till 03.11.2015 when he was granted bail by this Court.

30. It has also not been disclosed that the present petitioner no.1 and 2 others had assailed the order passed by the Deputy Director of Consolidation dated 18.08.2005 and the said writ petition was dismissed on 21.03.2017 and needless to say the dismissal of the writ petition would confirm the order passed by the Deputy Director of Consolidation dated 18.08.2005 and the legal position as obtained is that the order in reference holding that the entries allegedly in favour of the petitioners no.1 and 4 were found to be fraudulent and were set aside and expunged and this order attained finality.

31. Even though it is attempted to state by the counsel for the petitioners that a review has been filed but the fact remains that this fact has also not been disclosed by the petitioners in the writ petition and it is only when the matter was heard today that it has been mentioned. Moreover, vague and non descriptive averments have been made in the petition and it is also not clear whether the petitioners have any personal right to mention this petition.

32. The names as indicated in the paragraph-6 as noticed above also do not indicate any personal cause of action. In case if any of the petitioners would have been aggrieved, they would have a right of taking recourse to the provisions of U.P. Consolidation of Holdings Act, 1953 to ventilate their grievance but what prima facie appears from the record is that the petitioners no.1 and 4 have already been held to be the beneficiaries of fraudulent entries against whom action has been taken and the fraudulent entries have been

expunged. This aspect of the matter and the background of the litigation has been deliberately suppressed.

33. It appears that the petitioners by taking recourse to an oblique and circuitous route is attempting to malign the Consolidation Authorities. It has also not been brought on record that what is the outcome of the criminal case as to whether after filing of the chargesheet, the trial has concluded or not and whether the petitioners no.1 and 4 have been convicted or acquitted in the said trial.

34. This Court finds that the explanation as offered by the counsel for the petitioners for not disclosing the detailed facts and the background of the litigation is not cogent or inadvertent to be ignored. The petitioners counsel Shri Rahul Roshan Dubey has been representing the petitioners in several petitions and it cannot be said that the counsel himself was not aware. Before the counsel espouses the cause of any litigant, he is first an officer of the Court. It was his bounden duty to have disclosed the correct facts candidly and it also cannot be said that the counsel for the petitioners is not aware of the law or he has not much experience since the petitioners counsel has been registered with the U.P. Bar Council in the year 2012 and as such he has a standing of more then ten years at the Bar.

35. The role of an advocate in the justice dispensation system is of crucial importance as already noticed above that the counsel representing a case of his client is first an officer of the Court and then he pleads the case for his client fearlessly. In the instant case, the counsel for the petitioner, who has been representing them in various petitions appears to have lost

sight of his duties as an officer of the Court. Recently in ***Bhagwan Singh Vs. State of U.P. and Others***; 2024 SCC OnLine SC 2599 wherein the Apex Court in paragraph nos. 3, 4, 31, 33 and 34 has held as under:-

"3. While the finest of the legal minds and legal eagles on the Bench and in the Bar of the Supreme Court are busy developing the best of the jurisprudence and laying down the best of the laws for the country, there are certain sinister cabal of unscrupulous litigants and a coterie of their counsellors, who are always busy in taking undue advantage of the systemic lacunae and in misusing the process of law, in turn damaging the image of the Courts as also of the entire legal fraternity/legal profession. The huge quantum of work load in the Courts, limitations of the human agencies in manning the Justice Delivery System and the fertile minds of the unscrupulous litigants and their legal counsellors are some of the factors responsible for not allowing the Justice Delivery System to work as effectively and efficiently as it is expected to work.

4. The wrongdoers must fear the law that they will be punished, the innocents must rest assured that they will not be, and the victims must be confident that they will get the justice. This is what a citizen of the democratic country like India, governed by Rule of Law would legitimately expect from the Courts. The Courts are called the 'Temple of Justice'. However, often brazen attempts are being made to abuse and misuse

the process of law by committing frauds on Courts. This is one of such cases where such an attempt has been made to pollute the stream of justice. With this little Preface let us deal with the facts of the case.

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31. People repose immense faith in Judiciary, and the Bar being an integral part of the Justice delivery system, has been assigned a very crucial role for preserving the independence of justice and the very democratic set up of the country. The legal profession is perceived to be essentially a service oriented, noble profession and the lawyers are perceived to be very responsible officers of the court and an important adjunct of the administration of justice. In the process of overall depletion and erosion of ethical values and degradation of the professional ethics, the instances of professional misconduct are also on rise. There is a great sanctity attached to the proceedings conducted in the court. Every Advocate putting his signatures on the Vakalatnamas and on the documents to be filed in the Courts, and every Advocate appearing for a party in the courts, particularly in the Supreme Court, the highest court of the country is presumed to have filed the proceedings and put his/her appearance with all sense of responsibility and seriousness. No professional, much less legal professional, is immuned from being prosecuted for his/her criminal misdeeds.

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WAY FORWARD TO CORRECTIVE MEASURES

33. This is the opportune time to remind the Advocates about the Standard of Professional misconduct and Etiquettes as contained in Chapter II Part VI of the Bar Council of India Rules. As stated in the Preamble thereof, an Advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity, may still be improper for an advocate. Though an Advocate is expected to fearlessly uphold the interests of his client, his conduct must conform to the Rules of Conduct and Etiquettes laid down in the said Chapter, both in letter and in spirit.

34. The role and the duty of the Advocates particularly Advocates-on-Record are contained in Order IV of the Supreme Court Rules, 2013. The relevant part of Rule 7 Order IV of the said Rules reads as under:

“7. (a).

(b) (i) Where the vakalatnama is executed in the presence of the Advocate-on-Record, he shall certify that it was executed in his presence.

(ii) Where the Advocate-on-Record merely accepts the vakalatnama which is already duly executed in the presence of a

Notary or an advocate, he shall make an endorsement thereon that he has satisfied himself about the due execution of the vakalatnama."

36. For all the aforesaid reasons, this Court comes to a definite conclusion that the petition suffers now gross concealment of material facts. The petition is vague, no personal cause of action of the petitioners has been made out coupled with the fact that the petition suffers from concealment of material fact and is an attempt to waste the precious time of the court by resorting to filing a frivolous petition and if the State Counsel and the Gaon Sabha would not have brought the facts to the notice of the Court, the petitioners would have had a leverage by getting away with concealment and non disclosure of material facts.

37. In light of the detailed discussions, this Court finds that it is a fit case for dismissing the petition but it also is a case where exemplary cost must be imposed. Accordingly, the petition is dismissed with the cost of Rs.50,000/- to be deposited with the District Legal Aid Services Authority, Lucknow within a period of eight weeks from today.

(2024) 9 ILRA 1397
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2024

BEFORE

**THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.**

Writ -C No. 17513 of 2024

Ved Prakash & Ors. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Akhilesh Tripathi, Anant Agarwal

Counsel for the Respondents:

C.S.C., Kailash Nath Singh, Sandeep Kumar Pathak

Civil Law - The Constitution of India, 1950-Article 226 – The Uttar Pradesh Revenue Code, 2006 - Section 207 - Uttar Pradesh Revenue Code Rules, 2006-Rule 183-

The duty of the appellate court is to review the findings of the trial court and decide whether to reverse or affirm them. The appellate court has the power to rehear the case on both the question of law and fact. It is essential for the appellate court to address all the issues and contentions raised by the parties in the appeal- The order to be passed in appeal must reflect a conscious application of mind and record findings supported by reasons on all issues arising from the contentions put forth and pressed by the parties- The appeal under Section 207 of the Revenue Code, being a regular first appeal, it would be the duty of the first appellate court to write a self-contained judgment after applying its mind to the facts of the case, recording findings and arriving at a conclusion based on reasons. **(Para 17-19)**

Petition allowed. (E-15)

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Akhilesh Tripathi, learned counsel for the petitioners, Sri Abhishek Shukla, learned Additional Chief Standing Counsel appearing for the State-respondents and Sri Kailash Nath Singh, learned counsel for the respondent no.4.

2. The present petition has been filed seeking to assail the order dated 30.01.2024 passed by respondent no.2, Additional Commissioner (Administration), Varanasi Division, Varanasi in Case No.2418 of 2023 (Computerized Case No.C202314000002481, Jay Prakash Vs. Om

Prakash), under Section 207 of the UP Revenue Code, 2006, and also the earlier order dated 14.11.2023 passed by respondent no.3, Sub-Divisional Officer, Tehsil Pindra, District Varanasi, in Case No.14091 of 2021 (Computerized Case No.T202114700214091, Om Prakash Vs. Ved Prakash), under Section 116 of the Revenue Code.

3. Briefly stated facts of the case are as follows.

4. The petitioners claim to be co-sharers of the respondent no.4 in land bearing arazi nos.466, 472, 475 and 459 situate at the village in question. A suit bearing Case No.861 of 2022 (Om Prakash Singh Vs. Ved Prakash and others), under Section 116 of the Code, was instituted, and on 16.02.2023, an order was passed for making a preliminary decree. The aforesaid order is stated to have been passed ex parte against the petitioners herein.

5. An application seeking recall of the aforesaid order, filed by the petitioners was dismissed by an order dated 14.11.2023, and in terms of the said order, the kurra report submitted by the Lekhpal, was confirmed and a direction was issued for making final decree.

6. Aggrieved by the aforesaid order, the petitioners preferred an appeal, registered as Case No.2418 of 2023, which has been dismissed by the respondent no.2 by an order dated 30.01.2024.

7. It is the aforesaid order dated 30.01.2024 passed by respondent no.2, against which the present writ petition has been preferred.

8. Contention of the counsel for the petitioners is that the order dated

16.02.2023, passed in proceedings under Section 116, of which recall had been sought, was ex parte, and that, accordingly, the said order, in terms of which the kurra report had been accepted, was legally unsustainable.

9. It has been submitted that despite the aforesaid grounds having been taken before the respondent no.2, an order has been passed without adverting to the grounds raised in the memo of appeal.

10. Section 116 of the Revenue Code relates to suits for division of holdings, and as per the provisions contained therein, a bhumidhar may sue for the division of the holding of which he is a co-sharer.

11. Section 117 of the Revenue Code refers to the duty of the court in suits for division of holding, and it provides that the Court of Assistant Collector shall follow such procedure as may be prescribed.

12. For ease of reference, the aforementioned statutory provisions contained in Sections 116 and 117 of the Revenue Code, are being extracted below:

“116. Suit for division of holding.—(1) A bhumidhar may sue for the division of the holding of which he is a co-sharer.

(2) In every such suit, the Court may also divide the trees, wells and other improvements existing on such holding but where such division is not possible, the trees, wells and other improvements aforesaid and valuation thereof shall be divided

and adjusted in the manner prescribed.

(3) One suit may be instituted for the division of more holdings than one where all the parties to the suit other than the Gram Panchayat are, jointly interested in each of the holdings.

(4) to every suit under this section, the Gram Panchayat concerned shall be made a party.

117. Duty of Court in suits for division of holding.—(1) In every suit for division of holding under section 116 the Court of Assistant Collector shall-

(a) follow such procedure as may be prescribed;

(b) apportion the land revenue payable in respect of each such division.

(2) A division of holding referred to in section 116 shall not affect the joint liability of the tenure-holders thereof in respect of the land revenue payable before the date of the final decree.”

13. The rules related to Sections 116 and 117, as aforesaid, have been provided under Rules 107, 108 and 109 of the UP Revenue Code Rules, 20162, and in terms thereof the case is to be registered as a suit to be decided according to the provisions of the Code of Civil Procedure, 1908. The court has been enjoined to determine shares of the parties, make valuation of the holdings and to pass a preliminary decree. The kurra report, is to be prepared by the Lekhpal upon which objections are to be invited, and thereafter an appropriate order is to be passed by the Sub-Divisional Officer after affording opportunity of hearing to the parties, and considering the objections filed against the

report submitted by the Lekhpal. Upon the confirmation of the report and the kurra, the final decree is to follow.

14. The relevant rules under the Revenue Code Rules, are being reproduced below:-

“107. Suit for division of holding (Section 116).—Every plaint in a suit for division of a holding (including trees, wells and other improvements) shall contain the following particulars:-

(1) Name, parentage and address of the plaintiff.

(2) Name parentage and address of other co-sharers of the holding.

(3) Share claimed by the plaintiff.

(4) Share of other co-tenure holders.

(5) Detailed particulars of the holding including plot numbers, area and land revenue.

(6) Whether the plaintiff is a recorded or unrecorded tenure holder.

Note: The plaint shall be accompanied by a certified copy of the Khatauni and other documents relied upon by the plaintiff.

108. Suit for division for several holdings (Section 116).—Where the suit relates to the division of more than one holding, the particulars specified in rule 107 shall be mentioned in the plaint in respect of all such holdings.

109. Preliminary and Final decrees (Section 117).—(1) If the plaint referred to in rule 107 or rule 108 is in order, it shall be registered as a suit and the

defendants shall be called upon to file their written statements. The suit shall then be decided according to the provisions of the Code of Civil Procedure, 1908.

(2) Before making a division the court shall—

(a) determine separately the share of the plaintiff and each of the other co-tenure holders ;

(b) record which, if any, of the co-tenure holders wish to remain joint ; and

(c) make valuation of the holding (or holdings) in accordance with the circle rate fixed by the Collector applicable to each plot in the holding.

(3) If the suit is decreed, the Court shall pass a preliminary decree declaring the share of the plaintiff.

(4) After the preparation of preliminary decree the Sub Divisional Officer shall get the Kurra prepared through the Lekhpal.

(5) The Lekhpal shall submit the Kurra report within a period of one month from the date of receiving the order in this regard and at the time of preparation of Kurra he shall observe the following principles—

(a) the plot or plots shall be allotted to each party in proportionate to his share in the holding;

(b) the portion allotted to each party shall be as compact as possible;

(c) as far as possible no party shall be given all the inferior or all the superior classes of land;

(d) as far as possible existing fields shall not be split up;

(e) Plots which are in the separate possession of a tenure holder shall, as far as possible, be allotted to such tenure holder if they are not in access of his share;

(f) If the plot or any part thereof is of commercial value or is adjacent to road, abadi or any other land of commercial value, the same shall be allotted to each tenure holder proportionately and in the case of second condition the same shall be allotted proportionately adjacent to road, abadi or other land of commercial value; and

(g) If the co-tenure holders are in separate possession on the basis of mutual consent or family settlement, the Kurra shall, as far as possible, be fixed accordingly.

(6) When the report regarding Kurra is submitted by the Lekhpal, the objection shall be invited thereon and thereafter the appropriate order shall be passed by the Sub Divisional Officer after affording opportunity of hearing to the parties and considering the objection, if any, filed against the report submitted by the Lekhpal.

(7) If the report and Kurra is confirmed by the Sub Divisional Officer, the final decree shall follow it.

(8) At the stage of the final decree, the Court shall—

(a) Separate the share of the plaintiff from that of the defendant by metes and bounds.

(b) Place on record a map showing in different colours the properties given to plaintiff as

distinct from those given to the defendant.

(c) Apportion the land revenue payable by the parties.

(d) Direct the record of rights and map to be corrected accordingly.

(9) If, for adjusting the equities between the parties, payment of compensation regarding trees, wells or other improvements becomes necessary, the revenue Court concerned may also pass necessary orders at the stage of final decree.

(10) The Sub-Divisional Officer shall make an endeavour to decide the suit within the period of six months and if the suit is not decided within such period, the reason shall be recorded.”

15. Any party aggrieved by a final order or decree passed in a suit for division of holdings under Section 116, is entitled to the remedy of a first appeal under Section 207 of the Revenue Code. The appeal is to be preferred before the Court of Commissioner, as per the provisions contained under Section 207 read with the Third Schedule. The power of appellate court has been stated under Rule 183 of the Revenue Code Rules, whereunder it is provided that the appellate court may either admit the appeal, or after giving the appellant an opportunity of being heard, summarily reject it. Upon the appeal being admitted, a date is to be fixed for hearing of the case and a notice is to be served on the respondent or the opposite party.

16. The provisions relating to a first appeal, under Section 207 of the Revenue Code, and the corresponding Rule 183 of the Revenue Code Rules, which

describes the power of the appellate court, are being extracted below:-

“207. First appeal.—(1)

Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in Column 2 of the Third Schedule, may prefer a first appeal to the Court or officer specified against it in Column 4, where such order or decree was passed by a Court or officer specified against it in Column 3 thereof.

(2) A first appeal shall also lie against an order of nature specified—

(a) in Section 47 of the Code of Civil Procedure, 1908; or

(b) in Section 104 of the said Code; or

(c) in Order XLIII, Rule 1 of the First Schedule to the said Code.

(3) The period of limitation for filing a first appeal under this section shall be thirty days from the date of the order or decree appealed against.

183. Power of appellate and revisional Court (Sections 207, 208 and 210).—(1) The appellate or revisional Court may either admit the appeal or revision, as the case may be, or after giving the appellant or the revisionist an opportunity of being heard, summarily reject it.

(2) If the appeal or revision is admitted a date shall be fixed for hearing of the case and notice shall be served on the respondent or the opposite party.

(3) The appellate or the revisional court may, with the

consent of the parties, finally dispose of the appeal or revision at the stage of admission.

(4) The appellate or the revisional court shall, endeavor to finally decide the appeal or revision, as the case may be, within a period of six months from the date of filing the appeal or revision and if the appeal or revision is not decided within the aforesaid period, the reason for the same shall be recorded.”

17. The duty of the appellate court, as has been consistently held, is to review the findings of the trial court and decide whether to reverse or affirm them. The appellate court has the power to rehear the case on both the question of law and fact. It is essential for the appellate court to address all the issues and contentions raised by the parties in the appeal.

18. The order to be passed in appeal must reflect a conscious application of mind and record findings supported by reasons on all issues arising from the contentions put forth and pressed by the parties. The judgment of the appellate court must not only record the decision but also give reasons for the same. This is necessary as it allows the parties to understand the reasons behind the court's decision and to challenge it if necessary before a higher statutory forum. In the present case the order passed by the first appellate court under Section 207 is subject to the remedy of a further second appeal under Section 208 of the Revenue Code.

19. The appeal under Section 207 of the Revenue Code, being a regular first appeal, it would be the duty of the first appellate court to write a self-contained

judgment after applying its mind to the facts of the case, recording findings and arriving at a conclusion based on reasons.

20. It is well settled that an appeal is the continuation of the proceedings of the original court, and the appellate jurisdiction, ordinarily, involves a rehearing on law as well as on facts. The appellate court's duty to advert to the grounds stated in the memorandum of appeal and pressed by the party concerned, is a fundamental aspect of the judicial process ensuring that the decision in the appeal is well reasoned and is seen to be just to the parties.

21. The first appeal being a valuable right of the appellant, all questions of fact and law decided by the trial court are open for reconsideration. The appellate court, is therefore required to address itself to all the issues and the order of the appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions.

22. The respondent no.2 has neither adverted to the grounds raised in the appeal nor has it given any cogent reason for passing the order. The order impugned dated 30.01.2024 passed by the appellate court, apart from being cryptic, appears to have been passed without examining any of the aspects which are required to be gone into in a regular appeal.

23. Counsel for the respondent no.4 has not been able to dispute that the order passed by the appellate authority is without following the settled principles in regard to the duties of a court exercising appellate jurisdiction.

24. Counsel for the contesting parties are ad idem on the point that it

would serve the ends of justice if the case is remitted to the respondent no.2 for passing of a fresh order, after according due consideration to the grounds raised in the memo of appeal and granting opportunity to the parties concerned.

25. Having regard to the aforesaid, this Court deems it appropriate to set aside the order dated 30.01.2024 passed by the respondent no.2 in Case No.2418 of 2023 (Computerized Case No.C202314000002481, Jay Prakash Vs. Om Prakash), under Section 207 of the Revenue Code.

26. The matter is remitted to the respondent no.2 to pass a fresh order in accordance with law, after giving due opportunity to the parties concerned, and according consideration to the grounds raised in the memo of appeal.

27. A prayer is made by the counsel for the petitioner, at this stage, that the appeal be decided by the concerned respondent expeditiously and within a stipulated time period.

28. Counsel for the respondents have not opposed the aforesaid prayer.

29. It is accordingly provided that the concerned respondent would be expected to conclude the proceedings expeditiously and preferably within a period of **six months** from the date of production of certified copy of the instant order, provided there is no other legal impediment.

30. The petition stands **allowed** to the extent indicated above.

(2024) 9 ILRA 1404
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 30.09.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ A No. 8771 of 2024

Aniruddh Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner
Ravi Singh, Raghvendra Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Re-fixation of salary after retirement – Recovery of Rs. 5,68,082/- – Permissibility – Government Order dated 16.01.2007 permit the employer to examine the last 34 months period of an employee after his retirement for re-fixation of salary – Violation thereof – Effect – High Court found the impugned recovery order in violation of the instructions being issued by the Hon'ble Apex Court in *Rafiq Masih's case* – Held, re-fixation of salary beyond the period of 34 months not permissible in view of the Government Order dated 16.01.2007 – *Sushil Kumar Singhal's case* relied upon (Para 11)

Writ allowed. (E-1)

List of Cases cited:

1. St. of Punj. & ors. Vs Rafiq Masih & ors.; (2005) 4 SSC 334
2. High Court of Punj. and Har. & ors. Vs Jagdev Singh; (2014) 16 SCC 267
3. Sushil Kumar Singhal Vs Pramukh Sachiv Irrigation Department & ors.; (2014) 16 SCC 444

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ravi Singh, learned counsel for the petitioner and Sri Ashwani Kumar Singh Rathore, learned Standing Counsel.

2. By means of the present petition, the petitioner has prayed the following main reliefs:

"I. To issue a writ, order or direction of or in the nature of certiorari, thereby quashing the order dated 06.09.2024, contained in Annexure No. 1 to this writ petition.

II. To issue a writ, order or direction of or in the nature of certiorari, thereby quashing the order dated 07.09.2024, contained in Annexure No. 2 to this writ petition.

III. To issue a writ, order or direction of or in the nature of mandamus directing the respondents not to recover any amount from the petitioner in pursuance of impugned orders 06.09.2024 & 07.09.2024, contained in Annexure No. 1 & 2 to this writ petition.

IV. To issue a writ, order or direction in the nature of mandamus directing the respondents to release her entire post retiral dues including pension, gratuity, leave encashment within the period to be fixed by this Hon'ble Court."

3. Learned counsel for the petitioner has stated that the petitioner has retired from the post of Senior Assistant from the office of Deputy Director Agriculture, Barabanki on 31.07.2024. The aforesaid post comes within the purview of Class--III post. After his retirement, the impugned order dated 06.09.2024 (Annexure No. 1) has been passed re-fixing the salary and

Pay-Grade of the petitioner w.e.f. 01.07.2006. On account of re-fixation of salary of the sum of Rs.5,68,082/- has been directed to be recovered from the petitioner vide order dated 07.09.2024 (as contained in Annexure No.2).

4. Learned counsel for the petitioner has assailed the aforesaid inaction on the ground that in view of the dictum of the Hon'ble Apex Court in re; **State of Punjab and Others Vs. Rafiq Masih and Others (2005) 4 SSC 334**, no such recovery may be executed from a Class III employee at the fag end of retirement or after retirement in the name of access amount being paid when the employee was in service.

5. Sri Ravi Singh has also submitted that the Hon'ble Apex Court has clarified the dictum in re; **High Court of Punjab and Haryana and Other Vs. Jagdev Singh (2014) 16 SCC 267 and in State of Punjab and Others Vs. Rafiq Masih and Others (supra)** to the extent that if at the time of making access payment, any undertaking has been received from the employee, such recovery may be executed but in the present case no such undertaking has been received from the petitioner when the benefit of pay-grade etc. was provided to the petitioner.

6. He has also submitted that before passing the impugned order, no opportunity of hearing was given to the petitioner.

7. Sri Ravi Singh has further submitted that in view of the policy of the State Government itself pursuant to the Government Order dated 16.01.2007, the employer may examine

the last 34 months period of an employee after his retirement for re-fixation of salary etc but in the present case, such re-fixation has been carried out w.e.f. 01.07.2006.

8. The aforesaid Government Order dated 16.01.2007 has been approved by the Hon'ble Apex Court in re; **Sushil Kumar Singhal Vs. Pramukh Sachiv Irrigation Department and Others (2014) 16 SCC 444**.

9. Therefore, the impugned orders are patently illegal, arbitrary, discriminatory and uncalled for in view of the dictum of Hon'ble Apex Court in re; **State of Punjab and Others Vs. Rafiq Masih and Others (supra)** and **Sushil Kumar Singhal Vs. Pramukh Sachiv Irrigation Department and Others (supra)**.

10. Sri Ashwani Kumar Singh Rathore tried to defend the impugned orders but has submitted that undisputedly the petitioner retired from Class III post an impugned exercise of re-fixation of salary and pay-grad etc. as well as the direction for recovery has been passed after his retirement, therefore, appropriate order may be passed.

11. Having heard learned counsel for the parties and having perused the material on record, since the petitioner retired from Class III post and impugned recovery direction/ order has been passed after his retirement, therefore, such impugned order is in violation of the instructions being issued by the Hon'ble Apex Court in re; **State of Punjab and Others Vs. Rafiq Masih and Others (supra)**. Besides, the period for re-fixation of salary which has

been considered is beyond 34 months, therefore, in view of the Government Order dated 16.01.2007 and also in view of the dictum of Hon'ble Apex Court in re; **Sushil Kumar Singhal Vs. Pramukh Sachiv Irrigation Department and Others (supra)**, such re-fixation may not be permitted in the eyes of law. Since no recital has been given regarding any undertaking at the time of making access payment to the petitioner, therefore, in view of the dictum of Hon'ble Apex Court in re; **High Court of Punjab and Haryana and Other Vs. Jagdev Singh (supra)** such recovery may not be permitted.

12. Accordingly, the writ petition is allowed. Consequently, the impugned orders dated 06.09.2024 (contained in Annexure No. 1) and 07.09.2024 (contained in Annexure No. 2) are hereby set aside/ quashed.

13. The opposite parties are further directed to release the entire service benefits of the petitioner including pension, gratuity, leave encashment and other applicable benefits, with expedition, preferably within a period of six weeks from the receipt of certified copy of the order of this Court, provided the petitioner has completed all required formalities, failing which the petitioner would be entitled for the interest @ 8% per annum on delayed payment.

14. With the aforesaid observations and directions, the writ petition is **allowed**.

15. No order as to costs.

(2024) 9 ILRA 1406

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 23.09.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ -A No. 39076 of 2015

Heeraman Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Ashutosh Kumar Pandey, Sanjeev Singh, Sujeet Kumar Rai

Counsel for the Respondents:

C.S.C.

Service Law – claim for compassionate appointment-rejected-father's post as Sahyogi to the Collection Amin was abolished upon his death-Uttar Pradesh Co-operative Collection Fund and the Amins and other Staff Service Rules, 2002-Rule 5-rules have statutory force-framed by the Governor-Section 130 read with Section 92(A) and Section 92(B) of the U.P. Cooperative Societies Act, 1965-deceased employee-government servant-post's abolition did not preclude offering a compassionate appointment on a suitable Group 'D' post-rejection order quashed-direction to grant compassionate appointment-petition allowed. (paras 10, 12, 14, 15 and 16)

HELD:

Rule 5 clearly stipulates that strength of service of each category of post under the service cadre mentioned under the Rules would be with prior approval of the Government. The rules that have been framed by the Governor taking aid to the provision as contained under Section 130 read with Section 92(A) and Section 92(B) of the U.P. Cooperative Societies Act, 1965, are definitely having statutory force. Number of posts of Sahyogi to the Amin are prescribed to be 90 in the service cadre and it appears that immediately after rules were framed and brought into force, the Government decided to regularize all such Sahyogis working on a temporary basis and so resultantly the order of confirmed appointment was issued in favour of

the petitioner's father on 23rd November, 2002. (para 10)

Thus, there is no quarrel about the status of the vacancy as to be belonging to the government service within the definition of the rules and appointment order issued as a consequence thereof to the father of the petitioner. The plea taken in the counter affidavit vide paragraphs 5 & 6 to the effect that petitioner's father was not a government employee is, therefore, clearly misplaced one. In the entire counter affidavit the appointment order has not been disputed, nor it has been questioned on the ground of being obtained by fraud or by any mischief at the end of petitioner's father. (Para 12)

Insofar as the other plea taken in the order impugned that since cadre in which petitioner's father was appointed became a dying cadre as the word and expression 'otherwise' would relate to all such eventualities including the death of the employee as contemplated under the rules, to treat the post abolished as a consequence thereof, also does not appeal to reason. The dying in harness Rules, 1974 do not provide that a person seeking compassionate should be offered appointment upon such posts only on which the deceased employee was working and, therefore, the appointment could have been offered on any group 'D' post. It is not a case of respondent that no other group 'D' post' available to accommodate the petitioner in the matter of compassionate appointment. (Para 14)

In a judgment of Supreme Court in the case of the St. of Uttar Pradesh & ors. v. Premlata in Civil Appeal No. - 6003 of 2021 decided on 5th October, 2021 the Court has very categorically held that suitability of the posts means that the applicant seeking compassionate appointment should be offered appointment only in the status in which his father was working. For instance, if father was working on a group 'D' post then a dependent should not be offered group 'C' post. The appointment on equivalent post can be made. (Para 15)

Petition allowed. (E-13)

List of Cases cited:

1. Kaushlendra Kuwar Vs Registrar, Cooperative Societies, U.P. Lucknow & ors. in Civil Misc. Writ Petition No.- 44810 of 2011 decided on 5th April, 2007

2. The St. of Uttar Pradesh & ors. Vs Premlata in Civil Appeal No. - 6003 of 2021 decided on 5th October, 2021

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

1. Heard Sri Sanjeev Singh and Sri Ashutosh Kumar Pandey, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. Petitioner before this Court is aggrieved by the decision taken by the respondents under the order impugned dated 23rd February, 2015, whereby claim of the petitioner for compassionate appointment has been rejected solely on the ground that petitioner's father was working as an Aid (Sahyogi) to the Collection Amin and the relevant service rules, namely, Uttar Pradesh Co-operative Collection Fund and the Amins and other Staff Service Rules, 2002 (hereinafter referred to as 'Rules, 2002') very categorically provided that the post of Sahyogi of Amin that were 90 in number stand abolished with the retirement of such Sahyogi of Amin or otherwise. Since father of the petitioner died on 12th May, 2012, according to the respondents, the post also got abolished and as it had become a dying cadre.

3. Assailing the order impugned Sri Sanjeev Singh, learned counsel for the petitioner, in the first instance, has drawn the attention of the Court to the appointment order of the petitioner's father issued to him on 23rd November, 2002, which categorically records that petitioner's father is appointed as Sahyogi in the regular pay scale as admissible in law to

the post in question w.e.f. 30th October, 2002 as a government employee. He further submits that petitioner's father was in the respondent's establishment ever since 1984 when he was initially appointed though he was working only on a temporary basis but with the confirmation in service giving him a permanent post in the employment of Government service, he became a regular Government employee in the year 2002.

4. In such above circumstances, Sri Sanjeev Singh has argued that Uttar Pradesh Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 as were applicable on the date of death of the father of the petitioner will certainly be applicable and even if posts were not there since petitioner had moved an application on 14th June, 2013 seeking appointment as a Class IV employee, petitioner could have been adjusted against any group 'D' post. Still further he submits that if vacancies are not there as per the relevant dying in harness rules, 1974 a supernumerary post could have been created.

5. Learned counsel for the petitioner has also placed reliance upon the judgment of a coordinate Bench of this Court in the case of **Kaushlendra Kuwar v. Registrar, Cooperative Societies, U.P. Lucknow and others** in Civil Misc. Writ Petition No.- 44810 of 2011 decided on 5th April, 2007, a copy whereof has been brought on record as Annexure- 1 to the affidavit filed in support of the misc. application dated 12th December, 2023.

6. Meeting the arguments advanced by learned counsel for the petitioner, learned Standing Counsel has sought to defend the order for the reasons assigned therein. In support of his

argument, he has relied upon paragraph 5 and 6 of the counter affidavit in which it has been stated that petitioner's father was not appointed against any government post as per the amended Rules, 2002. It has also been submitted that merely because the pay fixation was done and an employee would not become a government employee as the payment of salary was made from fund of the district bank. He has also sought to dispute the appointment order issued to the petitioner's father stating therein that he was being offered appointment on a post which belonged to the government service.

7. Having heard learned counsel for the respective parties and having perused the records, I find that the petitioner's father though was appointed in the year 1984 in a temporary capacity but was later on came to be offered confirmed appointment on the post of Sahyogi to the Collection Amin on 23rd November, 2002 along with two other persons. The name of petitioner's father appears on serial No.- 2 of the appointment order. The entire appointment order for better appreciation as has been brought on record as Annexure - 3 to the writ petition is reproduced hereunder:

"आदेश

उत्तर प्रदेश सहकारी संग्रह निधि तथा अन्य कर्मचारी सेवा नियमावली, 2002 के नियम-6 में निहित व्यवस्था के अनुसार निम्न विवरण के सहयोगी को वेतनमान 2550-55-2660-60-3200 में दिनांक 30.10.2002 से सरकारी सेवा में नियुक्त किया जाता है। इनकी पारस्परिक वरिष्ठता वाद में यथा विधि निर्धारित होगी:-

मांक	ब्र म	ना पदनाम	नाम जनपद
1	2	3	4
1.	सर्वश्री राम प्रकाश सिंह	सहयोगी	गाजीपुर

2.	उपेन्द्र नाथ राम	सहयोगी	गाजीपुर
3.	ओम प्रकाश तिवारी	सहयोगी	गाजीपुर

सहकारी सेवा में 30.10.2002 से तैनात होने के पश्चात् इन पर उत्तर प्रदेश सरकारी संग्रह निधि तथा अन्य कर्मचारी सेवा नियमावली 2002 तथा उत्तर प्रदेश सरकारी कर्मचारी आचरण नियमावली 1956 तथा उत्तर प्रदेश सरकार द्वारा जारी सभी आदेश लागू होंगे।

ह०

(हृदयराम चौरसिया)

उप निबन्धक,

सहकारी समितियाँ, उ०प्र०,

वाराणसी मण्डल,

वाराणसी।

कार्यालय उप निबन्धक, सहकारी समितियाँ, उ०प्र०,
वाराणसी मण्डल, वाराणसी।

पत्रांक: 4235-39/क्षेत्रीय संग्रह-लेखा/ दिनांक:
नवम्बर 23, 2002”

8. The language in which the appointment order is issued, clearly demonstrates that petitioner's father was appointed in pay scale Rs.2550-55-2660-60-3200 w.e.f. 30th October, 2002 in government service and also it was provided that seniority will be determined later on.

9. Coming to the service rules aid of which has been taken by both learned counsel for the petitioner and learned Standing Counsel, namely U.P. Cooperative Collection Fund and the Amins and other Staff Rules, 2002, I find that the post of Sahyogi to the Collection Amin was a cadre post and posts were 90 in number as sanctioned though the rules declared it to be a dying cadre as the post would stand abolished in the event government servant retired or otherwise. Rule 5 of Part-II of the

Rules, 2002 for better appreciation are reproduced hereunder:

“5.(1) The strength of the service and of each category of posts therein shall be such as may be determined by the Registrar with the prior approval of the State Government.

(2) The strength of the service and of each category of posts therein shall until orders varying the same are passed under sub-rule (1) be as given in the Schedule below.

Schedule

Sl. No.	Name of the post	No. of Post	Remark
1	Amin	206	Three posts in each district however in district having less than three tehsils, two post in each district.
2	Sahyogi's of Amin	90	The post falling vacant due to retirement or otherwise shall cease to exist.
3	Amin on Commission	2689	The post falling

	basis		vacant due to retirement or otherwise shall cease to exist.

(3). The Appointing Authority may leave unfilled or the Government may hold in abeyance any vacant post without thereby entitling any person to compensation or the Government may create such additional permanent or temporary posts as it may consider proper."

10. Rule 5 clearly stipulates that strength of service of each category of post under the service cadre mentioned under the Rules would be with prior approval of the Government. The rules that have been framed by the Governor taking aid to the provision as contained under Section 130 read with Section 92(A) and Section 92(B) of the U.P. Cooperative Societies Act, 1965, are definitely having statutory force. Number of posts of Sahyogi to the Amin are prescribed to be 90 in the service cadre and it appears that immediately after rules were framed and brought into force, the Government decided to regularize all such Sahyogis working on a temporary basis and so resultantly the order of confirmed appointment was issued in favour of the petitioner's father on 23rd November, 2002.

11. It is pertinent to mention here that appointment was offered to the petitioner's father on 30th October, 2002 w.e.f. the date of enforcement of the rules with the publication of the same in the Gazette.

12. Thus, there is no quarrel about the status of the vacancy as to be belonging to the government service within the definition of the rules and appointment order issued as a consequence thereof to the father of the petitioner. The plea taken in the counter affidavit vide paragraphs 5 & 6 to the effect that petitioner's father was not a government employee is, therefore, clearly misplaced one. In the entire counter affidavit the appointment order has not been disputed, nor it has been questioned on the ground of being obtained by fraud or by any mischief at the end of petitioner's father.

13. In such circumstances, therefore, to hold the petitioner's father was not working on a government post seems to have been made under some confusion at the end of the respondents while deciding the representation/ application of the petitioner seeking compassionate appointment.

14. Insofar as the other plea taken in the order impugned that since cadre in which petitioner's father was appointed became a dying cadre as the word and expression 'otherwise' would relate to all such eventualities including the death of the employee as contemplated under the rules, to treat the post abolished as a consequence thereof, also does not appeal to reason. The dying in harness Rules, 1974 do not provide that a person seeking compassionate should be offered appointment upon such posts only on which the deceased employee was working and, therefore, the appointment could have been offered on any group 'D' post. It is not a case of respondent that no other group 'D' post' available to accommodate the petitioner in the matter of compassionate appointment.

15. In a judgment of Supreme Court in the case of the **State of Uttar Pradesh & others v. Premlata** in Civil Appeal No. - 6003 of 2021 decided on 5th October, 2021 the Court has very categorically held that suitability of the posts means that the applicant seeking compassionate appointment should be offered appointment only in the status in which his father was working. For instance, if father was working on a group 'D' post then a dependent should not be offered group 'C' post. The appointment on equivalent post can be made. Vide paragraphs 10.2, 10.3 & 11 the Court held thus:

"10.2 The Division Bench of the High Court in the present case has interpreted Rule 5 of Rules 1974 and has held that 'suitable post' under Rule 5 of the Rules 1974 would mean any post suitable to the qualification of the candidate irrespective of the post held by the deceased employee. The aforesaid interpretation by the Division Bench of the High Court is just opposite to the object and purpose of granting the appointment on compassionate ground. 'Suitable post' has to be considered, considering status/post held by the deceased employee and the educational qualification/eligibility criteria is required to be considered, considering the post held by the deceased employee and the suitability of the post is required to be considered vis a vis the post held by the deceased employee, otherwise there shall be no difference/distinction between the appointment on compassionate

ground and the regular appointment. In a given case it may happen that the dependent of the deceased employee who has applied for appointment on compassionate ground is having the educational qualification of Class-II or Class-I post and the deceased employee was working on the post of Class/Grade-IV and/or lower than the post applied, in that case the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post. The aforesaid shall be contrary to the object and purpose of grant of appointment on compassionate ground which as observed hereinabove is to enable the family to tide over the sudden crisis on the death of the bread earner. As observed above, appointment on compassionate ground is provided out of pure humanitarian consideration taking into consideration the fact that some source of livelihood is provided and family would be able to make both ends meet.

10.3 In the present case as observed hereinabove initially the respondent applied for appointment on compassionate ground on the post of Assistant Operator in Police Radio Department. The same was not accepted by the Department and rightly not accepted on the ground that she was not fulfilling requisite eligibility criteria for the post of Assistant Operator.

Thereafter the respondent again applied for appointment on the compassionate ground on the post of Workshop Hand. The case of the respondent was considered, however, she failed in the physical test examination, which was required as per the relevant recruitment rules of 2005. Therefore, thereafter she was offered appointment on compassionate ground as Messenger which was equivalent to the post held by the deceased employee. Therefore appellants were justified in offering the appointment to the respondent on the post of Messenger. However, the respondent refused the appointment on such post.

11. In view of the above and for the reasons stated above, the Division Bench of the High Court has misinterpreted and misconstrued Rule 5 of the Rules 1974 and in observing and holding that the 'suitable post' under Rule 5 of the Dying In Harness Rules 1974 would mean any post suitable to the qualification of the candidate and the appointment on compassionate ground is to be offered considering the educational qualification of the dependent. As observed hereinabove such an interpretation would defeat the object and purpose of appointment on compassionate ground."

16. In such circumstances, therefore, I am of the considered view that petitioner could have been offered any group 'D' post in the establishment of the respondent.

17. Thus, the order impugned rejecting the claim of the petitioner for compassionate appointment cannot be sustained in law and, accordingly, the order dated 23rd February, 2015 (Annexure - 7 to the writ petition) is hereby quashed.

18. The appointment order to the petitioner on the compassionate basis shall be issued by the respondents within maximum period of 30 days from the date of production of certified copy of this order if otherwise there is no legal impediments.

19. It is clarified that petitioner's claim will not be rejected on any technical ground including the ground that appointment is to be offered after five years of the death of the deceased employee.

20. There will be no order as to cost.

(2024) 9 ILRA 1412
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2024

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Criminal Revision No. 4562 of 2024

Sanjeev Nayan Mishra **...Revisionist**
Versus
State of U.P. & Ors. **...Opposite Parties**

Counsel for the Revisionist:

Ayush Mishra, Prabha Shanker Mishra,
 Vinay Kumar Tiwari

Counsel for the Opposite Parties:

G.A.

Criminal Law –Code of Criminal Procedure, 1973 - Section 397/401 - order rejecting discharge application challenged- -Section

13 (1) (b) r/w Section 13 (2) of Prevention of Corruption Amendment Act-Section 227 Cr.P.C-application of discharge-disproportionate assets in check period-at the stage of framing charges-it is not required to evaluate the evidence's probative value but only to determine if a prima facie case exists-there was sufficient ground to proceed with the trial based on the material presented-trial court's decision to reject the discharge application-well-reasoned-revision dismissed. (Paras 12 and 23)

HELD:

The Apex Court, in the case of Sajjan Kumar Vs C.B.I. : (2010) 9 SCC 368, held that at the time of framing of charge, the Court has to look at all the material placed before it and determine whether a prima facie case is made out or not, and the court is not required to consider the evidentiary value of the evidence as any question of admissibility or reliability of evidence is a matter of trial. (Para 12)

Thus, the position of law that emerges is that at the stage of discharge/framing of charge, the Court is merely required to shift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused i.e. whether a prima facie case is made out against the accused. Further the ground that income of other family members has not been considered also cannot be looked into and considered at the stage of discharge, it is to be considered in the trial only. (Para 23)

Revision dismissed. (E-13)

List of Cases cited:

1. Sajjan Kumar Vs C.B.I.: (2010) 9 SCC 3682
2. Amit Kapoor Vs Ramesh Chander: (2012) 9 SCC 460
3. Asim Shariff Vs National Investigation Agency: (2019) 7 SCC 148
4. Bhawna Bai Vs Ghanshyam: (2020) 2 SCC 217
5. M.E. Shivalingamurthy Vs CBI: (2020) 2 SCC 768

6. St. of Rajasthan Vs Ashok Kumar Kashyap: 2021 SCC OnLine SC 314

7. St. of T.N. Vs R. Soundirarasu: (2023) 6 SCC 768

8. Manendra Prasad Tiwari Vs Amit Kumar Tiwari: 2022 SCC OnLine SC 1057

9. Kanchan Kumar Vs St. of Bihar: (2022) 9 SCC 577

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Ayush Mishra, learned counsel for the revisionist, Sri P.K. Giri, learned Additional Advocate General and Ajay Singh, learned A.G.A.-I for the State of U.P. and perused the material on records.

2. The present revision under Section 397/401 Cr.P.C. has been filed by the revisionist- **Sanjeev Nayan Mishra**, with the prayer to allow the present revision and set-aside the impugned order dated 14.08.2024 passed by Special Judge, Prevention of Corruption Act / Additional Sessions Judge, Meerut, in Criminal Case No. 08 / 146 arising out Case Crime No. 05 of 2020, under Section 13 (1) (b) r/w Section 13 (2) of Prevention of Corruption Amendment Act, Police Station U.P. Vigilance Establishment, Meerut, Sector Meerut, with a further prayer to stay the effect & operation of the aforesaid impugned order, during the pendency of the present revision.

3. The present revision has been preferred against the order dated 14.08.2024 by which the trial court concerned has rejected the Application No. 53 Ka under Section 227 Cr.P.C. along with additional Application No. 57 Kha for discharge. Earlier the revisionist had approached this Court challenging the

charge-sheet of the matter in Application U/S 482 No. 22409 of 2024 (Sanjeev Nayan Mishra vs. State of U.P. and 3 others) which was disposed of vide order dated 16.07.2024 by a co-ordinate Bench of this Court in which liberty was granted to the applicant to approach the court concerned for discharge under Section 227 Cr.P.C. The said order reads as under:-

"1. Heard Mr. Rajendra Prasad Tiwari, the learned counsel for applicant and the learned A.G.A. for State-opposite party-1.

2. Perused the record.

3. Applicant Sanjeev Nayan Mishra has approached this Court by means of present application under Section 482 Cr.P.C. with the following prayer:

"It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the Crl. Misc. Application U/S 482 Cr.P.C. and to quash the charge sheet no. 02/2024 dated 20.01.24 in Case Crime No. 05/2020, u/s 13 (1)B r/w 13 (2) Prevention of Corruption (Amendment) Act, 2018, Police Station -U.P. Vigilance Establishment Meerut Sector Meerut and cognizance order dated 31.01.24 passed by Additional District & Sessions Judge/Special Judge, Prevention of Corruption, Meerut in Crl. Case No. 08/146/2024, State Vs. Sanjeev Nayan Mishra.

It is also further prayed that this Hon'ble court may graciously be pleased to stay the entire proceeding of Crl. Case No. 08/146/2024, State Vs. Sanjeev Nayan Mishra, Case Crime No. 05/2020, u/s 13(1) B r/w 13 (2) Prevention of Corruption (Amendment) Act, 2018, Police station-U.P. Vigilance Establishment Meerut Sector Meerut in pursuance of charge sheet no. 02/2024 dated 20.01.2024 and cognizance order dated 31.01.24 passed by

Additional District & Sessions Judge/Special Judge, Prevention of Corruption, Meerut during the pendency of the present Criminal Misc. Application u/s 482 Cr.P.C., in the interest of justice, otherwise applicants will suffer irreparable loss and injury."

4. After some arguments, the learned counsel for applicant fairly submits that since as per the material on record no prima facie case is made out against applicant, therefore, interest of justice shall better be served in case applicant is permitted to seek discharge under Section 227 Cr.P.C. before court.

5. Learned A.G.A.has no objection to the prayer made by the learned counsel for applicant.

6. Having heard the learned counsel for applicant, the learned A.G.A. for State and considering the submissions urged by the learned counsel for applicant as noted herein above, the prayer prayed for by means of present application is refused.

7. However, liberty is granted to applicants to approach court below by means of a discharge application under Section 227 Cr.P.C. within a period of two weeks from today. In case applicant appears before court below and files discharge application, court below shall enlarge the applicant on interim bail and, thereafter, decide the application for discharge filed by applicant within a period of one month from the date of presentation of a certified copy of this order by a reasoned and speaking order. The protection granted by court below shall come to an end automatically after the order is passed by court below on the discharge application.

8. With the aforesaid directions, this application is finally disposed of."

4. In compliance of the said order the application for discharge and another application supplementing it was moved which has been rejected and is now the subject matter of the present revision.

5. The facts of the case are that the revisionist was working as the District Social Welfare Officer and retired from service on 31.07.2019. The allegation against the revisionist is that during the check period 02.02.1990 to 30.03.2016 after calculation of his income and expenditure, disproportionate income to the tune of Rs. 42,15,150/- was found and as such after enquiry a First Information Report was lodged against him on 26.10.2020, under Sections 13 (1) (b) and Section 13 (2) of Prevention of Corruption Act, 1988 by Smt. Neelam, Inspector, U.P. Vigilance Establishment, Meerut, Sector Meerut.

6. The matter was investigated and a charge-sheet dated 20.01.2024 was submitted under Section 13 (1) (b) r/w Section 13 (2) of Prevention of Corruption Act 2018 on which the court concerned took cognizance and summoned him vide order dated 31.01.2024. Against the same, the revisionist preferred a petition under Section 482 Cr.P.C. before this Court which was disposed of by the order dated 16.07.2024 which is quoted herein above. Subsequent to the disposal of the petition under Section 482 Cr.P.C. of the revisionist, the revisionist preferred an application dated 26.07.2024 numbered as Paper No. 53 Ka, under Section 227 Cr.P.C. claiming discharge. Further an application No. 57 Kha with additional grounds was moved by the revisionist for the same. Both the applications stand rejected vide the order impugned herein.

7. Learned counsel for the revisionist submitted that the rejection of the application for discharge of the revisionist is totally based on misreading of material on record and without appreciating the same in its true prospective. It is submitted that although in the first information report it is stated that income of Rs. 42,15,150/- is shown to be disproportionate but in the charge-sheet the said amount shown is Rs. 31,75,590/- and thus the whole prosecution story becomes suspicious. It is submitted that as a matter of fact the revisionist retired on 31.07.2019 but the Investigating Officer has shown his retirement as 30.03.2016 which would also go to show that investigation has not been conducted seriously. It is further submitted that salary of Smt. Beena Mishra, wife of the revisionist for the months of July 2010 to March 2012 and even the properties in the name of the dependents of the revisionist have wrongly been shown in the calculation. It is submitted that the income of the revisionist has not been calculated properly. It is further submitted that the trial court concerned has not applied its judicial mind while deciding the application for discharge and has in a mechanical manner dismissed the same. It is submitted that as such the revision be allowed and the order impugned be set-aside and the revisionist be discharged.

8. *Per contra*, learned counsel for the State opposed the prayer and submitted that the revisionist was a Government servant. After investigation it has been found that there are disproportionate assets with him and thus charge-sheet was submitted against him on which the court concerned has taken cognizance and summoned him. It is submitted that in so far as the order summoning the revisionist is concerned, the same has attained finality as although

the same was challenged before this Court but the same was not interfered and liberty was granted to him to claim discharge. It is submitted that the trial court has considered his applications for discharge in a detailed manner and has meticulously returned a finding that the material available on record does not call for the accused to be discharged and thus rejected his said applications. It is submitted that in so far as the factum of accounting of income is concerned, the same is a matter of trial which needs to be considered at the appropriate stage by the trial court. It is submitted that the revision is devoid of any merit and be dismissed.

9. After hearing the learned counsels for the parties and perusing the records, it is evident that the revisionist was a public servant. Subsequent to an enquiry for the relevant check period with regards to disproportionate a first information report was lodged against him. The matter was investigated and the investigating agency submitted a charge-sheet against him on which the court concerned has taken cognizance and summoned him. The summoning order was challenged before this Court which was not interfered but liberty was granted to him to claim discharge. The revisionist moved applications for discharge which has been rejected vide the order impugned which is the subject matter of challenge before this Court. In so far as calculation of income is concerned, the same cannot be looked into at this stage. The same is a matter of trial. The application for discharge has been rejected by this trial court by a well reasoned and speaking order.

10. The law with regards to discharge of accused, framing of charge and powers

of revision under Section 397 Cr.P.C. is well settled.

11. An accused can also be discharged as per Section 227, 239 Cr.P.C. They read as under:

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

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

12. The Apex Court, in the case of **Sajjan Kumar Vs. C.B.I. : (2010) 9 SCC 368**, held that at the time of framing of charge, the Court has to look at all the material placed before it and determine whether a prima facie case is made out or not, and the court is not required to consider the evidentiary value of the evidence as any question of admissibility or reliability of evidence is a matter of trial. The relevant portion of the judgment is reproduced below:

"21. On consideration of the authorities about scope of Sections 227 and

228 of the Code, the following principles emerge:

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

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

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

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

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

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate

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

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

13. In **Amit Kapoor Vs. Ramesh Chander : (2012) 9 SCC 460**, the Apex Court enlisted certain principles with reference to exercise of power under Section 397 and Section 482 of Cr.P.C. by the Courts while deciding as to whether the charges framed against an accused be quashed or not. The principles listed are as under:

"27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397

or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

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

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

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings,

such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

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

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

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

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take

into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed *prima facie*.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised *ex debito justitiae*, i.e. to do real and substantial justice for administration of which alone, the courts exist.

27.16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial

compliance to the requirements of the offence."

14. In the case of **Asim Shariff v. National Investigation Agency : (2019) 7 SCC 148**, it was reiterated by the Apex Court that the trial court is not supposed to divulge the evidence on the record to determine whether the accused would get acquitted or convicted if a particular charge is framed against an accused. The relevant portion of the observation of the court in the case is as under:

"18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out; where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the court is not supposed to hold a mini trial by marshalling the evidence on record."

15. Further, in the case of **Vikram Johar v. State of Uttar Pradesh : 2019 SCC OnLine SC 609** the Apex Court has

reiterated that during the stage of charge, the court must not conduct a mini-trial and the decision should be based on the prima facie appreciation of the materials placed on record. The relevant portion of the said judgment is as under:

"19. It is, thus, clear that while considering the discharge application, the Court is to exercise its judicial mind to determine whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not to hold the mini trial by marshalling the evidence."

16. The Apex Court in **Bhawna Bai Vs. Ghanshyam : (2020) 2 SCC 217**, has observed as under:—

"13. ...At the time of framing the charges, only prima facie case is to be seen; whether case is beyond reasonable doubt, is not to be seen at this stage. At the stage of framing the charge, the court has to see if there is sufficient ground for proceeding against the accused. While evaluating the materials, strict standard of proof is not required; only prima facie case against the accused is to be seen."

17. In **M.E. Shivalingamurthy Vs. CBI : (2020) 2 SCC 768**, the Hon'ble Apex Court, while discussing the principles to be followed while dealing with an application seeking discharge, observed as under:

"i. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the Trial Judge would be empowered to discharge the accused.

ii. The Trial Judge is not a mere Post Office to frame the charge at the instance of the prosecution.

iii. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the Police or the documents produced before the Court.

iv. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, "cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial.

v. It is open to the accused to explain away the materials giving rise to the grave suspicion.

vi. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

vii. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

viii. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused..."

18. The Apex Court decision in **State of Rajasthan Vs. Ashok Kumar Kashyap : 2021 SCC OnLine SC 314**, held that the at the stage of framing of the charge and/or considering the discharge application, a mini trial is not permissible. The Court observed that the position of law that emerges is that at the stage of discharge/framing of charge, the Judge is

merely required to take note of the material on record in order to find out whether or not there is sufficient ground for proceeding against the accused.

19. In the case of **State of Rajasthan Vs. Ashok Kumar Kashyap : 2021 SCC OnLine SC 314**, the Apex Court held that the evaluation of evidence on merits is not permissible at the stage of considering the application for discharge. At the stage of framing of the charge and/or considering the discharge application, a mini trial is not permissible. It has been held as under:

"23. In the case of P. Vijayan (supra), this Court had an occasion to consider Section 227 of the Cr.P.C. What is required to be considered at the time of framing of the charge and/or considering the discharge application has been considered elaborately in the said decision. It is observed and held that at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. It is observed that in other words, the sufficiency of grounds would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. It is further observed that if the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228 Cr.P.C., if not, he will discharge the accused. It is further observed that while exercising its judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution, it is not necessary for the court to enter into the pros and cons of the matter or into a

weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts."

20. The Apex Court, in **State of T.N. v. R. Soundirarasu : (2023) 6 SCC 768** has held that discharge claimed by contending that the Investigating officer has not considered the proper explanation and income of other family members and also failed to consider the assets lawfully acquired by the wife is not tenable since the accused public servant does not have a right to be afforded a chance to explain the alleged disproportionate assets to the investigating Office before the filing of charge-sheet. It has been held as under:

"45. In K. Veeraswami [K. Veeraswami v. Union of India, (1991) 3 SCC 655 : 1991 SCC (Cri) 734] , this Court held thus : (SCC p. 715, para 75)

"75... since the legality of the charge-sheet has been impeached, we will deal with that contention also. Counsel laid great emphasis on the expression "for which he cannot satisfactorily account" used in clause (e) of Section 5(1) of the Act. He argued that that term means that the public servant is entitled to an opportunity before the investigating officer to explain the alleged disproportionality between assets and the known sources of income. The investigating officer is required to consider his explanation and the charge-sheet filed by him must contain such averment. The failure to mention that requirement would vitiate the charge-sheet and renders it invalid. This submission, if we may say so, completely overlooks the powers of the investigating officer. The investigating officer is only required to collect material to find out whether the offence alleged appears to have been committed. In the course of the

investigation, he may examine the accused. He may seek his clarification and if necessary, he may cross check with him about his known sources of income and assets possessed by him. Indeed, fair investigation requires as rightly stated by Mr A.D. Giri, learned Solicitor General, that the accused should not be kept in darkness. He should be taken into confidence if he is willing to cooperate. But to state that after collection of all material the investigating officer must give an opportunity to the accused and call upon him to account for the excess of the assets over the known sources of income and then decide whether the accounting is satisfactory or not, would be elevating the investigating officer to the position of an enquiry officer or a Judge. The investigating officer is not holding an enquiry against the conduct of the public servant or determining the disputed issues regarding the disproportionality between the assets and the income of the accused. He just collects material from all sides and prepares a report which he files in the court as charge-sheet."

(emphasis supplied)

75. The ambit and scope of exercise of power under Sections 239 and 240 of the CrPC, are therefore fairly well settled. The obligation to discharge the accused under Section 239 arises when the Magistrate considers the charge against the accused to be "groundless". The Section mandates that the Magistrate shall discharge the accused recording reasons, if after (i) considering the police report and the documents sent with it under Section 173, (ii) examining the accused, if necessary, and (iii) giving the prosecution and the accused an opportunity of being heard, he considers the charge against the accused to be groundless, i.e., either there

is no legal evidence or that the facts are such that no offence is made out at all. No detailed evaluation of the materials or meticulous consideration of the possible defences need be undertaken at this stage nor any exercise of weighing materials in golden scales is to be undertaken at this stage - the only consideration at the stage of Section 239/240 is as to whether the allegation/charge is groundless.

76. This would not be the stage for weighing the pros and cons of all the implications of the materials, nor for sifting the materials placed by the prosecution the exercise at this stage is to be confined to considering the police report and the documents to decide whether the allegations against the accused can be said to be "groundless".

77. The word "ground" according to the Black's Law Dictionary connotes foundation or basis, and in the context of prosecution in a criminal case, it would be held to mean the basis for charging the accused or foundation for the admissibility of evidence. Seen in the context, the word "groundless" would connote no basis or foundation in evidence. The test which may, therefore, be applied for determining whether the charge should be considered groundless is that where the materials are such that even if unrebutted, would make out no case whatsoever.

79. Thus, the revisional power cannot be exercised in a casual or mechanical manner. It can only be exercised to correct manifest error of law or procedure which would occasion injustice, if it is not corrected. The revisional power cannot be equated with the appellate power. A Revisional Court cannot undertake meticulous examination of the material on record as it is undertaken by the trial court or the appellate court. This power can only be

exercised if there is any legal bar to the continuance of the proceedings or if the facts as stated in the charge-sheet are taken to be true on their face value and accepted in their entirety do not constitute the offence for which the accused has been charged. It is conferred to check grave error of law or procedure."

21. In the case of **Manendra Prasad Tiwari Vs. Amit Kumar Tiwari : 2022 SCC OnLine SC 1057**, the Apex Court has explained the well-settled law on exercise of powers under Section 397 and 482 Cr.P.C. as under:

"21. The law is well settled that although it is open to a High Court entertaining a petition under Section 482 of the CrPC or a revision application under Section 397 of the CrPC to quash the charges framed by the trial court, yet the same cannot be done by weighing the correctness or sufficiency of the evidence. In a case praying for quashing of the charge, the principle to be adopted by the High Court should be that if the entire evidence produced by the prosecution is to be believed, would it constitute an offence or not. The truthfulness, the sufficiency and acceptability of the material produced at the time of framing of a charge can be done only at the stage of trial. To put it more succinctly, at the stage of charge the Court is to examine the materials only with a view to be satisfied that prima facie case of commission of offence alleged has been made out against the accused person. It is also well settled that when the petition is filed by the accused under Section 482 CrPC or a revision Petition under Section 397 read with Section 401 of the CrPC seeking for the quashing of charge framed against him, the Court should not interfere with the order unless there are strong

reasons to hold that in the interest of justice and to avoid abuse of the process of the Court a charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions. It is to be kept in mind that once the trial court has framed a charge against an accused the trial must proceed without unnecessary interference by a superior court and the entire evidence from the prosecution side should be placed on record. Any attempt by an accused for quashing of a charge before the entire prosecution evidence has come on record should not be entertained sans exceptional cases.

22. The scope of interference and exercise of jurisdiction under Section 397 of CrPC has been time and again explained by this Court. Further, the scope of interference under Section 397 CrPC at a stage, when charge had been framed, is also well settled. At the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage the final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with the scheme of Code of Criminal Procedure.

23. Section 397 CrPC vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an

error of jurisdiction or law or the perversity which has crept in the proceeding."

22. In the case of **Kanchan Kumar Vs. State of Bihar : (2022) 9 SCC 577** the Apex Court while considering the judgement in the case of Dipakbhai Jagdishchandra Patel Vs. State of Gujarat summarised the principles on discharge under Section 227 Cr.P.C. and held as follows:

"15. Summarising the principles on discharge under Section 227 CrPC, in *Dipakbhai Jagdishchandra Patel v. State of Gujarat* [*Dipakbhai Jagdishchandra Patel v. State of Gujarat*, (2019) 16 SCC 547 : (2020) 2 SCC (Cri) 361] , this Court recapitulated : (SCC p. 561, para 23)

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

case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence."
(emphasis supplied)"

23. Thus, the position of law that emerges is that at the stage of discharge/framing of charge, the Court is merely required to shift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused i.e. whether a *prima facie* case is made out against the accused. Further the ground that income of other family members has not been considered also cannot be looked into and considered at the stage of discharge, it is to be considered in the trial only.

24. Looking to the facts of the case, the *prima facie* allegation against the revisionist and the law as stated above, no case for interference is made out. The present revision is thus **dismissed**.

(2024) 9 ILRA 1424
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.

Criminal Misc. Writ Petition No. 9932 of 2024

Smt. Kalpana Maheshwari ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:

Jitendra Kumar

Counsel for the Respondents:

G.A., Manu Vardhana, Sanjay Kumar Yadav

Criminal Law – Constitution of India, 1950 - Article 226 -whether the Central Bureau of Investigation (CBI) should investigate the death of daughter of petitioner, who died in the USA- under Section 188 of the Cr.P.C.- Sections 5 and 6 of Delhi Special Police Establishment Act, 1946- Government Notification dated 27.05.2016 and circular dated 11.05.2017-for offences committed outside India by Indian citizens, only the Central Government's sanction is required-not the St. Government's consent-court directed the CBI and the Ministry of Home Affairs-complete the necessary formalities and conduct the investigation within 15 days-petition allowed. (Paras 15 and 16)

HELD:

In view of above analysis this Court holds that for conducting investigation for the offence committed outside the India by Indian citizen under Section 188 Cr.P.C. there is no requirement to seek consent of St. Government under Section 6 of DSPE Act and only sanction of Central Government is required. (para 16)

Reverting back to the present case, though it is clear from above analysis that there is no requirement for seeking consent of the St. Government to conduct investigation under Section 188 Cr.P.C. but the affidavit filed by the Secretary, Department of Personnel and Training, Government of India specifically mentioned that the consent of the St. Government is required and on the other hand it was also mentioned in the aforesaid affidavit that the St. Government has also conveyed its consent for conducting investigation in the present case to Ministry of External Affairs, Government of India by letter dated 5.9.2023, therefore, in substance St. of U.P. already conveyed its consent to Government of India for conducting the investigation by C.B.I. about the death of daughter of the petitioner but the C.B.I. as well as DoPT unnecessarily raising

technical issue and shifting burden on each other instead of taking any fruitful action to conduct the investigation for the death of daughter of the petitioner in United St.s of America. (Para 16)

Petition allowed. (E-13)

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

1. Short counter affidavit filed today by the Union of India is taken on record.

2. Heard Sri Anoop Trivedi, learned Senior Counsel assisted by Sri J.K. Pandey and Ms. Nimisha Jain, learned counsel for the petitioner, Sri Ratan Singh, learned A.G.A. appearing for the State respondents, Sri Gyan Prakash, learned Senior Counsel assisted by Sri Sanjay Kumar Yadav, learned counsel appearing for the Central Bureau of Investigation (C.B.I.) and Sri Manu Vardhana, learned counsel appearing for the Union of India.

3. Fact giving rise to the present petition is that the daughter of the petitioner Anshu Maheshwari had married to Sumit Binani on 27.11.2020. Thereafter, both of them shifted to United States of America (U.S.A.), where the daughter of the petitioner died in a blast in the house at Seattle U.S. and when the petitioner came to know about the same she lodged a first information report dated 28.9.2023 at Police Station Medical College, District Meerut, U.P. making allegations of dowry death against the accused-Sumit Binani and copy of this first information report was sent to Ministry of Home Affairs, Government of India, New Delhi. The petitioner also made a complaint to C.B.I. on 2.6.2022 about the aforesaid incident. Thereafter, on 15.10.2023 office of Senior

Superintendent of Police, Meerut has submitted a report to Inspector General of Police, Meerut Zone, Meerut recommending the case to be investigated by the C.B.I. as the offence has been committed outside India and finally matter was referred to C.B.I. by the police authorities of U.P. When no action was taken by the C.B.I. to conduct investigation under Section 188 Cr.P.C. regarding death of daughter of the petitioner, the petitioner has approached this Court by filing present petition with the following prayers:-

“a) Issue appropriate direction to transfer investigation of the FIR no. 0383/2023 dated 28.09.2023 U/S 304-B IPC at P.S. Medical College to CBI;

b) Issue any other orders or directions as this Hon’ble Court may deem fit, just and proper in the facts and circumstances of the case.”

4. On 21.8.2024 following order was passed:-

"1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri A.K. Pandey and Ms. Namisha Jain, learned counsel for the petitioner, Sri Kuldeep Singh Chauhan, learned A.G.A. appearing for the State of U.P./respondent no.1, Sri Gyan Prakash, learned Senior Advocate along with Sri Sanjay Kumar Yadav, learned counsel appearing for Central Bureau of Investigation/respondent no.2.

2. The present petition has been filed with the prayer to transfer investigation of FIR No. 0383/2023 dated 28.9.2023 under section 304-B IPC registered at Police Station Medical College to Central Bureau of Investigation (hereinafter referred to as 'CBI').

3. We have heard learned counsel for the parties at length.

4. It is an admitted fact that death of Anshu, daughter of the petitioner has taken place in United States of America (U.S.A.) within 15 months of her marriage. It is pointed out that in view of the provisions of section 188 Cr.P.C., the investigation has to be conducted by CBI.

5. Attention was drawn towards Annexure 16 to the petition to submit that vide notification dated 27.5.2016 issued by Govt. of India, Ministry of Personnel, Public Grievances & Pensions (Department of Personnel & Training), New Delhi to the effect that investigation and prosecution of offence committed outside territorial jurisdiction of India be investigated by CBI being the nodal agency for the purposes of sanction for prosecution under section 188 Cr.P.C. Attention was further drawn towards Annexure 10 to the petition which is a letter written by Senior Superintendent of Police, Meerut to the Inspector General, Meerut recommending the case to be investigated by the CBI.

6. Attention was also drawn to Annexure 12 to the petition which is a letter dated 05.9.2023 written by Special Secretary, Govt. of Uttar Pradesh to Deputy Secretary, CPB Division, Ministry of Foreign Affairs, Government of India to the effect that recommendation has been made that as the death has taken place in U.S.A., therefore, the matter may be investigated by CBI and it was requested that necessary action be taken as per rules.

7. Attention was further drawn to Annexure 13 to the petition which is a letter dated 08.11.2023 written by CBI to the petitioner to the effect that until and unless notification u/s 6 of DSPE Act, 1946 for transfer of the said FIR to CBI is issued by State Govt. of Uttar Pradesh followed by a notification u/s 5 of DSPE Act issued

in that regard by Govt. of India / DoPT., the matter cannot be investigated by CBI and, therefore, she was advised to pursue the matter with the Govt. of U.P. u/s 6 of DSPE Act, 1946 for transfer of investigation of Meerut Police case to CBI.

8. By drawing attention to para 5 of the letter dated 01.2.2024 (annexed at page 183 of the paper book) which states "As such you are advised to either file a writ under Article 226 of Indian Constitution in the Hon'ble Allahabad High Court or under Article 32 of Indian Constitution to Hon'ble Supreme Court of India praying for direction to CBI for taking up investigation of Meerut Police case by CBI or request the Chief Secretary/Principal Secretary, Home of the Govt. of U.P. to issue notification u/s 6 of DSPE Act, 1946 for transfer of Meerut Police case to CBI and send the same to the Secretary, DoPT. Based on that, notification u/s 5 of DSPE Act, 1946 can be issued by DoPT and thereafter CBI can take over the case of Meerut Police", it is pointed out that the petitioner has been advised either to file a petition under Article 226 before this Court or under Article 32 of Constitution of India before Hon'ble the Supreme Court of India praying for a direction to CBI for taking up the investigation of Meerut Police case by CBI or request the Chief Secretary / Principal Secretary, Home of the Govt. of U.P. to issue notification u/s 6 of DSPE Act, 1946 for transfer of the case and send the same to DoPT so that based on that, notification u/s 5 of DSPE Act, 1946 can be issued by DoPT and thereafter CBI can take over the case of Meerut Police. Submission, therefore, is that vide notification dated 27.5.2016 (Annexure 16 to the petition), CBI itself has been designated as the nodal agency to deal with and obtain sanction for prosecution from

Ministry of Home Affairs (MHA) under section 188 Cr.P.C.

9. Per contra, Sri Gyan Prakash, learned Senior Counsel appearing for CBI submits that formalities have to be completed before the CBI takes over the matter for investigation or direction can be issued by this Court in the light of the documents herein. He further submits that for the purpose of doing the needful, the Union of India through Ministry of Home Affairs and Department of Personnel & Training (DoPT) would be the necessary parties so that their stand may also come on record.

10. Prima facie, it appears that CBI alone being the nodal authority is saddled with the liability of obtaining sanction for prosecution from the MHA u/s 188 Cr.P.C. as per notification dated 27.5.2016 (Annexure 16 to the petition), however, no final observation is being made in this regard.

11. However, in view of the assertion made by the learned A.G.A. to avoid any further complication or legal impediment, learned counsel for the petitioner is directed to implead Union of India through Secretary, Ministry of Home Affairs, North Block, New Delhi as well as the Department of Personnel & Training (DoPT). Sri Gyan Prakash, learned Senior Counsel also represents Union of India and, therefore, the petitioner counsel is permitted to serve copy in respect of the newly impleaded respondents to Sri Gyan Prakash or in the office of the Additional Solicitor General of India at the earliest.

12. In the facts and circumstance of the case, it is provided that all the respondents shall bring on record their stand on the issue by filing short counter affidavit within a period of two weeks.

13. Put up this case as fresh on 12.9.2024.

14. It is expected that in the short counter affidavit, all the respondents shall clarify their stand on the issue involve herein."

5. Subsequently, on 12.9.2014 following order was passed:-

"Re: Impleadment Application

1. Heard counsel for the parties.

2. This impleadment application is allowed.

3. Formal impleadment may be carried out in the array of parties during the course of the day.

Re: Writ Petition

1. Short counter affidavit filed by the State is taken on record.

2. On the request of Sri Manu Vardhan, learned counsel appearing for Union of India, put up this case as fresh on 21.9.2024 on the assurance given by him on behalf of Union of India as well as Sri Gyan Prakash, learned Senior Counsel assisted by Sri Sanjay Kumar Yadav appearing for C.B.I. that the matter will be sorted out between them by the next date fixed and appropriate action will be taken.

3. It is made clear in case no satisfactory response is received from Union of India and C.B.I., this Court will consider summoning the highest officer concerned in person.

4. Secretary, Department of Personnel and Training is directed to file personal affidavit mentioning therein the action taken by the Department pursuant to the letter issued by the Ministry of Home Affairs dated 28.2.2024 regarding permission to investigate the matter under section 188 Cr.P.C. He shall also apprise the Court about the procedure for handing over the investigation to C.B.I. under section 188 Cr.P.C."

6. Pursuant to the aforesaid orders short counter affidavit has been filed by the Union of India.

7. Before proceeding further it would be relevant to take note of Section 188 Cr.P.C., which is quoted as under:-

"188. Offence committed outside India. When an offence is committed outside India-

(a) by a citizen of India, whether on the high seas or elsewhere; or

(b) by a person, not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government."

8. Relevant paragraphs 7 (d), 7 (f), 7 (g), 10, 11 and 12 of the short counter affidavit are also quoted as under:-

"7.

(d) That, various grievances of Smt. Kalpana Maheshwari have been received in this Department seeking for transferring the investigation from Uttar Pradesh to CBI and also complaining against CBI for not lodging any FIR in this regard. The grievances had been forwarded to the Ministry of External Affairs and Government of Uttar Pradesh vide letters No. 245/228/2023-AVD-II dated 18.01.2024, 27.12.2023 and vide OM of even number dated 14.11.2023 on following grounds:

(i) As per the provisions of the Delhi Special Police Establishment (DSPE) Act, 1946, prior consent of the State Government concerned under Section 6 of the DSPE Act through a Notification is pre-requisite for consideration for entrusting any case to CBI for investigation and the same is being annexed herewith and marked as Annexure No. C.A.1 to this counter affidavit.

(ii) That, the State Government of Uttar Pradesh vide their letter dated 23.02.2024 has forwarded a reply to this Department that in the questioned matter, the State Government has taken action on the various grievance petitions. The State Government has enclosed a copy of letter dated 12.02.2024, whereby they have disposed of the grievance and the same is being annexed herewith and marked as Annexure No. C.A.2 to this counter affidavit.

(f) That, no such consent under section 6 of DSPE Act, 1946 for transfer of FIR No. 0383/2023 dated 28.09.2023 registered u/s. 304B of I.P.C., Police Station Medical College, District-Meerut to CBI has been received from the State Government in this Department.

(g) That, at present, consideration/pending no such proposal is under in this Department for transferring of investigation of FIR No. 0383/2023 dated 28.09.2023 registered u/s. 304B of I.P.C., Police Station Medical College, District-Meerut to CBI.

10. That, CBI in its letter dated 01.02.2024 (signed on 31.01.2024) has inter-alia apprised the applicant about the procedure for handing over the investigation of a case of offences taken abroad u/s. 188 Cr.P.C. as under:

"3. As per the provisions u/s 188 Cr.P.C. and section 4 of I.P.C. "if an offence is committed outside India by a

citizen of India or by any person on any ship or aircraft registered in India, the said offence can be investigation/inquired into or tried in India with the sanction of the Central Government. CBI has been notified by MHA, Government of India as the nodal authority under these sections. As such, had no F.I.R. been registered at Meerut Police, CBI could have investigated/inquired into the matter of the unnatural death of your daughter in USA."

11. That, CBI has been designated as nodal authority to deal with and obtain sanction for prosecution from Ministry of Home Affairs under section 188 of Cr.P.C.

12. That, in the absence of consent under section 6 of DSPE Act, 1946 for transfer of FIR No. 0383/2023 dated 28.09.2023 registered u/s 304B of I.P.C., Police Station Medical College, District-Meerut to CBI this Department has no role in the instant matter at this stage."

9. We have gone through the affidavit carefully.

10. From perusal of the affidavit filed by the Secretary, Department of Personnel and Training, Government of India, New Delhi it appears that the guideline for conducting investigation under Section 188 Cr.P.C. has been mentioned. For initiating investigation under Section 188 Cr.P.C. consent of State Government is pre-requisite for consideration to entrust any case to C.B.I. for investigation. It is further mentioned that after receiving of consent of the State Government as required under Section 6 of Delhi Special Police Establishment Act, 1946 (hereinafter referred to as DSPE Act) C.B.I. being the Nodal Agency will get sanction from the Department of Personnel and Training, Government of India (hereinafter referred

to as DoPT) only then C.B.I. can conduct investigation.

11. However, from perusal of Section 188 Cr.P.C. it is clear that if any offence is committed by the citizen of India outside India then investigation can be inquired or tried in India after getting previous sanction of the Central Government.

12. From perusal of the Government notification dated 27.5.2016 issued by the Ministry of Personnel and Public Grievance and Pensions (Department of Personnel and Training), New Delhi, it is explicit that C.B.I. was designated as Nodal Agency to deal with and obtain sanction for prosecution from the Ministry of Home Affairs, therefore, it is clear that in case any offence is committed outside India then only C.B.I. can investigate and the State Government has no role in such cases.

13. As per Section 6 of DSPE Act consent of State Government is required for investigation in any area of the State Government but if the investigation is to be conducted for the offence committed outside India by the Indian citizen then there is no requirement of seeking consent of State Government. The Central Government may by order under Section 5 of DSPE Act extend the jurisdiction of C.B.I. to any area in a State but in the case of investigation outside the country, Central Government does not pass any order under Section 5 of DSPE Act to extend the jurisdiction of C.B.I. to any area in a State. Section 5 and 6 of DSPE Act are quoted as under:-

“5. Extension of powers and jurisdiction of special police establishment to other areas.—

(1) The Central Government may by order extend to any area (including Railway areas) in a State, not being a Union territory, the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under section 3.

(2) When by an order under sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject to any orders which the Central Government may make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of the police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force.

3) Where any such order under sub-section (1) is made relation to any area, then, without prejudice to the provisions of sub-section (2), any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf, exercise the powers of the officer in charge of a police station in that area and when so exercising such powers, shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station.

6. Consent of State Government to exercise of powers and jurisdiction.—

Nothing contained in section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in 3[a State, not being a Union territory or railway area], without the consent of the Government of that State."

14. A circular dated 11.5.2017 issued by the C.B.I., which was produced by learned counsel for the petitioner before this Court, itself shows that C.B.I. in pursuance of the notification dated 27.5.2016 of the Central Government has issued the circular and this circular specifically mentioned that the C.B.I. has been designated as Nodal Agency to deal with and obtain sanction for prosecution from Ministry of Home Affairs under Section 188 Cr.P.C., therefore, it is the C.B.I., which has to initiate the proceeding for obtaining sanction for the prosecution from Ministry of Home Affairs for conducting investigation regarding offence mentioned under Section 188 Cr.P.C. The circular no. 03 of 2017 dated 11.5.2017 is reproduced as under:-

“No. 21/47/2016-PD//28
CENTRAL BUREAU OF
INVESTIGATION
POLICY DIVISION, ROOM NO. 27,
NORTH BLOCK,
NEW DELHI.

Dated 11 May, 2017

CIRCULAR NO. 03 2017

Sub: Guidelines for Investigation and Prosecution of fugitives (Indian Nationals) by CBI for the offences committed outside India, referred by Central Government from time to time.

In exercise of the powers conferred by Section 3 of DSPE Act, the Central Government has issued a Notification dated 27.05.2016 empowering and extending the jurisdiction of members of Delhi Special Police Establishment U/s 5 of DSPE Act to investigate and prosecute the offences as described U/s 4 of the IPC, i.e. the offences committed outside territorial jurisdiction of India, as referred by Central Government from time to time, CBI has also been designated as Nodal

authority to deal with and obtain sanction for prosecution from MHA U/s 188 of the Cr.P.C.

2. in order to effectively deal with these referred cases from Ministry of External Affairs, the following SOP has been drawn for compliance by the IPCC and concerned Zones/Branches of CBI.

(i) On receipt of case file at IPCC Branch, the case file would be scrutinized by the Nodal Officer, not below the rank of Inspector of Police, to the effect that the file is complete in all respects, especially the documents mentioned in the covering letter received from MEA. If the file is incomplete he will get the same completed from the concerned Branch of MEA.

(ii) After completion of Initial scrutiny of the case file and documents, the concerned Nodal Officer shall prepare his comments mentioning the category or class of offence it belongs to. The purpose would be to ascertain the Branch or Zone the file should be marked for further proceedings.

(iii) The concerned Nodal Officer will then put up the file along with his comments to the AD/PCU who shall put up detailed comments including the proposal relating to the Zone/Branch to which the case may be referred to according to the classification as mentioned in Para 4 of the present Guidelines.

(iv) On receipt of the file, the DD(CO) may obtain the legal opinion, if it is expedient in the interest of the case, from Additional Legal Advisor or any other Law Officer, and after preparing his comments, DD(CO) may submit his recommendation for perusal/approval of JD(TFC) and DCBI.

(v) After approval, the case shall either be referred to the Zone as approved by the DCBI or it shall be sent back to the MEA, clearly mentioning the

non-cognizable nature of the offence and/or any other relevant reason.

(vi) The Head of Zone (HoZ) to whom the case has been referred shall transmit the same to their Branches with appropriate directions.

3. In addition to the established monitoring mechanism within the Zone as envisaged in the Crime Manual, the concerned branch shall submit an issue-based and quarterly progress report to the DD(CO), JD(TFC) and the DCBI. The progress may also be communicated to the MEA, on quarterly basis or at the frequency as decided by JD(TFC).

4. Classification of cases to be referred to concerned Zone:-

a)	Cases pertaining to large scale banking frauds	BSF Zone
b)	Cases pertaining to Cheating, Criminal misappropriation, Breach of Trust, Embezzlement of gold, Cybercrime and any other frauds involving Economic offences	EO Zone
c)	Cases pertaining to murder, rape, kidnapping etc. affecting the human body.	Special Crime Zone

5. Cases not belonging to any of the above category, may be referred to JD(TFC), who will then decide the Zone wherein the case may be sent.

6. In view of the above, It is requested that all HOBs should sensitize all the Investigating Officers of the Branch about these instructions for strict compliance.

This issues with the approval of DCBI.

(S.Balasubramony)
Asst. Insp. General of Police (P)
CBI/New Delhi,

Copy to-

1. The Additional Director (RA) & the Additional Director (YCM), CBI, New Delhi

2. Director of Prosecution, CBI

3. All Heads of Zones, CBI

4. All DisG Range, CBI

5. All Heads of Branches Including DIG(Trg.) & DD(IPCU), CBI

6. OSD to DCBI

7. Sr. PS to DCBI

8. Guard file of Policy Division.”

15. In view of above analysis this Court holds that for conducting investigation for the offence committed outside the India by Indian citizen under Section 188 Cr.P.C. there is no requirement to seek consent of State Government under Section 6 of DSPE Act and only sanction of Central Government is required.

16. Reverting back to the present case, though it is clear from above analysis that there is no requirement for seeking consent of the State Government to conduct investigation under Section 188 Cr.P.C. but the affidavit filed by the Secretary, Department of Personnel and Training, Government of India specifically mentioned that the consent of the State Government is required and on the other hand it was also mentioned in the aforesaid affidavit that the State Government has also conveyed its consent for conducting investigation in the present case to Ministry of External Affairs, Government of India by letter dated 5.9.2023, therefore, in substance State of U.P. already conveyed its consent to Government of India for conducting the investigation by C.B.I. about the death of daughter of the petitioner but the C.B.I. as well as DoPT unnecessarily raising technical issue and shifting burden on each other instead of

taking any fruitful action to conduct the investigation for the death of daughter of the petitioner in United States of America.

17. By our earlier order dated 12.9.2024 statement made by learned counsel for the Union of India and C.B.I. was noted and in paragraph 2 of the order it was observed that the matter will be sorted out between them by the next date and appropriate action will be taken.

18. We find that by filing short counter affidavit again Union of India and other respondents are shirking their responsibilities and are doing nothing.

19. In view of the peculiar circumstances, this Court direct the respondent no. 2-Central Bureau of Investigation, New Delhi and respondent no. 3-Secretary, Ministry of Home Affairs, North Block, New Delhi to conduct the investigation regarding death of daughter of the petitioner (first informant) by completing necessary formalities within a period of 15 days from the date of production of a certified copy of this order before them.

20. With the aforesaid observations, present petition stands allowed.

(2024) 9 ILRA 1433
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.

Criminal Misc. Writ Petition No. 15393 of 2024

Devendra Tripathi & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Ramesh Kumar Singh

Counsel for the Respondents:
Jitendra Kumar Shukla, G.A.

Criminal Law – Constitution of India,1950
- Article 226 -prayer seeking appointment
of another agency-fair investigation-FIR
registered under Sections 452, 376, 313,
506, 323, 427 IPC- alleging bias due to
ongoing civil disputes with the informant-
accused individuals cannot demand a
change in the investigating agency- unless
there is clear evidence of malafide actions
by the current investigators- petitioners
failed to demonstrate such malafide
intent-petition dismissed. (Paras 8 and 9)
HELD:

With above observations, the Hon'ble Apex Court concluded that "In view of the above, it is clear that the consistent view of this Court is that the accused cannot ask for changing the Investigating Agency or to do investigation in a particular manner including for Court monitored investigation. However, Hon'ble Apex Court while placing reliance on an earlier judgement in In Narmada Bai v St. of Gujarat,22 the petitioner filed a writ 22 (2011) 5 SCC 79, observed that "this case supports my view that in the interest of justice, and particularly when there are serious doubts regarding the investigation being carried out, it is not only permissible, but our constitutional duty to ensure that the investigation is carried out by a special investigation team or a special investigative agency so that justice is not compromised. (Para 8)

In present case, the main contention raised on behalf of the petitioners is that they have been roped in by the informant in present criminal case with a view to exert pressure in a civil suit filed at the instance of petitioner No.1 for avoidance of a sale deed propounded by respondent No.4, the informant with regard to disputed land on which petitioners claimed their title and possession. Only, on this count, it cannot be discerned that the case lodged at the

instance of the informant is malicious or investigation carried out by the police has been shoddy or perfunctory or partial. Law will take its own course. (Para 9)

Petition dismissed. (E-13)

List of Cases cited:

1. Romila Thapar & ors.Vs U.O.I. & ors., (2018) 10 SCC 753

2. Narmada Bai Vs St. of Guj. (2011) 5 SCC 79

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

1. By means of present writ petition, the petitioners, who are accused in present case, have prayed for issuance of a writ of mandamus directing the respondent Nos.1 and 2 to appoint another agency for fair investigation in Case Crime No.116 of 2023, under Sections 452, 376, 313, 506, 323, 427 IPC, P.S. Madhian, District Mirzapur, within stipulated period as fixed by this Hon'ble court.

2. Heard learned counsel for the petitioners, learned counsel for the respondent No.4, Sri Amit Sinha learned AGA for the State and perused the material placed on record.

3. The factual matrix of the case in brief are that the informant moved an application under Section 156(3) Cr.P.C. before the Court of Magistrate in District Court Mirzapur with allegations that on 17.7.2023, at around 7:00 AM, she was alone in the house, accused Girja Shanker @ Gopal (petitioner no.2) forcefully made his entry in her house and asked her for a spade. When she stated that her husband had taken the same to field, he tried to molest her and started touching her private parts by hand whereupon she raised cry.

The accused dashed her on a cot and inserted finger in her private part; her husband reached there on hearing her noise, thereupon co-accused Satya Prakash and Devendra Tripathi arrived there together with an unknown person. They dashed her husband on ground and assaulted the victim and her husband by kicks and fists. When the victim prayed for mercy to miscreants on the ground of her pregnancy, then they assaulted her on her abdomen by kicks and have torn her clothes and outraged her modesty. They also assaulted her on her private parts which resulted in bleeding from her private parts and her child got killed in womb. Some persons reached there co-accidentally and then the accused persons fled away from the spot after damaging her household goods and threatening the victim and her husband with life. Her report was not lodged at police station concerned. The FIR was lodged on 27.8.2023, at 17:47 hours vide GD Entry No.032, dated 27.8.2023 time 17:47 hours, at police station concerned following the order of learned Magistrate passed on the application under Section 156(3) Cr.P.C. The police investigated the case and filed a charge-sheet against accused Satya Prakash Tripathi for charge under Sections 313, 323, 427, 452 and 506 IPC. The learned Magistrate took cognizance of the offence and summoned the accused. The investigation has been kept pending against co-accused Girja Shanker @ Gopal and Devendra Tripathi, who are son and father, respectively.

4. Learned counsel for the petitioners against whom the investigation has been kept pending have stated that they have prayed for a writ of mandamus from this Court to appoint another agency for fair investigation in said criminal case. FIR version is totally wrong, baseless and

concocted. Petitioner No.1 is a very old person of 75 years of age and petitioner No.2 is his son. It is inconceivable that father and son would be involved in such type of offence together. The FIR has been lodged maliciously by the informant by filing an application under Section 156(3) Cr.P.C. before the Magistrate. The said application was filed belatedly before the Court after 9 days of the incident i.e. on 26.7.2023. The real bone of contention between the parties is that a partition suit bearing Case No.38 of 2017, under Section 116 of UP Revenue Code is pending before the Court of Sub Divisional Magistrate, Mirzapur, in which petitioner No.1 is plaintiff and other co-owners are respondents. The respondent No.4 (Informant) on the basis of a forged sale deed dated 4.6.2020, filed a mutation case before Tehsildar, Madhian, which bears Case No.91/631 of 2020 (Nitu Kumari vs. Rajendra Prasad), which is pending in the Court of Nayab Tehsildar, Madhian, in which petitioner No.1 filed objection. When the informant and her colleagues came on spot to take over possession of the land, then the petitioner got apprised of a forged sale deed on which basis respondent No.4 filed mutation application. Petitioner No.1 filed Civil Suit No.37 of 2023 (Devendra Tripathi vs. Nitu Kumari and others) on 29.5.2023 with a prayer to declare the said sale deed dated 4.6.2020 void and also for decree of injunction on 29.5.2023 and after filing of the present suit by petitioner No.1, the respondent No.4 moved an application on 23.7.2023 under Section 156(3) Cr.P.C. for registration of FIR with regard to an alleged incident dated 17.7.2023 with wild allegations against the petitioners and co-accused Satya Prakash Tripathi. He next submitted that the said FIR was lodged only with a view to exert pressure on

petitioners and co-accused Satya Prakash Tripathi as latter filed various applications against respondent No.4 and her husband regarding raising of illegal construction on disputed land. The copy of medical examination and radiological examination of the informant has been filed as annexure to present petition, which reveal that no clinically injury seen in private parts, genitalia and any body parts, only slightly bleeding P/V was found present. Petitioner No.1 has also filed an application under Section 156(3) Cr.P.C. against respondent No.2 and others before the Court of Magistrate on 6.7.2023 for lodging of FIR with regard to execution of forged sale deed on 4.6.2020 with a view to cause wrongful loss to him and said application has been treated as complaint by learned Magistrate and directed recording of statement under Sections 200 and 202 Cr.P.C., which is still pending before the court concerned. Various civil cases are pending before the competent courts between the contesting parties. Respondent No.4 bears political cloud and local police is in her pressure. Therefore, the petitioners do not expect fair investigation from local police and therefore, some other agency may be entrusted the investigation of the case lodged against the petitioners.

5. Per contra, learned counsel for the respondent No.4 and learned AGA vehemently opposed the prayer for appointing another agency for investigation of the case.

6. Learned AGA cited an authority of Hon'ble Apex Court in **Romila Thapar and others vs. Union of India and others, (2018) 10 SCC 753**, in support of his contention that the prayer made in present petition is not tenable legally. In said case

Hon'ble Apex Court formulated following questions for consideration:-

(i) Should the Investigating Agency be changed at the behest of the named five accused?

(ii) If the answer to point (i) is in the negative, can a prayer of the same nature be entertained at the behest of the next friend of the accused or in the garb of PIL?

(iii) If the answer to question Nos.(i) and/or (ii) above, is in the affirmative, have the petitioners made out a case for the relief of appointing Special Investigating Team or directing the Court monitored investigation by an independent Investigating Agency?

(iv) Can the accused person be released merely on the basis of the perception of his next friend (writ petitioners) that he is an innocent and law abiding person?

7. The Hon'ble Apex answered question No.1 in following manner:

"24. This Court in the case of Divine Retreat Centre Vs. State of Kerala and Ors.12, (2008) 3 SCC 542 has enunciated that High Court in exercise of its inherent jurisdiction cannot change the investigating officer in the midstream and appoint an investigating officer of its own choice to investigate into a crime on whatsoever basis. The Court made it amply clear that neither the accused nor the complainant or informant are entitled to choose their own Investigating Agency to investigate the crime in which they are interested. The Court then went on to clarify that the High Court in exercise of its power under Article 226 of the Constitution can always issue appropriate directions at the instance of the aggrieved person if the High Court is convinced that the power of

investigation has been exercised by the investigating officer mala fide.

25. Be that as it may, it will be useful to advert to the exposition in State of West Bengal and Ors. Vs. Committee for Protection of Democratic Rights, West Bengal and Ors.¹³ In paragraph 70 of the said decision, the Constitution Bench observed thus:

"70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 13 (2010) 3 SCC 571 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

26. In the present case, except pointing out some circumstances to question the manner of arrest of the five

named accused sans any legal evidence to link them with the crime under investigation, no specific material facts and particulars are found in the petition about mala fide exercise of power by the investigating officer. A vague and unsubstantiated assertion in that regard is not enough. Rather, averment in the petition as filed was to buttress the reliefs initially prayed (mentioned in para 7 above) – regarding the manner in which arrest was made. Further, the plea of the petitioners of lack of evidence against the named accused (A16 to A20) has been seriously disputed by the Investigating Agency and have commended us to the material already gathered during the ongoing investigation which according to them indicates complicity of the said accused in the commission of crime. Upon perusal of the said material, we are of the considered opinion that it is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of the banned organisation and its activities. This is not the stage where the efficacy of the material or sufficiency thereof can be evaluated nor it is possible to enquire into whether the same is genuine or fabricated. We do not wish to dilate on this matter any further lest it would cause prejudice to the named accused and including the co-accused who are not before the Court. Admittedly, the named accused have already resorted to legal remedies before the jurisdictional Court and the same are pending. If so, they can avail of such remedies as may be permissible in law before the jurisdictional courts at different stages during the investigation as well as the trial of the offence under investigation. During the investigation, when they would be produced before the Court for obtaining

remand by the Police or by way of application for grant of bail, and if they are so advised, they can also opt for remedy of discharge at the appropriate stage or quashing of criminal case if there is no legal evidence, whatsoever, to indicate their complicity in the subject crime.

27. In view of the above, it is clear that the consistent view of this Court is that the accused cannot ask for changing the Investigating Agency or to do investigation in a particular manner including for Court monitored investigation. The first two modified reliefs claimed in the writ petition, if they were to be made by the accused themselves, the same would end up in being rejected. In the present case, the original writ petition was filed by the persons claiming to be the next friends of the concerned accused (A16 to A20). Amongst them, Sudha Bhardwaj (A19), Varvara Rao (A16), Arun Ferreira (A18) and Vernon Gonsalves (A17) have filed signed statements praying that the reliefs claimed in the subject writ petition be treated as their writ petition. That application deserves to be allowed as the accused themselves have chosen to approach this Court and also in the backdrop of the preliminary objection raised by the State that the writ petitioners were completely strangers to the offence under investigation and the writ petition at their instance was not maintainable. We would, therefore, assume that the writ petition is now pursued by the accused themselves and once they have become petitioners themselves, the question of next friend pursuing the remedy to espouse their cause cannot be countenanced. The next friend can continue to espouse the cause of the affected accused as long as the concerned accused is not in a position or incapacitated to take recourse to legal remedy and not otherwise.

8. With above observations, the Hon'ble Apex Court concluded that **"In view of the above, it is clear that the consistent view of this Court is that the accused cannot ask for changing the Investigating Agency or to do investigation in a particular manner including for Court monitored investigation.** However, Hon'ble Apex Court while placing reliance on an earlier judgement in In Narmada Bai v State of Gujarat,²² the petitioner filed a writ 22 (2011) 5 SCC 79, observed that "this case supports my view that in the interest of justice, and particularly when there are serious doubts regarding the investigation being carried out, it is not only permissible, but our constitutional duty to ensure that the investigation is carried out by a special investigation team or a special investigative agency so that justice is not compromised."

9. In present case, the main contention raised on behalf of the petitioners is that they have been roped in by the informant in present criminal case with a view to exert pressure in a civil suit filed at the instance of petitioner No.1 for avoidance of a sale deed propounded by respondent No.4, the informant with regard to disputed land on which petitioners claimed their title and possession. Only, on this count, it cannot be discerned that the case lodged at the instance of the informant is malicious or investigation carried out by the police has been shoddy or perfunctory or partial. Law will take its own course.

10. Without expressing any opinion on the version and counter version of the informant and accused side and placing reliance on the dictum of Hon'ble Apex Court in above cited case, we are of the considered opinion that the prayer made in present writ petition is not liable to be granted.

11. Accordingly, present writ petition stands **dismissed**.

12. However, it is made clear that any observation made hereinabove will have no bearing on the merits of the case.

(2024) 9 ILRA 1438
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.09.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters Under Article 227 No. 3907 of 2024

The New India Assurance Company Ltd.,
Lakhimpur Kheri **...Petitioner**
Versus
Permanent Lok Adalat, Lakhimpur Kheri &
Anr. **...Respondents**

Counsel for the Petitioner:
Asit Srivastava

Counsel for the Respondents:

Civil Law – Constitution of India,1950 - Article 227 -validity of judgement delivered by Permanent Lok Adalat challenged-dispute regarding insurance claim for a truck accident-whether the owner of the truck who had agreed to sell the truck to some other person retained insurable interest- statutory provision regarding transfer of vehicles- contained in Section 157 of the Motor Vehicles Act, 1988- as the truck's ownership had not legally transferred-no change in ownership-respondent owner thus entitled to claim- legislative intent to hold insurers liable even if ownership transfer isn't recorded-petition dismissed. (Paras 13, 14, 16, 17 and 18)

HELD:

Further, Section 157 provides that upon transfer of ownership of a vehicle, the certificate of insurance and the policy described in the certificate shall be deemed to have been

transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer. The deeming fiction provided by the statute means that even if the insurance policy is not transferred in fact, the insurance company would become liable under the policy to the transferee of the vehicle. Therefore, the intention of the legislature is to make the insurance company liable immediately, in spite the transfer having not been recorded in the records of the transport office. The intention of the legislation is to include the transferees liberally and not to exclude them strictly. (Para 13)

This judgment also affirms the conclusion drawn by this Court in the preceding paragraph that the intention of the legislature is to make the insurance company liable immediately, in spite the transfer having not been recorded in the records of the transport office. The intention of the legislation is to include the transferees liberally and not to exclude them strictly. (Para 14)

The Hon'ble Supreme Court held that the transfer of the vehicle was not in dispute and the insurance company was liable to satisfy the claim. This judgment also supports the view of this Court that the intention of the legislature is to make the insurance company liable immediately, in spite the transfer having not been recorded in the records of the transport office and the intention is not to exclude the transferees strictly. (Para 16)

In the present case the transfer does not stand completed and the claimant continues to be the registered owner of the vehicle. He had entered into a contract of insurance with the appellant and he filed the claim. (Para 17)

In absence of the ownership of the vehicle having been transferred, the petitioner would continue to be liable under the contract of insurance entered between the appellant and the registered owner of the vehicle. (Para 18)

Petition dismissed. (E-13)

List of Cases cited:

1. Complete Insulations (P) Ltd. Vs New India Assurance Co. Ltd., (1996) 1 SCC 221

2. Balwant Singh & Sons Vs National Insurance Co. Ltd., (2020) 11 SCC 745

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

1. Heard Sri Asit Srivastava, the learned counsel for the petitioner, Sri Ashok Kumar, the learned Counsel for the caveator / opposite party – Govind Gupta and perused the record.

2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioner has challenged validity of the judgment and order dated 04.06.2024 passed by the Permanent Lok Adalat, Lakhimpur Kheri in P.L.A. Case No. 09 of 2022.

3. The opposite party Govind Gupta filed the aforesaid P.L.A. case stating that he is the registered owner of Truck bearing registration no. UP 31 T 9835, which was insured by the petitioner - The New India Assurance Co. Ltd. for the period 06.11.2019 to 05.11.2020 for a sum of Rs.13,00,000/-. The truck met with an accident in the night of 01.11.2020. The opposite party gave information of the damage caused to the truck to the petitioner and submitted a claim form. The petitioner's surveyor had inspected the truck. Rs.4,85,768/- were spent in repair of the truck and the opposite party had submitted the repair bills to the petitioner. The petitioner rejected the insurance claim.

4. The petitioner filed objections stating that after the surveyor had submitted his report, the petitioner had appointed an investigator, who took a written statement of the opposite party, wherein the latter stated that he had transferred the truck to one Sanjeev Kumar son of Siya Ram subject to the condition

that Sanjeev Kumar will pay the Bank's installments. At the time of the accident, the truck was being driven by a driver engaged by Sanjeev Kumar. At the time of the accident the truck was in custody of Sanjeev Kumar and not in custody of the opposite party. The investigator had recorded statement of Sanjeev Kumar also, who stated that he was paying the installments to the bank. The petitioner claims that this indicates that the truck was in custody of Sanjeev Kumar and ownership of the truck could not be transferred only because the truck was hypothecated and it could legally be transferred only after repayment of the loan. The petitioner had disputed correctness of the amount spent in repairs also.

5. The Permanent Lok Adalat had framed the following three issues: -

1) Whether the dispute was beyond jurisdiction of the Court?

2) What would be the effect of involvement of a third party in the dispute between the parties?

3) Whether the truck met with an accident in the night of 01/01.11.2020 and whether the claimant was entitled to receive compensation for the damage caused to the vehicle? If yes, then he is entitled to receive what amount as compensation?

6. While dealing with issue no. 2, the Permanent Lok Adalat has recorded in its judgment that the petitioner has admitted in the written statement that the vehicle was insured; that it had met with an accident; that the claimant - opposite party had given information of the accident; that the vehicle got damaged in the accident and that it has rejected the insurance claim. It was

contended by the petitioner that the opposite party had transferred the vehicle to Sanjeev Kumar and, therefore, the opposite party did not have any insurable interest. The petitioner admitted that as the vehicle loan amount had not been repaid, the vehicle could not be transferred and it continued to be registered in the name of Sanjeev Kumar. Sanjeev Kumar had filed an application for impleadment which had been rejected on 27.04.2023 as he was not the owner of the vehicle and he could not be impleaded in the proceedings.

7. Keeping in view all the aforesaid facts and circumstances of the case, the Permanent Lok Adalat came to the conclusion that the agreement between the opposite party and Sanjeev Kumar would not affect the adjudication of dispute between the parties to the case.

8. Sri. Asit Srivastava, the learned Counsel for the petitioner has limited his ground of challenge to the finding recorded on Issue no. 2 only.

9. The learned Counsel for the petitioner has drawn attention of the Court to a copy of the agreement dated 24.10.2019 executed by the opposite party and Sanjeev Kumar Verma, whereby the opposite party had agreed to sell the truck to the latter, the transferee had agreed to pay installments to the bank towards repayment of the loan and the parties had agreed that the vehicle will be transferred thereafter. It is also written in the agreement that the entire responsibility regarding the vehicle after execution of the agreement would lie on the transferee.

10. The learned Counsel for the petitioner has submitted that when the truck had been transferred by the opposite party,

he was not entitled to make any insurance claim in respect of the transferred vehicle. In support of this contention, he has placed reliance on the judgments in the cases of **Complete Insulations (P) Ltd. v. New India Assurance Co. Ltd.**, (1996) 1 SCC 221 and **Balwant Singh and Sons v. National Insurance Co. Ltd.**, (2020) 11 SCC 745,

11. The statutory provision regarding transfer of vehicles is contained in Section 157 of the Motor Vehicles Act, 1988, which provides as follows: -

“157. Transfer of certificate of insurance

(1) Where a person, in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter, transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

Explanation.-- For the removal of doubts, it is hereby clarified that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour, and the insurer shall make the necessary changes in the certificate and the policy of

insurance in regard to the transfer of insurance.”

12. Thus a bare perusal of the aforesaid statutory provision makes it manifest that the aforesaid section is attracted when the owner of the vehicle transfers the ownership of the motor vehicle, which has not been done in the present case. The opposite party had merely entered into an agreement for transferring the ownership of the vehicle at a future point of time, after repayment of the entire loan taken for purchase of the vehicle.

13. Further, Section 157 provides that upon transfer of ownership of a vehicle, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer. The deeming fiction provided by the statute means that even if the insurance policy is not transferred in fact, the insurance company would become liable under the policy to the transferee of the vehicle. Therefore, the intention of the legislature is to make the insurance company liable immediately, in spite the transfer having not been recorded in the records of the transport office. The intention of the legislation is to include the transferees liberally and not to exclude them strictly.

14. In **Complete Insulations (P) Ltd. v. New India Assurance Co. Ltd.**, (1996) 1 SCC 221, a car was purchased in the name of Mrs Archana Wadhwa for which the respondent company had issued a comprehensive insurance policy. The premium for the insurance was paid by the appellant Company in whose favour the car was transferred. The registration of the car

was transferred to the appellant on 15.06.1989. On 26.06.1989, the appellant intimated the transfer of registration and asked for transfer of the insurance policy. A reminder was sent on 24.07.1989, but the respondent did not respond. On 17.09.1989 the car met with an accident in which the Managing Director of the appellant suffered serious injuries and his sister died. On 11.10.1989 the appellant asked for the assessment of the damage as the car was a total loss. The respondent did not respond. A reminder dated 26.12.1989 met with the same fate. The appellant got a notice issued, to which the respondent replied that the appellant had no insurable interest in the car. The appellant filed a complaint before the Consumer Disputes Redressal Commission, Chandigarh, which directed the respondent to pay Rs. 83,000/- i.e. the insured value of the vehicle, along with costs and interest. The National Consumer Disputes Redressal Commission set aside the order of the Commission at Chandigarh, dismissed the complaint and granted cost of the appeal. The question involved in appeal before the Hon'ble Supreme Court was whether on the above facts, without the insurance policy being transferred in the name of the appellant, it was entitled to be indemnified by the insurer. The Hon'ble Supreme Court answered the question in the affirmative, holding the Insurance Company liable to indemnify the transferee although the insurance policy had not been transferred in its name. This judgment also affirms the conclusion drawn by this Court in the preceding paragraph that the intention of the legislature is to make the insurance company liable immediately, in spite the transfer having not been recorded in the records of the transport office. The intention of the legislation is to include the transferees liberally and not to exclude them strictly.

15. **Balwant Singh and Sons v. National Insurance Co. Ltd.**, (2020) 11 SCC 745, was an appeal filed arising from a judgment of the National Consumer Disputes Redressal Commission dismissing a revision petition filed by the appellant. Ncdrc upheld the view of the District Consumer Disputes Redressal Forum, Jalandhar and of the State Consumer Disputes Redressal Commission, Chandigarh that the insurer was not liable on a claim preferred under a policy of insurance for the loss of a vehicle occasioned by theft. The undisputed facts of the case were mentioned in para 9 as follows: -

“9.1. The appellant purchased the vehicle at an auction conducted by the Bank to whom the vehicle was hypothecated in pursuance of a hire-purchase agreement.

9.2. The appellant paid full consideration for the sale which was conducted in an auction to the Bank.

9.3. A certificate of possession was furnished to the appellant by the Bank.

9.4. The Bank intimated the insurer that it ceased to have a lien on the vehicle consequent to the auction-sale.

9.5. The proposal for insurance was submitted by the appellant to the insurer.

9.6. Premium in respect of the insurance cover was paid by the appellant.

9.7. The policy of insurance was issued by the insurer in the name of the third respondent but clearly reflecting the name of the appellant as well. Evidently, in this background, the reference of the appellant was not just for the purposes of a postal address.”

16. The Hon'ble Supreme Court held that the transfer of the vehicle was not in

dispute and the insurance company was liable to satisfy the claim. This judgment also supports the view of this Court that the intention of the legislature is to make the insurance company liable immediately, in spite the transfer having not been recorded in the records of the transport office and the intention is not to exclude the transferees strictly.

17. In the present case the transfer does not stand completed and the claimant continues to be the registered owner of the vehicle. He had entered into a contract of insurance with the appellant and he filed the claim.

18. In absence of the ownership of the vehicle having been transferred, the petitioner would continue to be liable under the contract of insurance entered between the appellant and the registered owner of the vehicle.

19. In view of the foregoing discussion, I am of the considered view that there is no illegality of error in the judgment and order dated 04.06.2024 passed by the Permanent Lok Adalat, Lakhimpur Kheri in P.L.A. Case No. 09 of 2022 allowing the claim of the opposite party warranting interference by this Court.

20. The petition lacks merits and the same is **dismissed**. The parties shall bear their own costs of litigation.

(2024) 9 ILRA 1443

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 25.09.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.

**THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.**

Habeas Corpus Writ Petition No. 445 of 2024

Kallu @ Praveen ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Anju Shukla, Nigamendra Shukla

Counsel for the Respondent:
A.S.G.I., G.A., Prem Narayan Rai

Criminal Law – Constitution of India, 1950 - Article 226 - order of preventive detention by District Magistrate- under Section 3 (2) of the National Security Act, 1980-detention under F.I.R. under Sections 147, 148, 149, 302 and 404 of IPC-detention is based on this FIR- no sucg proceedings initiated against the petitioner in St. of Haryana on basis of earlier registered FIR- matter of trial whether the petitioner who is nominated on the St.ment of co-accused-such St.ment can be read in evidence against the petitioner when eyewitnesses have not named him-petitioner was not initially named in FIR-implicated later on the St.ment of co-accused- lack of a proper hearing and non-disclosure of vital materials to petitioner- NSA provisions cannot be used to prevent bail applications-detention order set aside-petition allowed. (Paras 26 and 27)

HELD:

The detention of the petitioner is based on two F.I.R. i.e. one Case Crime No. 0611 of 2023 under Sections 147, 148, 149, 302 and 404 of IPC at Police Station – Teelamod, Trans Hindon Commissionerate Ghaziabad in U.P. In this F.I.R., for a period of one month, the informant, his wife, and wife of his deceased-brother did not name the petitioner as an accused. Rather, perusal of the F.I.R. shows that the same has been registered against the co-villagers on account of enmity regarding the election of Village Pradhan and all the three witnesses have assigned specific roles of firing on deceased to those persons who are residents of the same

village. Therefore, it will be the mater of trial whether the petitioner who is nominated on the St.ment of co-accused, such St.ment can be read in evidence against the petitioner when eyewitnesses have not named him.

It is well settled principle of law that provisions of NSA cannot be invoked just to deter a person from exercising his right to apply for bail before the competent Court of law.

The order dated 16.4.2024 passed by the Special Secretary rejecting the representation of the petitioner is a totally non speaking order and does not qualify the test as laid down by the Supreme Court in Nenavath Bhujji's Case (Supra). (Para 26)

Thus, from the above, it is apparent that the material forming basis of the opinion of the competent authority to pass impugned orders were never supplied to the petitioner in terms of the decisions in Smt. Icchu Devi Choraria's Case (Supra), Mohinuddin's Case (Supra), Smt. Shalini Soni's Case (Supra) and S. Gurdip Singh's Case (Supra) and he has not been afforded proper opportunity of hearing and the impugned order of rejection is a totally non speaking order with regard to the pleas raised by the petitioner. (Para 27)

Petition allowed. (E-13)

List of Cases cited:

1. Tofan Singh Vs St. of T.N., (2013) 16 SCC 31
2. Nenavath Bhujji Vs The St. of Telangana & ors., 2024 (3) SCR 1181
3. HABEAS CORPUS WRIT PETITION No. - 271 of 2024 (Faizan Khan Alias Raja Babu Vs Addhikshak Janpadkendriya Karagar Bareilly And 3 Others) decided on 14.5.2024
4. Mohinuddin Vs District Magistrate, Beed & ors., 1987 0 AIR (SC) 1977
5. Smt. Shalini Soni Vs U.O.I. & ors., 1981 0 AIR (SC) 431
6. S. Gurdip Singh Vs U.O.I. & ors., 1981 0 AIR (SC) 362

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

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

2. This petition is filed challenging the order dated 19.02.2024 passed by the District Magistrate, Ghaziabad in exercise of power under Section 3 (2) of the National Security Act, 1980 (herein after referred to as 'NSA') and all the consequential orders dated 2.4.2024, 5.04.2024, 9.4.2024 and 16.4.2024 passed by the respondents vide which the petitioner is directed to remain in preventive detention for one year.

3. Brief facts of the case are that an F.I.R. dated 23.10.2023 was registered vide Case Crime No. 0611 of 2023 under Sections 147, 148, 149, 302 and 404 of IPC at Police Station – Teelamod, Trans Hindon Commissionerate Ghaziabad. In the F.I.R., there were nine persons named as an accused along with three unknown persons.

4. Counsel for the petitioner has referred to the F.I.R. to submit that as per prosecution, on account of enmity regarding the election of the Gram Pradhan, nine persons namely Kapil-Gram Pradhan, Jitendra, Sonu, Hariom, Sheetal, Dharmveer, Dharampal, Anand along with three unknown persons fired upon the brother of the informant namely Pramod Kasana alias Lalu and he died on the spot.

Counsel submits that all the nine persons named in the F.I.R. are the residents of the same village and they were allegedly identified by the informant.

5. Counsel further submits that later on, the police recorded the statement

of Sunita wife of informant-Vinod who stated on the line of the F.I.R. as she has alleged that there was enmity with her brother-in-law, deceased-Pramod Kasana, with accused Kapil and she along with her husband was following the deceased and saw that Kapil, Sachin and Praveen were firing upon Pramod Kasana whereas Jitendra, Dharmpal and Dharmveer had caught hold of Pramod and others had encircled him.

6. It is further stated that after some time, the police recorded the statement of Karuna wife of the victim, on the same line and stated that she had seen Kapil, Sachin and Praveen firing upon her husband Pramod Kasana and other accused had caught hold of her husband.

7. It is submitted that neither in the F.I.R. nor in the statements of eye-witnesses the name of the petitioner surfaced. However, in the supplementary statement, the informant named the petitioner as one of the assailant who was referred to as an unknown person. However, no overt act was attributed to him. Counsel submits that the said statement was made after the arrest of one accused-Sachin and his confessional statement was recorded by the police and petitioner was named as one of the conspirator.

8. Counsel submits that this statement of Sachin was recorded on 20.11.2023 i.e. more than one month after the incident just to involve the petitioner.

9. Counsel has referred to the judgment of the Supreme Court in **Tofan Singh vs. State of Tamil Nadu, (2013) 16 SCC 31** to submit that it will be a matter of trial whether the confessional statement

made by one of the accused can be used against the other accused. It is further submitted that on the basis of the said F.I.R. proceedings under the NSA was initiated against the petitioner.

10. Counsel submitted that the petitioner is resident of Village-Ameerpur@ Motipur, PS-Tigaon, District – Faridabad, Haryana and is not the resident of the village of the informant and other accused persons. It is also submitted that nothing has come on record that the petitioner is related to any of the accused.

11. It is submitted that in the impugned order, in paragraph No.29, a reason is given that if petitioner Kaalu alias Praveen is released on bail in aforesaid Case Crime No. 0611 of 2023, he may indulge in similar other activities causing threat to national security and therefore, on this ground, the District Magistrate, Ghaziabad passed the order dated 19.2.2024 directing detention of the petitioner for a period of one year in exercise of power under Section 3 (2) read with Section 8 of the NSA.

12. Counsel submits that petitioner has given objections/representation before the District Magistrate taking as many as thirty grounds primarily that no proper opportunity of hearing has been given; no copy of report forming basis of detention was supplied; no proper procedure was adopted and two F.I.Rs at Police Station - Kheripul, which are formed basis against the petitioner apart from the present are registered in Haryana and not in UP.

13. The first F.I.R. was registered under Section 325, 379B and 307 of IPC and second under Section 25 of the Arms Act.

14. Counsel for the petitioners submits that no such proceeding is initiated in the State of Haryana.

15. Counsel submits that vide subsequent impugned order, the representation of the petitioner has been rejected by passing a totally non speaking order dated 16.4.2024, therefore, it is prayed that the detention of the petitioner is illegal and he is in illegal detention since 19.02.2024 and he be released.

16. Counsel has relied upon the judgment of the Supreme Court in **Nenavath Bhujji Vs. The State of Telangana and others, 2024 (3) SCR 1181** where in paragraph No.43, following directions were issued :

“43. We summarize our conclusions as under: -

(i) The Detaining Authority should take into consideration only relevant and vital material to arrive at the requisite subjective satisfaction,

(ii) It is an unwritten law, constitutional and administrative, that wherever a decision-making function is entrusted to the subjective satisfaction of the statutory functionary, there is an implicit duty to apply his mind to the pertinent and proximate matters and eschew those which are irrelevant & remote,

(iii) There can be no dispute about the settled proposition that the detention order requires subjective satisfaction of the detaining authority which, ordinarily, cannot be questioned by the court for insufficiency of material. Nonetheless, if the

detaining authority does not consider relevant circumstances or considers wholly unnecessary, immaterial and irrelevant circumstances, then such subjective satisfaction would be vitiated,

(iv) In quashing the order of detention, the Court does not sit in judgment over the correctness of the subjective satisfaction. The anxiety of the Court should be to ascertain as to whether the decision-making process for reaching the subjective satisfaction is based on objective facts or influenced by any caprice, malice or irrelevant considerations or non-application of mind,

(v) While making a detention order, the authority should arrive at a proper satisfaction which should be reflected clearly, and in categorical terms, in the order of detention,

(vi) The satisfaction cannot be inferred by mere statement in the order that “it was necessary to prevent the detenu from acting in a manner prejudicial to the maintenance of public order”. Rather the detaining authority will have to justify the detention order from the material that existed before him and the process of considering the said material should be reflected in the order of detention while expressing its satisfaction,

(vii) Inability on the part of the state’s police machinery to tackle the law and order situation should not be an excuse to invoke the jurisdiction of preventive detention,

(viii) *Justification for such an order should exist in the ground(s) furnished to the detenu to reinforce the order of detention. It cannot be explained by reason(s) / grounds(s) not furnished to the detenu. The decision of the authority must be the natural culmination of the application of mind to the relevant and material facts available on the record, and*

(ix) *To arrive at a proper satisfaction warranting an order of preventive detention, the detaining authority must, first examine the material adduced against the prospective detenu to satisfy itself whether his conduct or antecedent(s) reflect that he has been acting in a manner prejudicial to the maintenance of public order and, second, if the aforesaid satisfaction is arrived at, it must further consider whether it is likely that the said person would act in a manner prejudicial to the public order in near future unless he is prevented from doing so by passing an order of detention . For passing a detention order based on subjective satisfaction, the answer of the aforesaid aspects and points must be against the prospective detenu. The absence of application of mind to the pertinent and proximate material and vital matters would show lack of statutory satisfaction on the part of the detaining authority.”*

17. Counsel submits that without recording a satisfaction, the order of detention has been passed in an illegal manner.

18. Counter affidavit by the State of Uttar Pradesh has been filed, in which, pending cases against the petitioner including Case Crime No. 611 of 2023 under Section 302 of IPC in Police Station – Teelamod, Trans Hindon Commissionerate Ghaziabad and two F.I.Rs registered under Section 307 and 379B of IPC in District Faridabad, Haryana, as detailed. It is submitted that District Magistrate, Ghaziabad has recorded a finding and has also communicated the order dated 19.2.2024 to the petitioner. It is, however, submitted that in one case in Haryana, the petitioner has been released on bail.

19. In the affidavit filed by the Deputy Secretary, Home, similar stand is taken and it is submitted that vide order dated 16.4.2024, the representation of the petitioner was rejected. The operative part of the order read as under :

"उत्तर प्रदेश शासन

गृह (गोपन) अनुभाग-7

संख्या- 108/2/02/2024-सी०एक्स०-7

लखनऊ: दिनांक 16 अप्रैल, 2024

आदेश

“चूंकि, श्री कालू उर्फ प्रवीन पुत्र श्री सत्यवीर को "राष्ट्रीय सुरक्षा अधिनियम, 1980" की धारा 3(2) के अधीन जिला मजिस्ट्रेट, गाजियाबाद के द्वारा पारित निरोधादेश दिनांक- 19.02.2024 के आधार पर दिनांक- 19.02.2024 को निरुद्ध किया गया है।

और चूंकि, उक्त अधिनियम की धारा 10 के अधीन उक्त श्री कालू उर्फ प्रवीन का प्रकरण उ०प्र० परामर्शदात्री परिषद को निर्दिष्ट किया गया था और परामर्शदात्री परिषद ने उक्त अधिनियम की धारा 11 के अधीन रिपोर्ट दी है कि उनकी राय में उक्त व्यक्ति को निरुद्ध करने का पर्याप्त कारण है।

अतएव, अब उत्तर प्रदेश परामर्शदात्री परिषद (निरुद्धियाँ) की रिपोर्ट पर आवश्यक

विचारोपरान्त, राज्यपाल महोदय, उक्त अधिनियम की धारा 12(1) के अधीन शक्ति का प्रयोग करते हुए पूर्वोक्त निरोधादेश की पुष्टि करते हैं और निदेश देते हैं कि उक्त श्री कालू उर्फ प्रवीन को उक्त अधिनियम की धारा 13 के अन्तर्गत निरुद्ध किये जाने के दिनांक- 19.02.2024 से बारह माह की अवधि तक के लिए निरुद्ध रखा जायेगा।

राज्यपाल महोदय की आज्ञा से
ह०अपठनीय

(डा० अनिल कुमार सिंह)

विशेष सचिव,

गृह (गोपान) विभाग,

उत्तर प्रदेश शासना"

20. In reply, the petitioner through his father-in-law filed a rejoinder denying the allegation and stated that the petitioner is illegally detained under the National Security Act.

21. In another rejoinder, it is stated on behalf of the petitioner that the copies of the report of the District Magistrate and that of Advisory Board, Lucknow were not provided to the petitioner and, therefore, principle of natural justice are violated. It is stated that in the F.I.R. in Haryana, the petitioner is on bail.

22. In another rejoinder affidavit, it is stated that the Advisory Board has passed the order in a mechanical manner just to approve the detention order passed by the District Magistrate and the mandate of Article 22 (4) of the Constitution of India is violated.

23. Counsel for the petitioner has argued that the detention of the petitioner is illegal and the proceedings have been initiated in violation of the settled provisions of the facts as well as the subsequent order has been passed in the mechanical manner.

24. Learned Counsel has referred to the judgement of this Court in **HABEAS CORPUS WRIT PETITION No. - 271 of 2024 (Faizan Khan Alias Raja Babu Vs. Addhikshak Janpadkendriya Karagar Bareilly And 3 Others)** decided on 14.5.2024 and has relied on paragraph Nos. 13 and 14 which read as under :

*"13. Counsel for the petitioner has referred to the decision in **Smt. Icchu Devi Choraria Vs. Union of India and others, 1980 0 AIR (SC) 1983**, to submit that it is held by the Supreme Court of India that right provided under Article 22 (5) of the Constitution of India is a substantive right and, if there is violation of the same, the detention order is liable to be quashed. Similar view is taken by the Supreme Court in **Mohinuddin Vs. District Magistrate, Beed and others, 1987 0 AIR (SC) 1977**, **Smt. Shalini Soni vs. Union of India and others, 1981 0 AIR (SC) 431** and in **S. Gurdip Singh vs. Union of India and others, 1981 0 AIR (SC) 362**.*

*14. Counsel has then relied upon another decision in **Sushanta Kumar Banik Vs. State of Tripura and Ors., 2022 0 AIR (SC) 4715**, whereby the Supreme Court has held that when vital material or vital facts are withheld and not placed by the Sponsoring Authority before the Detaining Authority, it vitiate the procedure. Counsel submits that admittedly in the instant case, till date the vital material relied upon by the Sponsoring Authority or by the Screening Authority had not been*

disclosed to the petitioner and, therefore, detention of the petitioner under PIT NDPS Act is illegal.”

25. Learned A.G.A. for the State in reply has agreed that a proper procedure has been followed and District Magistrate has recorded its satisfaction that if the petitioner is released on bail, he may be a threat to the national security.

26. After hearing the counsel for the parties, we find merits in the petition for the following reasons :

A. The detention of the petitioner is based on two F.I.R. i.e. one Case Crime No. 0611 of 2023 under Sections 147, 148, 149, 302 and 404 of IPC at Police Station – Teelamod, Trans Hindon Commissionerate Ghaziabad in U.P. In this F.I.R., for a period of one month, the informant, his wife, and wife of his deceased-brother did not name the petitioner as an accused. Rather, perusal of the F.I.R. shows that the same has been registered against the co-villagers on account of enmity regarding the election of Village Pradhan and all the three witnesses have assigned specific roles of firing on deceased to those persons who are residents of the same village. Therefore, it will be the mater of trial whether the petitioner who is nominated on the statement of co-accused, such statement can be read in evidence against the petitioner when eye-witnesses have not named him.

B. In the second F.I.R. relating to District Faridabad, the petitioner has been released on bail

and that F.I.R. is under Section 307 and 379B of IPC.

C. The petitioner is facing the trial in Case Crime No. 0611 of 2023 and is in judicial custody since 23.12.2023 and when he filed an application for bail, the provisions of NSA were invoked with an allegation as mentioned in paragraph No.29 of the impugned order that if the petitioner is granted bail, he may misuse the same.

D. It is well settled principle of law that provisions of NSA cannot be invoked just to deter a person from exercising his right to apply for bail before the competent Court of law.

E. The order dated 16.4.2024 passed by the Special Secretary rejecting the representation of the petitioner is a totally non speaking order and does not qualify the test as laid down by the Supreme Court in **Nenavath Bhujji's Case (Supra)**.

F. It is admitted case that before passing the impugned order dated 19.2.2024, the District Magistrate has neither afforded any legal assistance nor afforded any opportunity of personal hearing to the petitioner. There is nothing on record to suggest that the relevant material forming basis of passing the impugned order dated 19.2.2024 was ever supplied to the petitioner as order only reflects that the copy of the impugned order be sent to the petitioner.

27. Thus, from the above, it is apparent that the material forming basis of the opinion of the competent authority to

29. However, it is made clear if petitioner is found involved in any subsequent F.I.R., it will be open for the authorities to initiate fresh proceedings against the petitioner.

**Election Law –Election petition
challenging the election of the returned
candidate in MLC elections-petition filed
beyond time by 92 days- beyond the 45-**

After having heard learned counsel for the petitioner and perusing the records, it is settled that unless and until an election petition is maintainable and is not barred by limitation, the merits of the matter cannot be seen and considered. In the present matter, from the judgement relied by the learned counsel for the petitioner and the discussion as above, it is apparent that the provisions of Limitation Act, 1963 do not apply to election petitions. The filing / presentation of the election petition is strictly governed by Section 81 of the Act, 1951. The trial of the election petition is provided

under Section 86 of the Act, 1951. The Act specifically provides that if an election petition does not comply with the provisions of Section 81 or Section 82 or Section 117 of it, the High Court shall dismiss it. (Para 21)

Petition dismissed. (E-13)

List of Cases cited:

1. Nijam Uddin Choudhury Vs Aftab Uddin Laskar: Case No.: I.A. (Civil) / 1984 / 2023, decided on 16.10.2023

2. Hukumdev Narain Yadav Vs Lalit Narain Mishra: (1974) 2 SCC 133

3. Hari Shankar Tripathi Vs Shiv Harsh: (1976) 1 SCC 897

4. Lachhman Das Arora Vs Ganeshi Lal: (1999) 8 SCC 532

5. Suman Devi Vs Manisha Devi: (2018) 9 SCC 808

6. Thampanoor Ravi Vs Charupara Ravi: (1999) 8 SCC 74

(Delivered by Hon'ble Samit Gopal, J.)

1. Heard Sri Amit Kumar Pandey, learned counsel for the petitioner and perused the records.

2. The present election petition has been filed by the petitioner- Prahlad Singh challenging the election of returned candidate Yogesh Chowdhary (the respondent) as a Member of Legislative Council and that the same be set-aside and be declared null & void.

3. The case of the petitioner is that the returned candidate / respondent Yogesh Chaudhary has been declared as an elected person of the U.P. Legislative Council by the Returning Officer, a certificate dated

14.03.2024 has been issued to the said effect.

4. The present election has been presented on 30.07.2024 before the Registrar General of this Court. The petition has been filed beyond time by 92 days.

5. Section 81 of the Representation of People Act, 1951 (hereinafter referred to as 'The Act, 1951') reads as under:-

"81. Presentation of petitions. –

(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

*(2) [***]*

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

6. Section 86 of the Act, 1951 reads as under:-

"86. Trial of election petitions.—

(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation.—An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation.—For the purposes of this sub-section and of section 97, the trial of a petition

shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial."

7. As per Section 81 of the Act, 1951 an election petition may be presented to the High Court within 45 days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

8. The present petition has been filed beyond a period of 92 days as prescribed in Section 81 of the Act, 1951.

9. Section 86 (1) of the of the Act, 1951 provides that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act.

10. Learned counsel for the petitioner submitted that the respondent while disclosing & explaining his criminal antecedents in Format C-2 although disclosed 06 cases to be pending against him but did not disclose 01 other criminal case of which a complaint dated 05.10.2006 was filed by one Giriraj Singh against Giriraj Singh and 11 others for offences under Sections 420, 467, 468, 471, 120-B, 504, 506 I.P.C. in which the respondent is an accused at serial no. 3 which is pending trial before the court concerned. It is submitted that on coming to know about the same, the petitioner sent a complaint dated 29.03.2024 to the Chief Election Commissioner, Election Commission of India, New Delhi informing him about the same which has been delivered to him but no action has been taken. It is further submitted that subsequently the petitioner filed a petition being Writ-C No. 19843 of 2024 (Prahlad Singh Vs. Union of India and 3 others) which has been dismissed vide order dated 05.06.2024 by a Division Bench of this Court with an observation that if the petitioner was aggrieved by the election of the elected person, he can challenge the election as per the constitutional mandate by means of an election petition. The said order reads as under:-

“1. The petitioner is aggrieved by the election of the

respondent no.4 as a member of the legislative council.

2. Learned counsel for the petitioner states that he had represented to the Chief Election Commissioner, New Delhi with regard to the wrong information, which was provided by the respondent no.4 in the Format-C2, while he was filling his nomination.

3. Learned counsel appearing for the Election Commission, Shri Jitendra Ojha and Additional Chief Standing Counsel, Shri Rajeev Gupta relying upon the Article 329 of the Constitution of India submitted that if any person is aggrieved by any Election, then he can challenge the same by means of any election petition.

4. In the instant writ petition the petitioner was aggrieved by the election of an elected person (respondent no.4). He can challenge the election as per the constitutional mandate by means of an election petition.

5. Having heard the learned counsel for the parties, we are definitely of the view that no interference is warranted in the instant writ petition.

6. Accordingly, the writ petition is dismissed.”

11. It is submitted next that the petitioner then again sent a complaint dated 12.07.2024 to the Election Officer, Vidhan Sabha Secretariat, Lucknow, U.P. informing him about the same with the prayer to take appropriate action. It is submitted that the present election petition has thus been filed without any delay. Learned counsel for the petitioner has further placed before the

Court judgement of a learned Senior Judge of the Guwahati High Court at Guwahati in the case of **Nijam Uddin Choudhury Vs. Aftab Uddin Laskar : Case No. : I.A. (Civil) / 1984 / 2023**, decided on 16.10.2023 and while placing para 15 of the same has submitted that the issue of limitation has to be determined as a preliminary issue under Order XIV Rule 2 Code of Civil Procedure. It is submitted that as such in so far as the question of limitation is concerned, the present petition be entertained, notice be issued to the respondent and the matter be heard and decided on its merit.

12. The Act, 1951 is a Code in itself. It provides the period of limitation within which an election petition has to be filed in Section 81. Section 86 (1) of it deals with the issue where the provision of Section 81 has not been complied with. The Act specifically states that the High Court shall dismiss the petition which does not comply with the provisions of Section 81 of the Act, 1951.

13. There is no provision in the Act, 1951 for considering the period of limitation. There is nothing in the Act, 1951 which gives powers for condonation of delay, if any, and the extension of the period of limitation. The time prescribed for presentation of an election petition is provided specifically in Section 81 of the Act, 1951. The judgement in the case of **Nijam Uddin** (*supra*) as is being relied upon by the learned counsel for the petitioner is distinguishable in as much as the presentation of the present petition beyond 92 days is an admitted fact and as such nothing lay to be decided on the said fact. The case relied upon by the learned counsel for the petitioner has a different fact in as much as the fact about limitation

was in dispute therein. The issue with regard to a delayed presentation of an election petition which arises in the present petition is an admitted fact and is no more *res integra*.

14. The Apex Court in the case of **Hukumdev Narain Yadav Vs. Lalit Narain Mishra: (1974) 2 SCC 133** has held regarding the question of applicability of Section 5 of the Limitation Act to an election petition. It was held as under:

“16. In K. Venkateswara Rao v. Bekkam Narasimha Reddi [AIR 1969 SC 872 : (1969) 1 SCR 679 : (1969) 2 SCJ 505] to which we shall refer more fully later, Vidyacharan Shukla case was attempted to be pressed into service, but this Court repelled it and observed at pp. 688-689:

“In our view, the situation now obtaining in an appeal to this Court from an order of the High Court is entirely different. There is no Section in the Act as it now stands which equates an order made by the High Court under Section 98 or Section 99 to a decree passed by a civil court subordinate to the High Court. An appeal being a creature of a statute, the rights conferred on the appellant must be found within the four corners of the Act. Sub-section (2) of the present Section 116-A expressly gives this Court the discretion and authority to entertain an appeal after the expiry of the period of thirty days. No right is however given to the High Court to entertain an election petition which does not comply

with the provisions of Section 81, Section 82 or Section 117.”

17. Though Section 29(2) of the Limitation Act has been made applicable to appeals both under the Act as well as under the Code of Criminal Procedure, no case has been brought to our notice where Section 29(2) has been made applicable to an election petition filed under Section 81 of the Act by virtue of which either Sections 4, 5 or 12 of the Limitation Act has been attracted. Even assuming that where a period of limitation has not been fixed for election petitions in the Schedule to the Limitation Act which is different from that fixed under Section 81 of the Act, Section 29(2) would be attracted, and what we have to determine is whether the provisions of this Section are expressly excluded in the case of an election petition. It is contended before us that the words “expressly excluded” would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. As usual the meaning given in the Dictionary has been relied upon, but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein

cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. The provisions of Section 3 of the Limitation Act that a suit instituted, appeal preferred and application made after the prescribed period shall be dismissed are provided for in Section 86 of the Act which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Sections 81, 82 or 117. It will be seen that Section 81 is not the only Section mentioned in Section 86, and if the Limitation Act were to apply to an election petition under Section 81 it should equally apply to Sections 82 and 117 because under Section 86 the High Court cannot say that by an application of Section 5 of the Limitation Act, Section 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Sections 82 and 117 of the Act, or alternatively if the provisions of the Limitation Act do not apply to Section 82 and Section 117 of the Act, it cannot be said that they apply to Section 81. Again Section 6 of the Limitation Act which provides for the extension of the

period of limitation till after the disability in the case of a person who is either a minor or insane or an idiot is inapplicable to an election petition. Similarly, Sections 7 to 24 are in terms inapplicable to the proceedings under the Act, particularly in respect of the filing of election petitions and their trial."

15. Further in the case of **Charan Lal Sahu Vs. Nandkishore Bhatt : (1973) 2 SCC 530** it has been held by the Apex Court that there is no question of any common law right to challenge an election and as such any discretion to challenge the delay in presentation of the petition or absolve the petitioner from the payment of security for costs can only be provided under the statute governing election disputes and if no such discretion was conferred in respect of any of these matters none can be exercised under any general law or any principles of equality and if for non-compliance of the provisions of Section 82 and 117 which is mandatory, the election petition has to be dismissed under Section 86 (1) of the Act 1951, presentation of election petition within the period prescribed in Section 81 of the Act 1951 would be equally mandatory, non-compliance of which visits the penalty of the petition being dismissed, it was held, for all the reasons mentioned, therein that provisions of Section 5 of the Limitation Act do not govern the filing of election petitions or their trial. The Apex Court held as under:-

"3. The right to challenge an election is a right provided by Article 329(b) of the Constitution of India, which provides that no election to either House of

Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. The right conferred being a statutory right, the terms of that statute had to be complied with. There is no question of any common law right to challenge an election. Any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes. If no discretion is conferred in respect of any of these matters, none can be exercised under any general law or on any principle of equity. This Court has held that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. In N.P. Ponnuswami v. Returning Officer, Namakkal Constituency [(1952) 1 SCC 94 : AIR 1952 SC 64 : 1952 SCR 218 : 1952 SCJ 100 : 1 ELR 133] it was pointed out that strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the Legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

16. Further the Apex Court in the case of **Hari Shankar Tripathi Vs. Shiv Harsh : (1976) 1 SCC 897** has held as under:-

“6. To begin with we would first deal with the case of Hukumdev Narain Yadav. What had happened in that case was that the election petition was filed on March 20, 1972 instead of being filed on Saturday, March 18, 1972 which was the last day on which the limitation expired. The election petitioner sought to cross the bar of limitation on the ground that Saturday not being a working day of the court, the petitioner was entitled to file the petition on the next working day, namely, Monday. This Court on a consideration of various factors negated this contention and held that even though the judges of the High Court did not usually sit on Saturdays it was undoubtedly a working day of the court and it could not be said that the court was observing a closed holiday on Saturday. After referring to a large number of decisions and traversing various provisions of the Limitation Act, this Court observed as follows: [SCC pp. 142-43, 151, paras 11, 25]

“...for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4, 9 to 18 and 22 shall apply only insofar as, and to the extent to which, they are not expressly excluded by such appeal or local law

For all these reasons we have come to the conclusion that the provisions of Section 5 of the Limitation Act do not govern the filing of election petitions or their trial and, in this view, it is unnecessary to consider whether there are any merits in the application for condonation of delay.”

This Court accordingly held that Section 4 as also Section 5 of the Limitation Act had no application to the election petitions on the true interpretation of Section 29(2) of the Limitation Act. The Court also held on a reading of Rules 6 and 7 with Rule 26 of the Patna High Court Rules that even though the Judges were not sitting on Saturdays the election petition could be presented on a Saturday to the Registrar or other officers as envisaged by Rule 26 of the Patna High Court Rules. In the instant case, however, the period of limitation provided by Section 81(1) of the Representation of the People Act appears to have expired during the summer vacation which according to the notification of the Allahabad High Court was declared to be a closed holiday. By virtue of the notification of the Allahabad High Court dated September 22, 1973 when the High Court Calendar for 1974 was approved by the Court after inviting objections from the members of the public, a list of days had been mentioned to be treated as closed holidays. The last part of this notification runs thus:

List of days to be observed as closed holiday in the High Court

of Judicature at Allahabad during the year 1974.

In view of this notification, therefore, the legal position would be that the summer vacation, namely, the period starting from May 25 and ending on July 7, 1974, would be deemed to be closed holidays in the High Court. Thus it follows that June 14, 1974, which fell within this period would also be a closed holiday. If, therefore, the period of limitation under Section 81 of the Representation of the People Act expired on June 14, 1974 which being a closed holiday right upto July 7, 1974, then Section 10, of the General Clauses Act would apply in terms and the appellant would be fully justified in filing the petition on July 8, 1974 when the court reopened after the summer vacation. The relevant portion of Section 10 of the General Clauses Act runs thus:

“10.(1) Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.”

Analysing the section it would appear that the following conditions must be satisfied before a litigant may take advantage of the protection of Section 10 of the General Clauses Act:

“(1) that any act or proceeding is allowed to be done or taken in any court or office on a particular day or a prescribed period;

(2) that if the court or office is closed on that day or the last day of prescribed period then the act or proceeding will be deemed to have been taken in due time if it is done or taken on the next day afterwards on which the court or office is open.”

The proviso to Section 10 makes these provisions inapplicable to cases where the Limitation Act applies. In the instant case which arises out of the election petition it is manifest from the judgment of this Court on Hukumdev Narain Yadav that the provisions of Sections 4 and 5 of the Limitation Act do not apply. It is also clear from the notification of the High Court referred to above that the entire period of the summer vacation starting from May 25 to July 7, 1974, was a closed holiday. Thirdly the period of limitation prescribed by Section 81(1) of the Representation of the People Act expired on June 14, 1974 during the summer vacation. In these circumstances the inescapable conclusion would be that Section 10 of the General Clauses Act would apply in terms and the appellant would be entitled to file

the election petition on July 8, 1974 as he did."

17. Further the Apex Court in the case of **Lachhman Das Arora Vs. Ganeshi Lal : (1999) 8 SCC 532** has held as under:-

"7. On its plain reading, Section 81(1) lays down that an election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 of the Act to the High Court by any candidate at such election or by an elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates. The Act is a special code providing a period of limitation for filing of an election petition. No period for filing of an election petition is prescribed under the Indian Limitation Act. The Act insofar as it relates to presentation and trial of election disputes is a complete code and a special law. The scheme of the special law shows that the provisions of Sections 4 to 24 of the Indian Limitation Act do not apply. If an election petition is not filed within the prescribed period of forty-five days, Section 86(1) of the Act, which provides that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117, is straightaway attracted."

18. Further the Apex Court in the case of **Suman Devi Vs. Manisha Devi : (2018) 9 SCC 808** has held as under:-

"7. In Hukumdev Narain Yadav v. Lalit Narain Mishra [Hukumdev Narain Yadav v. Lalit Narain Mishra, (1974) 2 SCC 133] , while considering whether the provisions of the Limitation Act, 1963 would be applicable to an election petition under the Representation of the People Act, 1951, P. Jaganmohan Reddy, J., speaking for a three-Judge Bench of this Court held thus : (SCC p. 147, para 18)

"18. ...The applicability of these provisions has, therefore, to be judged not from the terms of the Limitation Act but by the provisions of the Act relating to the filing of election petitions and their trial to ascertain whether it is a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in Section 29(2) of that Act."

This Court held that the provisions of Section 5 of the Limitation Act do not govern filing of election petitions or their trial.

8. In Charan Lal Sahu v. Nandkishore Bhatt [Charan Lal Sahu v. Nandkishore Bhatt, (1973) 2 SCC 530] , a two-Judge Bench held that there is no common law right to challenge an election since it is purely a matter of regulation by the terms of the statute. The right being statutory, the terms of the statute must be complied with.

9. A three-Judge Bench of this Court in Lachhman Das Arora

v. *Ganeshi Lal* [*Lachhman Das Arora v. Ganeshi Lal*, (1999) 8 SCC 532] , construed the provisions of Section 81(1) of the Representation of the People Act, 1951, which prescribes a period of 45 days to file an election petition. Dr A.S. Anand, C.J. speaking for the Court, held thus : (SCC pp. 535-36, para 7)

“7. On its plain reading, Section 81(1) lays down that an election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 of the Act to the High Court by any candidate at such election or by an elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidates at the election and the dates of their election are different, the later of those two dates. The Act is a special code providing a period of limitation for filing of an election petition. No period for filing of an election petition is prescribed under the Indian Limitation Act. The Act insofar as it relates to presentation and trial of election disputes is a complete code and a special law. The scheme of the special law shows that the provisions of Sections 4 to 24 of the Indian Limitation Act do not apply. If an election petition is not filed within the prescribed period of forty-five days, Section 86(1) of the Act, which provides that the High Court shall dismiss an election petition which does not comply with the

provisions of Section 81 or Section 82 or Section 117, is straightaway attracted.”

(emphasis in original)

19. The High Court while hearing an election petition operates as an Authority under Article 329 (b) of the Constitution of India whose jurisdiction is circumscribed by the statutory provisions as per the Act, 1951.

20. The Apex Court in the case of ***Thampanoor Ravi Vs. Charupara Ravi* : (1999) 8 SCC 74** has thus held that a High Court hearing an election petition does not function as a Constitutional Court per se nor does it have extraordinary constitutional or inherent powers. It has been held as under:

“12. Under Article 329(b) of the Constitution no election to a legislature shall be called in question except by an election petition presented to such authority and in such manner as may be provided by or made by the appropriate legislature. Under Section 80-A of the RP Act, the forum for adjudication of an election petition is the High Court. The scope of this provision is considered by this Court in *Upadhyaya Hargovind Devshanker v. Dhirendrasinh Virbhadrasinghji Solanki* [(1988) 2 SCC 1 : AIR 1988 SC 915] . In that decision, the question was whether an order made on an interlocutory application in an election petition could be the subject of a letters patent appeal. It was observed in that decision that conferment of power under the RP Act to try any

election does not amount to enlargement of the existing jurisdiction of the High Court. The jurisdiction exercisable under the RP Act is a special jurisdiction conferred on the High Court by virtue of Article 329(b) of the Constitution. Therefore, even though the High Court may otherwise exercise ordinary and extraordinary jurisdiction it would be difficult to envisage a situation that while trying an election petition in exercise of the jurisdiction conferred by the RP Act it can adjudicate upon the vires of the RP Act or any rule or order made thereunder and the election petition has to be tried in accordance with the provisions of the RP Act and thus the court cannot entertain and pronounce upon matters which do not fall within the ambit of Section 100 of the RP Act. Even an ordinary civil court will not have jurisdiction to decide questions arising under insolvency enactments; much less a special authority like the High Court when it is not invested with such power under the Insolvency Act. This Court in Bhagwati Prasad Dixit 'Ghorewala' v. Rajeev Gandhi [(1986) 4 SCC 78 : 1986 SCC (Cri) 399 : (1986) 2 SCR 823] reversed the view taken in Bhagwati Prasad [1985 All WC 682] on which reliance was placed by the respondent that the High Court can decide whether a person has acquired citizenship or lost citizenship. In that case a question arose as to whether in an election petition the High Court had jurisdiction to determine the

citizenship of a person. The High Court had taken the view that notwithstanding the statutory bar contained in Section 9(2) of the Citizenship Act that wherever a question arises as to whether, when and how a person has acquired the citizenship of another country it shall be determined by such authority in the manner prescribed by the rules of evidence as may be prescribed in that behalf; that since by virtue of Article 329(b) of the Constitution all questions arising in an election petition filed under the RP Act were exclusively triable in an election petition, it had the jurisdiction to decide the question whether a candidate had ceased to be an Indian citizen. This Court took the view that when such a question arises it would be a matter to be decided by the authority constituted under the Citizenship Act and when no decision is given by the competent authority under the Citizenship Act, the question whether he ceased to be a citizen of India could not be adjudicated in an election petition."

(emphasis supplied)

21. After having heard learned counsel for the petitioner and perusing the records, it is settled that unless and until an election petition is maintainable and is not barred by limitation, the merits of the matter cannot be seen and considered. In the present matter, from the judgement relied by the learned counsel for the petitioner and the discussion as above, it is apparent that the provisions of Limitation Act, 1963 do not apply to election petitions. The filing / presentation of the election petition is strictly governed by Section 81

of the Act, 1951. The trial of the election petition is provided under Section 86 of the Act, 1951. The Act specifically provides that if an election petition does not comply with the provisions of Section 81 or Section 82 or Section 117 of it, the High Court shall dismiss it.

22. In view of the reasons as stated above, this Court comes to a conclusion that the present election petition is barred by Section 81 read with Section 86 of the Act, 1951 and is liable to be dismissed. It is thus ordered to be *dismissed*.

(2024) 9 ILRA 1462
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.09.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Writ Petition No. 6581 of 2024

Mohd. Hasan		...Petitioner
	Versus	
U.O.I. & Anr.		...Respondents

Counsel for the Petitioner:
 Salman Abbas

Counsel for the Respondents:
 A.S.G.I.

Criminal Law – Constitution of India , 1950 - Article 226 -order of the Magistrate denying renewal of passport on the ground of lack of jurisdiction challenged whether the petitioner could renew his passport despite pending criminal proceedings-notification of Government of India dated 25.08.1993-Office Memorandum dated 10.10.2019-no restriction to the learned trial court to direct for grant of permission for renewal of passport-citizens of country entitled to passport-fundament right under Article

19(1) (d) of the Constitution of India-petition allowed. (Paras 8 and 9)

HELD:

After considering the arguments as advanced by learned counsel for the parties as well as after perusal of record, this Court finds that Under Article 19(1)(d) and Article 21 of the Constitution of India, the citizens of the country are entitled for passport. In *Maneka Gandhi Vs U.O.I. 1978 (1) SCC 248*, the Apex Court has held that having passport is a fundamental right of the citizen of India and a citizen can not be deprived of such fundamental right.... (Para 8)

Thus, this Court after considering the aforesaid judgment of Hon'ble the Supreme Court in the case of *Maneka Gandhi (Supra)* is of the view that right to travel abroad is a part of the personal liberty guaranteed under Article 21 and 19 (1) (g) of the Constitution of India and in addition thereto a careful reading of provisions of the Passport Act and the Notification dated 25.08.1993 alongwith the Office Memorandum dated 10.10.2019 in the light of it's legislative backgrounds as mentioned above, it is clear that passport or travel document of a person, who is facing trial can be refused by the authority concerned during pendency of his criminal case, but there is no statutory bar for giving no objection by the court concerned. No hard and fast straight jacket formula can be laid down regarding issuance of permission or giving no objection by the court concerned for issuance of passport. It is always discretion of the court concerned and depend upon the facts and circumstances of each case, act and conduct of the accused as well as nature of alleged offence committed by him/her and stage of trial, etc. Some time on account of enmity or ill will one party enmesh the other party in a frivolous criminal case to settle his personal score, therefore, in the interest of justice, it is necessary to consider all aspects of the matter and surrounding circumstances while granting or refusing the no objection for renewal or reissue of passport or travel documents by the court concerned or by the authorities concerned and the trial in the above case is not likely to conclude very soon. These were relevant factors to be considered by the learned Trial Court while passing the impugned order.

The learned trial court had completely ignored the Notification issued by Ministry of External Affairs, New Delhi dated 25.08.1993 as well as Office Memorandum dated 10.10.2019 issued by the Ministry of External Affairs, Government of India, New Delhi (referred above) while passing the impugned order for grant permission for renewal/re-issue of passport, thus, the impugned order is not sustainable in the eyes of law, therefore, the same is liable to be set aside/reversed. (Para 9)

Petition allowed. (E-13)

List of Cases cited:

Maneka Gandhi Vs U.O.I. 1978 (1) SCC 248

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Salman Abbas, learned counsel for the petitioner as well as Sri Surya Bhan Pandey, learned Sr. Advocate and Deputy Solicitor General of India assisted by Sri Varun Pandey, learned counsel for the Union of India and Sri Ashok Kumar Singh, learned A.G.A.-I for the State and perused the record.

2. The instant writ petition has been filed seeking following main reliefs:-

"i. Issue Writ, Order and direction in any nature of certiorari to quash/set aside the impugned order dated 08.08.2024 passed by learned Court of Additional Civil Judge / Additional Chief Judicial Magistrate, Court No.24, Lucknow in Criminal Case No.37328 of 2018; State Vs. Shahid Husain alias Shanne and Ors. arising out of Case Crime No.458 of 2016, under Section 420, 467, 468, 471 I.P.C., Police Station Thakurganj, District Lucknow for securing the interest of justice, which is contained in as Annexure No.1.

ii. Issue Writ, Order and direction in any nature of Mandamus

directing the Opposite Parties to consider the case of the petitioner and issue the passport to the petitioner irrespective of Case Crime No.458 of 2016, under Section 420, 467, 468, 471 I.P.C., Police Station Thakurganj, District Lucknow for securing the interest of justice. "

3. Learned counsel for the petitioner submits that a Passport was issued to the petitioner by the Passport Office, Lucknow bearing Passport No. Z267244 which was valid from 26.09.2012 till 25.09.2023.

4. Learned counsel for the petitioner further submits that an application was filed by the petitioner before the learned Additional Civil Judge/Additional Chief Judicial Magistrate, Court No.24, Lucknow for grant of permission for renewal of passport, which was rejected by means of order dated 08.08.2024 observing therein that this Court has no jurisdiction for granting the permission of renewal of passport. He further submits that the petitioner has been falsely implicated in F.I.R. No.458 of 2016, under Section 420, 467, 468, 471 I.P.C., Police Station Thakurganj, District Lucknow.

5. In support of his argument, learned counsel for the petitioner has relied upon the notification of Ministry of External Affairs, New Delhi dated 25.08.1993, which is being quoted hereunder:-

"G.S.R. 570(E).--In exercise of the powers conferred by clause (a) of Section 22 of the Passports Act 1967 (15 of 1967) and in supersession of the notification of the Government of India in the Ministry of External Affairs No. G.S.R. 298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do

so, hereby exempts citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of Clause (f) of sub-section (2) of Section 6 of the said Act, subject to the following conditions, namely:-

(a) the passport to be issued to every such citizen shall be issued –

(i) for the period specified in order of the court referred to above, if the court specified a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport for the travel abroad is specified in such order, the passport shall be issued for a period of one year;

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period of validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order;

(b) any passport issued in terms of (a)(ii) and (a)(iii) above can be further renewed for one year at a time, provided the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified.

(c) any passport issued in terms of (a)(i) above can be further renewed only on the basis of a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport-issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued.”

6. Thus, learned counsel for the petitioner submits that the impugned order dated 08.08.2024 is totally illegal, perverse and arbitrary as the same is passed without application of judicial mind and also without considering the notification of Ministry of External Affairs, Government of India, New Delhi, therefore, the same is liable to be quashed.

7. On the other hand, learned counsel for the Union of India has placed a notification of the Government of India dated 25.08.1993 (which has already been quoted above) and an Office Memorandum dated 10.10.2019 (which is being quoted hereunder) issued by the Ministry of External Affairs, Government of India, New Delhi. He has also placed an order passed by co-ordinate Bench of this Court dated 02.02.2024 passed in Application under Section 482 Cr.P.C. No.839 of 2024 and submits that there is no restriction to the learned trial court to direct for grant of permission for renewal of passport. He further submits that as per aforesaid notification and order passed by the co-ordinate Bench of this Court, the impugned order dated 08.08.2024 passed by learned Additional Civil Judge/Additional Chief Judicial Magistrate, Court No.24, Lucknow, on its face appears to be passed without application of judicial mind and without considering the aforesaid notification. Thus, the impugned order is liable to be quashed and authorities may be directed to consider the case for renewal of his passport. The Office Memorandum

dated 10.10.2019 is being quoted hereunder:

**Office Memorandum dated 10.10.2019
issued by the Ministry of External
Affairs, Government of India, New
Delhi:-**

**No. VI/401/1/5/2019
Government of India
Ministry of External Affairs
PSP Division
Patiala House Annexe, Tilak Marg
New Delhi, the 10th October 2019
OFFICE MEMORANDUM**

**Subject: Issue of passports to applicants
against whom criminal cases are pending
before a court of law in India.**

Reference is invited to Notification No. GSR 570(E) dated 25.8.1993 regarding issuance of passports to applicants who have criminal proceedings pending against them and whose applications would attract the provisions of clause (f) of sub-section (2) of Section 6 of the Passports Act, 1967.

2. GSR 570(E) dated 25.8.1993 is reproduced below for reference:

"G.S.R. 570(E).--In exercise of the powers conferred by clause (a) of Section 22 of the Passports Act 1967 (15 of 1967) and in supersession of the notification of the Government of India in the Ministry of External Affairs No. G.S.R. 298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do so, hereby exempts citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of Clause (f) of sub-section (2)

of Section 6 of the said Act, subject to the following conditions, namely:-

(a) the passport to be issued to every such citizen shall be issued –

(i) for the period specified in order of the court referred to above, if the court specified a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport for the travel abroad is specified in such order, the passport shall be issued for a period of one year;

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period of validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order;

(b) any passport issued in terms of (a)(ii) and (a)(iii) above can be further renewed for one year at a time, provided the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified.

(c) any passport issued in terms of (a)(i) above can be further renewed only on the basis of a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport-issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued."

3. It may be noted that applicants may be refused passports only on grounds

mentioned under Section 6(2) of the Passports Act, 1967. Section 6(2)(f) of the Act states that the passport authority shall refuse to issue a passport or travel document to an applicant on the ground that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India. GSR 570(E) dated 25.8.1993 was introduced to give relief to such applicants against whom criminal proceedings are pending before any Court of law in India but who may need to travel abroad for some urgent business. With an undertaking under GSR 570(E) and an order from the Court, an applicant could be issued a short validity passport of one year validity for the period specified by the Court.

4. It has been noticed that there are an increasing number of references being received regarding passport applications attracting Section 6(2)(f). It has also been brought to Ministry's notice that there are a number of complex issues involved while processing such applications. During the proceedings in a recent court case, the Hon'ble High Court of Delhi in W.P. (CRL) No. 2844/2018 /CRL.M.A. 48674/2018 has directed that guidelines be issued by the Ministry reiterating the procedure for processing of such applications and emphasizing that such applications need to be processed with due care and diligence.

5. In view of the above, the following instructions may be adopted while processing the passport applications in respect of those applicants who may have criminal proceedings pending before a criminal court in India:

(i) The provisions of GSR 570 (E) may be strictly applied in all case. GSR

570 (E) is a statutory notification and hence, forms part of the Rules. It is to be noted that as per Section 5 (2) of the Passports Act, 1967, the passport authority shall be order in writing take a decision whether to issue or refuse a passport, after making such inquiry, if any, as it may consider necessary. Moreover, Section 7 of the Passports Act, provides that a passport or travel document may be issued for a shorter period than the prescribed period if the passport authority, for reasons to be communicated in writing to the applicant, considers in any case that the passport or travel document should be issued for a shorter period. Rule 12 of the Passport Rules, 1980 only states that an ordinary passport shall be in force for a period of 10 years which implies that an ordinary passport cannot be issued beyond a period of 10 years.

(ii) Whenever an applicant is submitting a 'No Objection Certificate' (NOC) from a Court of law in India, the applicant should be advised that undertaking as per GSR 570(E) should be complete in all respects and should mention all the pending criminal cases against the applicant. The undertaking will have a not clearly stating that if any false or incomplete information is submitted by an applicant, then his passport application is liable to be rejected.

(iii) Extant instructions clearly lay down that such applications should be processed on pre- Police Verification (PV) mode. "Pre-PV" would be mandatory in all cases of applications submitted with GSR 570(E) to ensure that the undertaking submitted by the applicant is properly matched with the criminal cases mentioned in the Police Verification Report (PVR). Hence, such applications should not be accepted under Tatkaal nor such applications be moved to "post-PV" mode

or “No-PV” mode without proper justification and approval to be recorded in writing.

(iv) If an undertaking is incomplete or misleading and the applicant is found to have suppressed details of other criminal cases against the applicant, a Show Cause Notice should be issued to the applicant and action initiated against that applicant as per provisions of Section 12 of the Passports Act, 1967. If information that an applicant has obtained a passport by making a false submission or by suppressing material facts comes to light after the passport has been issued, the passport may be impounded or revoked as per provision of Section 10 (3) (b) of the Passports Act, 1967 after following the due procedure.

(v) In case where the first police verification (PV) is 'Adverse', secondary police verification may be generated. While a secondary PV is generated, it should be accompanied by a detailed letter seeking clarification regarding the pending criminal cases against the applicant and the status of these cases. Apart from generating secondary PVR, the passport officers may, if considered necessary, call for discreet enquiry through the police authorities by sending the court order submitted by the applicant or even seek verification from other government agencies/departments, as the case may be.

(vi) In case where the secondary Police Verification is also 'Adverse', it may be examined whether the details brought out in the police report match the undertaking submitted by the applicant. It may be noted that mere filing of FIRs and cases under investigation do not come under the purview of Section 6(2)(f) and that criminal proceedings would only be considered pending against an applicant if a case has been registered before any Court

of law and the court has taken cognizance of the same.

(vii) If the details given in the police report and the undertaking submitted by the applicant are matching, then the 'No Objection Certificate' issued by a Court of law submitted by the applicant would take precedence over any 'Adverse' report submitted by the police. In such cases, the 'Adverse' report may be overruled with the written approval of the Passport Officer.

(viii) If the details given in the PVR and the undertaking submitted by the applicant are at variance, then a notice may be issued to the applicant calling for clarification and advising the applicant to submit details of all pending criminal cases as well as to submit a revised No Objection Certificate (NOC).

(ix) If it is brought to the notice of the authority that an applicant has criminal proceedings arrayed against applicant before several courts of law, then the applicant may be advised to get NOC from all the concerned court (s). Normally, the Court Order would make a mention of the cases pending against the applicant as well as the prayer made by the applicant. This may be examined along with the undertaking submitted by the applicant and complaints or other court orders, if any, that have been received against the applicant.

(x) It may be noted that GSR 570(E) only exempts and applicant from the operation of Section 6 (2)(f) and none of the other sub-sections of Section 6(2) of the Passports Act, 1967.

(xi) A revised Undertaking under GSR 570(E) is attached at Annexure 'A'.

(xii) Passport Officers may issue an internal SOP along the above lines so that there is no confusion in handling of applications that would attract provisions of section 6(2)(f) of the Passports Act, 1967.

6. The above instructions may be noted for strict compliance with immediate effect.

Annexure 'A' UNDERTAKING
(to be submitted on plain paper as per provisions of GSR-570(E) dated 25.08.1993)

I am applying/have applied for passport with the following details:-

(a) Name
:.....

(b) Date of Birth
:.....

(c) Father's Name
:.....

(d) Mother's Name
:.....

(e) Present Address
:.....

(f) File No./ARN No.
:..... Date:.....

2. The Criminal case(s) with following details is/are pending against me:

(if more than one case is pending, details of all cases may be provided. Additional sheet giving complete information may be attached)

(a) Case No.
:.....

(b) Name of Court
:.....

(c) Details of Investigating Agency (Please provide details of Police station Investigating Officer, etc.)
:.....

(d) Last date of hearing
:.....

(e) Next date of hearing
:.....

3. I hereby undertake that I shall, if required by the Court concerned, appear before it at any time during the continuance in force of the passport so issued.

4. I am aware that it is an offence under the Passports Act, 1967 to furnish

any false information or to suppress any material information with a view to obtaining a passport or any other travel document.

5. The above information given by me in this undertaking and enclosures is true and I am solely responsible for its accuracy.

(Signature of the Passport applicant)

Name.....

Mobile No.....

Date:.....

Place:.....

8. After considering the arguments as advanced by learned counsel for the parties as well as after perusal of record, this Court finds that Under Article 19(1)(d) and Article 21 of the Constitution of India, the citizens of the country are entitled for passport. In **Maneka Gandhi Vs. Union of India 1978 (1) SCC 248**, the Apex Court has held that having passport is a fundamental right of the citizen of India and a citizen can not be deprived of such fundamental right and the Hon'ble Supreme Court in paragraph Nos. 214 and 215 was pleased to observe as under:

214. In India, at any rate, we are all certainly governed by our Constitution. The fact that the affected petitioner may not, as a result of a particular order, be able to do something intended to be done by her abroad cannot possibly make the governmental action in India either ineffective or immune from judicial scrutiny or from an attack made on the ground of a violation of a fundamental right which inheres in an Indian citizen. The consequences or effects upon the petitioner's possible actions or future activities in other countries may be a factor which may be weighed, where relevant,

with other relevant facts in a particular case in judging the merits of the restriction imposed. It will be relevant insofar as it can be shown to have some connection with public or national interests when determining the merits of an order passed. It may show how she has become a "person aggrieved" with a cause of action, by a particular order involving her personal freedom. But, such considerations cannot curtail or impair the scope or operation of fundamental rights of citizens as protections against unjustifiable actions of their own Government. Nor can they, by their own force, protect legally unjustifiable actions of the Government of our country against attacks in our own courts.

215. In order to apply the tests contained in Articles 14 and 19 of the Constitution, we have to consider the objects for which the exercise of inherent rights recognised by Article 21 of the Constitution are restricted as well as the procedure by which these restrictions are sought to be imposed. Both substantive and procedural laws and actions taken under them will have to pass tests imposed by Articles 14 and 19 whenever facts justifying the invocation of either of these articles may be disclosed. For example, an international singer or dancer may well be able to complain of an 'unjustifiable restriction on professional activity by a denial of a passport. In such a case, violations of both Articles 21 and 19(1)(g) may both be put forward making it necessary for the authorities concerned to justify the restriction imposed, by showing satisfaction of tests of validity contemplated by each of these two articles."

9. Thus, this Court after considering the aforesaid judgment of Hon'ble the Supreme Court in the case of **Maneka**

Gandhi (Supra) is of the view that right to travel abroad is a part of the personal liberty guaranteed under Article 21 and 19 (1) (g) of the Constitution of India and in addition thereto a careful reading of provisions of the Passport Act and the Notification dated 25.08.1993 alongwith the Office Memorandum dated 10.10.2019 in the light of it's legislative backgrounds as mentioned above, it is clear that passport or travel document of a person, who is facing trial can be refused by the authority concerned during pendency of his criminal case, **but there is no statutory bar for giving no objection by the court concerned. No hard and fast straight jacket formula can be laid down regarding issuance of permission or giving no objection by the court concerned for issuance of passport. It is always discretion of the court concerned and depend upon the facts and circumstances of each case, act and conduct of the accused as well as nature of alleged offence committed by him/her and stage of trial, etc.** Some time on account of enmity or ill will one party enmesh the other party in a frivolous criminal case to settle his personal score, therefore, in the interest of justice, it is necessary to consider all aspects of the matter and surrounding circumstances while granting or refusing the no objection for renewal or reissue of passport or travel documents by the court concerned or by the authorities concerned and the trial in the above case is not likely to conclude very soon. These were relevant factors to be considered by the learned Trial Court while passing the impugned order.

The learned trial court had completely ignored the Notification issued by Ministry of External Affairs, New Delhi dated 25.08.1993 as well as Office Memorandum dated 10.10.2019 issued by

the Ministry of External Affairs, Government of India, New Delhi (referred above) while passing the impugned order for grant permission for renewal/re-issue of passport, thus, the impugned order is not sustainable in the eyes of law, therefore, the same is liable to be set aside/reversed.

10. In view of above, in the light of the notification dated 25.08.1993 and the Office Memorandum dated 10.10.2019 as well as the judgment passed by Hon'ble the Supreme Court in the case of **Maneka Gandhi (Supra)** and considering the larger mandate of the Article 19 and 21 of the Constitution of India, the impugned order dated 08.08.2024 passed by learned Additional Civil Judge/Additional Chief Judicial Magistrate, Court No.24, Lucknow is hereby **set aside and reversed**.

11. Accordingly, the instant writ petition is **allowed** with following directions:

(i) The petitioner shall move a fresh application along with certified copy of this order for renewal/re-issue of his passport before the Regional Passport Officer, Lucknow within 20 days from the date of this order.

(ii) In case such application is moved by the petitioner, within the time stipulated by this Court, the concerned Regional Passport Officer/authority shall decide the application and pass an order for renewal/re-issue of the passport of the applicant within 01 month from the date of production of certified copy of this order, after completing the due formalities in accordance with law.

(iii) If the passport is renewed/re-issued to the petitioner, he shall inform and take permission from the trial court concerned before going abroad and he shall

appear before the trial Court on the date fixed as directed by the trial Court and he shall be bound by the terms and conditions imposed by the trial court, if any.

(iv) The trial Court, if grants permission to the petitioner to go abroad, may impose condition in accordance with law, during the pendency of the case pending before it.

(v) The petitioner is also directed to submit the copy of the trial court's order, if any, condition imposed by the trial court regarding permission to go abroad, before the Regional Passport Officer, Lucknow.

(vi) Let a copy of this order be given to Sri Surya Bhan Pandey, learned Sr. Advocate and Deputy Solicitor General of India appearing for Union of India and Sri Ashok Kumar Singh, learned A.G.A.-I for the State for information and communication to the authorities concerned.

(2024) 9 ILRA 1470
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ C No. 14235 of 2023

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

Counsel for the Petitioner:
 Satyaveer Singh, Sr. Advocate

Counsel for the Respondents:
 C.S.C.

Civil Law – Constitution of India, 1950 - Article 226 - cancellation of selection of the petitioner as Member of the District

Consumer Commission-under challenge-Rule 5(5) of the Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the St. Commission and District Commission) Rules, 2020- cancellation order lacked valid reasoning, as the political affiliation did not constitute a disqualification under the specified rules- reasons provided in a counter affidavit cannot substitute for those absent in the original order-cancellation order quashed-petition allowed. (Paras 4 and 5)

HELD:

In the counter affidavit, the ground for cancellation of the selection of the petitioner is that the petitioner was an office bearer of a political party, and therefore, his working as a Member of the District Consumer Commission would be prejudiced. It is to be noted that in the impugned order, no reason whatsoever was provided and this explanation has been provided only in the counter affidavit. Supplanting of reason by way of a counter affidavit cannot be a substitute for having providing reasons in the main order itself. (see: Mohinder Singh Gill & another vs The Chief Election Commissioner, New Delhi & ors., reported in 1978 (1) SCC 405). (Para 4)

In any event, we find that the reason provided in the counter affidavit is flimsy and does not fall in any of the clauses for disqualification as prescribed in Rule 5 of the Rules. The petitioner has himself informed to this Court that if he was appointed as a Member of the District Consumer Commission, he would have given resignation from the post that he was holding. Under such circumstances, we find that the impugned order is without any merit and deserves to be quashed and set-aside. (Para 5)

Petition allowed. (E-13)

List of Cases cited:

Mohinder Singh Gill & another vs The Chief Election Commissioner, New Delhi & ors., reported in 1978 (1) SCC 405

(Delivered by Hon'ble Shekhar B. Saraf, J.
&
Hon'ble Manjive Shukla, J.)

1. Heard counsel appearing on behalf of the parties.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner is aggrieved by the order dated March 1, 2023 bearing No.118/84-2-2023 issued by the Government of Uttar Pradesh, Lucknow and the subsequent communication dated March 14, 2023 with regard to cancellation of selection of the petitioner as Member of the District Consumer Commission.

3. It is to be noted that the petitioner was selected as a Member of the District Consumer Commission along with 13 other persons. By the impugned order dated March 1, 2023, his selection has been cancelled under Rule 5(5) of the Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission and District Commission) Rules, 2020 (hereinafter referred to as 'the Rules'). Rule 5 of the Rules is extracted below:-

“5. Disqualification for appointment of President or member of State Commission and District Commission – A person shall be disqualified as the President or a member of a State Commission or District Commission if he-

(1) has been convicted and sentenced to imprisonment for an offence which involves moral turpitude; or

(2) has been adjudged to be insolvent; or

(3) is of unsound mind and stands so declared by a competent authority; or

(4) has been removed or dismissed from the service of the State Government or Central Government or a body corporate owned or controlled by such Government; or

(5) has, in the opinion of the State Government, such financial or other interest as is likely to prejudicially affect his functions as the President or a member.”

4. In the counter affidavit, the ground for cancellation of the selection of the petitioner is that the petitioner was an office bearer of a political party, and therefore, his working as a Member of the District Consumer Commission would be prejudiced. It is to be noted that in the impugned order, no reason whatsoever was provided and this explanation has been provided only in the counter affidavit. Supplanting of reason by way of a counter affidavit cannot be a substitute for having providing reasons in the main order itself. (see: Mohinder Singh Gill & another vs The Chief Election Commissioner, New Delhi and others, reported in 1978 (1) SCC 405).

5. In any event, we find that the reason provided in the counter affidavit is flimsy and does not fall in any of the clauses for disqualification as prescribed in Rule 5 of the Rules. The petitioner has himself informed to this Court that if he was appointed as a Member of the District Consumer Commission, he would have given resignation from the post that he was holding. Under such circumstances, we find that the impugned order is without any merit and deserves to be quashed and set-aside.

6. Accordingly, the impugned order dated March 1, 2023 and subsequent

communication dated March 14, 2023 are quashed and set-aside. In the event, there is any vacancy of the post of Member of the District Consumer Commission, the petitioner should be appointed within eight weeks from date.

7. The writ petition is allowed.

(2024) 9 ILRA 1472
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ Tax No. 1396 of 2024

Hcl Infotech Ltd. ...Petitioner
Versus
Commissioner, Commercial Tax & Anr.
...Respondents

Counsel for the Petitioner:
 Atul Gupta

Counsel for the Respondents:
 C.S.C.

Law of taxation – Constitution of India,1950 - Article 226 - The Central Goods and Services Tax Act, 2017- Section 61 -Show cause notice under Section 74 CGST Act,2017 under challenge-previous proceedings under Section 73 CGST Act,2017 already dropped-no allegation of fraud or suppression of facts- notice lacked jurisdiction as it did not specify any fraud, wilful misSt.ment, or suppression of facts, which are necessary to invoke Section 74-show cause notice quashed-possibility of fresh proceedings allowed if necessary conditions are met-petition allowed. (Paras 19, 20, 21, 22, 25,26 and 27)

HELD:

We take note of the fact that Section 73 of the CGST Act gives power to the adjudicating authority to initiate proceedings for recovery of wrongly availed or utilized Input Tax Credit along with interest and penalty for any reason other than the reason of fraud or any wilful mis-St.ment or suppression of facts to evade tax. It is to be taken note of that Section 73 comes into play in all other circumstances except the cases where Input Tax Credit has been wrongly availed or utilized due to fraud or any wilful misSt.ment or suppression of facts to evade tax. Thus, from bare reading of Section 73 of the CGST Act, it becomes crystal clear that if the proceedings under Section 73 of the CSGT Act have been finalized, they cannot be reopened except the case where the Input Tax Credit has wrongly been availed or utilized due to fraud or any wilful mis-St.ment or suppression of facts to evade tax. (Para 21)

We find that proceedings initiated against the petitioner for availing or utilizing the excessive ITC have already been finalized by the Respondent No. 2 and the proceedings were dropped vide order dated 30.12.2023 therefore, the said proceedings could have been reopened under Section 74 of the CGST Act only if the adjudicating authority was prima facie satisfied that the petitioner has availed or utilized Input Tax Credit due to any fraud or any wilful mis-St.ment or suppression of facts to evade tax. The field of operation of Section 73 and 74 of the CGST Act is altogether different i.e. Section 73 operates in all other cases of wrongly availed or utilized Input Tax Credit for any reason other than fraud or wilful mis-St.ment or suppression of facts and Section 74 comes into play when the excessive Input Tax Credit has been availed due to some fraud or wilful mis-St.ment or suppression of facts. Thus it is patently manifest that for deriving the jurisdiction to initiate proceedings under Section 74 of the CGST Act, the adjudicating authority must expressly mention in the Show Cause Notice that he is prima-facie satisfied that the person has wrongly availed or utilized Input Tax Credit due to some fraud or a wilful mis-St.ment or suppression of facts to evade tax and that must be specifically spelled out in the Show Cause Notice. Once the aforesaid basic ingredient of the Show Cause Notice under Section 74 of the CGST Act is missing, the proceedings become

without jurisdiction as the adjudicating authority derives jurisdiction to proceed under Section 74 of the CGST Act only when the basic ingredients to proceed under Section 74 are present. (Para 22)

We find that the impugned Show Cause Notice does not make even a whisper of the fact that petitioner has wrongly availed or utilized Input Tax Credit due to any fraud, or wilful mis-St.ment or suppression of facts to evade tax therefore, the proceedings initiated against the petitioner under Section 74 of the CGST Act are without jurisdiction for the lack of basic ingredients required under the said clause. So far as the argument advanced by the learned counsel appearing for the respondents that the writ petition against the Show Cause Notice is not maintainable, is concerned, we find that it is consistent view of the Hon'ble Supreme Court that if the Show Cause Notice is without jurisdiction, then the same can be challenged by filing writ petition before the High Court under Artilece 226 of the Constitution of India. (Para 25)

In the present case, we do not find that the basic ingredients required for initiating proceedings under Section 74 of the CGST Act are present in the impugned Show Cause Notice dated 30.12.2023. Therefore, the entire exercise including the Show Cause Notice is without jurisdiction and thus this writ petition under Article 226 of the Constitution of India is maintainable. (Para 26)

In view of the aforesaid reasons, we are of the categorical view that the impugned Show Cause Notice dated 03.08.2024 in its present form lacks basic ingredients to proceed in the matter under Section 74 of the CGST Act. Therefore, the impugned Show Cause Notice dated 03.08.2024 and the entire exercise initiated pursuant thereto is absolutely without jurisdiction and is liable to be quashed. (Para 27)

Petition allowed. (E-13)

List of Cases cited:

1. U.O.I. Vs Hindalco Industries, (2003) 5 SCC 194

2. Raj Bahadur Narain Singh Sugar Mills Ltd. Vs U.O.I., 1996 (88) E.L.T. 24 (S.C.)

3. CCE Vs H.M.M. Ltd., 1995 (76) E.L.T. 497 (S.C.)

(Delivered by Hon'ble Shekhar B. Saraf, J.
&
Hon'ble Manjive Shukla, J.)

1. Heard Sri Atul Gupta, learned counsel appearing for the petitioner and Sri Ankur Agarwal, learned Standing Counsel appearing for the respondents.

2. Petitioner has filed this writ petition challenging therein the Show Cause Notice No. ZD090824020702H dated 03.08.2024 issued by the Deputy Commissioner, State Tax, Sector-2 NOIDA, U.P. under Section 74 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act').

3. Facts of the case, in brief, are that the petitioner is a public limited company and under the erstwhile regime it had centralised Service Tax registration in the State of U.P. and was procuring various input services to supply the IT services and had availed CENVAT Credit of the Service Tax and Cess paid thereon in terms of the CENVAT Credit Rules, 2004. Thereafter the Goods and Services Tax (GST) was introduced w.e.f. 01.07.2017 and for the purposes of GST petitioner got itself registered under the new regime vide GSTIN 09AADCH0305F1Z4. Since on the appointed date i.e. on 01.07.2017, the petitioner had unutilized CENVAT Credit of Service Tax, Education Cess Secondary & Higher Education Cess and Krishi Kalyan Cess amounting Rs. 5,47,57,755 as such said amount was transferred into the GST regime by filing Form GST TRAN-1 in terms of Section 140 of the CGST Act.

4. The petitioner out of the aforesaid carried forward transitional credit transferred the Input Tax Credit amounting Rs. 3,28,25,979/- under Section 140(8) of the CGST Act to the persons having same PAN and registered in the States of Gujarat, Himachal Pradesh, Karnataka and Rajasthan therefore, the net transitional credit remained with the petitioner in State of Uttar Pradesh amounting to Rs. 2,19,31,776/-. The petitioner in the month of March, 2018 reversed Rs. 25,31,801/- pertaining to carried forward credit of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess in GSTR-3B return filed for the month of March, 2018.

5. The Department issued a notice under Section 61 of the UPGST Act in Form GST ASMT-1 bearing reference no. ZD0904231397471 dated 29.04.2023 whereby the alleged discrepancies in the returns filed for the FY 2017-18 based on alleged scrutiny of such returns were intimated to the petitioner. Petitioner filed his reply on 05.07.2023 wherein it was categorically stated that there are no discrepancies and further clarified that the transitional credit of Rs. 2,19,31,776 has been claimed in accordance with provisions of Section 140(1) and Section 140(9) of the CGST Act and out of such total transitional credit, an amount of Rs. 25,31,801/- pertaining to Cess was already reversed.

6. Thereafter on 30.09.2023 a Show Cause Notice under Section 73 of the CGST Act was issued to the petitioner whereunder for the period from July, 2017 to March, 2018 a demand of Rs. 5,76,12,310/- along with interest and penalty was proposed. The petitioner submitted a detailed reply on 18.11.2023 to the aforesaid Show Cause Notice issued

under Section 73 of the CGST Act. The petitioner in its reply submitted that credit of Rs. 2,19,31,776/- has been claimed under Section 140(1) and 140(9) of the CGST Act and further out of such credit of Rs. 2,19,31,776/- and amount of Rs. 25,31,801/- pertaining to Cess was already reversed. The petitioner in its reply also clarified that Section 140(9) allows the registered person to take credit on the amount of service tax, which was earlier reversed due to non-payment of consideration, on payment of the consideration within a period of three months from the appointed date.

7. The Deputy Commissioner, State Tax, Sector-2 NOIDA, U.P. after considering the reply submitted by the petitioner and carrying out the verification of the documents and amounts passed the adjudication order No. ZD0912236703957 on 30.12.2023 whereby proceedings initiated against the petitioner under Section 73 of the CGST Act were dropped.

8. The Respondent No. 2 once again on the same facts has issued Show Cause Notice to the petitioner on 03.08.2024 under Section 74 of the CGST Act wherein it has been stated that the CENVAT closing balance of the petitioner in June 2017 was Rs. 4,16,00,772/- whereas petitioner had availed ITC amounting Rs. 5,47,57,755/- as such petitioner had availed excessive ITC amounting Rs. 1,31,56,983/-.

9. Learned counsel appearing for the petitioner has submitted before this Court that regarding the same issue of claim of the petitioner for Input Tax Credit earlier proceedings were drawn by issuing a Show Cause Notice under Section 73 of the CGST Act and ultimately Respondent No. 2, on being satisfied with the reply

submitted by the petitioner and after verification of the documents and amounts, dropped the proceedings vide order dated 30.12.2023 as such now again the same issue cannot be reopened by issuing a Show Cause Notice to the petitioner under Section 74 of the CGST Act.

10. Learned counsel appearing for the petitioner has argued that Section 73 and 74 of the CGST Act are independent from each other and they operate in different facts and circumstances. In the case of excessive claimed ITC, the proceedings are to be drawn under Section 73 of the CGST Act and once the said proceedings are concluded, same cannot be reopened. So far as Section 74 of the CGST Act is concerned, proceedings can be drawn under the said section where the adjudicating authority has some evidence and information to make out a reasonable belief that the excessive ITC has been availed by reason of fraud or any wilful mis-statement or suppression of facts to evade Tax.

11. Learned counsel appearing for the petitioner has further argued that the adjudicating authority derives jurisdiction to initiate proceedings under Section 74 of the CGST Act only after his prima-facie belief that the assessee has wrongly availed or utilized ITC by reason of fraud, or any wilful mis-statement or suppression of facts. He further submits that Section 74 of the CGST Act gives extended period of limitation to initiate proceedings thereunder, therefore unless in the Show Cause Notice it is categorically mentioned that the adjudicating authority has some information or evidence to make out a prima-facie belief that the assessee has wrongly availed or utilized ITC by reason of fraud, or any wilful mis-statement or suppression of facts, the proceedings under

Section 74 of the CGST Act would be without jurisdiction and cannot be carried out.

12. It has been argued on behalf of the petitioner that for the same amount of Input Tax Credit availed by the petitioner, once the proceedings under Section 73 have been dropped in favour of the petitioner, same cannot be reopened under Section 74 of the CGST Act by simply stating that the petitioner had availed excessive Input Tax Credit.

13. It has also been argued on behalf of the petitioner that since the Show Cause Notice issued under Section 74 of the CGST Act does not contain the essential ingredients for initiating proceedings under Section 74 of the CGST Act, as there is no mention in the impugned Show Cause Notice that petitioner has wrongly availed or utilized ITC by reason of fraud, or any wilful mis-statement or suppression of facts, the impugned Show Cause Notice dated 3.8.2024 is absolutely without jurisdiction.

14. Learned counsel appearing for the petitioner, to buttress his arguments, has relied on following judgments rendered by the Hon'ble Supreme Court:-

(i) Union of India Vs. Hindalco Industries, (2003) 5 SCC 194.

(ii) Raj Bahadur Narain Singh Sugar Mills Ltd. Vs. Union of India, 1996 (88) E.L.T. 24 (S.C.)

(iii) CCE Vs. H.M.M. Limited, 1995 (76) E.L.T. 497 (S.C.)

15. Sri Ankur Agarwal, learned Standing Counsel appearing for the respondents has argued that initially proceedings against the petitioner carried

out under Section 73 of the CGST Act were dropped and later on, since the adjudicating authority is of the view that petitioner has availed or utilized excessive ITC by suppression of material facts, as such proceedings under Section 74 of the CGST Act have been initiated against the petitioner by issuing impugned Show Cause Notice dated 3.8.2024.

16. Learned Standing Counsel appearing for the respondents has also argued that the petitioner has approached this Court at the stage of Show Cause Notice therefore, this writ petition in its present form is not maintainable and petitioner may raise all the points before Respondent No.2 and there the issues raised by the petitioner shall be considered in accordance with law.

17. We have considered the arguments advanced by the learned counsels appearing for the parties.

18. For analysing the arguments advanced by the learned counsels appearing for the parties, it would be apt to have a brief look of Section 73 and 74 of the CGST Act. Section 73 & 74 of the CGST Act are delineated below:

“Section 73 of CGST Act, 2017

73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful mis-statement or suppression of facts.—

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-

misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any

notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(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.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

Section 74 of CGST Act, 2017

74. Determination of tax not paid or short paid or erroneously refunded or

input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.—

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under

sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five percent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty equivalent to ten percent of tax or ten thousand, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five 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 five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.”

19. It has been argued on behalf of the petitioner that they were having CENVAT Credit of the Service Tax and Cess amounting Rs. 5,47,57,755/- in terms of the CENVAT Credit Rules, 2004 and after the enforcement of GST regime w.e.f. 01.07.2017 the aforesaid amount was transferred Input Tax Credit (ITC) by filing Form GST TRAN-1 in terms of the Section 140 of the CGST Act. Out of the aforesaid amount of Rs. 5,47,57,755/- petitioner availed Input Tax Credit amounting Rs. 3,28,25,979/- and thereafter amount of Rs. 2,19,31,776/- transitional credit remained balance with the petitioner in State of Uttar Pradesh. Petitioner also reversed Rs. 25,31,801/- pertaining to carried forward cess.

20. We find that proceedings under Section 73 of the CGST Act were initiated against the petitioner by issuing a Show Cause Notice on 30.09.2023 whereby petitioner was required to show cause in respect of the excessive ITC availed by the petitioner during the period from July, 2017 to March 2018. Petitioner filed a detailed reply and after considering the said reply and verification of the documents and the amounts, Respondent No. 2 passed order on 30.12.2023 whereby the proceedings in respect of excessive ITC availed by the petitioner, were dropped.

21. We take note of the fact that Section 73 of the CGST Act gives power to

the adjudicating authority to initiate proceedings for recovery of wrongly availed or utilized Input Tax Credit along with interest and penalty for any reason other than the reason of fraud or any wilful mis-statement or suppression of facts to evade tax. It is to be taken note of that Section 73 comes into play in all other circumstances except the cases where Input Tax Credit has been wrongly availed or utilized due to fraud or any wilful mis-statement or suppression of facts to evade tax. Thus from bare reading of Section 73 of the CGST Act, it becomes crystal clear that if the proceedings under Section 73 of the CGST Act have been finalized, they cannot be reopened except the case where the Input Tax Credit has wrongly been availed or utilized due to fraud or any wilful mis-statement or suppression of facts to evade tax.

22. We find that proceedings initiated against the petitioner for availing or utilizing the excessive ITC have already been finalized by the Respondent No. 2 and the proceedings were dropped vide order dated 30.12.2023 therefore, the said proceedings could have been reopened under Section 74 of the CGST Act only if the adjudicating authority was prima facie satisfied that the petitioner has availed or utilized Input Tax Credit due to any fraud or any wilful mis-statement or suppression of facts to evade tax. The field of operation of Section 73 and 74 of the CGST Act is altogether different i.e. Section 73 operates in all other cases of wrongly availed or utilized Input Tax Credit for any reason other than fraud or wilful mis-statement or suppression of facts and Section 74 comes into play when the excessive Input Tax Credit has been availed due to some fraud or wilful mis-statement or suppression of facts. Thus it is patently manifest that for

deriving the jurisdiction to initiate proceedings under Section 74 of the CGST Act, the adjudicating authority must expressly mention in the Show Cause Notice that he is prima-facie satisfied that the person has wrongly availed or utilized Input Tax Credit due to some fraud or a wilful mis-statement or suppression of facts to evade tax and that must be specifically spelled out in the Show Cause Notice. Once the aforesaid basic ingredient of the Show Cause Notice under Section 74 of the CGST Act is missing, the proceedings becomes without jurisdiction as the adjudicating authority derives jurisdiction to proceed under Section 74 of the CGST Act only when the basic ingredients to proceed under Section 74 are present.

23. The Hon'ble Supreme Court in the case of **Raj Bahadur Narain Singh Sugar Mills Ltd. Vs. Union of India, reported in 1996 (88) E.L.T. 24 (S.C.)** has held as follows:-

“9. We have set out the relevant parts of the show cause notice. It speaks of an erroneously granted rebate. There is no mention in it of any collusion, wilful mis-statement or suppression of fact by the appellants for the purposes of availing of the larger period of five years for the issuance of a notice under Rule 10. The party to whom a show cause notice under Rule 10 is issued must be made aware that the allegation against him is of collusion or wilful misstatement or suppression of fact. This is a requirement of natural justice. It is also the law, laid down by this Court in *Collector of Central Excise v. H.M.M. Limited* – 1995 (76) E.L.T. 497. It has been said there with reference to Section 11A of the Central Excises and Salt Act, 1944, which replaced Rule 10, that if the authorities propose to invoke the proviso to

Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions and omissions stated in the proviso is committed to extend the period from six months to five years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the proviso were more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show cause notice which was the allegation against the assessee falling within the four corners of the said proviso.”

24. The Hon'ble Supreme Court in the case of **CCE Vs. H.M.M. Limited, reported in 1995 (76) E.L.T. 497 (S.C.)** has held as follows:-

“2. The assessee contended before the Additional Collector of Central Excise that the show cause notice was time barred under the main part of Section 11A since it was issued after the expiry of the period of six months stipulated therein but the Additional Collector sustained the notice on the ground that it was within five years impliedly holding that the purported action was under the proviso to Section 11A of the Act. There is no dispute that the show cause notice cannot be sustained under sub-section (1) of Section 11A unless the proviso is attracted. Admittedly, it is beyond the period of limitation of six months prescribed under Section 11A (1) but it is within the extended period of 5 years under the proviso to that sub-section. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with

intent to evade payment of duty. In that case the period of six months would stand extended to 5 years are provided by the said proviso. Therefore, in order to attract the proviso to Section 11A (1) it must be alleged in the show cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was a guilty or wilful misstatement or suppression of fact. In the absence of such averments in the show cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11A(1) of the Act. The Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for the assessee contended that in the absence of any such allegation in the show cause notice the assessee was not put to notice regarding the specific allegation under the proviso to that sub-section. The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and

hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, misconduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention. If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty.”

25. We find that the impugned Show Cause Notice does not make even a whisper of the fact that petitioner has wrongly availed or utilized Input Tax Credit due to any fraud, or wilful misstatement or suppression of facts to evade

tax therefore, the proceedings initiated against the petitioner under Section 74 of the CGST Act are without jurisdiction for the lack of basic ingredients required under the said clause. So far as the argument advanced by the learned counsel appearing for the respondents that the writ petition against the Show Cause Notice is not maintainable, is concerned, we find that it is consistent view of the Hon'ble Supreme Court that if the Show Cause Notice is without jurisdiction then the same can be challenged by filing writ petition before the High Court under Article 226 of the Constitution of India.

26. In the present case, we do not find that the basic ingredients required for initiating proceedings under Section 74 of the CGST Act are present in the impugned Show Cause Notice dated 30.12.2023. Therefore the entire exercise including the Show Cause Notice is without jurisdiction and thus this writ petition under Article 226 of the Constitution of India is maintainable.

27. In view of the aforesaid reasons, we are of the categorical view that the impugned Show Cause Notice dated 03.08.2024 in its present form lacks basic ingredients to proceed in the matter under Section 74 of the CGST Act. Therefore, the impugned Show Cause Notice dated 03.08.2024 and the entire exercise initiated pursuant thereto is absolutely without jurisdiction and is liable to be quashed.

28. Accordingly, this writ petition is allowed. The Show Cause Notice dated 03.08.2024 is quashed leaving it open for Respondent No. 2 to initiate fresh proceedings under Section 74 of the CGST Act against the petitioner by issuing a fresh Show Cause Notice containing the basic ingredients regarding fraud or wilful mis-

statement or suppression of facts to evade tax, if they so exist.

(2024) 9 ILRA 1482
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ A No. 21492 of 2023
 connected with other cases

Vinod Kumar Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner
 Avdhesh Narayan Tiwari, Shivendu Ojha,
 Sr. Advocate

Counsel for the Respondents:
 C.S.C.

A. Service Law – Salary - U.P. Secondary Education Service Selection Board, 1982 - Sections 18 & 33G(8) - The U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 - The action of St. terminating services and stopping salary on 09.11.2023 was against the statutory provisions as well as the dictum of Hon'ble Apex Court. The GO of 09.11.2023 had created the entire chaos in the St. of U.P. as far as regularization of candidates appointed prior to 30.12.2000. (Para 29)

In the St. *ad hocism* has been going on for last 40 years in the aided Institutions. The Government from time to time had inserted various provisions in the Act of 1982 for regularising the services of teachers who were appointed either on *ad hoc* basis or against a short term vacancy. The candidates had been litigating the matter before this Court either for getting their salary post appointment, or for getting their services regularised. Many of the

candidates have been working in these aided Institutions for a long time on the basis of interim order granted by this Court. (Para 24)

The last of the provision which was inserted in the Act of 1982 was Section 33-G which has provided the cut off date as 30.12.2000 for consideration of regularization of services of such ad hoc/ short term teachers. The St. authorities had proceeded not to accord consideration for all these teachers who were appointed between the cut off date of 1985 to 2000 on the ground that the *ad hocism* was to end in the St. as mandated by Hon'ble Apex Court on 26.08.2000. (Para 25)

The two issues, one the appointment on ad hoc basis post 2000 and those appointments prior to 2000 have to be dealt with separately by St. authorities keeping in mind the two decisions of Hon'ble Apex Court, one rendered in case of *Sanjay Singh (infra)*, and the other in case of *Raghvendra Prasad Pandey (infra)*. (Para 28)

On 26.08.2000, the Hon'ble Apex Court never intended to stop the salary of those candidates who were appointed prior to 30.12.2000 as Section 33-B, 33-C, 33-F and 33-G clearly provided for regularization of all the teachers appointed between the date given in the said sections if the procedure provided therein was complied with. (Para 30)

The GO of 09.11.2023 was issued on a wrong premise and the Government had never taken any stand before the Hon'ble Apex Court in case of *Sanjay Singh (infra)* that the *ad hocism* was to end for the candidates who were appointed prior to 2000 and neither the St. had brought to the notice of Hon'ble Apex Court the provisions of Section 33-B, C, F and G. (Para 31)

From the counter affidavit filed by St. in S.L.P. of *Sanjay Singh (infra)* it is clear that the St. has accepted before the Hon'ble Apex Court that regularization has been undertaken u/s 33 and case of *Sanjay Singh (infra)* does not fall for consideration u/s 33 as he was appointed after 2000. (Para 33)

B. The St. should not have mixed the two issues of *Sanjay Singh* and regularization to be undertaken u/s 33, which has resulted into unnecessary litigation before this Court and has caused financial hardship to the petitioners for no fault of theirs. (Para 34)

The St. has corrected its stand on 26.09.2024 and has issued a clarification, clarifying the GO dated 09.11.2023. (Para 35)

This Court is faced with the task of considering each and individual case on merits, as in most of cases, the regularization Committee has proceeded to reject the regularization of candidates basically on the ground that relevant documents were not placed before it when due consideration was accorded. In many cases, termination has taken place on the basis of Government Order dated 09.11.2023.

Learned Additional Advocate General appearing for the St. has clearly conceded to the fact that all those matters which have been rejected by regularization Committee on the basis, that interim order was operating and cannot be considered in terms of Section 33-G(8) needs fresh consideration in the light of the conditions mentioned in the said provisions. (Para 37)

Writ petition disposed of. (E-4)

Precedent followed:

1. *Sanjay Singh & ors. Vs St. of U.P. & ors.*, Civil Appeal No. 8300 of 2016, decided on 26.08.2020 (Para 3)
2. *Abhishek Tripathi Vs St. of U.P. & ors.*, Writ Petition No. 655 (S/S) of 2014 (Para 9)
3. *Sanjay Singh Vs St. of U.P. & ors.*, (2013) 1 UPLBEC 758 (Para 9)
4. *Pradeep Kumar Vs St. of U.P. & ors.*, Writ-A No. 22520 of 2013, decided on 01.05.2013 (Para 9)
5. *Daya Shanker Mishra Vs District Inspector of Schools & ors.*, 2011 (1) ESC 221 (Para 81)

6. Vijay Shyam Dwivedi Vs St. of U.P. & ors., Writ –A No. 22154 of 2018, decided on 22.10.2018 (Para 98)

Present writ petitions assail orders dated 21.11.2023 and 22.11.2023, passed by District Inspector of Schools, Jalaun at Orai, stopping salary of the petitioner in terms of GO dated 09.11.2023.

(Delivered by Hon’ble Rohit Ranjan Agarwal, J.)

1. This bunch of writ petitions raises somewhat similar question for consideration by this Court filed under Article 226 of the Constitution of India. The leading case being Writ-A No.21492 of 2023 (Vinod Kumar Srivastava vs. State of U.P. and Ors.), wherein orders dated 21.11.2023 and 22.11.2023 passed by District Inspector of Schools, Jalaun at Orai is under challenge stopping salary of the petitioner in terms of Government Order dated 09.11.2023.

2. Petitioners before this Court have raised serious question as to the competence of the Regional Regularization Committee constituted by the State Government for looking into regularization of the Assistant Teachers appointed against the short term vacancy/ *ad hoc* appointment in view of the provisions of Section 33-B, C, F, and G.

3. The claim for regularization in most of cases has been rejected by the Committee relying upon the decision rendered by the Apex Court in case of **Sanjay Singh and others vs. State of Uttar Pradesh and others, Civil Appeal No. 8300 of 2016**, decided on 26.08.2020 and Government Order dated 09.11.2023.

4. The State Government had promulgated U.P. Secondary Education Service Selection Board Act, 1982 (*hereinafter called as “Act of 1982”*). Section 33-B was inserted by U.P. Act, 1991 w.e.f. 06.04.1991 relating to regularization of appointment of all teachers other than the Principal or Head Master who was appointed by promotion or by direct recruitment in the Lecturer grade or Trained Graduate grade on or before May 14, 1991 or in the Certificate of Teaching grade (CT Grade) on or before May 13, 1989 against a short term vacancy in accordance with Paragraph 2 of the The U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 and such vacancy was subsequently converted into a substantive vacancy.

5. It was also provided that any appointment made by direct recruitment on or after July 14, 1981 but not later than June 12, 1985 on *ad hoc* basis against a substantive vacancy in CT grade through advertisement and such appointment being approved by the Inspector, or appointment made by promotion or by direct recruitment on or after July 31, 1988 but not later than May 14, 1991 on *ad hoc* basis against a substantive vacancy in accordance with law.

6. The State thereafter inserted Section 33-C through U.P. Act No.25 of 1998 w.e.f. 20.04.1998 for regularization of certain more appointments of teachers post May 14, 1991 but not later than August 6, 1993 on *ad hoc* basis against substantive vacancy in accordance with Section 18, in the Lecturer grade or Trained Graduate grade.

7. The Act of 1982 was further amended and Section 33-F was inserted by U.P. Ordinance No.19 of 2000 for regularization of appointment against short term vacancies of teachers appointed by promotion or by direct recruitment in the Lecturer's grade or Trained Graduate grade on or after May 14, 1991 but not later than August 6, 1993 against a short term vacancy in accordance with Paragraph 2 of The U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 as amended from time to time.

8. Section 33-G was inserted by U.P. Act No.7 of 2016 providing for regularization of certain more appointments against the short term vacancies of teachers other than the Principal or Head Master who was appointed by promotion or by direct recruitment in the Lecturer's grade or Trained Graduate grade on or after August 7, 1993, but not later than January 25, 1999 against a short term vacancy in accordance with paragraph 2 of The U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 as amended from time to time. It was also provided that those teachers who were appointed by promotion or by direct recruitment on or after August 7, 1993, but not later than December 30, 2000 on *ad hoc* basis against substantive vacancy in accordance with Section 18 in Lecturer grade or Trained Graduate grade and possesses the qualification as provided under the U.P. Intermediate Education Act, 1921 (*hereinafter called as "Act, 1921"*) would be considered for regularization.

9. It appears that the matter for regularization of Assistant Teachers came up before Division Bench of this Court in case of **Abhishek Tripathi vs. State of**

U.P. and others, Writ Petition No. 655 (S/S) of 2014, who was appointed on the post of Lecturer in Hindi in the year 2013, the Division Bench found that the view taken in case of **Sanjay Singh vs. State of U.P. and others (2013) 1 UPLBEC 758** by Co-ordinate Bench was not correct and was overruled and the decision taken in case of **Pradeep Kumar vs. State of U.P. and Ors., Writ-A No.22520 of 2013, decided on 01.05.2013**, was correct and the Court refused to grant the benefit of regularization. Sanjay Singh and others preferred a Special Leave Petition before Hon'ble Apex Court which was converted into Civil Appeal No.8300 of 2016. The Apex Court found that the adhocism was to end in regard to appointment of Assistant Teacher, and by judgment dated 26.08.2020 exercising power under Section 142 of the Constitution held as under:-

"7. It is in the conspectus of all the aforesaid circumstances that we consider appropriate to issue the following directions in exercise of power under Article 142 of the Constitution of India:

(a) All the petitioners/appellants and applicants before us and for that matter all persons eligible under the advertisement will be permitted to appear for one single examination.

(b) Such of the persons who are successful, would have to go through a process of interview insofar as the post of lecturers is concerned, as we are informed that the post of TGTs the interviews have been dispensed with.

(c) We are inclined to give some weightage to the persons who have worked as TGT and lecturers depending on the period of service rendered. It is respondent No.3-Commission which will have to tweak this aspect and work out giving some weightage to both TGT and lecturers

depending on the period of service rendered. In the case of TGTs, such weightage will have to form a part of the total marks while in case of the lecturers such weightage can be given in the process of interview.

(d) The advertisement to be issued should contain the terms of these directions issued by us today.

(e) We make it clear that the decision as aforesaid will be final of the Commission and no further litigation will be entertained in respect thereof.

(f) Insofar as the verification of past service is concerned, the concerned teachers/lecturers would give the particulars and details to the Commission for obtaining such weightage and that aspect will be verified by the Commission in consultation with the State Government as we are told that it is the State Government which would have the wherewithal to do the needful. Needless to say that aspect will also be final without any further litigation being entertained in that behalf.

(g) In view of the weightage given, for the same the examination process can be completed.

*(h) The other aspect is that apart from the weightage, the period which has been verified as having been spent in teaching as *ad hoc*, would be counted for purposes of retiral benefits of the TGTs and Lecturers."*

10. Pursuant to the judgment of the Apex Court, State proceeded to issue the advertisement for regularizing the services of the *ad hoc* appointees in the educational institution. It appears that some clarification application was moved being M.A. No.818 of 2021 before Hon'ble Apex Court in Civil Appeal No.8300 of 2016. The Apex Court

clarified its earlier order and passed the following order :-

"Thus, only the remains issue consideration of these 18 persons appointed who are stated to had not been strictly appointed in terms of Section 16 (E) 11 of the said Act.

In view of the large number of vacancies in recruitment and the passage of time for which they have worked, to put a quietus to the issue, we consider appropriate that these 18 people may also be given appointment. We do so by exercising our jurisdiction under Article 142 of the Constitution of India to do complete justice to the parties. The list of these applicants be published on the web site within a week.

Insofar as the persons who have informed not to have been recruited in compliance of Section 16 (E) 11, that does not take away the obligation of the Institute to pay those people the salary having taken work from them. This is the burden of the Management and we cannot burden the Government.

Application stands disposed of.

The necessary action be taken by the respondent(s) within a maximum period of two months from today.

We make it clear that this puts a quietus to the complete issue and before us or entertained. no further proceedings before the High Court are to be entertained."

11. The State thereafter proceeded to regularize the services of all those candidates who were appointed on *ad hoc* basis post 2000 and had appeared in pursuance of the advertisement.

12. In one of the matters relating to Section 33-G, one Raghvendra Prasad

Pandey had filed a writ petition before Lucknow Bench of this Court. The said writ petition was allowed directing the State to proceed in accordance with Section 33-G. The State filed a Special Appeal Defective No.103 of 2023 before the Division Bench at Lucknow which was rejected by the order dated 03.03.2023. Against the said judgment, the State had preferred a Special Leave to Appeal before Hon'ble Apex Court bearing No.13023 of 2023, which was dismissed on 17.07.2023 upholding the order passed by the High Court, which is as under:-

"Application for impleadment is rejected.

The impugned judgment dated 03.03.2023 takes care of the interest of the petitioner in the following terms:

"Thus, continuance of the respondents- petitioners on adhoc capacity is subject to their consideration for substantive appointment in terms of Section 33G and further that they shall cease to remain adhoc appointees from such date as the State Government may provide. The appellants-State authorities shall thus undertake the aforesaid exercise as envisaged under Section 33G in respect of all the respondents- petitioners and conclude the same, as expeditiously as possible."

We really don't see why they should have come to this Court in view of the aforesaid liberty granted and it is for the petitioner to examine the case under the relevant statutory provision.

The Special Leave Petition is dismissed.

Pending applications stand disposed of."

13. It appears that the State Government thereafter proceeded to issue a

Government Order on 09.11.2023 wherein the reference as to the decision rendered in case of **Abhishek Tripathi (supra)** as well as decision of the Apex Court rendered in case of **Sanjay Singh (supra)** was noted down by the State Government, and it proceeded to hold in paragraph 4 and 5 of the Government Order that the Assistant Teachers appointed on *ad hoc* basis were not entitled to continue after the decision rendered on 26.08.2020, as they were not appointed in accordance with provisions of Section 18 of the Act, 1982 between the cut off date mentioned in the said paragraph. The salary was also directed to be stopped immediately and the services of such Assistant Teachers stood terminated from the said date. Relevant paragraphs 4 and 5 of the Government Order are extracted hereas under:-

“4- अतः विषयगत सिविल अपील संख्या- 8300/2016 संजय सिंह व अन्य बनाम उ०प्र० राज्य व अन्य एवं इससे सम्बन्धित मिसलेनियस अप्लीकेशन संख्या- 818/2021 में मा० सर्वोच्च न्यायालय द्वारा पारित आदेश दिनांक 26.08.2020 एवं 07.12.2021 के आलोक एवं उपर्युक्त वर्णित स्थिति एवं तथ्यों के आधार पर मुझे निम्नवत् कहने का निदेश हुआ है :-

1. अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में कार्यरत ऐसे तदर्थ शिक्षक, जिनकी नियुक्ति सीधी भर्ती द्वारा अल्पकालिक रिक्ति के सापेक्ष प्रवक्ता श्रेणी या प्रशिक्षित स्नातक श्रेणी में 07 अगस्त, 1993 को या उसके पश्चात किन्तु 25 जनवरी, 1999 के पश्चात नहीं, समय-समय पर यथासंशोधित उ०प्र० माध्यमिक शिक्षा सेवा आयोग (कठिनाईयों को दूर करना) (द्वितीय) आदेश, 1981 के पैरा-2 के अन्तर्गत अनियमित रूप से की गयी है और उनका विनियमितीकरण नहीं किया गया है, की तदर्थ सवायें समाप्त किये जाने का निर्णय लिया जाता है।

अथवा

मौलिक रिक्ति के सापेक्ष प्रवक्ता श्रेणी या प्रशिक्षित स्नातक श्रेणी में सीधी भर्ती द्वारा 07 अगस्त, 1993 को या उसके पश्चात किन्तु 30 दिसम्बर, 2000 के पश्चात नहीं, धारा-18 के अन्तर्गत अनियमित रूप से की गयी है. और उनका विनियमितीकरण

नहीं किया गया है, की तदर्थ सेवायें समाप्त किये जाने का निर्णय लिया जाता है।

अथवा

30 दिसम्बर, 2000 के पश्चात इण्टरमीडिएट शिक्षा अधिनियम, 1921 की धारा-16 (ई)-11 के अन्तर्गत की गयी है, की तदर्थ सेवायें समाप्त किये जाने का निर्णय लिया जाता है।

2. उक्त तदर्थ शिक्षकों में से वैसे तदर्थ शिक्षक जिनका वेतन भुगतान भा० सर्वोच्च न्यायालय, नई दिल्ली में योजित सिविल अपील संख्या-8300/2016 संजय सिंह व अन्य बनाम उ०प्र० राज्य व अन्य में पारित आदेश दिनांक 26.08.2020 तक होता रहा है एवं उक्त आदेश दिनांक 26.08.2020 के कारण प्रभावित अथवा अवरुद्ध हुआ है. के अवशेष वेतन का भुगतान शासनादेश निर्गत होने की तिथि तक किये जाने की स्वीकृति एतद्वारा इस शर्त के अधीन प्रदान की जाती है कि उक्त तिथि तक उनके द्वारा की गयी तदर्थ र्थ सेवायें सभी तथ्यों से प्रमाणित व सत्यापित हों।

3. उपर्युक्त परिधि में आने वाले वैरो तदर्थ शिक्षक, जिनकी कालान्तर में शिक्षण कार्य किये जाने / सेवावधि के दौरान आकस्मिक मृत्यु हो गयी हो, उनके वैध उत्तराधिकारी / नॉमिनी को मृत शिक्षक के शिक्षण कार्य किये जाने की अवधि तक के अवशेष वेतन का भुगतान विधिवत् रात्यापनोपरान्त किये जाने की स्वीकृति प्रदान की जाती है।

4. नियमानुसार प्रक्रियात्मक कार्यवाही सम्पन्न कर अवशेष वेतन के भुगतान की कार्यवाही शासनादेश निर्गत होने की तिथि से 30 दिवस के अन्तर्गत पूर्ण कर ली जायेगी। यदि उक्त अवधि के अन्तर्गत अवशेष देयक का भुगतान सुनिश्चित नहीं किया जाता है तो सम्बन्धित का उत्तरदायित्व निर्धारित कर उसके विरुद्ध नियमानुसार विभागीय कार्यवाही की जायेगी।

5. अवशेष वेतन भुगतान करते समय आगणित धनराशि की शुद्धता की जाँच / परीक्षण कर लिया जायेगा। भुगतान करने से पूर्व यह भी सुनिश्चित कर लिया जाय कि प्रश्नगत शिक्षक द्वारा उक्त अवधि में शिक्षण कार्य किया गया हो और उक्त अवधि का वेतन भुगतान उसे नहीं किया गया हो”

14. After the issuance of Government Order dated 09.11.2023, the Educational Authorities throughout the State proceeded to terminate the services of all the *ad hoc* appointees and teachers appointed against short term vacancy upto December 30, 2000 and their salary was stopped immediately.

15. Number of writ petitions were filed before this Court challenging the Government's action terminating their services and stopping the salary of such *ad hoc*/ short term appointees who were appointed upto December, 2000. By orders of this Court dated 04.01.2024, it was directed to the State authorities to release the salary of such *ad hoc* teachers and their services were not to be dispensed with without leaving of the Court. In the meantime, their papers were to be placed before Regional Regularization Committee for due consideration in accordance with Section 33-B, C, F and G. The said order is extracted hereas under:-

“1. All these five petitions captioned above are being taken up together as they involve same legal issue.

2. Heard learned counsel for the parties.

3. The controversy involved in these petitions have arisen on account of a Government Order issued by the State Government on 09.11.2023 which has been challenged in the other connected matters whereby the State Government has directed that in all those cases where the ad hoc teachers, though working, have not been found to be entitled to be regularized under Section 33-G of the U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as 'Act of 1982'), their services may be dispensed with.

4. The argument advanced by learned Senior Advocate, Sri R.K. Ojha, for all the petitioners is that the education authorities have started acting on an executive fiat issued by the State Government under the said Government Order, by directing for termination of services of such ad hoc teachers even without looking into the matter as to

whether their respective claims for regularization has been considered at all previously or not. It is submitted that this approach of the Education Authorities in following the mandate contained in the Government Order without verifying the facts is absolutely an arbitrary exercise of discretion at their end. It is argued that petitioners in these cases have been working as ad hoc Assistant Teachers since 1997 as their source of appointments was the Second Removal of Difficulties Order, 1982 and Section 18 of the U.P. Secondary Education Services Selection Board Act, 1982 (Act No.5 of 1982), and, therefore, their claim for regularization was liable to be accorded due consideration in view of Section 33-G of the Act No.5 of Act of 1982 as according to him they fall within the zone of consideration.

5. Sri Ojha, learned Senior Advocate, has placed before this Court a circular letter issued by the Additional Director of Education (Secondary) directing all the Regional Joint Director of Education on 03.01.2024 to submit report regarding disposal of the matters of regularization under Section 33-G by 05.01.2024. It is submitted that no such exercise can be undertaken or completed within the short span of time as suggested in the circular letter. However, in matters where regularization has already taken place there is no need to furnish such report as those teachers have stood regularized. He submits that this letter is nothing but an eyewash to somehow delay the proceedings pending before this Court as there is no interim protection granted to such teachers. Learned Advocates appearing in the connected matters, have also placed a circular letter issued by the Joint Director of Education, 7th Region, Gorakhpur wherein the report has been called for with regard to the teachers ,

whether fall within the zone of consideration for regularization or not, otherwise those who are not covered, the action pursuant to the Government Order dated 09.11.2023 may take place.

6. Sri Ashok Khare, learned Senior Advocate who has also appeared not as a counsel in this case but in other identical matters, informs the Court that several petitions of identical nature were liable to come today but have not come on board on account of some technical glitch in computer system.

7. Sri R.C. Dwivedi, learned Advocate also prays the similar plea so as Mr. Adarsh Singh, Mr. Sankalp Narain, Sri Alok Dwivedi, Sri Gautam Baghel and some other advocates appearing in identical matters and they have taken the same plea that those matters may also be listed along with this petition as the law point being same.

8. They have pressed for their writ petitions being Writ -A Nos. 21361 of 2023, 21376 of 2023, 21332 of 2023, 21420 of 2023, 21398 of 2023, 21423 of 2023, 21402 of 2023, 21309 of 2023, 21383 of 2023, 21307 of 2023.

9. Sri Khare has further submitted that some of those petitioners and such other teachers are also seeking regularization under Section 33-B, C, F and G and so their services may also not be terminated.

10. It is also argued on behalf of the petitioners that in a matter of SLP arising out of a Division Bench judgment of this Court dated 30.03.2022 in Special Appeal (Defective) No. 103 of 2023 Supreme Court has noticed the direction for consideration of the State to undertake the exercise for regularization of eligible teachers under Section 33-G of Act No.05 of 1982, while dismissing the special leave petition.

11. Upon a pointed query being made to learned Additional Advocate for the State-respondents as to why the authorities are in such a hurry to call for such reports within three or four days as is reflected from the letter of the Additional Director (Secondary) U.P., learned Additional Chief Standing Counsel seeks time to verify the facts and Director of Education will certainly be ensuring that no illegality is committed.

12. This Court may grant time of course to verify the facts but the Court cannot be oblivious to the fact that these teachers have been working for petty long time and are now directed to be fired without notice. The Court is of prima facie view that their claim for regularization was liable to be considered in the first instance before taking any action pursuant to the Government Order dated 09.11.2023. The relevant paragraph no.4 of the Government Order dated 09.11.2023 is reproduced hereunder:

"4- अतः विषयगत सिविल अपील संख्या-8300/2016 संजय सिंह व अन्य बनाम उ०प्र० राज्य व अन्य एवं इससे सम्बन्धित मिसलेनियस अप्लीकेशन संख्या-818/2021 में मा० सर्वोच्च न्यायालय द्वारा पारित आदेश दिनांक 26.08.2020 एवं 07.12.2021 के आलोक एवं उपर्युक्त वर्णित स्थिति एवं तथ्यों के आधार पर मुझे निम्नवत् कहने का निदेश हुआ है:-

1. अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में कार्यरत ऐसे तदर्श शिक्षक, जिनकी नियुक्ति सीधी भर्ती द्वारा अल्पकालिक रिक्ति के सापेक्ष प्रवक्ता श्रेणी या प्रशिक्षित स्नातक श्रेणी में 07 अगस्त, 1993 को या उसके पश्चात किन्तु 25 जनवरी, 1999 के पश्चात नहीं, समय-समय पर यथासंशोधित उ०प्र० माध्यमिक शिक्षा सेवा आयोग (कठिनाईयों दूर करना) (द्वितीय) आदेश, 1981 के पैरा-2 के अन्तर्गत अनियमित रूप से की गयी है और उनका विनियमितीकरण नहीं किया गया है, की तदर्श सेवायें समाप्त किये जाने का निर्णय लिया जाता है।

अथवा

मौलिक रिक्ति के सापेक्ष प्रवक्ता श्रेणी या प्रशिक्षित स्नातक श्रेणी में सीधी भर्ती द्वारा 07 अगस्त, 1993 को या उसके पश्चात किन्तु 30 दिसम्बर, 2000 के पश्चात नहीं, धारा-18 के अन्तर्गत अनियमित रूप से की गयी है और उनका विनियमितीकरण नहीं किया गया है, की तदर्श सेवायें समाप्त किये जाने का निर्णय लिया जाता है। अथवा

30 दिसम्बर, 2000 के पश्चात इण्टरमीडिएट शिक्षा अधिनियम, 1921 की धारा-16 (ई)-11 के अन्तर्गत की गयी है, की तदर्श सेवायें समाप्त किये जाने का निर्णय लिया जाता है। I

2. उक्त तदर्श शिक्षकों में से वैसे तदर्श शिक्षक जिनका वेतन भुगतान मा० सर्वोच्च न्यायालय, नई दिल्ली में योजित सिविल अपील संख्या-8300/2016 संजय सिंह व अन्य बनाम उ०प्र० राज्य व अन्य में पारित आदेश दिनांक 26.08.2020 तक होता रहा है एवं उक्त आदेश दिनांक 26.08.2020 के कारण प्रभावित अथवा अवरूद्ध हुआ है, के अवशेष वेतन का भुगतान शासनादेश निर्गत होने की तिथि तक किये जाने की स्वीकृति एतद् द्वारा इस शर्त के अधीन प्रदान की जाती है कि उक्त तिथि तक उनके द्वारा की गयी तदर्श सेवायें सभी तथ्यों से प्रमाणित व सत्यापित हों।

3. उपर्युक्त परिशि में आने वाले वैसे तदर्श शिक्षक, जिनकी कालान्तर में सिद्धान्त कार्य किये जाने/सेवावधि के दौरान आकस्मिक मृत्यु हो गयी हो, उनके वैध उत्तराधिकारी/ नॉमिनी को मृत शिक्षक के शिक्षण कार्य किये जाने की अवधि तक के अवशेष वेतन का भुगतान विधिवत् सत्यापनोपरान्त किये जाने की स्वीकृति प्रदान की जाती है।

4. नियमानुसार प्रक्रियात्मक कार्यवाही सम्पन्न कर अवशेष वेतन के भुगतान की कार्यवाही शासनादेश निर्गत होने की तिथि से 30 दिवस के अन्तर्गत पूर्ण कर ली जायेगी। यदि उक्त अवधि के अन्तर्गत अवशेष देयक का भुगतान सुनिश्चित नहीं किया जाता है तो सम्बन्धित का उत्तरदायित्व निर्धारित कर उसके विरुद्ध नियमानुसार विभागीय कार्यवाही की जायेगी।"

13. From the recitals as contained in the directives issued in Sub Clause-1 of Clause 4 of the Government Order, it is very much clear that the services of those Assistant Teachers or Lecturers as the case may be, are required to be dispensed with where their appointments have been found to be illegal/invalid not worth regularization. Meaning thereby there has to be a fact

finding enquiry before such appointments are finally annulled.

14. Learned Senior Counsel for the petitioners submits that petitioners are not aggrieved by Clauses 2, 3 and 4 of the Government Order as they are not applicable to petitioners. Other learned Advocates have agreed with Mr. Ojha. At this stage, it is relevant to reproduce the letter of the Regional Joint Director of Education, Gorakhpur dated 18.12.2023 which refers to a situation only where such regularization could not have been taken place for not falling within the zone of consideration for regularization. The relevant paragraph nos.1 and 2 of the order dated 18.12.2023 is reproduced hereunder:

"नियमानुसार प्रक्रियात्मक कार्यवाही सम्पन्न कर अवशेष वेतन के भुगतान की कार्यवाही शासनादेश निर्गत होने की तिथि से 30 दिवस के अन्तर्गत पूर्ण कर ली जायेगी। यदि उक्त अवधि के अन्तर्गत अवशेष देयक का भुगतान सुनिश्चित नहीं किया जाता है तो सम्बन्धित का उत्तरदायित्व निर्धारित कर उसके विरुद्ध नियमानुसार विभागीय कार्यवाही की जायेगी।"

15. Upon bare reading of these two above quoted paragraphs, it becomes very much clear that the exercise is yet to be undertaken to assess and analyze the fact position whether a particular teacher is entitled for regularization. Whether this process has undergone already or not is not clear at this stage, atleast from the above quoted Government Order and the circular letter. It is also reflected from the circular letter of the Regional Joint Director of Education (Secondary), U.P. Prayagraj which is issued on behalf of the Director of Education (Secondary) Prayagraj dated 03.01.2024 that the report has been called for. The entire letter dated 03.01.2024 is reproduced hereunder:

""प्रेषक,

शिक्षा निदेशक (माध्यमिक), उ०प्र० शिक्षा सामान्य
(1) तृतीय अनुभाग प्रयागराज। सेवा में,

समस्त मण्डलीय संयुक्त शिक्षा निदेशक, 2- समस्त
जिला विद्यालय निरीक्षक, I उत्तर प्रदेश। उत्तर प्रदेश।

पत्रांक सामान्य (1) तृतीय / 18716/2023-
24 दिनांक 03-01-2024

विषय: माननीय सर्वोच्च न्यायालय, नई दिल्ली में
योजित विशेष अनुज्ञा याचिका- 13023/2023 उत्तर प्रदेश
सरकार व अन्य बनाम राघवेन्द्र प्रसाद पाण्डेय व अन्य में मान०
सर्वोच्च न्यायालय द्वारा पारित आदेश दिनांक 17-7-2023 के
अनुपालन के सम्बन्ध में।

विषय: माननीय सर्वोच्च न्यायालय, नई दिल्ली में
योजित विशेष अनुज्ञा याचिका- 13023/2023 उत्तर प्रदेश
सरकार व अन्य बनाम राघवेन्द्र प्रसाद पाण्डेय व अन्य में मान०
सर्वोच्च न्यायालय द्वारा पारित आदेश दिनांक 17-7-2023 के
अनुपालन के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक निदेशालय के पत्रांक सामान्य (1)
तृतीय/14780-800/2023-24 दिनांक 30-8-2023
पत्रांक सामान्य (1) तृतीय/15252-71/2023-24 दिनांक
12- 9-2023, पत्रांक सामान्य (1) तृतीय/16212/2023-
24 दिनांक 17-10-2023 एवं पत्रांक सामान्य (1) तृतीय /
16788/2023-24 दिनांक 02-11-2023 का संदर्भ ग्रहण
करने का कष्ट करें, जिसके द्वारा मान० सर्वोच्च न्यायालय में योजित
विशेष अनुज्ञा याचिका-13023/2023 उत्तर प्रदेश सरकार व
अन्य बनाम राघवेन्द्र प्रसाद पाण्डेय व अन्य में मान० सर्वोच्च
न्यायालय द्वारा पारित आदेश दिनांक 17-7-2023 से
आच्छादित एवं दिनांक 07 अगस्त, 1993 से दिनांक 30
दिसम्बर, 2000 तक नियुक्त समस्त शिक्षकों के विनियमितीकरण
के प्रकरणों को धारा-33 (जी) के अन्तर्गत विभागीय
नियमों/विनियमों के अन्तर्गत निस्तारित करते हुए कृत कार्यवाही की
सूचना निदेशालय को उपलब्ध कराये जाने के निर्देश दिये गये थे,
किन्तु वांछित आख्या/सूचना अद्यतन अप्राप्त है।

अतः प्रश्नगत प्रकरण में आपको पुनः निर्देशित किया
जाता है कि अपने-अपने मण्डल से सम्बन्धित दिनांक 07 अगस्त,
1993 से दिनांक 30 दिसम्बर, 2000 के मध्य नियुक्त समस्त
शिक्षकों के विनियमितीकरण के प्रकरणों को धारा-33 (जी) के
अन्तर्गत विभागीय नियमों/विनियमों के अन्तर्गत निस्तारित करते हुए
निस्तारण आख्या संलग्न प्रारूप पर दिनांक 05-01-2024 को
पूर्वान्ह 12.00 तक प्रत्येक दशा में निदेशालय प्रयागराज को हार्ड
एवं सॉफ्ट कॉपी में उपलब्ध कराना सुनिश्चित करें।

उक्त के अतिरिक्त यह भी सुनिश्चित करें कि विनियमितीकरण से सम्बन्धित कोई भी प्रकरण शेष नहीं रह गया है। विनियमितीकरण से सम्बन्धित कोई भी प्रकरण शेष रहने की दशा में सम्पूर्ण उत्तरदायित्व सम्बन्धित मण्डलीय / जनपदीय अधिकारी का होगा। साथ ही यह भी निर्देशित किया जाता है कि विनियमितीकरण से सम्बन्धित वादों में मान० उच्च न्यायालय / सर्वोच्च न्यायालय द्वारा अन्यथा कोई आदेश पारित किया गया हो, तो तत्काल विधिक कार्यवाही करना सुनिश्चित करें।

संलग्नक-उक्तवत्

भवदीय

ह० अप०

(सुरेन्द्र कुमार तिवारी)

अपर शिक्षा निदेशक (माध्यमिक)

उत्तर प्रदेश।"

16 Upon reading of the aforesaid circular letter of the Regional Joint Direction of Education (Secondary) this is again very much clear that the Education authorities are not themselves sure about the status of such teachers as to the legality of their appointments and their claim for regularization, if any, pending or disposed of. The papers are not with the authorities so as to form a view whether at any point of time the claim for regularization was accorded reconsideration or not. The manner in which the report has been called for within three days to complete the formalities, does appear, as has been argued by learned Senior Advocate, to be an eyewash. The teachers have been working in the institution for the last more than two decades and any sudden termination of service by an executive fiat would not only cause adverse civil consequences but would also be adversely affecting the academic activities in the respective institutions. Exercising my equitable jurisdiction under Article 226 of the Constitution if I do not arrest the situation at this stage, in my considered view, it will lead to a serious miscarriage of justice.

17. The situation qua regularization of teachers working in the Colleges, whether Assistant Teachers or Lecturers, have gone controversial only on account of certain matters pending before the Court or on account of inaction on the part of concerned education authorities even after the papers were processed by the Committee of Management through the District Inspector of Schools. It is admitted to the parties that the Regional Selection Committee headed by the Regional Joint Director of Education is the only Selection Committee for the purposes of consideration of regularization under the relevant provisions under Section 33, B, C, F, G of the Act No. 5 of 1982, as the case may be.

18 In the circumstances, therefore, it is hereby provided that the Director of Education (Secondary), Prayagraj shall be issuing necessary circular letter to the Regional Director of Education (Secondary) within three days asking them to inform District Inspector of Schools of each districts of the State to ensure that the papers regarding appointments and working of such Assistant Teachers who claim regularization or who were the applicants for the regularization are processed within a week's time to be placed before the Regional Selection Committee however, in cases where the papers have been processed, the Regional Selection Committee shall proceed to examine them and in all such cases including cases where teachers are working at the strength of interim order of this Court, if they come within the zone of regularization in view of Section quoted herein above, their claims shall be considered in accordance with law by the Regional Selection Committee and final orders shall be passed in each case and final report regarding the same shall

be submitted within a month to the Director of Education (Secondary) to be placed before the Court.

19 The Regional Selection Committee shall not wait for any case in which the papers are not processed and Regional Joint Director of Education (Secondary), Chairman of the Committee shall submit the report. If the teachers and Committee of Management do not come forward it will remain open for the Regional Selection Committee to proceed in accordance with law and submit report in that regard as well. The pending cases in matters of teachers working at the strength of interim order will not deter the selection committee in forwarding report regarding regularization.

20. The Director of Education (Secondary) shall also submit his ultimate covering report annexing reports of Regional Joint Directors of Education, regarding proposed action to be taken if there are cases of invalid appointments and can be said to be covered under the Government Order dated 09.11.2023. The report shall be submitted by the Director by the next date fixed.

21. In the meanwhile until further orders it is also provided that services of such ad hoc teachers will not be dispensed with without leave of the Court. They shall be continued to perform duties and paid salary.

22. It is clarified that this order will operate only in respect of all those teachers who have been appointed under the Second Removal of Difficulties Order framed under the Act No.5 of 1982 Act and Section 18 of the said Act and Rule 15 of U.P. Secondary Education Services Commission Rules 1995 and are seeking regularization taking aid of Section 33-B, C, F and G of the Act of 1982.

23. List these cases on 14.03.2024. ”

16. It appears that after the interim order was granted by this Court and direction was issued to the Regional Regularization Committee, matters were taken up by the State authorities for due consideration of the candidature of various teachers who were working on *ad hoc* basis or against short term vacancy upto 2000 and were getting salary from the State exchequer.

17. Their claims had been rejected by the Regularization Committee on various grounds, such as the papers were not forwarded by the Management Committee as to the short term vacancy which was created and thereafter, it was converted into substantive vacancy and the necessary requirement under the Act was not applied by the Management. The Selection Committee proceeded to reject many of the claims for regularization on the basis that the adhocism was to end in view of the judgment rendered by Hon'ble Apex Court in case of **Sanjay Singh (supra)** and the Government Order dated 09.11.2023 did not grant any benefit to such *ad hoc* appointees.

18. Such candidates filed fresh petitions, which are tagged with these cases. On 05.09.2024, the Court requested the State to deal with the two issues separately one with regard to appointments made prior to December 30, 2000, which are to be dealt in accordance with Section 33-B, C, F and G. Appointments falling after 2000 to be considered in light of decision in **Sanjay Singh (supra)**.

19. The Government Order dated 09.11.2023 had also mixed up the two

issues and gave impression that all those candidates who were appointed prior to December 30, 2000 and were getting salary from the State Exchequer, after the due approval by educational authorities, are also not entitled for regularization and the judgment rendered on 26.08.2020 by the Apex Court applies upon them also.

20. The Court required the State to come out with a clear policy and separate the two issues, one in regard to regularization of all those candidates who were appointed prior December 30, 2000 and those teachers who were appointed post 2000. The State Government sought time for issuing clarification in regard to the same.

21. On 27.09.2024, Additional Chief Secretary (Secondary) filed his personal affidavit wherein it has been stated that the Government Order dated 09.11.2023 has been clarified and now all those *ad hoc* appointees prior to December 30, 2000 are entitled for their salary post 09.11.2023 till consideration of regularization under the relevant provisions by the Regional Regularization Committee. The clarification was issued by the State Government on 26.09.2024, which was brought on record through the affidavit and relevant paragraphs 6 is extracted hereas under:-

“विषयांकित रिट याचिका में मा० न्यायालय द्वारा पारित आदेश दिनांक-04.01.2024, 03.09.2024, 05.09.2024 एवं 20.09.2024 के समादर में शासनादेश संख्या- 2373/15-05-2023-1601 (696)/2019, दिनांक-09.11.2023 में उल्लिखित अंश "दिनांक-30 दिसम्बर, 2000 के पश्चात् इण्टरमीडिएट शिक्षा अधिनियम, 1921 की धारा-16 (ई) 11 के अन्तर्गत नियुक्त किये गये तदर्थ शिक्षकों की सेवायें समाप्त किये जाने का निर्णय लिया जाता है" को यथावत् बनाये रखते हुए शासनादेश में उल्लिखित शेष अन्य बातों

के स्थान पर यह अंश रखा जाता है कि दिनांक 30 दिसंबर, 2000 तक के तदर्थ शिक्षक, जो समय-समय पर प्राविधानित/अधिनियमित नियमों/अधिनियमों / धाराओं के अन्तर्गत राहायक अध्यापक अथवा प्रवक्ता के पद पर नियुक्त किये गये हैं, को विषयगत रिट याचिका में मा० न्यायालय द्वारा पारित आदेश दिनांक 04.01.2024 एवं मा० सर्वोच्च न्यायालय में योजित विशेष अनुज्ञा याचिका संख्या-13023/2023 उ० प्र० राज्य व अन्य बनाम राघवेन्द्र प्रसाद पाण्डेय व अन्य में गा० सर्वोच्च न्यायालय द्वारा पारित आदेश दिनांक-17.07.2023 के अनुपालन में उनके विनियमितीकरण प्रकरण के निस्तारण की तिथि तक वेतन भुगतान किया जाना सुनिश्चित किया जाता है। वेतन भुगतान किये जाने से पूर्व संस्था में उनकी कार्यरतता का सत्यापन अवश्य कर लिया जाय। जितनी अवधि की कार्यरतता सत्यापित होती है, उतनी ही अवधि का वेतन भुगतान किया जाय।

तदनुसार शासनादेश संख्या-2373/15-05-2023-1601 (696)/2019, दिनांक- 09.11.2023 को उक्त सीमा तक संशोधित समझा जाय। अतः इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि कृपया विषयांकित प्रकरण में तदनुसार कार्यवाही 01 माह में सुनिश्चित कराते हुए विनियमितीकरण के अनिस्तारित समस्त प्रकरणों को सम्यक विचारोपरांत प्रत्येक दशा में 25 दिवरा के अन्दर निस्तारित किये जाने हेतु सक्षम प्राधिकारी / मण्डलीय समिति को निर्देशित करने का कष्ट करें। उक्त के अतिरिक्त यह भी निर्देशित किया जाता है कि विनियमितीकरण के निस्तारित प्रकरणों का विवरण निस्तारण आदेश की प्रति के साथ 07 दिवस में शासन को भी उपलब्ध कराना सुनिश्चित करें।

भवदीय,

(दीपक कुमार)

अपर मुख्य सचिव”

22. On the joint request of counsel for both the parties, this bunch of petitions is being heard and decided finally today. Sri Anil Tiwari, learned Senior Counsel had intervened on behalf of *ad hoc* appointees appointed post 2000, and submitted that the decision rendered in this case may not effect the case of regularization of such appointments and may be dealt on different pedestal.

23. Heard Sri Ashok Khare, Sri R.K. Ojha, Sri V.K. Singh, learned Senior

Counsel along with Sri Lokesh Dwivedi, Sri I.R. Singh, Sri Vinod Kumar Singh, Sri R.C. Dwivedi, Sri Rahul Jain, Sri Prabhakar Awasthi, Sri Shivendu Ojha, Sri Rajnish Kumar Srivastava, Sri Vimal Jain, Sri Dev Prakash Singh, Sri Vijay Shankar Rai, Smt. Manisha Singh, Sri Parmatma Nand Yadav, Sri Sunil Kumar Pandey, Sri Lalji Yadav, Sri Chitrasen Singh, Sri Prabhat Kumar Singh and Sri Rakesh Pratap Singh, learned counsel for the petitioner and Sri Ajeet Singh Kumar Singh, learned Additional Advocate General along with Sri J.N. Maurya, learned Chief Standing Counsel, Sri Amit Verma, Sri Suarabh, Sri Ankit Gaur, learned Standing Counsel for the State.

24. It is an admitted fact in the State that adhocism has been going on for last 40 years in the aided Institutions. The Government from time to time had inserted various provisions in the Act of 1982 for regularising the services of teachers who were appointed either on *ad hoc* basis or against a short term vacancy. The candidates had been litigating the matter before this Court either for getting their salary post appointment, or for getting their services regularised. Many of the candidates have been working in these aided Institutions for a long time on the basis of interim order granted by this Court.

25. The last of the provision which was inserted in the Act of 1982 was Section 33-G which has provided the cut off date as 30.12.2000 for consideration of regularization of services of such *ad hoc*/ short term teachers. The State authorities had proceeded not to accord consideration for all these teachers who were appointed between the cut off date of 1985 to 2000 on the ground that the adhocism was to end in

the State as mandated by Hon'ble Apex Court on 26.08.2000.

26. Many candidates who were appointed prior to 2000 had been litigating both before this Court and Lucknow Bench of this Court. One such matter in regard to regularization under Section 33-G came up before Lucknow Bench of this Court in case of **Raghvendra Prasad Pandey (supra)**. The matter had finally concluded by decision of Hon'ble Apex Court on 17.07.2023.

27. According to learned Additional Advocate General, the decision in **Raghvendra Prasad Pandey (supra)** was applicable in a particular case but the State is now proceeding to adopt for all the candidates who were appointed between the cut off date as mentioned in 33-G and their regularization will be undertaken by regularization Committee within the time prescribed.

28. The two issues, one the appointment on *ad hoc* basis post 2000 and those appointments prior to 2000 have to be dealt with separately by State authorities keeping in mind the two decisions of Hon'ble Apex Court, one rendered in case of Sanjay Singh (*supra*), and the other in case of **Raghvendra Prasad Pandey (supra)**.

29. The Government Order of 09.11.2023 had created the entire chaos in the State of U.P. as far as regularization of candidates appointed prior to 30.12.2000. In these bunch of cases, the Court found that the action of State terminating services and stopping salary on 09.11.2023 was against the statutory provisions as well as the dictum of Hon'ble Apex Court.

30. On 26.08.2020, the Hon'ble Apex Court never intended to stop the salary of those candidates who were appointed prior to 30.12.2000 as Section 33-B, 33-C, 33-F and 33-G clearly provided for regularization of all the teachers appointed between the date given in the said sections if the procedure provided therein was complied with.

31. The Government Order of 09.11.2023 was issued on a wrong premise and the Government had never taken any stand before the Hon'ble Apex Court in case of **Sanjay Singh (supra)** that the adhocism was to end for the candidates who were appointed prior to 2000 and neither the State had brought to the notice of Hon'ble Apex Court the provisions of Section 33-B, C, F and G.

32. The counter affidavit filed by State in S.L.P. of **Sanjay Singh (supra)** has been placed before this Court on previous date which is on record. In para no.5 of counter affidavit filed by Special Secretary, Secondary Education, Government of U.P., it has been stated that "from time to time the *ad hoc* teachers appointed under Removal of Difficulties Order have been regularised under Section 33 of the UP Secondary Education Services Selection Board Act 1982. To sort out the issue *ad hoc* appointments made by management, regularization Rules were framed in the year 2001. Further Section 33 F was also inserted in 1982 Act in which provision has been made for regularization of teachers appointed by promotion, direct recruitment on *ad hoc* basis against short term vacancy or substantive vacancy between 7/08/1993 to 30/12/2000. After 2000, State Government has regularised 670 *ad hoc* teachers whose appointment was done following prescribed procedure." Further,

in para no. 6, it has been stated that "the Appellants have been illegally appointed by the Committee of Management after 30 December 2000."

33. It is thus clear that the State has accepted before the Hon'ble Apex Court that regularization has been undertaken under Section 33 and case of **Sanjay Singh (supra)** does not fall for consideration under Section 33 as he was appointed after 2000.

34. The State should not have mixed the two issues of Sanjay Singh and regularization to be undertaken under Section 33, which has resulted into unnecessary litigation before this Court and has caused financial hardship to the petitioners for no fault of theirs.

35. The State has corrected its stand on 26.09.2024 and has issued a clarification, clarifying the Government Order dated 09.11.2023.

36. Now, this Court is faced with the task of considering each and individual case on merits, as in most of cases, the regularization Committee has proceeded to reject the regularization of candidates basically on the ground that relevant documents were not placed before it when due consideration was accorded. In many cases, termination has taken place on the basis of Government Order dated 09.11.2023.

37. Sri Ajit Singh, learned Additional Advocate General appearing for the State has clearly conceded to the fact that all those matters which have been rejected by regularization Committee on the basis, that interim order was operating and cannot be considered in terms of Section 33-G(8)

needs fresh consideration in the light of the conditions mentioned in the said provisions. Section 33-G(8) provides as under:-

“Adhoc teachers, who have not been appointed either in accordance with the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 or in accordance with Section 18 of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982 and are otherwise getting salary only on the basis of Interim/Final orders of the Court shall not be entitled for regularization.”

38. In view of statutory provisions, following writ petitions are allowed and the orders impugned in these writ petitions are set aside.

Writ-A No.(s)-

5805/2024, 7890/2024,
8218/2024, 5886/2024, 6015/2024,
9025/2024, 5737/2024, 6403/2024,
6022/2024, 7441/2024, 7611/2024,
1074/2024, 4250/2024, 4088/2024

39. The matter is remitted back to Regional regularization Committee for according fresh consideration keeping in mind the ingredients of sub-Section (8) of Section 33-G before passing order for regularization.

40. A list of cases has been provided by learned Additional Advocate General contending that in these writ petitions, the Government Order dated 09.11.2023 is only under challenge and prayer has been made for making payment of salary to petitioners.

41. According to him, the writ petitions have become infructuous after the Government Order dated 09.11.2023 has been clarified on 26.09.2024 and State Government has undertaken to give salary to all these candidates whose matter is under consideration for regularization. He further contends that all these petitioners of writ petitions are entitled for salary till their claim for regularization is decided.

42. In all these matters the prayer has also been made for seeking a direction upon the State authorities to consider the claim for regularization which is pending consideration.

43. As the claim for regularization till date has not been considered, these writ petitions are being disposed of with a direction to the authorities to decide the claim within a period of six weeks. It is further made clear that as far as challenge to the Government order dated 09.11.2023 has been made, that has become infructuous in view of the clarification issued by the State Government on 26.09.2024.

“Writ-A No(s)-

1671/2024, 1799/2024, 20881/2023,
2067/2024, 2307/2024, 1536/2024,
1855/2024, 2036/2024, 21205/2023,
2969/2024, 541/2024, 626/2024,
1055/2024, 1079/2024, 1121/2024,
2915/2024, 945/2024, 2896/2024,
2925/2024, 2445/2024, 2930/2024,
1139/2024, 1255/2024, 544/2024,
1132/2024 20150/2023, 20698/2023,
599/2024, 773/2024, 1234/2024,
3582/2024, 1242/2024, 740/2024,
748/2024, 17168/2023, 8532/2024,
20558/2023, 391/2024, 21492/2023,
1984/2024, 1105/2024, 1112/2024,
1118/2024, 1125/2024, 1145/2024,

1153/2024, 1155/2024, 1231/2024,
 1245/2024, 1250/2024, 1262/2024,
 1273/24, 1288/2024, 1291/2024,
 1329/2024, 1358/2024, 1380/2024,
 1524/2024, 1551/2024, 1575/2024,
 1659/2024, 1675/2024, 1709/2024,
 1731/2024, 1736/2024, 1739/2024,
 1750/2024, 1759/2024, 1798/2024,
 2009/2024, 1648/2024, 2089/2024,
 2092/2024, 21034/2023, 21309/2023,
 2143/2024, 2147/2024, 2154/2024,
 2164/2024, 2187/2024, 2189/2024,
 2191/2024, 2354/2024, 2360/2024,
 2399/2024, 2413/2024, 2422/2024,
 2454/2024, 2458/2024, 2460/2024,
 2469/2024, 2476/2024, 2511/2024,
 2528/2024, 2617/2024, 2679/2024,
 2681/2024, 2714/2024, 2757/2024,
 2780/2024, 2813/2024, 2873/2024,
 2875/2024, 2886/2024, 293/2024,
 2937/2024, 2938/2024, 294/2024,
 2944/2024, 3064/2024, 3116/2024,
 3179/2024, 3224/2024, 3277/2024,
 402/2024, 4033/2024, 4224/2024,
 478/2024, 561/2024, 630/2024, 635/2024,
 643/2024, 667/2024, 681/2024, 697/2024,
 751/2024, 772/2024, 844/2024, 852/2024,
 908/2024, 1700/2024, 20667/2023,
 20704/2023, 2349/2024, 397/2024,
 624/2024, 826/2024, 1410/2024, 863/2024,
 21600/2023, 584/2024, 2406/2024,
 2933/2024, 419/2024, 533/2024,
 20802/2023, 21695/2023, 20802/2023,
 2393/2024, 594/2024, 1001/2024,
 1088/2024, 1144/2024, 1221/2024,
 1237/2024, 1316/2024, 1715/2024,
 20700/2023, 21307/2023, 2430/2024,
 2905/2024, 468/2024, 21228/2023,
 695/2024, 1078/2024, 1173/2024,
 1229/2024, 1446/2024, 21689/2023,
 21763/2023, 556/2024, 655/2024,
 709/2024, 732/2024.”

44. However, leaving it open to petitioners of these writ petitions to assail

order passed by Regional Regularisation Committee through separate writ petitions in case their claim is turned down.

Writ-A No. 2244 of 2024

45. Sri R.K. Singh Kaushik, learned counsel for petitioner submitted that Writ Petition No. 2244 of 2024 has also become infructuous as only Government Order dated 09.11.2023 was under challenge.

Writ-A No. 4406 of 2024

46. Sri Rajneesh Kumar Singh, learned counsel for petitioner submitted that Writ Petition No. 4406 of 2024 has also become infructuous as only Government Order dated 09.11.2023 was under challenge.

Writ-A No. 1906 of 2024, 1920 of 2024 and 2264 of 2024

47. Sri Rajnish Kumar Srivastava, learned counsel for petitioner submitted that Writ Petition No. 1906 of 2024, 1920 of 2024 and 2264 of 2024 have also become infructuous as only Government Order dated 09.11.2023 was under challenge.

Writ-A No. 20456 of 2023

48. Sri Tanuj Shahi, learned counsel for petitioner states that his writ petition has become infructuous as only Government Order dated 09.11.2023 was under consideration. He further submits that his claim for regularisation has been accepted by Regional Regularisation Committee on 03.02.2024.

Writ-A No. 7661 of 2024

49. Sri Siddharth Khare, learned counsel for petitioner submitted that Writ Petition No. 7661 of 2024 has also become infructuous as only Government Order dated 09.11.2023 was under challenge.

Writ-A No. 21383 of 2023

50. Sri R.C. Dwivedi, learned counsel for petitioner submitted that Writ Petition No. 21383 of 2023 has also become infructuous as only Government Order dated 09.11.2023 was under challenge.

Writ-A No. 2472 of 2024, 3244 of 2024, 3283 of 2024

51. Sri D.P. Singh, learned counsel for petitioner states that these writ petitions have become infructuous as only Government Order dated 09.11.2023 is under challenge in these petitions and a prayer has been made for seeking direction upon Regularisation Committee to accord due consideration in terms of Section 33-B, C and G of the Act of 1982 as the Government Order has already been modified.

52. In view of above, the writ petition is disposed of directing the Regularisation Committee to accord fresh consideration to the claim of petitioners, within a period of six weeks from the date of this order.

Writ-A No. 20162 of 2023

53. Sri Gautam Baghel, learned counsel for petitioner states that writ petition has also become infructuous as the Government Order dated 09.11.2023 has been clarified on 26.09.2024.

Writ-A No. 21204 of 2023

54. Sri Mahesh Sharma, learned counsel for petitioner states that writ petition has also become infructuous as the Government Order dated 09.11.2023 has been modified on 26.09.2024.

Writ-A No. 507 of 2024

55. Sri Ratnakar Upadhyay, learned counsel for petitioner states that the writ petition has also become infructuous as Government Order dated 09.11.2023 was under challenge and the same has been modified on 26.09.2024.

Writ-A No. 3046 of 2024, 3049 of 2024, 3105 of 2024, 3205 of 2024

56. Sri Prabhat Kumar Singh, learned counsel for petitioner submitted that Writ Petition No. 3046 of 2024, 3049 of 2024, 3105 of 2024, 3205 of 2024 have also become infructuous as only Government Order dated 09.11.2023 was under challenge.

Writ Petition No. 21492 of 2023 along with Writ Petition No. 5731 of 2024

57. Petitioner in Writ Petition No.21492 of 2023 has challenged the action of D.I.O.S. whereby his salary has been stopped pursuant to Government Order dated 09.11.2023. As the Government Order has been clarified on 26.09.2024, the said writ petition has become infructuous and petitioner is entitled for payment of his salary in terms of clarification dated 26.09.2024 till his matter for regularization is considered by Committee, within six weeks.

58. As far as Writ Petition No. 5731 of 2024 is concerned, from perusal of the

order impugned dated 10.02.2024 rejecting the regularization on the ground that the petitioner was working on *ad hoc* basis and was getting salary and not entitled for regularization is not sustainable as it is clear that his appointment was against a short term vacancy which had become substantive vacancy.

59. In the earlier round of litigation, this Court on 15.03.2002 while allowing Writ Petition No. 35756 of 1997 had required the authorities to grant approval on the short term vacancy. The regularization Committee was not correct to record the finding on 10.02.2024. The order is hereby set aside.

60. The matter is again remanded back to Committee for consideration afresh in the light of the provisions of Section 33-G keeping in mind the appointment of petitioner against a short term vacancy and requirement having been fulfilled in terms of conditions laid down in the said provision.

Writ – A No.2365 of 2024

61. This writ petition assails the Government Order dated 09.11.2023 and also the subsequent action of District Inspector of Schools stopping payment of salary to the petitioner and removing him from the post of Assistant Teacher.

62. The claim of the petitioner is that he was appointed prior to 2000.

63. This Court on 19.02.2024 had granted an interim order providing continuation of the petitioner in the institution and payment of salary.

64. The State Government had clarified the Government Order dated 09.11.2023 on 26.09.2024 stating that till

the claim of regularization is decided by the Committee, the candidate shall be entitled for payment of salary.

65. In view of the clarification, the writ petition has become infructuous. Since the claim of petitioner for regularization has not been undertaken by the Regularization Committee, the same shall be completed within a period of six weeks from today. The petitioner shall be entitled for salary from 09.11.2023 till the final decision is taken by the Regional Regularization Committee.

Writ – A No.3598 of 2024

66. Learned counsel for the petitioner fairly states that the Government Order dated 09.11.2023 was under challenge and as the same has been clarified on 26.09.2024, the writ petition has become infructuous.

67. In view of the statement so made by counsel for the petitioner, the writ petition is dismissed as infructuous.

Writ – A No.3734 of 2024

68. The Regional Regularization Committee by the impugned order dated 03.02.2024 has rejected the claim for regularization on the ground that the Regional Committee had approved the promotion of the petitioner on 21.6.2008 and his initial appointment has not been regularized as such the benefit could not be accorded to him. The Committee further observed that Writ Petition No.29656 of 2001, which was filed by the petitioner, was withdrawn on 20.11.2010.

69. Learned counsel for the petitioner submits that initially Writ-A No.39906 of

1998 was filed wherein question was raised as to the entitlement of salary from the date of joining or from the date of issuance of approval order by the District Inspector of Schools. The writ petition was allowed on 15.09.2011 and the Court found that the petitioner was entitled to salary from the initial date of his joining and the approval i.e. 20.08.1994. According to him, there is no question of again considering the approval and cancelling earlier approval. According to him, the matter regarding his promotion was before the Regional Committee for consideration who had promoted him to the post of Lecturer on 21.06.2008. The said action of the previous officer cannot be questioned after twenty years.

70. This Court finds that the initial approval was under challenge before this Court and the Court on 15.09.2011 had found that the earlier approval order, which was modified on 29.09.1998, was not in consonance and quashed the same and the petitioner was held entitled for salary from 20.08.1994.

71. This Court finds that the findings recorded by the Regional Regularization Committee is against the material on record. Both the orders dated 3.2.2024 and 2.3.2024 are hereby quashed and the matter is remitted back to the Regional Regularization Committee for consideration afresh, in the light of the observations made above.

Writ – A No.3757 of 2024

72. The order dated 03.2.2024 passed by Regional Regularization Committee rejecting the claim of the petitioner is questioned on the ground that pursuant to the order dated 24.4.1996 passed in Civil Misc.

Writ Petition No.14137 of 1996, financial approval order was passed by the District Inspector of Schools on 28.06.1996 releasing the salary of the petitioner along with five other teachers. The Regularization Committee had found that the papers were fabricated by the Committee of Management and the said appointment could not have taken place and had refused to regularized the service in terms of provisions of Section 33-G.

73. Learned Standing Counsel has submitted that once it was found that the papers were forged in regard to the approval, no order can be passed.

74. From perusal of the findings recorded by the Regional Regularization Committee, this Court finds that the only reason assigned is that the order granting financial approval was passed in 1996 on the basis of forged and fabricated documents. The order of the writ Court dated 24.04.1996 was never challenged by the State in special appeal. It was in pursuance of the said order of the writ petition that the District Inspector of Schools had passed the order of approval on 28.06.1996. The Regularization Committee has to adhere to the provisions of Section 33-G and cannot travel beyond the scope of statutory provisions.

75. In view of the said fact the order dated 03.02.2024 (Annexure 1 to the writ petition) is hereby quashed and the matter is remitted back to the Regional Regularization Committee to accord fresh consideration in regard to the statutory provisions.

Writ – A No.3841 of 2024

76. The order dated 03.2.2024 passed by Regional Regularization Committee rejecting the claim of the petitioner is

questioned on the ground that pursuant to the order dated 24.4.1996 passed in Civil Misc. Writ Petition No.14117 of 1996, approval order was passed by the District Inspector of Schools on 28.06.1996 releasing the salary of the petitioner along with five other teachers. The Regularization Committee had found that the papers were fabricated by the Committee of Management and the said appointment could not have taken place and had refused to regularized the service in terms of provisions of Section 33-G.

77. Learned Standing Counsel has submitted that once it was found that the papers were forged in regard to the approval, no order can be passed.

78. From perusal of the findings recorded by the Regional Regularization Committee, this Court finds that the only reason assigned is that the order granting approval was passed in 1996 on the basis of forged and fabricated documents. The order of the writ Court dated 24.04.1996 was never challenged by the State in special appeal. It was in pursuance of the said order of the writ petition that the District Inspector of Schools had passed the order of approval on 28.06.1996. The Regularization Committee has to adhere to the provisions of Section 33-G and cannot travel beyond the scope of statutory provisions.

79. In view of the said fact the order dated 03.02.2024 (Annexure 1 to the writ petition) is hereby quashed and the matter is remitted back to the Regional Regularization Committee to accord fresh consideration in regard to the statutory provisions.

80. The petitioner through this writ petition has questioned the order of Regional Regularization Committee dated 03.02.2024 whereby the claim of the petitioner has been rejected.

81. According to the petitioner, earlier in the year 2005 he had approached this Court through Writ Petition No.37634 of 2005 questioning the decision of District Inspector of Schools whereby the approval was rejected. The writ Court on 16.04.2007 had quashed the order and remitted back the matter for reconsideration. Again, the approval was not granted and the petitioner filed Writ-A No.70271 of 2010. On 14.07.2014 the writ petition was again allowed and the matter was remitted back for consideration in the light of judgment of Division Bench rendered in case of **Daya Shanker Mishra vs. District Inspector of Schools and others, 2011(1) ESC 221.**

82. The approval was granted on 26.09.2014 by the District Inspector of Schools, Gorakhpur. The Committee had proceeded to hold that compliance of Section 18 as also Section 33G(8) of U.P. Secondary Education Service Selection Board Act, 1982 has not been done as such the regularization order cannot be passed.

83. This Court finds that the petitioner was appointed against short term vacancy on 08.02.1999 and he was working for last 25 years. The order dated 03.02.2024 does not take into consideration the earlier order passed by writ Court and that he was already granted approval on 26.09.2014. The interim order, if any, passed during pendency of the writ petition, would not disentitle the petitioner from the benefits of regularization under Section 33-G(8), in case the statutory condition as laid down in

sub-section (8) of Section 33-G is complied with.

84. In view of the said fact, the order dated 03.02.2024 is hereby quashed. The matter is remitted back to the Regional Regularization Committee to accord fresh consideration considering all the earlier round of litigation as well as statutory provision contained in Section 33-G(8). It is further directed that Committee shall not raise unnecessary technical issue as the petitioner has already worked for about 25 years and have been paid salary.

Writ – A No.3803 of 2024

85. The petitioner through this writ petition has questioned the order of Regional Regularization Committee dated 03.02.2024 whereby the claim of the petitioner has been rejected.

86. According to the petitioner, earlier in the year 2005 he had approached this Court through Writ Petition No.20511 of 2006 questioning the decision of District Inspector of Schools whereby the approval was rejected. The writ Court on 16.04.2007 had quashed the order and remitted back the matter for reconsideration. Again, the approval was not granted and the petitioner filed Writ-A No.60434 of 2010. On 12.11.2014 the writ petition was again allowed and the matter was remitted back for consideration in the light of judgment of Division Bench rendered in case of **Daya Shanker Mishra vs. District Inspector of Schools and others, 2011(1) ESC 221.**

87. The financial approval was granted on 17.12.2014 by the District Inspector of Schools, Gorakhpur. The Committee had proceeded to hold that compliance of Section 18 as also Section

33-G(8) of U.P. Secondary Education Service Selection Board Act, 1982 has not been done as such the regularization order cannot be passed.

88. This Court finds that the petitioner was appointed against short term vacancy on 08.02.1999 and he was working for last 25 years. The order dated 03.02.2024 does not take into consideration the earlier order passed by writ Court and that he was already granted financial approval on 17.09.2014. The interim order, if any, passed during pendency of the writ petition, would not disentitle the petitioner from the benefits of regularization under Section 33-G(8), in case the statutory condition as laid down in sub-section (8) of Section 33-G is complied with.

89. In view of the said fact, the order dated 03.02.2024 is hereby quashed. The matter is remitted back to the Regional Regularization Committee to accord fresh consideration considering all the earlier round of litigation as well as statutory provision contained in Section 33-G(8). It is further directed that Committee shall not raise unnecessary technical issue as the petitioner has already worked for about 25 years and has been paid salary.

Writ-A No. 3868 of 2024

90. Petitioner before this Court has been denied regularization pursuant to the order dated 17.02.2024 on the ground that compliance of Section 18 of the Act of 1982 was not done by Committee of Management while making his appointment against a vacancy which had occurred in the year 1990.

91. According to petitioner's counsel, petitioner was appointed on 12.12.1990 and

financial approval was granted on 07.08.1991. Petitioner had worked almost 33 years and had already attained the age of superannuation on 31.03.2024. The denial of regularization, at fag end of his service, is without following the procedure as laid down in Section 33-B of the Act of 1982.

92. Learned Standing Counsel has submitted that the procedure as prescribed under Section 18 of the Act of 1982 was not followed by Committee of Management, as such, regularization order could not have been passed.

93. I have heard learned counsel for parties and perused the order rejecting the claim of petitioner which is a one paragraph order. From perusal of the same it appears that publication made in terms of Section 18 was not in accordance with the rules and necessary requisition was not sent to Selection Board by Committee of Management.

94. Petitioner cannot be faulted for non-compliance, if any, of Committee of Management after 33 years. Statutory provisions of Section 33-B of the Act of 1982 provides for granting regularization in case of those who were appointed between the period given in the said regularization provision. Petitioner falls under the zone of consideration and by an innocuous order his claim has been rejected by the regularization committee. This Court finds that petitioner had worked for almost 33 years and attained the age of superannuation on 31.03.2024 and by an innocuous order his claim for regularization has been rejected.

95. On due consideration of aforesaid, the matter is remitted to Regional Regularization Committee to accord fresh

consideration, in accordance with law, after considering the provision of Section 33-B of the Act of 1982 and by taking a lenient view as petitioner had worked for almost 33 years and had already stood retired on 31.03.2024.

Writ Petition No. 4049 of 2024

96. It is contended on behalf of petitioner that the claim for regularization has been rejected vide order dated 03.02.2024 solely on the ground that the petitioner is continuing on the basis of interim order granted in special appeal and thus his services cannot be regularised in view of Section 33-G.

97. According to petitioner counsel, the ingredients of sub-Section (8) of Section 33-G was not considered by regularization Committee while deciding the claim.

98. Reliance has been placed upon decision of co-ordinate Bench rendered in case of **Vijay Shyam Dwivedi vs. State of U.P. and 3 others, Writ - A No. - 22154 of 2018**, decided on 22.10.2018 wherein the Court held that while considering the provisions of Section 33-G(8), the entire provision has to be considered and the authorities cannot reject the claim in isolation only relying upon the second part.

99. Learned Standing Counsel has submitted that the writ petition filed by petitioner was dismissed in the year 2019 and Section 33-G was inserted in the year 2016.

100. The argument raised by learned Standing Counsel is totally absurd. Section 33-G specifically provides for regularising the services of all those candidates who

appointed in between 07.08.1993 till 25.01.1999 against the short term vacancy and for *ad hoc* appointment till 30.12.2000.

101. The regularization Committee has not considered the entire scope of 33-G(8) and has summarily rejected the claim only replying upon the pendency of the special appeal and of the continuance of the petitioner on the strength of interim order.

102. The order is unsustainable and the same is hereby set aside. The matter is remitted back to regularization Committee to accord fresh consideration considering the judgment rendered in case of **Vijay Shyam Dwivedi (supra)** as well as the provisions of Section 33-G(8).

Writ-A No. 4056 of 2024

103. This writ petition assails the order dated 06.02.2024 passed by the Regional regularization Committee rejecting the claim for regularization of petitioner on the ground that his case is not covered under Section 33-G (8) of the Act of 1982.

104. From perusal of the order impugned, it is clear that only consideration by the regularization committee was that petitioner was getting the salary since 16.08.2002 pursuant to the interim order granted by the writ Court on 10.07.2001 in Civil Misc. Writ Petition No. 24196 of 2001. Apart from that, ingredients of Section 33-G (8) has not been considered by the regularization committee.

105. This Court in earlier case had required the regularization committee to accord due consideration in light of the judgment of this Court in case of **Vijay Shyam Dwivedi (Supra)**. In view of the

said fact, the order dated 06.02.2024 passed by the Regional regularization Committee is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration in light of the judgment rendered in case of **Vijay Shyam Dwivedi (Supra)** as well as provisions of Section 33-G (8) of the Act of 1982.

Writ-A No. 4078 of 2024

106. The order under challenge in present writ petition is dated 03.02.2024 passed by Regional regularization Committee rejecting the claim of petitioner for regularization on the ground that his writ petition being Writ-A No. 16260 of 2000 was dismissed on 27.01.2017, against which special appeal was filed and petitioner is being paid salary pursuant to the order passed in special appeal.

107. This Court finds that the issue in regard to consideration of Section 33-G (8) has already attained finality by the judgment of this Court rendered in case of Vijay Shyam Dwivedi (Supra) wherein the Court had found that entire provision of Sub-Section (8) of Section 33-G has to be considered and it cannot be read in isolation that benefit of regularization cannot be accorded due to pendency of litigation before this Court. This Court finds that first part of Section 33-G (8) has not been considered by the Regional regularization Committee and solely relying upon second part of the provision that writ petition is still pending authorities had rejected the claim of petitioner.

108. In view of the said fact, the order dated 03.02.2024 is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration in light of the judgment rendered in case of **Vijay**

Shyam Dwivedi (Supra) as well as provisions of Section 33-G (8) of the Act of 1982.

Writ-A No. 4080 of 2024

109. The order under challenge in present writ petition is dated 03.02.2024 passed by Regional regularization Committee rejecting the claim of petitioner for regularization on the ground that writ petition is pending before this Court and petitioner is being paid salary on the basis of interim order.

110. This Court finds that the issue in regard to consideration of Section 33-G (8) has already attained finality by the judgment of this Court rendered in case of **Vijay Shyam Dwivedi (Supra)** wherein the Court had found that entire provision of Sub-Section (8) of Section 33-G has to be considered and it cannot be read in isolation that benefit of regularization cannot be accorded due to pendency of litigation before this Court. This Court finds that first part of Section 33-G (8) has not been considered by the Regional regularization Committee and solely relying upon second part of the provision that writ petition is still pending authorities had rejected the claim of petitioner.

111. In view of the said fact, the order dated 03.02.2024 is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration in light of the judgment rendered in case of **Vijay Shyam Dwivedi (Supra)** as well as provisions of Section 33-G (8) of the Act of 1982.

Writ-A No. 4110 of 2024

112. The order under challenge in present writ petition is dated 05.02.2024 passed by Regional regularization Committee rejecting the claim of petitioner for regularization on the ground that writ petition is pending before this Court and petitioner is being paid salary on the basis of interim order.

113. This Court finds that the issue in regard to consideration of Section 33-G (8) has already attained finality by the judgment of this Court rendered in case of **Vijay Shyam Dwivedi (Supra)** wherein the Court had found that entire provision of Sub-Section (8) of Section 33-G has to be considered and it cannot be read in isolation that benefit of regularization cannot be accorded due to pendency of litigation before this Court. This Court finds that first part of Section 33-G (8) has not been considered by the Regional regularization Committee and solely relying upon second part of the provision that writ petition is still pending authorities had rejected the claim of petitioner.

114. In view of the said fact, the order dated 05.02.2024 is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration in light of the judgment rendered in case of **Vijay Shyam Dwivedi (Supra)** as well as provisions of Section 33-G (8) of the Act of 1982.

Writ-A No. 4114 of 2024

115. The order under challenge in present writ petition is dated 05.02.2024 passed by Regional regularization Committee rejecting the claim of petitioner for regularization on the ground that writ petition is pending before this Court and

petitioner is being paid salary on the basis of interim order.

116. This Court finds that the issue in regard to consideration of Section 33-G (8) has already attained finality by the judgment of this Court rendered in case of Vijay Shyam Dwivedi (Supra) wherein the Court had found that entire provision of Sub-Section (8) of Section 33-G has to be considered and it cannot be read in isolation that benefit of regularization cannot be accorded due to pendency of litigation before this Court. This Court finds that first part of Section 33-G (8) has not been considered by the Regional regularization Committee and solely relying upon second part of the provision that writ petition is still pending authorities had rejected the claim of petitioner.

117. In view of the said fact, the order dated 05.02.2024 is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration in light of the judgment rendered in case of Vijay Shyam Dwivedi (Supra) as well as provisions of Section 33-G (8) of the Act of 1982.

Writ-A No. 4116 of 2024

118. The order under challenge in present writ petition is dated 07.02.2024 passed by Regional regularization Committee rejecting the claim of petitioner for regularization on the ground that writ petition is pending before this Court and petitioner is being paid salary on the basis of interim order.

119. This Court finds that the issue in regard to consideration of Section 33-G (8) has already attained finality by the judgment of this Court rendered in case of

Vijay Shyam Dwivedi (Supra) wherein the Court had found that entire provision of Sub-Section (8) of Section 33-G has to be considered and it cannot be read in isolation that benefit of regularization cannot be accorded due to pendency of litigation before this Court. This Court finds that first part of Section 33-G (8) has not been considered by the Regional regularization Committee and solely relying upon second part of the provision that writ petition is still pending authorities had rejected the claim of petitioner.

120. In view of the said fact, the order dated 07.02.2024 is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration in light of the judgment rendered in case of Vijay Shyam Dwivedi (Supra) as well as provisions of Section 33-G (8) of the Act of 1982.

Writ-A No. 4118 of 2024

121. The order under challenge in present writ petition is dated 03.02.2024 passed by Regional regularization Committee rejecting the claim of petitioner for regularization on the ground that writ petition is pending before this Court and petitioner is being paid salary on the basis of interim order.

122. This Court finds that the issue in regard to consideration of Section 33-G (8) has already attained finality by the judgment of this Court rendered in case of Vijay Shyam Dwivedi (Supra) wherein the Court had found that entire provision of Sub-Section (8) of Section 33-G has to be considered and it cannot be read in isolation that benefit of regularization cannot be accorded due to pendency of litigation before this Court. This Court

finds that first part of Section 33-G (8) has not been considered by the Regional regularization Committee and solely relying upon second part of the provision that writ petition is still pending authorities had rejected the claim of petitioner.

123. In view of the said fact, the order dated 03.02.2024 is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration in light of the judgment rendered in case of Vijay Shyam Dwivedi (Supra) as well as provisions of Section 33-G (8) of the Act of 1982.

Writ-A No. 4720 of 2024

124. The order under challenge in present writ petition is dated 03.02.2024 passed by Regional regularization Committee rejecting the claim of petitioner for regularization on the ground that writ petition is pending before this Court and petitioner is being paid salary on the basis of interim order.

125. This Court finds that the issue in regard to consideration of Section 33-G (8) has already attained finality by the judgment of this Court rendered in case of Vijay Shyam Dwivedi (Supra) wherein the Court had found that entire provision of Sub-Section (8) of Section 33-G has to be considered and it cannot be read in isolation that benefit of regularization cannot be accorded due to pendency of litigation before this Court. This Court finds that first part of Section 33-G (8) has not been considered by the Regional regularization Committee and solely relying upon second part of the provision that writ petition is still pending authorities had rejected the claim of petitioner.

126. In view of the said fact, the order dated 03.02.2024 is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration in light of the judgment rendered in case of Vijay Shyam Dwivedi (Supra) as well as provisions of Section 33-G (8) of the Act of 1982.

Writ-A No. 4241 of 2024

127. The order under challenge in present writ petition is dated 07.02.2024 passed by Regional regularization Committee rejecting the claim of petitioner for regularization on the ground that writ petition is pending before this Court and petitioner is being paid salary on the basis of interim order.

128. It is contended that by the order impugned dated 07.02.2024 the claim of regularization has been rejected solely on the ground that though the appointment was made against short term vacancy, necessary requisition was not sent by the Committee of Management and no documents had been placed before the regularization committee in regard to appointment of petitioner.

129. This Court finds that the appointment of petitioner is of the year 1993 against a short term vacancy and financial approval was granted on 16.08.1994, since then petitioner is working and getting the salary. The regularization committee has not considered the provisions of Section 33-G (8) in entirety and had summarily rejected the claim for regularization. After lapse of 30 years, the authorities cannot reject the claim simplicitor. Matter needs reconsideration.

130. On due consideration of the aforesaid, the order impugned dated 07.02.2024 is hereby quashed. Matter is remitted to Regional regularization Committee for fresh consideration. The requisite documents regarding appointment of petitioner shall be summoned by the regularization committee from Committee of Management of the institution in question as petitioner, after passing of 30 years, cannot be asked to place the necessary documents regarding his appointment.

Writ-A No. 4565 of 2024

131. It is contended that post of Lecturer in Civics fell vacant on 27.02.1993 in the institution in question on promotion of one Vikramajeet Singh. Petitioner was appointed against the said vacancy. The finding recorded by the regularization committee does not take into note of the fact that appointment of petitioner is of the year 1994 and wrongly it has been recorded that vacancy in question occurred on 16.08.1995 and petitioner has concealed the said fact and was given appointment on 15.11.1994 when the post was not vacant.

132. It is further contended that the order impugned has been passed without affording opportunity of hearing to petitioner and, as such, he could not place the documents before the authorities.

133. This Court finds that the finding recorded by the authorities is against the material which has been brought on record by petitioner in the writ petition. Matter needs fresh consideration by regularization committee.

134. In view of the said fact, the order impugned dated 03.02.2024 is hereby

quashed. Matter is remitted to Regional regularization Committee for fresh consideration, in accordance with law and after providing opportunity of hearing to petitioner and permitting him to place all the documents, which are available with him for considering his claim for regularization.

Writ -A No.4824 of 2024

135. The order of Regional Regularization Committee dated 05.02.2024 is under challenge on the ground that no opportunity has been provided to the petitioner while his claim has been rejected though he has been working as an Assistant Teacher since 1999 and have been paid the salary pursuant to the interim order granted by the writ Court.

136. According to the petitioner, his case is not covered under Section 18 of Act of 1982 and needs consideration under Section 33-G.

137. Learned Standing Counsel has opposed the writ petition on the ground that consideration was there by the Committee and finding has been returned that the proper procedure was not followed when the short term vacancy was being filled up and no publication has been made in the newspaper.

138. From perusal of the order impugned, it is clear that no specific facts have been recorded by the Regional Regularization Committee while rejecting the claim. The detailed order needs to be passed once his claim is rejected after lapse of 25 years, as the petitioner has been paid salary from the State exchequer. The rejection with a single stroke of pen is not acceptable to the Court.

139. In view of the said fact, the order dated 05.02.2024 is hereby quashed. The matter is remitted back to the Regional Regularization Committee to accord fresh consideration considering statutory provision contained in Section 33-G.

DISCUSSION

140. Learned counsels appearing for various petitioners further contended that the petitioners before this Court have worked for almost 30-35 years and have been claiming regularization under various provisions of the Act of 1982. The State has proceeded to reject the regularization simpliciter in view of decision of Apex Court rendered in case of **Sanjay Singh (supra)** and the Government Order dated 09.11.2023. It has been contended that proper individual consideration is required in each of the matter after affording opportunity of hearing to the petitioners.

141. It has been brought to the notice of the Court that in many cases Committee of Management is not cooperating and not forwarding the relevant papers to the Regularization Committee for considering the regularization.

142. Sri Ashok Khare and Sri Ojha, learned Senior Counsel have submitted that the petitioners are not in possession of the various documents which are required by the Regularization Committee and could not place them before the authorities. According to them, in case the Committee of Management does not place the documents before the Regularization Committee, the Committee should proceed under the provisions of the Act to take action against the such defaulting institutions. For the fault of the institution, the petitioners, who have rendered services

for more than 25-30 years, cannot be penalized at the fag end of their services.\

143. It has also been brought to the notice of the Court that in most of the cases the financial approval has been granted by the District Inspector of Schools (DIOS) when the short term vacancy arose or the adhoc appointment was made. According to them, the financial approval is accorded only after the authorities are satisfied that the documents are in proper shape and a due procedure has been followed.

144. On the contrary, it has been argued on behalf of State that in many of the cases, the salary is being disbursed despite refusal of financial approval by the District Inspector of Schools only on the strength of the interim order.

145. This Court finds that after a lapse of 25-30 years, this Court cannot deny benefits of regularization as provided under Section 33-B, 33-C, 33-F, and 33-G of the Act of 1982 to such candidates who have been receiving salary either after the financial approval has been granted by the State authorities or in pursuance of the interim order. The provisions of Section 33-G(8) is very clear. The only consideration for refusal cannot be the pendency of writ petition and the interim order in operation. The first part needs to be considered by the authorities before disapproving the regularization. This fact has been considered by the coordinate Bench in case of **Vijay Shayam Dwivedi (supra)**.

146. I am of the view that after lapse of such a long period, denial by the State Government in regularizing the services of the petitioners would not be in the interest of justice and a sympathetic view should be

taken by the State while considering such regularization under the provisions of Section 33-B, 33-C, 33-F, and 33-G of the Act of 1982.

147. The Apex Court had found in **Sanjay Singh (supra)** that adhocism should end in the State of Uttar Pradesh. Once the State has proceeded to deal with the matters post 2000 on a different pedestal complying the order in case of **Sanjay Singh (supra)**, it should take a sympathetic view and consider the matter regarding regularization in terms of Section 33-B, 33-C, 33-F, and 33-G of the Act of 1982 for those short term vacancy and adhoc appointment which were made between 1985 to 2000. Rejecting regularization only on technical issues is leading to litigation which does not serve the purpose.

148. It has been informed to the Court that there were 1079 matters pending for regularization between these periods, and in about 78 cases, the State had passed order for regularization. This Court expects that the matters, which have been considered by the Court today and the remaining matters pending consideration, the authorities should take sympathetic view and proceed to consider the claim for regularization according to the provisions not insisting for the documents which are not in possession of the petitioners.

CONCLUSION

149. Considering the facts and circumstances of the case, this Court is of the opinion that the matters which have been remitted back to the Regularization Committee shall be considered in the light of the following directions:

(i) The Regional Regularization Committee shall accord fresh consideration

in all remitted matters within a period of six weeks from the date of remand.

(ii) As far as possible, the Regional Regularization Committee shall accord hearing to all the candidates whose claim is under consideration for regularization.

(iii) The Committee shall ask all the Management Committees of the Institution to provide necessary documents which are needed for consideration of regularization of the candidates within a period of two weeks from the date of this order. In case the documents are not provided by the Management Committees, the Regularization Committee shall proceed against the institution in question under the provisions of Act of 1921.

(iv) The Regularization Committee shall further accord due consideration to provision of Act of 1982 while considering the claim for regularization especially for all those candidates whose case fall under Sections 33-B, 33-C, 33-F, and 33-G.

(v) It is further provided that in view of clarification of Government Order dated 26.09.2024, all the candidates whose matters are under consideration before the Regional Regularization Committee, shall be paid their salary which has been stopped pursuant to the order dated 09.11.2023 within a period as prescribed in the clarification order dated 26.09.2024, till their claims are finally decided.

(vi) Further all the candidates whose claim has not been decided by the Regularization Committee shall be permitted to work.

(vii) It is clarified that in all those cases where the claim for regularization was rejected and the writ petition has been allowed by this Court and the matter has been remitted back for fresh consideration, those candidates shall be entitled for their

entire salary till their claim is decided afresh.

150. The directions issued is only pertaining to the appointments made against short term vacancy/*ad hoc* appointment upto 30.12.2000. Those cases in which appointment has been made post 2000, the judgment and directions given by this Court would not apply.

151. In view of the above, the issue raised in these bunch of petitions stand answered and the educational authorities to proceed in accordance with the directions as given above.

152. All the writ petitions stand disposed of.

(2024) 9 ILRA 1512

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 25.09.2024

BEFORE

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

Writ A No. 68692 of 2006

C/M Digvijay Nath Inter College

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Mr. Sarvesh Pandey, Advocate

Counsel for the Respondents:

Mr. Girijesh Kumar Tripathi, Addl. C.S.C.

A. Education Law – Extension of maintenance grant – Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971- The Right of Children to Free and Compulsory

Education Act, 2009 - Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978.

Non-receipt of compensatory grants could not be a ground to exclude the primary section of the Institution, as it would create a class within a class, which had no reasonable nexus with the object sought to be achieved by the scheme. (Para 12)

B. In this case, since the Institution is an intermediate college, the question of extension of grant-in-aid to its primary section, that is otherwise claimed to be an integral part of it, has to be decided under the provisions of the Act of 1971, and not the Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 (for short, 'the Act of 1978'). The position of law that a high school or an intermediate college, which is an institution governed by the Act of 1971, would be regarded as an integral whole and the teachers of its attached primary section, if part of that whole or as it is described in *Jai Ram Singh* a 'composite integrality', would entitle the teachers of the primary section to salaries paid out of the Exchequer under the Act of 1971. (Para 20)

The conclusions in *Jai Ram Singh* and the orders made w.r.t. the attached primary sections of recognized and aided high schools or intermediate colleges, do not spare a shadow of doubt that **the attached primary section of an intermediate college, like the Institution, cannot be denied grant-in-aid, subject to satisfaction of the test of 'composite integrality'.** The fact that the attached primary section of the Institution is an integral part of it, has not been seriously disputed by the respondents. Rather, it has not been disputed at all. In the day when the order of this Court was set aside by the Division Bench in Special Appeal Defective No. 1193 of 2013, there was insistence by the St., almost with reverence about the cut-off date, on which permission was granted for attachment to the primary section of an institution, be it a high school or an intermediate college or a junior high school. The only difference in the policy carried in the GOs dated 06.09.1989 and

01.10.1989 on one hand, and the one carried in the GO dated 27.10.2016 on other, was that whereas under the GOs of 1989, the cut-off date for permitting attachment or more than that submitting compensation St.ments in regard to grant for the attached primary sections of intermediate colleges was 01.04.1971, under the GO dated 27.10.2016, the policy spelt out the date for passing an order of attachment as 21.06.1973. (Para 23)

This Court is, therefore, of opinion that on the right to receive maintenance grant for the attached primary section of the Institution, the Government concede the position of 'composite integrality' as regards the attached primary section. The attached primary section of the Institution would, therefore, clearly be entitled to receive grant-in-aid already provided to them under the GO dated 09.12.2014, as amended on 15.03.2024. Since the right of children to receive free and compulsory education, who are in the age-group of 6- 14 years, is ultimately the right, that is subject matter of action in this writ petition, we cannot permit the said right to depend upon the mere edifice of an executive order with its inherent vagaries of what is known as policy and the change of which is at times more unpredictable than the weather. The right involved here, which is one belonging to students in the age- group of 6-14 years, must stand on more firm footing. It would require the shadows of the impugned order to be annihilated by this Court out of existence. And, further, a command by us for the continued payment of the maintenance grant to the attached primary section of the Institution. (Para 27)

C. Words and Phrases – (i) “institution” -

The expression "institution" has been defined under the enactment to mean a recognised institution which is receiving a maintenance grant from the St. Government.

The expression "institution" as defined under the 1971 Act does not exclude a primary section which meets the test of composite integrality with a High School or Intermediate college. The contention that the benefit of the 1971 Act can only apply if all sections of a composite institution are in receipt of financial aid is negated. Teachers of primary sections attached

to High Schools and Intermediate colleges, notwithstanding the fact that the said section is not in receipt of financial aid, would be entitled to the benefit of the 1971 Act. (Para 21)

(ii) "recognition" - The word "recognition" is defined under the 1921 Act to mean recognition for the purposes of preparing candidates for admission to the examinations conducted by the Board.

On a conjoint reading of these two provisions it would be evident that an institution is contemplated to be one which holds the requisite permission and authority to admit students desirous of taking the examinations conducted by the Board and is in receipt of a maintenance grant.

In light of the construction accorded to Section 2(b) by the Court, it is manifest that a primary section which is a homogenous part of a recognised and aided high school or intermediate institution would fall within the ambit of the 1971 Act. Secondly such a primary section viewed in light of the principle of composite integrality as propounded herein above cannot be understood to be a separate or distinct component. It would, irrespective of the fact that it may not be in receipt of a maintenance grant, remain an integral component of that institution. The teachers of such a primary section cannot therefore be denied the protection of the 1971 Act. (Para 20)

Writ petition allowed. (E-4)

Precedent followed:

1. St. of U.P. & ors.Vs Pawan Kumar Divedi & ors., (2014) 9 SCC 692 (Para 11)
2. Jai Ram Singh & ors.Vs St. of U.P. & ors., 2019 (6) ADJ 255 (Para 11)
3. Ramji Tiwari & ors.Vs District Inspector of Schools & ors., (1997) 1 UPLBEC 690 (Para 12)
4. Paripurna Nand Tripathi & anr. Vs St. of U.P. & ors., 2015 (3) ADJ 567 (DB) (Para 14)

Present petition assails the order dated 17.11.2006, passed by the Director of Education (Secondary), refusing extension of maintenance grant to the attached primary section of the Digvijay Nath Inter College, Chowk Bazar, Maharajganj.

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

1. This writ petition has come up for hearing after remand by the Division Bench in an appeal under Chapter VIII Rule 5 of the Rules of Court carried by the State from the judgment and order dated 19.10.2012, allowing the writ petition.

2. This writ petition is directed against the order of the Director of Education (Secondary) dated 17th November, 2006, refusing extension of maintenance grant to the attached primary section of the Digvijay Nath Inter College, Chowk Bazar, Maharajganj. The writ petition has been preferred by the Management of the aforesaid College. Beyond laying a challenge to the order of the Director of Education, denying the maintenance grant, the petitioners further seek a mandamus to the respondents to extend grant-in-aid to the attached primary section of the College under the provisions of the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (for short, 'the Act of 1971').

3. The short facts, giving rise to this petition, are these:

The Digvijay Nath Inter College, Chowk Bazar, Maharajganj (for short, 'the Institution') is an intermediate college, recognized under the Intermediate Education Act, 1921 (for short, 'the Act of 1921'). Salaries to teachers and other employees of the Institution, other than the

primary section, are paid out of the maintenance grant extended by the State under the provisions of the Act of 1971. The Institution has an attached primary section, teaching students from Classes 1 to 5. The primary section, according to the petitioners, is housed in the same premises as Classes 6 to 12 and under the supervision and control of the same Principal and the Management. In substance, the Institution says that they are an integral whole from Class 1 to 12. The District Inspector of Schools, Gorakhpur vide order dated 04.03.1972 granted recognition to the primary section of the Institution, followed by an order of the District Inspector of Schools dated 07.07.1972, granting permission to the Institution to run an attached primary section.

4. It is the petitioners' case that the Committee of Management appointed teachers and other staff to manage the attached primary section. The petitioners say that they were not included in the list of 393 institutions, teaching High School and Intermediate Classes, whose attached primary sections were brought under maintenance grant vide Government Order dated 06.09.1989. It is the petitioners' case that 15 sections were acknowledged to be functional in the primary section of the Institution by the District Inspector of Schools vide his order dated 30.08.1991. The Institution, according to the petitioners, is situate in a remote area, away from the City of Gorakhpur, now part of Maharajganj. It is more than 20 kilometers away from the District Headquarters of Maharajganj. It lies on the Nepal Border. The petitioners say that the Institution was recognized in the year 1972, but not included in the list of institutions by the State Government to whose primary

sections maintenance grant was provided. The petitioners, therefore, requested the State Government through the District Inspector of Schools that they be provided maintenance grant for their attached primary section. It appears that the petitioners' case was recommended by the Deputy Director of Education to the Director of Education by his memo dated 24.10.1991.

5. Since the Director of Education did not pass any orders on the endorsed request of the petitioners, they instituted Civil Misc. Writ Petition No.43123 of 1997 with a prayer that the Director of Education be commanded to pass appropriate orders on the letter of the Deputy Director of Education dated 24.10.1991, recommending the petitioners' case. This Court by an order dated 24.08.1998 disposed of the last mentioned writ petition with a direction to the Director of Education to decide the petitioners' claim within three months of the production of a certified copy of the order made in the writ petition, after hearing the parties concerned. The Director of Education by his order dated 08.09.1999, in compliance with the orders of this Court dated 24.08.1998, rejected the petitioners' representation for the extension of maintenance grant to their attached primary section. The petitioners questioned the said order by means of Civil Misc. Writ Petition No.9173 of 2000 before this Court, where they sought a mandamus to the respondents, that would include the Government, to extend the benefit of the Act of 1971 to the teachers of the primary section of the Institution and release the necessary grant. This writ petition was heard after exchange of affidavits with this Court disapproving the orders denying extension of maintenance grant on

irrelevant considerations and wrongfully doubting the orders, recognizing and permitting the attached primary section of the Institution to function as part of it. The matter was, therefore, remanded to the Director of Education to decide the petitioners' claim afresh, bearing in mind the guidance in the judgment, and, particularly, the criteria laid down by the Government for recognition and provision of maintenance grant under the Act of 1971 to attached primary sections, within a period of three months from the date of production of a certified copy of the judgment passed by this Court. This judgment was placed for necessary action before the Director of Education, U.P. by the petitioners through a communication dated 28.11.2005. The petitioners' claim was once again rejected for the provision of a maintenance grant to their attached primary section vide order dated 17.11.2006.

6. Aggrieved by the order of the Director of Education dated 17.11.2006 (for short, 'the impugned order'), this writ petition has been instituted.

7. A notice of motion was issued on 18.12.2006, and, in due course, a counter affidavit was put in on behalf of respondent No.3, the District Inspector of Schools, Maharajganj (for short, 'the DIOS'), to which the petitioners filed a rejoinder. It was on these pleadings that the writ petition was heard and allowed by this Court vide judgment and order dated 19.10.2012. The order impugned was quashed and a *mandamus* issued to the respondents to enlist the teachers and employees working in the attached primary section of the Institution for the provision of salaries under the Act of 1971, in accordance with law.

8. Disillusioned by the said judgment and order dated 19.10.2012 passed by this Court, the State of U.P. carried a special appeal to the Division Bench, being Special Appeal Defective No.1193 of 2013. The said appeal was allowed by a judgment and order dated 14.09.2017, setting aside the judgment dated 19.10.2012 passed by this Court and restoring the present writ petition to its original file and number, with a direction to hear and decide it afresh, bearing in mind the remarks of the Division Bench. This is how the present writ petition has come up for hearing afresh.

9. Heard Mr. Sarvesh Pandey, learned Counsel for the petitioners in support of this petition and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel, appearing on behalf of the respondents.

10. The petition, as agreed by learned Counsel for the parties, has been heard on the affidavits already on record, except an added affidavit dated 19.04.2024 of the Director of Education filed by Mr. Girijesh Kumar Tripathi, the learned Additional Chief Standing Counsel. The learned Counsel for the petitioners waived his right to file a rejoinder to the last mentioned affidavit.

11. Upon hearing learned Counsel for the parties, this Court must remark that in view of much change to the position of the law earlier laid down by the Supreme Court after the Constitution Bench in **State of U.P. and others v. Pawan Kumar Divedi and others, (2014) 9 SCC 692**, and in consequence, the principles enumerated, apart from the orders made by this Court in **Jai Ram Singh and others v. State of U.P. and others, 2019 (6) ADJ 255**, the entire contours of the issue and rights of

parties, would much change from the day as these stood, when judgment in this petition was earlier rendered, and also the time when the Division Bench set aside that judgment with a remand. This Court allowed the writ petition earlier fundamentally on two premises. The first was that the order impugned was manifestly illegal in that, that it was wrong to suspect the recognition and attachment granted to the primary section of the Institution by the District Inspector of Schools in the year 1972 or infer that the primary section was non-existent, because the Institution was not included in the list of 393 institutions, whose primary sections were brought under grant-in-aid vide Government Order dated 06.09.1989. This Court was of opinion that the approach of the respondents was wrong on this count, because the permission to start the primary section in the year 1972 and its attachment, in support of which orders were made, could not be doubted on a presumption, unless the genuineness of those documents was examined. The genuineness of the recognition and the permission could not be condemned, merely because on the basis of a survey done in the year 1989, the primary section of the school was not included in the list of 393 institutions, to whom maintenance grant was extended for their attached primary sections. The finding on this score was held by this Court, by the judgment earlier rendered, to be perverse.

12. The second count, on which the impugned order was found flawed, was that it proceeded to hold the petitioners disentitled to a grant for their primary section, because they were not in receipt of compensatory grants prior to 1971, whereas this issue was no longer *res integra* in view of the judgment of this Court in **Ramji Tiwari and others v. District Inspector of**

Schools and others, (1997) 1 UPLBEC 690. It was opined by this Court, while rendering the judgment since set aside by the Division Bench, that the decision in Ramji Tiwari (supra) placed the law firm on the point that the object of enlisting a school for receipt of grant-in-aid was to provide education at the primary level, which has been held to be a fundamental right. This Court then opined, “*while looking to the object of the scheme and the purpose sought to be achieved, it does not sound reasonable to exclude the institution from the scheme of grant-in-aid only on the premise that it was not receiving the compensatory grants from the State Government.*” It was remarked that non-receipt of compensatory grants could not be a ground to exclude the primary section of the Institution, as it would create a class within a class, which had no reasonable nexus with the object sought to be achieved by the scheme.

13. For a fact, it was remarked by this Court on the earlier occasion that the primary section of the Institution is located in one premises. The distinction, therefore, made between teachers, who would teach primary classes and those engaged in teaching the higher ones, is without basis. There were further remarks about the lack of distinction, as far as entitlement to grant is concerned, between teachers teaching classes 6 to 8, on one hand, and 1 to 5, on the other, but those may now not be relevant. In fact, the rather unconventional course of noting the remarks in the judgment, that has already been set aside by the Division Bench, is to bring into relief, almost a sea-change in the law, on the premise of which, the Division Bench proceeded to set aside the judgment earlier rendered, or for that matter, those on which this Court earlier entered judgment. The

order of remand, passed by the Division Bench in Special Appeal Defective No.1193 of 2013, may be noted for every material word of it, which reads:

“The judgment and order of learned Single Judge dated 19.10.2012, passed in Writ-A No.68692 of 2006 is liable to be set aside on the ground of non-consideration of essential conditions required to be satisfied under the letter of Director, Education, U.P. dated 21.10.1989, enclosed at page 119 and which has also been referred to in the order of learned Single Judge. The said letter refers to the Government Order dated 6.9.1989 as well as Government Order dated 1.10.1989 and further clarifies that only such primary institutions affiliated to high school and intermediate colleges would be brought on the grant-in-aid as attached primary section which satisfy the following conditions:

(a). Primary section was treated to be part of the main institution prior to 1.4.1971 and compensation statements were submitted treating the primary institution as part of the intermediate colleges prior to 1.4.1971, and

(b). The institution was granted recognition from Class 1 to Class 9 under one order of District Inspector of Schools.

We find that there has been complete non consideration of the aforesaid two conditions in the order of learned Single Judge before issuing the direction for payment of salary to the teachers of the primary section said to be attached to Digvijay Nath Inter College, Chowk Bazar, Maharajganj.

In our opinion satisfaction of the conditions mentioned in the government order referred to above is a condition precedent for such a direction being issued. In absence of any finding having been

recorded in that regard the judgment and order of writ court cannot be legally sustained specifically in the circumstance that the Government Order dated 21.10.1989 was not under challenge.”

14. It must be remarked that long since the policy of extending affiliation to the attached primary sections of junior high schools or high schools and intermediate colleges was framed by the State Government through a Government Order dated 06.09.1989, and, the later Order dated 01.10.1989, the constitutional perspective about the sacrosanctity of the right to free and compulsory education for children in the age group of 6-14 years underwent a seminal change. It had come to be judicially recognized as a facet of Article 21 of the Constitution, but the right to free and compulsory education for children in the age-group of 6-14 was still a weak current, driven by debate about the sacrosanctity of the right on one hand, and, the economic limitations of the State, on the other. To add to it, was a distinctive feature of the issue in the context of the State of U.P., where a Basic Education Board had been set up, taking over avowedly the entire responsibility of educating children from classes 1 to 5, with no share of this responsibility with private hands. It was the assumption of this wholesome responsibility by the State through the Uttar Pradesh Basic Education Act, 1972 (for short, 'the Act of 1972') that much difficulty arose with regard to aiding attached primary sections of junior high schools, high schools and intermediate colleges. It was in the context of the setting up of the Basic Education Board in the year 1972 and the existing schools managed by local bodies that the Board took over that the policy regarding extension of maintenance grant to attached primary

sections of junior high schools, high schools and intermediate colleges, privately managed, became the subject matter of much litigation. The cut-off dates, that were prescribed in the grant-in-aid policy embodied in the Government Orders dated 06.09.1989 and 01.10.1989, as regards recognition and attachment permissions, were asserted by the State to be relevant. However, the right to free and compulsory education, being engrafted as a separate fundamental right in the Constitution by the 86th Amendment Act, 2002, the judicially recognized fundamental right became a formal constitutional charter. The Right of Children to Free and Compulsory Education Act, 2009 (for short, 'the Act of 2009') was then enacted to legislatively give effect to the fundamental right embodied under Article 21-A of the Constitution. It was these and other accompanying changes that led a Division Bench of this Court in **Paripurna Nand Tripathi and another v. State of U.P. and others, 2015 (3) ADJ 567 (DB)** to remark and direct as follows:

“18. In the State of Uttar Pradesh, most of the institutions providing basic education have been established by societies registered under the Societies Registration Act, 1860 by private managements. The State Government has framed policy guidelines and has issued executive orders/circulars/administrative orders from time to time laying down standards/norms for providing grant-in-aid to unaided institutions. Unless those conditions are fulfilled by private institutions, the State Government does not take liability for the payment of salaries of the teachers and other employees of such institutions.

19. After the enactment of the Act, 2009 and the law laid down by the

Supreme Court in **Society for Unaided Private Schools of Rajasthan (supra)**, **Bhartiya Seva Samaj Trust (supra)** and **State of Uttar Pradesh and others v. Pawan Kumar Divedi and others, (2014) 9 SCC 692**, we are of the view that the State Government may revisit its age old policy in the light of the constitutional amendment and the law laid down by the Supreme Court on the subject.

20. Undoubtedly, now it is the State's responsibility to provide free and compulsory education to the children of the age of six to fourteen years. Private institutions, which are imparting education to children of the said age group, in fact, are performing and sharing the obligations of the State. Therefore, an obligation is cast upon the State Government not only to provide the grant-in-aid to such institutions but to provide infrastructure also subject to reasonable conditions laid down by it. Providing education to the children of the age of six to fourteen years shall be a mirage unless qualitative education is provided to them.

21. In the State of Uttar Pradesh, the large majority of children of the said age group come from the marginalized sections of the society. Most of the institutions providing primary and basic education are situated in rural and semi-urban areas. To provide quality education it is necessary that trained and competent teachers are appointed and necessary infrastructure is also made available to such institutions. The teachers in private unaided institutions are working in pitiable conditions. No good teacher would like to work in such institutions. Thus, the students will be deprived of quality education.

22. In view of the supervening events, we are of the view that the order of the learned Single Judge dated 29 August

2014 and the order of the State Government dated 10 January 2002 need to be set aside and are, accordingly, set aside. The matter is remitted to the State Government to reconsider it in the light of the law referred to above. The State Government may reconsider its policy of 1989 in respect of the grant of aid to the unaided institutions in the light of the constitutional amendment, the Act of 2009 and the law laid down in the judgments referred above.”

15. In compliance with the command of this Court in **Paripurna Nand Tripathi (supra)**, the State formulated a policy regarding extension of grant-in-aid to primary educational institutions attached to non-government aided junior high schools, high schools and intermediate colleges. The revised policy was carried in a Government Order dated 27.10.2016. Under the changed policy, claims of various institutions, seeking maintenance grant for their attached primary sections, the institutions being private aided ones, to wit, junior high schools, high schools or intermediate colleges, or still more, distinctly recognized and unaided primary schools or junior basic schools, as these are called, were all rejected by Government Orders dated 13.07.2017. Both the Government Orders, embodying the policy, and the later one of 13.07.2017, disposing of claims of different categories of primary or junior basic schools, were challenged before this Court in a batch of writ petitions, that came to be decided in **Jai Ram Singh (supra)**.

16. Now, before this Court may examine what **Jai Ram Singh** has decided and what would be the impact of that decision on the rights of the petitioners here, it must be remarked that this Court would stand formally relieved of examining

the issues remitted to us in terms of the order of remand, because the two issues relevant under the grant-in-aid policy applicable under the Government Orders dated 06.09.1989 and 01.10.1989, now stand effaced in terms of the revised policy on the subject carried in the Government Order dated 27.10.2016. As would be presently seen, the Government Order dated 27.10.2016 would also not oblige this Court to examine something of the likeness of the issues remitted under the old policy carried in the Government Orders dated 06.09.1989 and 01.10.1989, because Clause 1 of the Government Order dated 27.10.2016 to the extent it prescribes a cut-off date (21.06.1973) as well as Clauses 1.1 and 1.2 thereof, were struck down by this Court in **Jai Ram Singh** as arbitrary and irrational. Of course, a slew of other directions were issued in **Jai Ram Singh**, including ones commanding the State to reformulate its policy, bearing in mind the remarks in **Jai Ram Singh**. Much of the rights, which the petitioners assert now, stand concluded in terms of the holding of this Court in **Jai Ram Singh**. **Jai Ram Singh** is, therefore, a decision of seminal importance, governing the rights of the petitioners, now suited in this writ petition. Eschewing much detail of the many facts and the issues considered in **Jai Ram Singh**, that may not be relevant to the petitioners' rights, far simplified now, it would be apposite to note that this Court in **Jai Ram Singh** considered the batch of writ petitions in four groups, that can best be understood by a reference to paragraph No.4 of the report, which reads:

“4. The writ petitions in this batch can be broadly classified as falling in the following categories:

GROUP A- Recognised and unaided primary sections attached to junior

high schools/high schools and intermediate colleges.

GROUP B- Recognised and unaided junior high schools.

GROUP C- Recognised and unaided Primary Schools.

GROUP D-Unaided Primary School With Unaided Junior High School.”

17. Before proceeding further, it must be remarked that for the most part, the directions made in **Jai Ram Singh** and the holding that would be relevant to the issue here, would relate to Group A of the writ petitions decided there. This is for the reason that the petitioners are an intermediate college and the provision of maintenance grant that they seek is one for their attached primary section. This was the subject matter of consideration in **Jai Ram Singh** in writ petitions marked as Group A. The policy regarding extension of maintenance grant to the attached primary section of a high school or intermediate institution, amongst others, as already said, was revised and embodied in the Government Order dated 27.10.2016 and this Government Order was the subject matter of challenge, besides another, in **Jai Ram Singh**. The Government Order dated 27.10.2016 (relevant part) reads:

"1. बेसिक शिक्षा विभाग के सर्व शिक्षा अभियान के तहत प्रदेश में 300 की आबादी तथा 01 किलोमीटर की दूरी पर नवीन प्राथमिक विद्यालय खोले जाने की नीति है। प्रदेश में 2055 बस्तियाँ ऐसी हैं, जहाँ निःशुल्क एवं अनिवार्य बाल शिक्षा अधिकार अधिनियम, 2009 के context में प्राथमिक विद्यालय उपलब्ध नहीं हैं। अतएव मात्र ऐसी बस्तियों में दिनांक 21-6-1973 के पूर्व से स्थापित सम्बद्ध प्राइमरी विद्यालयों के प्रस्ताव को ही अनुदान पर लिए जाने के सम्बन्ध में विचार किया जायेगा। इस तरह के विद्यालयों के प्रस्ताव पर निम्न प्रतिबंधों के तहत विचार किया जा सकेगा-

1.1 सम्बद्ध प्राइमरी विद्यालय की स्थाई मान्यता कक्षा-1 से 8 तक एक साथ प्रदान की गयी हो।

1.2 प्राइमरी कक्षाओं की सम्बद्धता का आदेश जिला विद्यालय निरीक्षक द्वारा दिनांक 21-6-1973 के पूर्व निर्गत किया गया हो।

1.3 सम्बद्ध प्राइमरी प्रभाग एक ही प्रधानाचार्य के नियंत्रण में हो और प्राइमरी कक्षाओं के लिए पृथक से प्रधानाध्यापक की नियुक्ति न की गयी हो।

1.4 प्राइमरी कक्षायें हाईस्कूल तथा इण्टर कक्षाओं के साथ एक ही प्रांगण में संचालित हो तथा एक ही प्रबंधतंत्र के नियंत्रण में हो।

1.5 कक्षा-5 उत्तीर्ण छात्रों को कक्षा-6 में बिना टी0सी0 के प्रवेश दिया जाता हो। प्राइमरी विभाग उच्चतर माध्यमिक विद्यालय/ इण्टर कालेज का अभिन्न अंग हो।"

18. One of the central issues, that were dealt with in **Jai Ram Singh**, was the importance of the order of attachment, and a fortiori the date of that order, *as a sine qua non* to the extension of grant-in-aid to the primary section of a high school or intermediate institution, or may be even a junior high school under the Government Order dated 27.10.2016. In answering the imperative of an authority of the Education Department, passing an order approving the attachment of a primary section to an existing high school or intermediate institution, or for that matter, a junior high school, and further, the date of that order made relevant under the revised policy carried in the Government Order dated 27.10.2016, this Court held in **Jai Ram Singh** thus:

"41. Before we proceed to deal with the primary questions of law which arise, it would be appropriate to briefly deal with the issue of attachment of primary sections as understood by the State and the orders that were passed in connection therewith.

42. The State prior to the passing of the 1972 Act [and in some cases even thereafter] passed formal orders recognising primary sections attached to

junior high schools, high schools and intermediate colleges. These orders appear to have been passed taking note of the fact that these primary sections were operating from a common campus, under the control of a common management, administered by one Headmaster and a seamless progression of students from classes I to V to class VI and onwards.

43. On 21 June 1973, a Government Order was issued mandating that henceforth no orders of attachment would be passed. This order was essentially issued since by that time the Board had come to be established and various primary schools and institutions functioning till then under the control of local bodies came to be transferred and vested in the Board in accordance with the provisions of the 1972 Act.

44. While various orders of attachment evidently came to be passed even after the issuance of the 21 June 1973 order, we are really not concerned with the validity of those orders. The fundamental issue which needs to be considered is the character and the legal imperative of these orders existing in respect of an institution for it to claim the benefits of coverage under the 1971 and 1978 Acts.

45. At the very outset it needs to be stated that no statutory provision was referred to by the respondents to which these orders of attachment were traceable. The respondents also do not rely upon any provision, statutory or otherwise, in terms of which an order of attachment was liable to be made before the primary section could be accorded legal recognition of being an integral part of a larger institution.

46. Whether the various sections of an institution imparting education to different tiers of classes are integrated, fundamentally and on first principles, is an issue of fact. A primary section which is an

integral part of an institution, be it a junior high school, high school or intermediate college, would remain and be entitled to be recognised in law as such irrespective of an order of attachment made by the respondents. An institution would be entitled in law to be treated and viewed as one unit if its various components satisfy the tests propounded in Vinod Sharma I. This would not and cannot depend upon an order of attachment existing in this respect. An issue of whether an institution is “one unit” would have to be considered bearing in mind the determinative factors which were formulated in Vinod Sharma I and whether that institution has the requisite attributes of integrality. This would, as noted above, be an issue which would have to be tested on the anvil of the factors that were formulated in Vinod Sharma I in respect of each individual institution and in any case would not be dependent upon the existence or absence of an order of attachment.

47. In view of the above discussion, this Court is of the firm view that an order of attachment, whether made before or after the 21 June 1973 Government Order, cannot be determinative of the oneness of an institution. If the institution otherwise has the attributes as evolved in Vinod Sharma I it would be entitled to be considered and viewed as “one unit”.

(emphasis by Court)

19. The restrictions imposed, subject to which maintenance grant could be extended to the attached primary section of a high school or an intermediate institution, or for that matter, a junior high school, carried in Clauses 1, 1.1 and 1.2 of the Government Order dated 27.10.2016, were held to be arbitrary by this Court in **Jai**

Ram Singh in terms of the following remarks:

“58. However, turning then to the further restrictions imposed by the State in the impugned policy document, the Court finds itself unable to hold in favour of the State or to sustain the restrictions as imposed. The restriction of grant being extended to only those institutions in these 2055 localities which had been established or an order of attachment made prior to 21 June 1973 appears to be wholly irrational. This Court has already held that the issue of attachment is clearly of no relevance since whether there exists composite integrality between a primary section and other components of an educational institution is essentially an issue of fact to be found and gathered in each individual case. The issuance of formal orders of attachment are also not traceable to any statutory power or obligation. If a primary section, therefore, has come to be accorded recognition post 21 June 1973 and otherwise meets the test of composite integrality then it clearly cannot be denied the benefits of grant in aid. The date of its attachment, be it prior to or post 21 June 1973 is not shown or established to have any rational nexus to the entitlement to grant in aid. Denial of financial aid to an institution which otherwise exists in these 2055 localities merely because the primary section came to be attached after 21 June 1973 is wholly arbitrary and unsustainable. Regard must also be had to the fact that this stipulation is evidently a reiteration of a condition which existed in the original policy document of 6 September 1989. The State has failed to justify the perpetuation of this condition after a lapse of three decades. In fact the imposition of this condition was faulted by a learned Judge of the Court in Committee of Management

Field Marshall General Manek Shaw Uchhatar Madhyamik Vidyalaya, Writ Petition No. 6241 of 1992 decided on 7 January 1993, in the following terms: -

“.....It is true that the Government by its letter dated 21.6.1973 has directed that primary sections of Higher Secondary institutions will not be permitted to be attached to them for payment of salary after the date of that letter, namely, 21.6.1973; but the Government itself by its letter dated 6.9.1989, granted such a recognition to 393 Higher Secondary institutions, whereby the benefits of the Act has been extended to the teachers and other employees working in primary sections of these institutions. As mentioned hereinabove, the primary section was attached to the college right from 1971 and there is no prohibition in any of the aforementioned Government orders against giving benefit of the Act to the primary section of the college. The basis on which the benefit of the Act has been denied to the primary section of the college, as such, cannot be sustained.”

The aforesaid decision was affirmed by the Division Bench of the Court which dismissed Special Appeal No. 397 of 1993 filed by the Director of Education. Of more relevance, however, are the following observations as were made by the Supreme Court in *Mata Tapeswari Saraswati Vidya Mandir:-*

“.....It is by virtue of the amended provisions of Section 13-A that a class within a class was being sought to be created in perpetuity. The application of the 1978 Act only to educational institutions which received grant-in-aid prior to 30th June, 1984, has, in our view, been rightly held to be arbitrary by the High Court. Such provision is in violation of the equality clause enshrined in Article 14 of the Constitution.

26. If it was the intention of the State Government to extend the benefit of the grant-in-aid Scheme to 1000 unaided permanently recognized (A Class) Junior High Schools by its advertisement dated 9th September, 2006, then it would not be fair, as has been rightly held by the High Court, to exclude such unaided institutions which besides imparting education at the Junior High School level were also imparting education, either at the Primary or the Higher Secondary level, from the grant-in-aid scheme, inasmuch as, they too continued to have Junior High Schools imparting education for classes 6 to 8.”

59. Similarly the stipulation in clause 1.1 which places a precondition of an eligible institution being one which had been granted permanent recognition to run classes I to VIII by a composite order is, in the considered view of this Court, wholly arbitrary. Undisputedly in numerous instances institutions in the State have come to be established in phases and over a period of time. The grant of recognition whether from classes VI to VIII in the first instance and addition of Classes I to V thereafter or vice versa cannot be said to be a rational basis for determining whether the institution should be accorded financial aid. Even if the primary section came to be established and recognised subsequently in a school which was originally imparting education to classes VI to VIII, the same cannot be a disqualification for grant in aid. As long as the institution is established to have composite integrality between its various components and tiers it would be eligible in law to be considered for grant in aid.

60. The condition imposed in the policy document that an order of attachment should have been passed prior to 21 June 1973 must also suffer the same fate. An institution is liable to be viewed as

one unit as long as it is established that its various components are a homogeneous whole. The issuance of a formal order of recognition of homogeneity cannot be treated as a pre condition. This quite apart from the fact that the cut off date of 21 June 1973 itself is of no consequence for reasons noted above.

61. On an overall conspectus of the aforesaid conclusions, the Court finds itself unable to sustain either the cut off date of 21 June 1973 as prescribed in paragraph 1 or conditions 1.1 and 1.2 of the Government Order of 27 October 2016. Similarly, the condition of a common campus must be understood in light of the observations made under Heading 'K'."

(emphasis by Court)

20. It must be remembered in this case that since the Institution is an intermediate college, the question of extension of grant-in-aid to its primary section, that is otherwise claimed to be an integral part of it, has to be decided under the provisions of the Act of 1971, and not the Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978 (for short, 'the Act of 1978'). The position of law that a high school or an intermediate college, which is an institution governed by the Act of 1971, would be regarded as an integral whole and the teachers of its attached primary section, if part of that whole or as it is described in **Jai Ram Singh** a 'composite integrality', would entitle the teachers of the primary section to salaries paid out of the Exchequer under the Act of 1971, has led to the following remarks by this Court in **Jai Ram Singh**:

"76. The expression "institution" has been defined under this enactment to mean a recognised institution which is

receiving a maintenance grant from the State Government. The word "recognition" is defined under the 1921 Act to mean recognition for the purposes of preparing candidates for admission to the examinations conducted by the Board. On a conjoint reading of these two provisions it would be evident that an institution is contemplated to be one which holds the requisite permission and authority to admit students desirous of taking the examinations conducted by the Board and is in receipt of a maintenance grant. Undisputedly primary sections in this batch which form part of a high school or intermediate institution are claimed to be an integral part of institutions which are receiving maintenance grant for the high school and intermediate sections and have also been authorised by the Board to admit students who seek to take the exams conducted by it. The issue essentially would be whether the mere fact that the primary sections of such institutions do not receive a maintenance grant would take them outside the ambit of the 1971 Act.

77. In the considered view of this Court, the expression "institution" as used in the 1971 Act is not liable to be understood or interpreted in the manner suggested. Firstly and on a consideration of the plain language as employed, any institution which is recognised and in receipt of maintenance grant is covered. It would, therefore, on fundamental principles be incorrect to deconstruct that provision by way of an interpretational exercise to mean that part of an institution which is in receipt of financial aid. Secondly the expression "institution" must be viewed as having been used in a compendious manner. This would clearly be reasonable and logical since merely because a particular component or section of the institution be not in receipt of financial aid,

would not detract from that institution otherwise being recognised and in receipt of a maintenance grant. Any other manner of interpretation would entail the provision being read as requiring all components and sections of that institution to be in receipt of aid independently in order to fall within the ambit of the statute.

78. It is not disputed that various privately managed high schools and intermediate colleges in receipt of a maintenance grant stand covered and have been extended the benefit of this legislation. If the argument advanced on behalf of the respondents were to be accepted, various privately managed high schools and intermediate colleges receiving a maintenance grant with attached primary sections which may not be in receipt of financial aid from the State may stand removed and exorcised from the 1971 Act.

79. Lastly and as has been held above, this Court is of the considered view that the word "institution" must necessarily be understood as an amalgam and a compound made up of various homogenous components. This path would be in line with the reasoning underlying Vinod Sharma I and III as well Pawan Kumar Dwivedi. Viewed from the above angles it is evident that merely because an unaided primary section attached to a high school or intermediate college which is recognised and in receipt of a maintenance grant, is not in receipt of financial aid from the State, it would not stand placed outside the scope and ambit of the 1971 Act. Any other construction would lead not only to an anomalous situation, it would lead to the statute itself being rendered discriminatory and unconstitutional. It was this very aspect which was frowned upon in Pawan Kumar Dwivedi albeit with reference to the provisions of the 1978 Act.

80. In light of the construction accorded to Section 2 (b) by the Court, it is manifest that a primary section which is a homogenous part of a recognised and aided high school or intermediate institution would fall within the ambit of the 1971 Act. Secondly such a primary section viewed in light of the principle of composite integrality as propounded herein above cannot be understood to be a separate or distinct component. It would, irrespective of the fact that it may not be in receipt of a maintenance grant, remain an integral component of that institution. The teachers of such a primary section cannot therefore be denied the protection of the 1971 Act."

(emphasis by Court)

21. The conclusions summarized in **Jai Ram Singh**, those that are relevant to the issue here, read:

"A. An order of attachment has not been established to have any statutory backing. At least no provision, statutory or otherwise, has been referred to evidence a legal imperative of such an order existing in favour of an institution as a pre condition for it being viewed as one unit.

B. Whether a particular institution fulfills the tests formulated in Vinod Sharma-I would be an issue of fact to be determined in respect of each individual institution. While an institution may be made up of various sections or compartments its oneness would have to be tested on the principles of composite integrality as evolved in this decision. In order to meet the test of composite integrality, it must be established that the institution exists as an amalgam of various components indelibly fused together to constitute a singular whole. The requirement of a common campus cannot

be recognised as a determinative factor. The issue of composite integrality would have to be answered upon a cumulative consideration of all relevant factors.

C. Clause 1 of the Government Order dated 27 October 2016 of the State restricting the grant of financial aid to 2055 localities which remain unserved in the first instance is not found to be arbitrary or irrational. However, the further condition imposed alongwith the above stipulation and restricting financial aid only to such institutions in these localities which were established prior to 21 June 1973 is irrational and unsustainable.

D. Both Clauses 1.1 and 1.2 of the Government Order dated 27 October 2016 are liable to be struck down as being wholly perverse and violative of Article 14 of the Constitution.

E. Vinod Sharma-I, II, III and Pawan Kumar Dwivedi do not principally rest upon a construction of the provisions of the statutory enactments applicable. The core principle deducible from these decisions is that all teachers of an attached primary section which constitutes an integral and composite component of the institution as a whole cannot be discriminated against or denied the protection of the 1971 and 1978 Acts per se. These decisions recognised the rights of such teachers traceable to Article 14 of the Constitution.

F. The expression "institution" as defined under the 1971 Act does not exclude a primary section which meets the test of composite integrality with a High School or Intermediate college. The contention that the benefit of the 1971 Act can only apply if all sections of a composite institution are in receipt of financial aid is negated. Teachers of primary sections attached to High Schools and Intermediate colleges, notwithstanding

the fact that the said section is not in receipt of financial aid, would be entitled to the benefit of the 1971 Act."

22. It would also be relevant in the context of the issue here to refer to the order that was made in **Jai Ram Singh**:

"94. Clause 1 of the Government Order dated 27 October 2016 to the extent of prescribing the cut off date of 21 June 1973 as well as Clauses 1.1 and 1.2 thereof are struck down as being as arbitrary and wholly irrational. The State shall in consequence revisit and reframe the impugned Policy in light of the observations made in this judgment. The orders of 13 July 2017 insofar as they defer reconsideration for a period of five years consequentially stand set aside to that extent.

95. Writ Petitions in Group A insofar as they relate to primary sections attached to recognised and aided high schools or intermediate colleges covered by the provisions of the 1971 Act cannot be denied the protection of that statute. The petitions in this group falling under the aforesaid class shall stand allowed. The State is consequently directed to bring teachers falling in this class within the ambit of the 1971 Act subject to the requisite exercise being undertaken to assess that they satisfy the test of composite integrality.

96. Writ Petitions in Group A relating to primary sections attached to junior high schools are not covered under the provisions of the 1978 Act. No relief can be granted to them in light of the 2017 Amendments. The petitions preferred at their instance shall stand disposed of subject to liberty being reserved to challenge the 2017 Amendments as

introduced in the 1972 and 1978 Acts, if so chosen and advised.

97. Writ Petitions falling in Group B are allowed. The State shall in consequence reconsider their claims for grant in aid in light of the policy that may be framed in light of the directions issued herein above.

While Writ Petitions falling in Group C to the extent that they assailed the Government Order dated 27 October 2016 are disposed of in light of the directions issued above, no further consequential relief can be granted presently in their favour in the absence of a challenge to the 2017 Amendments introduced in the 1972 and 1978 Acts. Their right to assail these amendments is preserved to be raised in independent proceedings. Similarly writ petitions falling in group 'D' stand disposed of insofar as the challenge to the impugned Government Orders are concerned. The unaided primary sections thereof cannot be granted any relief in the absence of a challenge to the 2017 Amending Acts. Their right to assail the same is preserved. The junior high schools in this group shall however be entitled to assert their claims afresh for grant in aid in light of the conclusions recorded in the body of the judgment.”

23. The holding in sub-paragraphs A, B, C, D, E and F of the conclusions in **Jai Ram Singh** and the orders made with regard to the attached primary sections of recognized and aided high schools or intermediate colleges, do not spare a shadow of doubt that the attached primary section of an intermediate college, like the Institution, cannot be denied grant-in-aid, subject to satisfaction of the test of 'composite integrality'. The fact that the attached primary section of the Institution is an integral part of it, has not been

seriously disputed by the respondents. Rather, it has not been disputed at all. In the day when the order of this Court was set aside by the Division Bench in Special Appeal Defective No.1193 of 2013, there was insistence by the State, almost with reverence about the cut-off date, on which permission was granted for attachment to the primary section of an institution, be it a high school or an intermediate college or a junior high school. The only difference in the policy carried in the Government Orders dated 06.09.1989 and 01.10.1989 on one hand, and the one carried in the Government Order dated 27.10.2016 on other, was that whereas under the Government Orders of 1989, the cut-off date for permitting attachment or more than that submitting compensation statements in regard to grant for the attached primary sections of intermediate colleges was 01.04.1971, under the Government Order dated 27.10.2016, the policy spelt out the date for passing an order of attachment as 21.06.1973.

24. There was a further requirement in the Government Orders of 1989 for granting permanent recognition to the attached primary section and Classes 1 to 8 together, which would virtually work out to a unified permission for the primary section and classes up to the 8th by a single order. This policy was also revised, as already noticed more than once, in terms of the Government Order dated 27.10.2016 pursuant to a command of the Division Bench of this Court in Special Appeal Defective No.994 of 2014, bearing in mind the great constitutional and seminal changes that had come about in consequence of introduction of a new and named fundamental right under Article 21-A of the Constitution, providing for a right to free and compulsory education to

children in the age-group of 6-14 years, the enactment of the Act of 2009 to give effect to the fundamental right and so on. But, the revised policy carried in the Government Order dated 27.10.2016 did no more than bring about cosmetic changes. It altered the cut-off date from 01.04.1971 to 21.06.1973, prior to which affiliation to the attached primary section ought have been granted to the primary section of an attached junior high school, high school or intermediate college. The condition regarding the attached primary section receiving permanent recognition from Classes 1 to 8 together or by a single order was also retained. The retention of these conditions about a cut-off date for grant of affiliation by the District Inspector of Schools and recognition for Classes 1 to 8 together by a single order was really an old wine in a new bottle. It did little to change and adjust to the measurably enlarged dimensions of the right to free and compulsory education for children in the age-group of 6-14 years, in consequence of introduction of Article 21-A in Chapter III of the Constitution, the enactment of the Act of 2009, and, above all, the way the right was linked to Article 14 of the Constitution by the holding of the Constitution Bench in **Pawan Kumar Divedi** (*supra*). It was for these reasons and all others assigned in **Jai Ram Singh** that Clauses 1, 1.1 and 1.2 of the Government Order dated 27.10.2016 were struck down as arbitrary and irrational by this Court, and, more than that, what was emphasized by this Court was the concept of 'institutional integrality' of the attached primary section with the higher section or part of the institution to entitle the primary section to grant-in-aid under the Act of 1971. Indeed, the right of a child in the decisive age-group of 6-14 years would remain illusory if artifices, such as a cut-off

date for the grant of affiliation or recognition by the District Inspector of Schools to the attached primary section, introduced through an executive order of the Government, were allowed to frustrate that right.

25. So far as the validity of principles laid down or the orders made in **Jai Ram Singh** are concerned, the same have attained finality with the Division Bench of this Court dismissing the two special appeals by the State against the said judgment, being Special Appeal Defective No.1135 of 2019 and Special Appeal Defective No.20 of 2020 vide common judgment and order dated 17.11.2020. The judgment has also been upheld, though not relevant for the purpose of issues involved in this petition, at the instance of teachers, not of attached primary sections of high schools or intermediate colleges, but primary schools or attached primary sections of junior high schools, who were not granted relief, though their rights were acknowledged. In substance, therefore, the law, that has been laid down by Yashwant Varma, J. in **Jai Ram Singh**, appears to be the settled position, contrary to which no binding authority of a later date, or a Larger Bench of our Court or the Supreme Court, has been brought to my notice.

26. Much to the contrary in the affidavits filed on behalf of the State on 19.04.2024, which is a personal affidavit of the Director of Education, U.P., it is averred that in compliance with the judgment and order of this Court passed in the present writ petition on 19.10.2012, since set aside in Special Appeal and following contempt proceedings, grant-in-aid to the attached primary section of the Institution was extended by the State Government by a Government Order dated

09.12.2014. The said Government Order carried a condition that the grant provided to the attached primary section of the Institution would be subject to final result of Special Appeal Defective No.1193 of 2013, that was preferred by the State Government and at the relevant time pending. It is then said in this affidavit that the Special Appeal came to be allowed with a remand to this Court to decide the writ petition afresh on parameters indicated with reference to the then operative policy of the State Government carried in the Government Orders of 1989. But, before the Special Appeal was decided, on 14.09.2017 a Division Bench of this Court in **Paripurna Nand Tripathi** issued directions to the State Government to revise its old policy of 1989 with regard to the extension of maintenance grant to the attached primary sections of junior high schools, high schools and intermediate institutions. Accordingly, the Government re-formulated their policy, which was embodied in the Government Order dated 27.10.2016. It then held field about how and on what parameters grant-in-aid was to be extended to the attached primary sections of intermediate colleges etc. This Government Order dated 27.10.2016, and a fortiori the revised policy, was struck down by this Court in **Jai Ram Singh**. It is fairly acknowledged in the affidavit filed by the Director of Education vide paragraph No.11 that the conditions mentioned in the Government Orders of 1989, marked (a) and (b) by the Division Bench in the order of remand, are no longer in existence, since the new and revised policy brought by the Government was struck down in the material part by this Court in **Jai Ram Singh**. Accordingly, the Government Order dated 09.12.2014, extending grant-in-aid to the Institution was amended on 15.03.2024 to delete that part of the order, which made

the extension of maintenance grant to the attached primary section of the Institution, subject to the result of the Special Appeal. The Government Order dated 15.03.2024 has further directed that the grant extended by the Government Order dated 09.12.2014 would continue perpetually.

27. This Court is, therefore, of opinion that on the right to receive maintenance grant for the attached primary section of the Institution, the Government concede the position of 'composite integrality' as regards the attached primary section. The attached primary section of the Institution would, therefore, clearly be entitled to receive grant-in-aid already provided to them under the Government Order dated 09.12.2014, as amended on 15.03.2024. Since the right of children to receive free and compulsory education, who are in the age-group of 6-14 years, is ultimately the right, that is subject matter of action in this writ petition, we cannot permit the said right to depend upon the mere edifice of an executive order with its inherent vagaries of what is known as policy and the change of which is at times more unpredictable than the weather. The right involved here, which is one belonging to students in the age-group of 6-14 years, must stand on more firm footing. It would require the shadows of the impugned order to be annihilated by this Court out of existence. And, further, a command by us for the continued payment of the maintenance grant to the attached primary section of the Institution.

28. In the result, this writ petition succeeds and is **allowed**. The impugned order dated 17.11.2006 passed by the Director of Education (Secondary), Government of U.P., Lucknow is hereby **quashed**. A *mandamus* is issued to each of

the respondents to provide regular maintenance grant to the attached primary section of the Institution, under the Act of 1971, in the same manner as the high school and intermediate sections.

29. There shall be no order as to costs.

(2024) 9 ILRA 1530

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 26.09.2024

BEFORE

THE HON'BLE MAHESH CHANDRA

TRIPATHI, J.

THE HON'BLE PRASHANT KUMAR, J.

Special Appeal No. 601 of 2024

**Constable No. 118 Awadhes Kumar
Pandey ...Appellant**

Versus

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

Counsel for the Appellant:

Balwant Singh

Counsel for the Respondents:

C.S.C.

A. Service Law – Departmental proceedings – Dismissal - U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Rule 14(1) - Whether the dismissal of petitioner from service pursuant to departmental enquiry was justified?

In a departmental enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials, which are legally probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. The essence of judicial approach is objectivity, exclusion of extraneous materials or considerations and

observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender or independence of judgment vitiate the conclusions reached, such finding even though of a domestic tribunal, cannot be held good. (Para 27)

(i) From brief analysis of the facts of the case, the alleged incident does not inspire confidence at all. The alleged incident is said to have happened at the petitioner's residence. In the departmental enquiry five witnesses were examined. Except Ram Nageena Singh, Sub Inspector, no other witnesses had directly or indirectly supported the occurrence as they were not eye-witnesses. The St.ment of Shri Ram Nageena Singh is also different in the departmental enquiry as well as in criminal trial. One thing is clear that he was not the eye witness of the alleged incident. (Para 26)

(ii) The other charge is of absence of two days from duty. If the absence is due to compelling circumstances under which it is not possible to report or perform duty such absence cannot be held to be willful and employee cannot be held to be guilty of misconduct. (Para 28)

In the instant case, neither Inquiry Officer nor Appellate Authority found absence of appellant wilful. Evidence produced by the appellant to substantiate his claim was ignored by the authorities concerned and on the basis of irrelevant facts and surmises the petitioner was held guilty. (Para 29)

Since the charges on which the punishment was invoked even imposed are taken to be correct, what is now left at this belated stage to be considered and examined is, as to whether the punishment imposed was commensurate with the said charges or not. (Para 30)

B. Jurisdiction – Irrationality and perversity are recognised grounds of judicial review. The High Court normally does not interfere with the quantum of

punishment unless the punishment shocks the conscience of the Court.

Normally, it is the disciplinary authority, which should be best left with the duty of imposing the punishment after considering the facts and circumstances of the case. However, it is well settled that in case, if on the admitted facts, the punishment imposed is grossly disproportionate to the offence, which shocks the conscience of the Court, the Court has the power and jurisdiction to interfere with the punishment imposed. (Para 32)

In the facts and circumstances of the case, the punishment is found to be disproportionate and unjustified. (Para 33)

C. On the facts of the case, what is the effect of acquittal order passed by the trial court in a criminal trial, whereby the petitioner was acquitted?

Once the termination order is set aside, the natural consequence is that the employee should be taken back in service and thereafter proceeded with as per the directions. Once the termination order is set aside, then the employee is deemed to be in service. (Para 38)

The acquittal in criminal proceeding was after full consideration of prosecution witnesses and prosecution miserably failed to prove the charge and the same can easily be arrived at after reading of judgment in entirety. After examining the factual position, which emerges from the criminal proceeding, it is found that the same witnesses were examined in departmental enquiry, who were examined in the criminal trial. The trial court had acquitted the petitioner-appellant after examining all the prosecution witnesses. (Para 36)

The petitioner- appellant was honorably acquitted. The disciplinary proceeding and the orders passed thereon cannot be allowed to stand. The charges were not just the same but identical and the evidence, witnesses and circumstances were all the same. Merely on the basis of two days absence, that so due to ailment, no such major penalty can be inflicted. (Para 37)

D. Words and Phrases – "honourable acquittal" - The expressions 'honourable acquittal', 'acquitted of blame' and 'fully exonerated' are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression 'honourably acquitted'. **When the accused is acquitted after full consideration of prosecution case and the prosecution miserably fails to prove the charges leveled against the accused, it can possibly be said that the accused was honourably acquitted.** (Para 35)

The orders passed by the disciplinary authority, appellate and revisional authority as well as the judgment passed by the learned Single Judge are not sustainable and the same are accordingly set aside. Consequently, the petitioner-appellant is entitled for reinstatement. (Para 40)

As the matter is old, at this stage, matter has not been remitted to the authority concerned. Since the petitioner's counsel has not stated on affidavit as to whether the petitioner-appellant was gainfully working somewhere else or not, petitioner has not been accorded full back wages. The petitioner- appellant is entitled for 25% back wages.

Special appeal allowed. (E-4)

Precedent followed:

1. Ram Lal Vs St. of Raj. & ors., (2024) 1 SCC 175 (Para 13)
2. Deputy Inspector General of Police & anr.Vs S. Samuthiram, AIR 2013 SC 14 (Para 13)
3. St. of Har. & anr.Vs Ved Kaur, (2017) 6 SCC 796 (Para 13)
4. Captain M. Paul Anthony Vs Bharat Gold Mines Ltd. & ors., (1999) 3 SCC 679 (Para 18)
5. G.M. Tank Vs St. of Guj. & ors., 2006 (5) SCC 446 (Para 19)
6. Krushnakant B. Parmar Vs U.O.I. & anr, (2012) 3 SCC 178 (Para 28)

7. Ranjit Thakur Vs U.O.I. & ors., AIR 1987 SC 2386 (Para 31)

8. Suresh Kumar Tiwari Vs D.I.G., P.A.C. & anr., 2001 (4) AWC 2630 (Para 32)

9. Commissioner of Police, New Delhi & anr. Vs Mehar Singh, (2013) 7 SCC 685 (Para 35)

10. Anantdeep Singh Vs The High Court of Punjab & Haryana at Chandigarh & anr., Misc. Application No. 267 of 2024 in Civil Appeal No. 3082 of 2022 dated 06.09.2024 (Para 38)

11. Kalp Nath Rai Vs S.S.P. & ors., Special Appeal No. 88 of 2013, dated 19.12.2016 (Para 39)

Present special appeal assails the validity of the impugned judgment and order dated 19.10.2023, passed by the learned Single Judge in Writ-A No. 40893 of 2010.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.

&

Hon'ble Prashant Kumar, J.)

1. Heard Shri Umesh Vats, learned counsel assisted by Shri Balwant Singh, learned counsel for the petitioner-appellant and Shri Ratan Deep Mishra, learned Standing Counsel along with Shri Piyush Shukla, learned Standing Counsel for the State respondents

2. Present special appeal has been preferred assailing the validity of the impugned judgment and order dated 19.10.2023 passed by the learned Single Judge in Writ-A No.40893 of 2010 (Const. No.118 Awadhesh Kumar Pandey v. State of U.P. & Ors.), which, for ready reference, is reproduced in entirety as under:-

"1. Heard Shri Rajesh Nath Tripathi, learned counsel for the petitioner and Shri Girijesh Kumar Tripathi, learned standing counsel for the State respondents.

2. This writ petition has been preferred for seeking quashing of the impugned orders dated 10.5.2009, 10.9.2009 and 10.5.2010 passed by respondent nos. 2,3 and 4 respectively through which the services of the petitioner has been terminated.

3. It is the case of the petitioner that he was duly selected and appointed as Constable in Civil police and was posted at police station Bakhira District Sant Kabir Nagar. On 12.9.2008, the petitioner was assigned special duty and attached with Circle officer, Mehdawal and when he was relieved from the special duty by the Circle Officer, Mehdawal he fallen ill and came for taking bed rest at his rented accommodation, where some altercation took place between the petitioner and his landlord and at the same time Additional Superintendent of Police (A.S.P) Sant Kabir Nagar was passing and seen the crowd near the house of the petitioner, he stopped there and on wrong information that was given by some person against the petitioner that he was having illicit relationship with a women, the A.S.P, directed to arrest the petitioner and that women also and a case was registered bearing case crime no.2158 of 2008 under Section 294 I.P.C in police station Kotwali Khalilabad, District Sant Kabir Nagar. The petitioner was released on bail on the very next date as there was not a single person of public or nearby locality to support the prosecution version of the F.I.R. Chargesheet dated 18.11.2008 was forwarded and filed in the court on 11.12.1988 and after taking cognizance, Criminal Case No.6478 of 2008 was registered between State of U.P. vs. Awadhesh Pandey under Section 294 IPC before the court of Chief Judicial Magistrate, District Sant Kabir Nagar but as the A.S.P. was annoyed with the petitioner,

he was suspended the petitioner on 23.9.2008 and after considering the reply submitted by the petitioner, he was reinstated in service with effect from 29.11.2008 and continued on duty till his dismissal from service on 10.5.2009. After registration of the first information report, a disciplinary proceedings were also initiated against the petitioner and served with a show cause notice also. Petitioner submitted his written reply on 6.11.2008 and also prayed to produce two witnesses namely Shri Vinod Rai and Arendra Rai in defence of his case but the same was not accepted by the Enquiry Officer and submitted enquiry report dated 19.4.2009. Respondent No.2 had again issued show cause notice on 22.4.2009 granting fifteen days time to file his reply to the enquiry report. Since the petitioner was suffering from hypertension w.e.f. 20.4.2008 to 10.5.2009 hence he could not appear personally before the Superintendent of Police. Petitioner sent his explanation dated 8.5.2009 by Blaze Courier Ltd, which was received in the office of Superintendent of Police on the same dated i.e, 8.5.2009. Respondent no.2 thereafter passed an order of dismissal from service on 10.5.2009 totally ignoring the detailed reply of the petitioner dated 8.5.2009.

4. Against the order of dismissal dated 10.5.2009, petitioner preferred an appeal before Deputy Inspector General of Police, Basti Region (respondent no.3) alongwith his medical certificate showing that he was continuously ill w.e.f. 20.4.2008 to 10.5.2009. Respondent no.3 dismissed the appeal of the petitioner on 10.9.2009, copy of which had been served upon the petitioner on 17.9.2009.

5. Being aggrieved with the order of the appellate authority, petitioner preferred writ dated 10.9.2009 before this Court being Civil Misc. Writ Petition

No.69680 of 2009. The writ petition too was dismissed on 22.12.009 on the ground of alternative remedy of filing revision under Rule 23 of Rules of 1901. Thereafter petitioner preferred revision before the revisional authority. Revision of the petitioner was also dismissed on the ground of delay in filing the revision.

6. Learned counsel for the petitioner submitted that the petitioner did not commit any misconduct as alleged by the disciplinary authority and the said misconduct was not supported by any evidence and the enquiry officer without appreciating the evidence and without enquiring the said misconduct by any independent witnesses, passed the order of dismissal from service. Learned counsel for the petitioner further submitted that if the said incident is true, the same was not committed by the petitioner during duty period and the said alleged incident committed by him at his private residence which is not a misconduct in performing his duties. The petitioner has also been acquitted in case crime no.2158 of 2008 under Section 294 I.P.C on the basis of which the services of the petitioner were terminated. The departmental appeal preferred by the petitioner was dismissed without providing any information of date and hearing and as such the orders impugned are illegal and the same may be set aside.

7. In support of his submissions, learned counsel for the petitioner relied upon the judgments of Coordinate Bench of this Court passed in Basistha Muni Mishra vs. Union of India [2023 (6) ADJ 704] and Indra Kumar (Ex-Constable) vs. Union of India [2023 (5) ADJ 57 (LB)]. In addition to the aforesaid judgments, learned counsel for the petitioner had also relied upon the judgment of Kedar Nath Yadav vs. State of Uttar Pradesh, Laws (All) 2005 (5) 286 as

well as *M. Paul Anthony Capt vs. Bharat Gold Mines Ltd*, 1999 Law Suit (SC) 379.

8. *Per contra*, learned standing counsel opposed the prayer as made in the petition and submitted that the petitioner was awarded punishment of dismissal from service on the basis of departmental proceedings carried out against him for committing negligence and carelessness in performing duty as he did not record his returning in police station Bakhira on 21.9.2008 and because of his unauthorised absence alongwith his government rifle and 20 units of bullets, he was arrested red handed alongwith a women and said F.I.R was lodged against him. He further submitted that during the course of enquiry, neither the petitioner produced any evidence in his defence nor examined any witnesses in his favour after having being given so many opportunities of hearing.

9. Learned standing counsel placed reliance upon the judgment passed in *Imtiyaz Ahmad Malla vs. State of Jammu & Kashmir and others* [SLP (C) No. 678 of 2021] and submitted that a terminated employee cannot be reinstated in service only because of his acquittal in criminal proceedings.

10. After having the rival submissions as extended by learned counsel for both the parties and perusal of the records as well as the judgments relied upon, the Court finds that the services of the petitioner were terminated on the basis of departmental proceedings, not at the behest of criminal proceedings in which the petitioner was ultimately acquitted. The departmental proceedings were conducted on the ground that the petitioner had not complied with the order of his senior and without informing the department, he was absent from duty with his government rifle and 20 units of bullets and the said

proceedings were culminated into termination from service of the petitioner as he was found guilty under the provisions of Police Officers of Subordinate Ranks (Punishment & Appeal) Rules, 1991 and as such, the criminal proceedings initiated against the petitioner under Section 294 IPC is not identical with the departmental proceedings.

11. In the case of *Imtiyaz Ahmad Malla (Supra)*, the Hon'ble Supreme Court held that if a persons is acquitted or discharged, it cannot obviously be inferred that he was falsely involved, or he had no criminal antecedents and it does not entitle an employee to the reinstatement in service.

12. In another case, namely, *The State of Rajasthan and others vs. Phool Singh* (Civil Appeal No.5930 of 2022, dated 2.9.2022), the Apex Court has taken a different view with the order passed in *Capt. M. Paul Anthony (Supra)* and held that a terminated employee cannot be reinstated in service because of his acquittal in criminal proceedings.

13. The departmental proceeding were conducted against the petitioner in accordance with procedure and law and the charges leveled against him, were found proved thereafter, the petitioner had been terminated from service and as such the orders impugned are perfectly just and legal.

14. In view of the aforesaid facts and circumstances, the present petition lacks merit and is accordingly dismissed."

FACTS

3. The petitioner-appellant was a Constable in Civil Police, U.P. and at the relevant point of time he was posted at the Police Station Bakhira, Distt. Sant Kabir Nagar. The petitioner was assigned the special duty and was attached with the

Circle Officer, Mehdawal. As the Circle Officer, Mehdawal was assigned Special VVIP duty at Kanpur Nagar, he had relieved the petitioner and directed him to join back his duties at the Police Station Bakhira. It is claimed that while returning from the duty of Circle Officer on 21.09.2008, the petitioner had suddenly suffered from high fever, acute headache and severe body pain and as such he could not report on duty on 21.09.2008. He was compelled to take rest at his rented accommodation at Village Vidhiyani, P.S. Kotwali, Khalilabad.

4. It is claimed that on 23.09.2008 some of his friends and closed relatives had come to his house to inquire about his well being. Meanwhile, some altercation has erupted between his friends and the son of his landlord and the crowd had also gathered. At that point of time, Smt. Kaushilya Devi, the domestic maid had also reached there. However, the Addl. Superintendent of Police, Sant Kabir Nagar, was also passing nearby on his official jeep, upon hearing the noise stopped there. It is alleged that some miscreants had falsely informed the Addl. Superintendent of Police that the petitioner had illicit relationship with his maid and some of them had also seen them in an obscene situation as the door of the house was open. Thereupon, the Addl. Superintendent of Police, being annoyed, immediately sent wireless message to local police Chowki and directed arrest of the petitioner. Thereafter, the police had reached there and arrested the petitioner and Smt. Kaushilya Devi and a First Information Report being Case Crime No.2158 of 2008 was registered under Section 294 IPC at P.S. Kotwali, Khalilabad. The petitioner was suspended on the same day on 23.09.2008 and the

departmental enquiry was initiated, wherein he had filed his written statement and after considering his reply, the petitioner was reinstated on 29.11.2008. Though in the criminal proceeding he has been honorably acquitted but in the departmental enquiry he was found guilty, consequently he was dismissed from the services on 10.05.2009. The appeal and revision were also rejected giving rise to the writ petition in question, which was dismissed by the order impugned, hence this appeal.

**SUBMISSIONS OF LEARNED
COUNSEL FOR THE PETITIONER-
APPELLANT**

5. Shri Umesh Vats, learned counsel for the petitioner-appellant has vehemently submitted that learned Single Judge has erred in law in dismissing the writ petition without considering the facts of the instant matter. There is an error apparent on the face of record and dismissal of the writ petition is based on surmises and conjectures. The petitioner did not commit any of the misconduct alleged by the disciplinary authority and even the alleged misconduct was not supported by any evidence either documentary or oral in the departmental enquiry. In most arbitrary manner, the enquiry officer, while submitting enquiry report, had proposed punishment of dismissal from service. In the disciplinary proceedings, two charges were levelled against the petitioner. The first charge related to absence from duty for two days without information and the second charge related to criminal case registered against the petitioner under Section 294 IPC. Only on the basis of said charges the petitioner was terminated from service on the ground of misconduct. Though in criminal proceeding after adducing the evidence and examination of all the prosecution

witnesses, the trial court had acquitted the petitioner honorably. Even the said charge does not fall under the category of misconduct, whereby major punishment could be inflicted upon the petitioner.

6. Shri Vats further submitted that mere acquittal in criminal proceeding although does not confer any indefeasible right to an employee to claim benefit including reinstatement. However, where charges in departmental enquiry and criminal matter are identical; evidence, witnesses and circumstances are also the same; where the court in exercise of judicial review finds that the acquittal in criminal proceeding was after full consideration of prosecution witnesses and prosecution miserably failed to prove the charges, the Court can interfere with the order passed by the disciplinary authority, where the finding of disciplinary authority are found to be unjust, unfair and oppressive.

7. He next submitted that in the instant matter even in the departmental enquiry six witnesses were examined. All the witnesses of Police Department admitted that they were not the witnesses of alleged incident except witness no.4 i.e. Sub-Inspector Ram Nageena Singh, who was Chowki Incharge. In his statement, he had stated that he had received information from one informer that the petitioner was indulged in some obscene activity with one lady in his house. Crowd of passerby gathered there and there were indignation amongst them. For ready reference, the version of Ram Nageena Singh in the departmental enquiry, is reproduced as under:-

"उप निरीक्षक श्री राम नगीना सिंह प्रभारी चौकी कानूनगो पुरा थाना कोतवाली नगर जनपद बहराइच ने सशपथ बयान

किया कि मैं दिनांक 13-03-2008 से 02-11-2008 तक थाना कोतवाली खलीलाबाद में नियुक्त रहा उक्त दौरान दिनांक 10-06-2008 से बतौर प्रभारी चौकी गोला बाजार नियुक्त रहा उसी दौरान दिनांक 23-09-2008 को मैं अभि० एच० जी० रामदरश यादव को साथ लेकर वगरज विवेचना चौकी क्षेत्र में मौजूद रहा कि उसी दौरान जरिये मुखविर सूचना मिली कि मुहल्ला विधियानी में अपने क्वार्टर में का० अवधेश पाण्डेय जो बखिरा थाने में तैनात है एक महिला के साथ अश्लील हरकत कर रहे, है तथा सार्वजनिक रास्ते से आने जाने वालों की काफी भीड़ लगी है तथा लोगों में काफी क्षोभ है इस सूचना पर विश्वास करके हमराही एच० जी० को साथ लेकर मौके पर पहुँचा तथा अश्लील हरकत व भीड़भाड़ को देखकर उक्त आरक्षी व उस महिला को पकड़ा गया जिसने पूछताछ पर उक्त महिला से अपना नाम कौशिल्या पत्नी सिद्धनाथ निवासी प्रजापतिपुर थाना घनघटा जनपद संत कबीर नगर बताया। उक्त महिला को महिला का० अमरावती दूबे के साथ लेकर गिरफ्तारी की गयी थी तथा उक्त दोनों व्यक्तियों का० अवधेश पाण्डेय व कौशिल्या देवी के विरुद्ध आ० स० 2158 / 2008 धारा 294 आई० पी० सी० थाना खलीलाबाद पर पंजीकृत कराया गया था।"

8. Learned counsel for the petitioner submitted that the aforesaid statement is unreliable as he was not the witness of the said incident. He had also appeared in the criminal case as prosecution witness, wherein in cross-examination he had made a statement that when he reached there, the petitioner was sitting in the north side of his room and the lady was sitting in south. For ready reference, the statement of PW-4 in the criminal trial is also reproduced as under:-

"अभियोजन पक्ष से परीक्षित साक्षी पी०डब्लू०-4 राम नगीना सिंह, जिनके द्वारा अभियुक्तगण को मौके से गिरफ्तार करना कहा गया है, ने अपने प्रतिपरीक्षा बयान में यह कथन किया है कि-"अवधेश पाण्डेय अपने कमरे में किस चीज पर बैठे थे, याद नहीं है। वह मकान/कमरे में बैठे थे। याद नहीं है। यह मकान / कमरे में दरवाजे के सामने उत्तर साईड में बैठे थे, महिला दरवाजे के सामने दक्षिण तरफ बैठी थी। दरवाजे पर ये लोग थे जो अन्दर दरवाजे से सटे थे, वहीं से गिरफ्तार कर लिया।" जबकि साक्षी द्वारा अपने मौखिक मुख्य परीक्षा बयान में यह कथन किया गया है कि इन दोनों को अश्लील हरकत देखकर खुले दरवाजे से होकर दोनों को टोका

गया। इस प्रकार साक्षी पी० डब्लू०-४ राम नगीना सिंह के मौखिक मुख्य परीक्षा बयान एवं प्रति परीक्षा बयान में विरोधाभास होना प्रतीत होता है। जहाँ एक ओर साक्षी पी० डब्लू०-४ राम नगीना सिंह द्वारा अपने मौखिक मुख्य परीक्षा में कथन किया गया है कि अभियुक्तगण कमरे में अश्लील हरकत कर रहे थे, जिससे काफी भीड़ इकट्ठा हो गयी थी तथा आने जाने वाले लोगों में क्षोभ व्याप्त हो गया था, वहीं साक्षी पी० डब्लू०-४ राम नगीना सिंह ने अपने प्रति परीक्षा बयान में यह कथन किया है कि अवधेश पाण्डेय कमरे में उत्तर तथा महिला दक्षिण तरफ बैठी थी। इन लोगों के मुँह से कुछ कहते हुए नहीं सुना था। साक्षी पी० डब्लू०-४ राम नगीना सिंह द्वारा अपने मौखिक बयान में ऐसा कोई कथन नहीं किया गया है जिससे इस तथ्य की पुष्टि होती हो कि अभियुक्तगण द्वारा कमरे के अन्दर ऐसी हरकत की जा रही थी जो कि अश्लीलता की परिधि में आती है।"

9. In this backdrop, he vehemently submitted that bare perusal of the statement of Ram Negeena Singh in departmental proceeding as well as in criminal proceeding shows two different versions, therefore, the same is unreliable. The enquiry officer has heavily relied upon the statement made by Ram Nageena Singh in the departmental proceeding and merely on the basis of said statement not only submitted enquiry report but also recommended for dismissal of petitioner-appellant from service. He submitted that during criminal trial each and every evidence and prosecution witnesses were examined and the Chief Judicial Magistrate, Sant Kabir Nagar acquitted the petitioner honorably on 18.04.2017.

10. Learned counsel for the petitioner, in support of his submissions, has also placed reliance upon Regulation 492 of U.P. Police Regulations¹, which deals with judicial trial of police officer. The said Regulation provides that whenever a police officer has been judicially tried, the Superintendent must await the decision of the judicial appeal, if any, before deciding whether further departmental action is

necessary. He submits that the simple language of provision shows that where a Police Officer has been tried judicially and only the judgment is awaited, in such circumstances and in interregnum period, the competent authority should not decide to take further departmental proceedings but should await the decision.

11. He has also placed reliance on Regulation 493 of the Regulations, which provides that it will not be permissible for the Superintendent of Police in the course of a departmental proceeding against a Police Officer, who has been tried judicially to re-examine the truth of any facts in issue at his judicial trial, and the finding of the Court on these facts must be taken as final. If the accused has been judicially acquitted or discharged, and the period for filing an appeal has elapsed and/or no appeal has been filed, the Superintendent of Police must at once reinstate him, if he has been suspended, but the findings of the Court not be inconsistent with the view that the accused has been guilty of negligence in, or unfitness for the discharge of his duty within the meaning of Section 7 of the Police Act, the Superintendent of Police may refer the matter to the Deputy Inspector-General of Police and ask for permission to try the accused departmentally for such negligence or unfitness.

12. He assertively submitted that in the instant matter initially the petitioner was placed under suspension on 23.09.2008 and after considering his reply/ response he was reinstated in service by the competent authority w.e.f. 29.11.2008 and he continued on duty till his dismissal w.e.f. 10.05.2009. In this backdrop, he submitted that the suspension was earlier revoked and he was reinstated in service as the

misconduct was not such grave, which could inflict major punishment. He submitted that the instant matter, it is not a case, wherein the trial court has acquitted the petitioner giving the benefit of doubt but contrarily it had honorably acquitted the petitioner. In such situation, the only misconduct, which remains is the two days absence from duty. He vehemently submitted that in the facts and circumstances of the case the punishment imposed was shockingly disproportionate to the charges proved.

13. Lastly he has placed reliance on Rule 14 (1) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991², which deals with the procedure for conducting departmental proceedings against the police officers. He submitted that the enquiry officer may for sufficient reasons to be recorded in writing refuse to call a witness. The proceeding shall contain sufficient record of evidence and statement of findings and grounds thereof. The enquiry officer may recommend punishment but it should be separate from these proceeding. In the instant matter, initially in an arbitrary manner while submitting report, the Enquiry Officer had recommended for dismissal, which is unsustainable. It is submitted that in an arbitrary manner the appeal and revision had also been rejected. In support of his submissions, he has placed reliance upon the judgments passed by Hon'ble Apex Court in **Ram Lal v. State of Rajasthan & Ors.**³, **Deputy Inspector General of Police & Anr. v. S. Samuthiram**⁴, **State of Haryana & Anr. v. Ved Kaur**⁵.

**ARGUMENT OF LEARNED
STANDING COUNSEL ON BEHALF
OF RESPONDENTS**

14. Per contra, Shri Ratan Deep Mishra, learned Standing Counsel has vehemently opposed the special appeal. He submitted that the petitioner belongs to a disciplined force and the impugned punishment order for dismissal has been passed strictly in accordance with law after following the due procedure and giving opportunity of being heard and as such learned Single Judge has rightly proceeded to decline to interfere in the matter and dismissed the writ petition.

15. He further submitted that the punishment inflicted upon the petitioner is commensurate to the charges found proved by the Disciplinary Authority. Hence no interference is required in the order of punishment as upheld by learned Single Judge.

ANALYSIS

16. Heard rival submissions, perused the record and respectfully considered the judgments cited at Bar.

17. In the instant matter, heavy reliance has been placed upon the honorable acquittal of the petitioner-appellant by the trial court. There is no bar of holding disciplinary proceeding during the pendency of trial though basis may be one and the same. The enquiry officer can come to the different conclusion that what arrived at by the criminal court and it is immaterial whether charges were identical or witnesses were same. The power exercised by criminal court and the enquiry officer under the relevant law and the service law are distinct and separate. But there must be subjective satisfaction of the disciplinary authority to record reasons in writing that it is not reasonably practicable to hold enquiry, which mean that there

must be some material for satisfaction of the Disciplinary Authority not to hold enquiry. The subjective satisfaction of the authorities is to be based on certain objective facts so as to justify dispensation of the enquiry.

18. The Constitution Bench of the Supreme Court in **Captain M. Paul Anthony v. Bharat Gold Mines Ltd. & Ors.**⁶ had held that one of the grounds where departmental proceeding could be kept in abeyance is:

“based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.”

19. In **G.M. Tank v. State of Gujarat & Ors.**⁷, the Supreme Court held that where departmental proceedings and criminal case are based on identical and similar set of facts and the charges in a departmental case against the applicant and the charges before the Criminal Court are one and the same in which case, the departmental proceedings would be stayed till the disposal of the criminal case.

20. We are conscious that in the departmental proceedings power under Article 226/227 of the Constitution is very limited and in the disciplinary proceedings, the High Court is not and cannot act as a second Court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The Court has to see whether the enquiry is held by the

competent authority and its conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such a conclusion and also to see whether the disciplinary authority had erroneously failed to admit admissible and material evidence. The Court can also see whether the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding and whether the finding of fact is based on any or no evidence.

21. In the instant matter the most glaring fact is that the petitioner-appellant was staying at his own residence. It is alleged that he indulged in some obscene act with the lady and as the door was open the passerby had seen the such incident. The police officials had reached later on. Merely on the basis of statement of Ram Nageena Singh, Sub Inspector, major punishment was inflicted upon the petitioner-appellant, whereas Ram Nageena Singh has given entirely different version before the criminal court. Even in the criminal proceeding the trial court had examined all the five prosecution witnesses and honorably acquitted the petitioner.

22. In the instant matter, there were identical allegations in both the proceedings. Five witnesses were examined in the departmental proceeding and similarly they were also examined in the criminal trial. The enquiry officer in the departmental proceeding found charges proved against the petitioner and the disciplinary authority vide order dated 10.05.2009 had dismissed the petitioner from service. The appellate and revisional authority had also dismissed the appeal and revision. Though, on the other hand, after examining all the prosecution witnesses,

the trial court had acquitted the petitioner for the offence under Section 294 IPC.

23. Learned Single Judge vide order dated 19.10.2023 dismissed the writ petition by holding that standard of proof in criminal proceeding and departmental proceeding is different. Learned Single judge found no infirmity in the order of disciplinary authority.

QUESTIONS FOR CONSIDERATION

24. In the instant matter, following two questions arise for consideration:-

(a) Whether the dismissal of petitioner from service pursuant to departmental enquiry was justified

(b) On the facts of the case, what is the effect of acquittal order passed by the trial court in a criminal trial, whereby the petitioner was acquitted.

25. We now proceed to examine both the questions independently.

Question No.1

26. From brief analysis of the facts of the case, we find that the alleged incident does not inspire confidence at all. The alleged incident is said to have happened at the petitioner's residence. In the departmental enquiry five witnesses were examined. Except Ram Nageena Singh, Sub Inspector, no other witnesses had directly or indirectly supported the occurrence as they were not eye-witnesses. The statement of Shri Ram Nageena Singh is also different in the departmental enquiry as well as in criminal trial. One thing is clear that he was not the eye witness of the alleged incident.

27. The other charge is of absence of two days from duty. In a departmental enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials, which are legally probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. The essence of judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender or independence of judgment vitiate the conclusions reached, such finding even though of a domestic tribunal, cannot be held good.

28. Hon'ble Apex Court in **Krushnakant B. Parmar v. Union of India & Anr.**⁸ has held that if the absence is due to compelling circumstances under which it is not possible to report or perform duty such absence cannot be held to be wilful and employee cannot be held to be guilty of misconduct. Paragraphs 17, 18 and 19 of the said judgment, for ready reference, are reproduced as under:-

"17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of

devotion to duty or behaviour unbecoming of a Government servant.

18. In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct.

19. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty."

29. In the instant case, neither Inquiry Officer nor Appellate Authority found absence of appellant willful. Evidence produced by the appellant to substantiate his claim was ignored by the authorities concerned and on the basis of irrelevant facts and surmises the petitioner was held guilty.

30. It is trite law that the High Court normally does not interfere with the quantum of punishment unless the punishment shocks the conscience of the Court. As already noticed above, since the charges on which the punishment was invoked even imposed are taken to be correct, what is now left at this belated stage to be considered and examined is, as to whether the punishment imposed was commensurate with the said charges or not.

31. Hon'ble Apex Court in the case of **Ranjit Thakur v. Union of India and Ors., AIR 1987 SC 2386**, has held that *"the question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the*

sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."

32. In the light of the law laid down by the Apex Court as well as this Court in **Suresh Kumar Tiwari v. D.I.G., P.A.C. and another**⁹, in our view the broad principle, which emerges is that normally, it is the disciplinary authority, which should be best left with the duty of imposing the punishment after considering the facts and circumstances of the case. However, it is well settled that in case, if on the admitted facts, the punishment imposed is grossly disproportionate to the offence, which shocks the conscience of the Court, the Court has the power and jurisdiction to interfere with the punishment imposed.

33. In the facts and circumstances of the case we find that the punishment is disproportionate and unjustified. Accordingly, question no.1 is answered.

Question No.2

34. Before delving upon the second question, it is expedient to note that much emphasis has been laid by the appellant's counsel upon the acquittal of the petitioner being honorable. The term 'honorable

acquittal' has not been defined anywhere in the Code of Criminal Procedure (now Bhartiya Nyay Sanhita).

35. The Hon'ble Apex Court in the case of **Commissioner of Police, New Delhi & Anr. v. Mehar Singh**¹⁰, has observed in para 25 as under:-

“25. The expression ‘honourable acquittal’ was considered by this Court in S. Samuthiram. In that case this Court was concerned with a situation where disciplinary proceedings were initiated against a police officer. Criminal case was pending against him under Section 509 of the IPC and under Section 4 of the Eve-teasing Act. He was acquitted in that case because of the non-examination of key witnesses. There was a serious flaw in the conduct of the criminal case. Two material witnesses turned hostile. Referring to the judgment of this Court in Management of Reserve Bank of India, New Delhi v. Bhopal Singh Panchal[12], where in somewhat similar fact situation, this Court upheld a bank’s action of refusing to reinstate an employee in service on the ground that in the criminal case he was acquitted by giving him benefit of doubt and, therefore, it was not an honourable acquittal, this Court held that the High Court was not justified in setting aside the punishment imposed in departmental proceedings. This Court observed that the expressions ‘honourable acquittal’, ‘acquitted of blame’ and ‘fully exonerated’ are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression ‘honourably acquitted’. This Court expressed that when the accused is acquitted after full consideration of prosecution case and the prosecution

miserably fails to prove the charges leveled against the accused, it can possibly be said that the accused was honourably acquitted.”

(Emphasis supplied)

36. After examining the factual position, which emerges from the criminal proceeding, we find that the same witnesses were examined in departmental enquiry, who were examined in the criminal trial. The trial court had acquitted the petitioner-appellant after examining all the prosecution witnesses. The conclusion is that the acquittal in criminal proceeding was after full consideration of prosecution witnesses and prosecution miserably failed to prove the charge and the same can easily be arrived at after reading of judgment in entirety.

37. We have also carefully perused the judgment of trial court, which is on record, and it can be safely said that the petitioner-appellant was honorably acquitted. We find that the disciplinary proceeding and the orders passed thereon cannot be allowed to stand. The charges were not just the same but identical and the evidence, witnesses and circumstances were all the same. Merely on the basis of two days absence, that so due to ailment, no such major penalty can be inflicted. Accordingly, question no.2 is answered.

ANALYSIS BY THE COURT

38. In a recent judgment, Hon'ble Apex Court in **Anantdeep Singh v. The High Court of Punjab and Haryana at Chandigarh & Anr.**¹¹ has held that once the termination order is set aside, the natural consequence is that the employee should be taken back in service and thereafter proceeded with as per the

directions. Once the termination order is set aside, then the employee is deemed to be in service. For ready reference, para 21 of the said judgment is reproduced as under:-

".....21. Once the termination order is set aside and judgment of the High Court dismissing the writ petition challenging the said termination order has also been set aside, the natural consequence is that the employee should be taken back in service and thereafter proceeded with as per the directions. Once the termination order is set aside then the employee is deemed to be in service. We find no justification in the inaction of the High Court and also the State in not taking back the appellant into service after the order dated 20.04.2022. No decision was taken either by the High Court or by the State of taking back the appellant into service and no decision was made regarding the back wages from the date the termination order had been passed till the date of reinstatement which should be the date of the judgment of this Court. In any case, the appellant was entitled to salary from the date of judgment dated 20.04.2022 till fresh termination order was passed on 02.04.2024. The appellant would thus be entitled to full salary for the above period to be calculated with all benefits admissible treating the appellant to be in continuous service....."

39. The Division Bench of this Court in **Kalp Nath Rai v. S.S.P. & Ors.**¹² has observed as under:-

"....14. The question relating to jurisdiction of the Court in judicial review in a departmental proceeding fell for consideration before Hon'ble the Supreme Court in *M.B.Bijlani v. Union of India and Ors.* reported in (2006) 5 SCC 88 wherein it is held:

"It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi- criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

15. In *Krushnakant B Parmar Vs. Union of India* and another [Civil Appeal No. 2106 of 2012 (arising out of SLP (C) No. 15381 of 2007, decided on 15.2.2012] in a similar circumstances, the Supreme Court in paragraphs Nos. 15 to 22 held as follows:-

"15. In the case of appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour was unbecoming of a Government servant.

16. The question whether 'unauthorised absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful.

18. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

19. In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct.

20. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty.

21. The question relating to jurisdiction of the Court in judicial review in a Departmental proceeding fell for consideration before this Court in *M.B. Bijlani vs. Union of India* and others reported in (2006) 5 SCC 88 wherein this Court held:

"It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi- criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved

like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

22. In the present case, the disciplinary authority failed to prove that the absence from duty was wilful, no such finding has been given by the Inquiry Officer or the Appellate Authority. Though the appellant had taken a specific defence that he was prevented from attending duty by Shri P. Venkateswarlu, DCIO, Palanpur who prevented him to sign the attendance register and also brought on record 11 defence exhibits in support of his defence that he was prevented to sign the attendance register, this includes his letter dated 3rd October, 1995 addressed to Shri K.P. Jain, JD, SIB, Ahmedabad, receipts from STD/PCO office of Telephone calls dated 29th September, 1995, etc. but such defence and evidence were ignored and on the basis of irrelevant fact and surmises the Inquiry Officer held the appellant guilty."

16. A Division Bench of this Court in the case of *Suresh Kumar Tiwari v. D.I.G., P.A.C. and Anr.*, 2001 (4) AWC 2630, 2002 Lab IC 259, has, while reiterating the view of the Supreme Court, held that the High Court normally does not interfere with the quantum of punishment

unless the punishment shocks the conscience of the Court.

17. As already noticed above, since the charges on which the punishment has been imposed are to be taken as correct, what is now left to be considered and examined is as to whether the punishment imposed was commensurate with the said charges or not.”

(Emphasis supplied)

CONCLUSION AND DIRECTION

40. Considering the facts and circumstances, we are of the considered opinion that the orders passed by the disciplinary authority, appellate and revisional authority as well as the judgment passed by the learned Single Judge are not sustainable and the same are accordingly set aside. Consequently, the petitioner-appellant is entitled for reinstatement.

41. As the matter is old, at this stage, we are not inclined to remit the matter to the authority concerned. Since the petitioner's counsel has not stated on affidavit as to whether the petitioner-appellant was gainfully working somewhere else or not, we are not inclined to accord full back wages. In view of this, we find that the petitioner-appellant is entitled for 25% back wages.

42. We accordingly direct that the petitioner-appellant shall be reinstated in service and shall be paid 25% back wages alongwith all other consequential benefits forthwith.

43. With the aforesaid observations, the special appeal stands **allowed**.

**(2024) 9 ILRA 1545
APPELLATE JURISDICTION**

CIVIL SIDE

DATED: ALLAHABAD 02.09.2024

BEFORE

**THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.**

Special Appeal No. 46 of 2024

**Dr. Jitendra Singh Kushwaha ...Appellant
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Appellant:

Awadh Behari Singh, Gaurav Pundir

Counsel for the Respondents:

C.S.C., Kunal Shah, Sanjay Kumar Om

A. Service/Education Law – Essential qualification - The Uttar Pradesh St. Medical Colleges Teachers' Service Rules, 1990 - Minimum Qualification for Teachers in Medical Institution Regulations, 1998.

Since the term 'equivalent qualification' was not used in the advertisement, whether the St. Government could have calculated the experience of an Additional Professor as equivalent to that of a Professor and whether this amounted to changing the terms of the advertisement?

(i) The Regulations, 1998 consider the posts of Additional Professor and Professor in a Medical College to be equivalent. Therefore, any experience gained as an Additional Professor should be counted towards the required experience for the post of Professor. Notably, it is only after the St. Government determined the equivalency in favour of the Petitioner that the Appellant is attempting to change its position. This shift is not permissible, particularly when no objections were raised before the Hon'ble Single Judge when the direction for determination of equivalence was issued, and especially since the Regulations, 1998 themselves recognize the equivalency

between the posts of Additional Professor and Professor in a Medical College. (Para 41, 44)

(ii) When an expert body, after considering the relevant Regulations, working conditions, and teaching experience, decides on equivalence, this decision should not be interfered with unless there is a compelling reason to do so. In matters of determining equivalence, the appropriate regulatory authorities responsible for setting qualifications for the posts are the proper entities to make such decisions. Once these authorities have made a decision on equivalence, it should not be challenged by others. The employer is best positioned to decide who should be appointed, and when this decision is supported by an expert body, it should be respected and not interfered with. (Para 45)

(iii) The absence of the term "equivalent post" in the advertisement is irrelevant, as the Regulations, 1998 framed by the MCI already establish the equivalence of these two posts. (Para 42)

The advertisement must be interpreted in consonance with the Regulations, 1998. If a candidate meets the requirements set out in the Regulations but those in the advertisement differ, the candidate should still be considered eligible, and the statutory requirements should prevail over the advertisement. (Para 43)

Since the Regulations 1998 recognized equivalence between these positions and the expert body, after reviewing the relevant Regulations, interpreted the role of Professor as equivalent to that of Additional Professor, this interpretation would not constitute a change to the advertisement's terms by any stretch of imagination. As the Regulations 1998, framed by the MCI, duly recognize the equivalence of the roles of Additional Professor and Professor in a Medical College, and this equivalence has been validated by the expert body, the judgment of the Hon'ble Single Judge is justified and cannot be questioned. (Para 46)

B. Whether the rules of the game were changed after the game had begun?

(i) The determination of the equivalency between the two posts is merely clarificatory in nature. The Hon'ble Single Judge observed that the orders dated 10.01.2022 and 30.05.2022, issued by the St. Government, which treated the posts in question as equivalent, were consistent with the notifications, guidelines, and clarifications issued by the expert body, i.e. the MCI and its successor-the NMC and were merely clarificatory in nature. (Para 47)

(ii) When a candidate participates in a selection process, he/she rightfully expects the recruitment agency to follow the legal requirements. The need for clarification by the St. Government arose because the Respondent Commission was not recognizing or considering the inherent equivalence prescribed in the Regulations, 1998. The orders dated 10.01.2022 and 30.05.2022 issued by the Principal Secretary of the Department of Medical Education, which clarified that the posts of Professor and Additional Professor in a Medical College are equivalent, simply acknowledged an existing situation that was already legally established in the Regulations, 1998. These orders from the St. Government did not create any new rights but merely clarified a right that the Service Commission had not been properly acknowledging. (Para 48)

The orders issued by the St. Government, which deemed the posts equivalent, are merely clarificatory and do not alter the rules after the game has begun; instead, they serve as an interpretation of the rules while the game is in progress. (Para 49, 50)

C. Whether there was a difference in the grade pay admissible to the posts of Additional Professor and Professor, and whether the two posts could be equated even if there is difference in grade-pay?

Differing pay scales do not inherently render two posts "non-equivalent." Equivalence should be assessed based on the similarities in the nature and duties of

the positions, as well as the minimum qualifications required for both roles. (Para 53)

The St. Government determined the equivalence of the posts of Additional Professor and Professor after considering that the teaching experience required for both posts is identical, the nature of work and responsibilities are the same, and the duration for a teacher to become a Professor in a Government Medical College and an Additional Professor in SGPGIMS is equal. Given these factors, the difference in grade pay is insignificant. (Para 51, 52)

The MCI and NMC duly considered the posts of Additional Professor and Professor to be equivalent. The clarification of the St. Government on equivalence was an interpretation of existing rules, which do not amount to changing the rules, and the difference in pay grade alone does not make the posts non-equivalent if other factors are identical, such as duties and qualifications. Therefore, there is no infirmity in the impugned judgment and order dated 22.12.2023, passed by the learned Single Judge. (Para 56)

Special appeal dismissed. (E-4)

Precedent followed:

1. Ashish Kumar Vs St. of U.P., (2018) 3 SCC 55 (Para 43)
2. Anand Yadav Vs, St. of U.P., (2021) 12 SCC 390 (Para 45)
3. Praveen Kumar C.P. Vs Kerala Public Service Commission, (2021) 17 SCC 383 (Para 49)
4. Sub-Inspector Roopal & anr. Vs Governor through Chief Secretary, (2000) 1 SCC 644 (Para 53)
5. Vice Chancellor L.N. Mithila University Vs Dayanand Jha, (1986) 3 SCC 7 (Para 53)

Precedent distinguished:

K. Manjusree Vs St. of A.P. & anr., (2008) 3 SCC 512 (Para 18)

Present special appeal assails the judgment and order dated 22.12.2023,

passed by Hon'ble Single Judge in Civil Misc. Writ Petition No. 17887 of 2022.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Awadh Behari Singh, learned counsel for the Appellant/ respondent No.5, Sri Ashok Khare, learned Senior Advocate assisted by Sri Kunal Shah, learned counsel for the respondent No.5/ petitioner, Sri Mohan Srivastava, learned Standing Counsel for the State-respondents and Sri Sayujya Singh, Advocate appearing along with Sri Vivek Kumar Singh, learned counsel for the respondent No.2 - National Medical Commission.

2. The present intra court appeal is directed against the impugned common Judgment and order dated 22.12.2023 passed by Hon'ble Single Judge passed in Writ-A No.17887 of 2022, (Dr. Sheo Kumar Vs. State of U.P. and others), Writ-A No. 11798 of 2021, (Dr. Jitendra Singh Kushwaha Vs. State of U.P. and others) and Writ-A No.4236 of 2022 (Sheo Kumar vs. State of U.P. and Others).

FACTUAL MATRIX OF THE CASE

3. Facts in nutshell essential for disposal of the instant appeal are noted hereinbelow.

Petitions filed by the respondent No.5/ Petitioner	Petition filed by the Appellant/ respondent No.5
1. Writ-A No. 17887 of 2022 was filed by Dr. Sheo Kumar, whose selection was canceled by the Commission vide its order dated 10.08.2022.	Writ-A No. 11798 of 2021 was filed by Dr. Jitendra Singh Kushwaha, challenging the selection of Dr. Sheo Kumar as Principal (Allopathy) in the Department of Medical Education on the ground that Dr. Sheo Kumar did not possess the
2. When the Commission failed to process the appointment despite the State Government's	

clarification and failed to proceed with the appointment of Dr. Sheo Kumar – the petitioner/respondent No. 5, he filed Writ-A No.4236 of 2022 (Sheo Kumar vs. State of U.P. and Others), praying for a mandamus to direct the Respondent Commission to process his candidature.	requisite experience under the relevant Recruitment Rules.

4. The controversy involved in the aforementioned petitions was decided by the learned Single Judge with a common judgment and order dated 22.12.2023. **The short question before the learned Single Judge was whether experience as an Additional Professor in a Medical College would also count as experience of a Professor, which a candidate is required to possess to become Principal of a Medical College under the relevant Rules.** The Commission had invited applications for the solitary post of Principal (Allopathy) in the Department of Medical Education through an advertisement dated 22.12.2020. The "Essential Qualification" for the said post required a candidate to have a total teaching experience of at least 10 years as a Professor/Associate Professor/Reader in a Medical College/Institution recognized by the MCI2, of which at least 5 years should be as a Professor in a department. As the appellant/respondent No.5 raised questions about the alleged experience of the respondent No. 5/ petitioner – Dr. Sheo Kumar, his experience is reproduced below for ready reference:

**Experience of the
Petitioner/Respondent No. 5:**

- **Associate Professor: 3 years**
- **Additional Professor: 4 years**
- **Professor: 3 years 6 months 22 days**

- **Total cumulative experience: 10 years, 6 months, 22 days**
- **Experience as Professor and Additional Professor: 7 years, 6 months, 22 days**

5. In response to the advertisement, the Commission shortlisted the candidates and called them for an interview. During the interview, the Respondent No.5/Petitioner was asked by the Commission to submit an undertaking to the effect that within 30 days he would produce: (i) certified copies of the experience certificate demonstrating that he had 10 years of teaching experience, including 5 years as a Professor, and (ii) guidelines from the Medical Council of India treating both the posts of Professor and Additional Professor as equivalent. In response, the Respondent No.5/Petitioner complied with the undertaking and submitted the requisite documents to the Commission on 20.07.2021. The result of the selection process was declared, and the Respondent No.5/Petitioner was provisionally selected. Before the Commission could forward the proposal for the appointment of the Petitioner/Respondent No. 5 as Principal (Allopathy) to the State Government, the appellant herein preferred a Writ Petition, which was registered as Writ A No.11798 of 2021 (Dr. Jitendra Singh Kushwaha vs. State of U.P. and Others). In that proceeding, the Commission initially took the stand that the candidature of the Respondent No.5/Petitioner had been processed provisionally and that the Commission would not recommend his name until adequate evidence was provided to support his assertion that he had the requisite teaching experience as a Professor. In this proceeding, the Respondent No.5/Petitioner relied upon his

experience as an Additional Professor at SGPGIMS³, arguing that it should be counted as experience on the post of Professor since both posts are equivalent. In this backdrop, the learned Single Judge initially observed that the controversy could be resolved by calling the State Government to determine the equivalence of the post of Additional Professor and Professor. Later, the learned Single Judge, by order dated 08.10.2021 (as corrected on 22.10.2021), directed the Director General of Medical Education and Training, Uttar Pradesh, to take a decision regarding the equivalence of the posts of Professor and Additional Professor in consultation with the NMC⁴. By letter dated 10.01.2022, the Principal Secretary of the Department of Medical Education issued an order clarifying that the post of Additional Professor at SGPGIMS and Professor in a State Medical College are equivalent, and the State Government also declared the Petitioner eligible for appointment as Principal, directing the Commission to take further steps. The learned Single Judge, by order dated 31.01.2022, observed that the pendency of Writ-A No.11798 of 2021 filed by the Appellant/ respondent no.5, would not impede the Commission from proceeding further.

6. Thereafter, the Appellant/ respondent No.5 subsequently amended his Writ Petition and challenged the clarificatory order dated 10.01.2022 issued by the State Government, treating the posts of Additional Professor at SGPGIMS and Professor in a State Medical College as equivalent.

7. Subsequently on 30.05.2022, the State Government further clarified that, regarding experience, qualifications, nature of duty, and work, the post of Additional

Professor and Professor in a Medical College are the same, notwithstanding the difference in grade pay. The experience acquired by the Petitioner/Respondent No.5 was thus liable to be counted towards the requirement of 5 years' experience as a Professor.

8. When the Commission failed to process the appointment despite the State Government's clarification and failed to proceed with the appointment of Dr. Sheo Kumar – the petitioner/respondent No. 5, filed Writ A No.4236 of 2022 (Sheo Kumar vs. State of U.P. and Others), praying for a mandamus to direct the Respondent Commission to process his candidature. During pendency of the writ petition, the Commission, by order dated 10.08.2022, rejected the candidature of the Petitioner/Respondent No. 5 on the grounds that he did not have 5 years' experience as a Professor and refused to acknowledge his experience as an Additional Professor at SGPGIMS as equivalent to that of a Professor in a State Government Medical College.

9. The respondent No.5/ Petitioner then filed Writ-A No.17887 of 2022, challenging the order dated 10.08.2022. The learned Single Judge clubbed all three matters and treated Writ-A No.17887 of 2022 (Dr. Sheo Kumar vs. State of U.P. and Others) as the leading writ petition.

10. The issue for consideration before the learned Single Judge was "**Whether experience as an Additional Professor in a Medical College would also count as experience as a Professor, which a candidate is required to possess to become Principal of a Medical College under the relevant Rules.**" The learned Single Judge also noted that while State

Medical Colleges have a 3-tier hierarchical system of teaching faculty, i.e., Assistant Professor, Associate Professor, and Professor, institutions like SGPGIMS and AIIMS have a 4-tier faculty designation system, i.e., Assistant Professor, Associate Professor, Additional Professor, and Professor.

11. In the instant matter, the relevant Rules applicable are Rules, 19905, which regulate the conditions of appointment and service of teaching faculty and Principals in State-run Medical Colleges. Rule 8 of the Rules, 1990 provides that a candidate for recruitment to various categories of posts in the service must possess the qualifications prescribed by the MCI from time to time. The MCI has also framed the Regulations, 19986. The Regulations, 1998 prescribed the research and teaching experience required for both the posts, which is the same. A minimum of 8 years of post-PG experience is required for promotion to either the post of Additional Professor or Professor. In the Regulations, 1998, the post of Associate Professor constitutes the feeder cadre for both the posts of Professor and Additional Professor.

12. The learned Single Judge also took note of the essential qualifications prescribed for the post of Professor and Additional Professor in a Medical College as per Regulations, 1998. For ready reference, these are reproduced below:

Posts	A Academic Qualificati on	Teaching & Research Experience
Professor/Ad dl. Professor (8 years of Post PG Experience)	A post graduate qualification MD/MS in the concerned subject and	Associate Professor in the subject for 3 years in a permitted/approved/recog nized medical college/institution with 4 Research Publications in Indexed Journal on

	as per the TEQ Regulation	Cumulative basis with minimum of 2 Research Publication during the tenure of Associate Professor as 1st Author or as corresponding author

13. It is not in dispute that when the candidates applied for the post of Principal as per the advertisement in question, the required qualifications for the roles of Professor and Additional Professor in a Medical College, as noted by the learned Single Judge, are as follows:

Posts	Academic Qualificati on	Teaching & Research Experience
Professor/Ad dl. Professor (8 years of Post PG Experience)	A post graduate qualification MD/MS/ DNB in the concerned subject and as per these Regulations	(i) Associate Professor in the subject for 3 years in a permitted/approved/recog ni-zed medical college/institution with three Research publications (atleast two as Associate Professor) (only original papers, meta-analysis, systematic reviews, and case series that are published in journals included in Medline, Pubmed Central, Citation index, Sciences Citation index, Expanded Embase, Scopus, Directory of Open access journals (DoAJ) will be considered). The author must be amongst first three or should be the Corresponding author. (ii) Should have completed the Basic course in Medical Education Technology from Institution(s) designated by MCI. (iii) Should have completed the Basic course in biomedical research from Institution(s) designated by MCI. Further provided that for the transitory period of 2

		years w.e.f. the date of this notification, the appointment/ promotion to the post of Professor can be made by the institution in accordance with the "Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998" as prevailing before issuance of this notification.

14. The record also reflects that the Board of Governors in supersession of the MCI, vide a letter dated 13.12.2018, clarified that since the academic qualifications and the teaching and research experience required for the posts of Professor and Additional Professor are the same, both posts are considered equivalent by the MCI. In the writ petition, the NMC also filed a Counter Affidavit, wherein it categorically stated that the experience gained by Dr. Sheo Kumar, the Petitioner/Respondent No.5, while working as an Additional Professor at SGPGIMS, Lucknow, would be counted along with his teaching experience as a Professor towards his appointment as Principal.

15. The learned Single Judge, after considering that in SGPGIMS, the position of Associate Professor serves as a feeder cadre for the role of Additional Professor, logically concluded that the position of Additional Professor is superior to that of Associate Professor. As the expert body, namely the NMC and its predecessor, the MCI, had already clarified that the positions of Additional Professor and Professor in a medical college are equivalent, and had explicitly stated in their affidavit that the experience gained by the Petitioner as an Additional Professor at SGPGIMS could be counted as experience for the post of Professor towards the

appointment as Principal, the learned Single Judge found no reason to deviate from the view taken by the expert body. The relevant portion of the judgment is quoted below:

"20. Thus, for a Professor, a candidate is required to possess eight years teaching experience at postgraduate level and three years teaching experience as an Associate Professor in a recognised medical college/institution. As per the Medical Council of India that frames Rules and Regulations for academic qualifications for different categories of posts in the field of medical education, a Professor is required to possess experience of teaching at postgraduate level and also having at least three years as Associate Professor, so essentially the requirement is that eight years teaching experience, which would include teaching experience of Associate Professor for three years for professor.

21. Now, looking to the circular of the SGPGI, a person would be getting promotion as Additional Professor after three years of service as an Associate Professor. Meaning thereby, those who are to be promoted as Additional Professor shall have to have three years experience of Associate Professor. Thus, feeding cadre of the Additional Professor is Associate Professor. The conclusion, therefore, would be that Additional Professor is above to the Associate Professor and since the Medical Council of India has defined experience of Professor as including of Additional Professor and the NMC has equated the posts, no other body can interpret experience as to qualification otherwise.

22. Both the MCI and NMC therefore, would be the only authorities to define the experience and it having defined in its wisdom the experience of a Professor

to include the experience of an Additional Professor, the essential qualification/eligibility criterion for the two posts to be the same, this Court cannot sit in appeal to take a view contrary to what a body of experts in the field, has taken.”

**SUBMISSIONS ON BEHALF OF
APPELLANT/ RESPONDENT NO.5:-**

16. Sri Awadh Behari Singh, learned counsel for the Appellant/respondent No.5, vehemently submitted that the essential qualifications for selection and appointment to the post of Principal of the Government Medical College were clearly prescribed in the advertisement in accordance with the rules. He submits that the learned Single Judge committed manifest legal errors by modifying the essential qualifications for the selection and appointment to the post of Principal at the Government Medical College. This modification was done placing reliance on letters dated 10.01.2022 and 13.12.2018 issued by the Secretary of the concerned Government Department, which equated the experience of an Additional Professor with that of a Professor. However, such reliance is not permissible under the law.

17. He further elaborated by submitting that the rules, as laid out in the advertisement dated 22.12.2020, were clear and specific in their requirements. The Regulations 1998, which was amended up to 08.06.2017, explicitly mandates that at least five years of experience as a Professor is required for the appointment to the post of Principal. This requirement was a crucial aspect of the selection process, ensuring that candidates possess the necessary experience and expertise to lead a medical institution. By equating the experience of an Additional Professor with

that of a Professor, the learned Single Judge effectively undermined the intent of these Regulations and the standards they were designed to uphold.

18. The learned counsel for the Appellant further submitted that the selection criteria and the rules of the Commission cannot be altered or changed afterwards. In this backdrop, he had placed reliance on the judgment of the Apex Court in **K.Manjusree vs State Of A.P. & Anr**7.

19. He also argued that the learned Single Judge failed to appreciate that the posts of Professor, Additional Professor, and Associate Professor are significantly different, as these three posts carry different pay scales and grade pay. Therefore, the specific requirement prescribed in the advertisement for the selection and appointment to the post of Principal of the Government Medical College, which requires five years of experience as a Professor, cannot be equated with experience as an Additional Professor. In support of his submission, he also placed reliance upon the pay scales of Professors and Additional Professors. He referred to a letter from the Director General of Medical Education and Training dated 26.07.2022, which was sent to the State Government and emphasized that for appointment as a Principal, five years of experience as a Professor is mandatory. This letter does not equate the experience of a Professor with that of an Additional Professor.

20. He next submitted that it is a well-established principle of law, as upheld by the Apex Court, that the "rules of the game" cannot be changed once the game has started. He elaborated that as such the criteria for selection cannot be changed by

the authorities in the middle of the selection process when it has already begun. He asserted that the learned Single Judge failed to consider this settled legal principle. He further argued that the issue of equivalent qualifications only arises when the rules explicitly provide for such consideration. In the absence of an express provision in the relevant rules, the court should not examine this question, yet the learned Single Judge wrongly treated the experience of a Professor as equal to that of an Additional Professor.

21. He lastly submitted that there are two different faculty systems in medical institutions. In the SGPGIMS, there is a four-tier faculty designation system: Assistant Professor, Associate Professor, Additional Professor, and Professor. An Additional Professor becomes eligible for promotion to Professor after four years of service. In contrast, Government Medical Colleges have a three-tier system: Assistant Professor, Associate Professor, and Professor, with no position of Additional Professor. Therefore, the requirement of five years of experience as a Professor in the advertisement should not have been equated with the experience of an Additional Professor based on the letter issued by the Secretary of the Government. This letter of clarification was in fact contrary to the rules framed by the Government itself, which the learned Single Judge failed to consider while passing the impugned order.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

22. Per contra, Sri Ashok Khare, learned Senior Advocate, assisted by Sri Kunal Shah, learned counsel for the respondent No.5/ Petitioner, Dr. Sheo Kumar,

vehemently opposed the instant appeal and submitted that Dr. Sheo Kumar is working at SGPGIMS, where a 4-tier hierarchical teaching system, i.e. Assistant Professor, Associate Professor, Additional Professor, and Professor, exists. He submitted that the essential qualifications for a candidate to be appointed as an Additional Professor and a Professor are the same, as the teaching work/assignment for both posts is identical.

23. Sri Khare also placed reliance on the advertisement, in which it was categorically mentioned that the essential qualifications must be recognized by the MCI; otherwise, the candidature would be canceled. He submitted that the advertisement prescribed the same academic qualifications for the posts of Professor and Additional Professor, requiring the candidate to have eight years of postgraduate experience and to possess the qualification of MD/MS/DNB in the concerned subject as per the regulations.

24. He further relied on the earlier notification issued by the Board of Governors of the MCI dated 13.12.2018, which states that, according to the MCI norms, Professors and Additional Professors are equivalent. He submitted that this clarification was issued much before the advertisement. Therefore, there is a fallacy of argument on behalf of the appellant that the learned Single Judge has infact substituted or diluted the essential qualifications to some extent and any interpretation to incorporate within it the experience of an Additional Professor, would amount to a legislative act which was beyond the scope of the authority of the recruitment and selection body.

25. He next submitted that Dr. Sheo Kumar—the petitioner/respondent—was only provisionally selected, and his

selection was subject to his furnishing the requisite certificates of experience, which he claimed based on the 4-tier hierarchical teaching system prevailing at SGPGIMS. He submitted that this factual situation was duly modified in the Regulation, 1998 on 05.06.2017 and again on 01.11.2018. According to the MCI norms, a Professor and an Additional Professor are considered equivalent, with the further stipulation that the concerned appointing authority may prescribe norms higher than those in the 1998 Regulation.

26. In this backdrop, he submitted that since the advertisement clearly provides that the essential qualification must be recognized by the MCI; otherwise, the candidature will not be considered. Furthermore, for the posts of Professor and Additional Professor, the candidate is required to possess eight years of postgraduate experience and three years of teaching experience as an Associate Professor in a recognized medical college or institution. Normally, the corollary would be that a Professor is required to have eight years experience of teaching at the postgraduate level and also to have at least three years of experience as an Associate Professor, amounting to eight years of teaching experience in total. The 4-tier hierarchical teaching system prevailing at SGPGIMS clearly demonstrates that an Additional Professor is above an Associate Professor, and the MCI has defined the experience of a Professor as inclusive of the experience of an Additional Professor. Additionally, the NMC itself has clarified this situation.

27. He further submitted that in the present matter, the dispute is not regarding the substitution in additional qualifications. This is not a case where Dr. Sheo Kumar

was lacking the necessary experience; the dispute is solely about obtaining the correct comments from the relevant authority on whether experience as an Additional Professor in a medical college would also count as experience as a Professor. In this matter, once the MCI and the NMC categorically held that the experience of a Professor includes the experience of an Additional Professor, the essential qualification and eligibility criteria for both positions are deemed the same. He vehemently submitted that the said clarification cannot be ignored and in view of the said factual situation as there is no challenge to the decision of the MCI and the NMC, learned Single Judge has rightly held that it cannot sit in appeal to take a view contrary to what a body of experts in the field, has taken.

28. He lastly submitted that the learned Single has assigned unassailable reasoning for denying the relief to the appellant and thus the present appeal is liable to be dismissed on merit.

29. Sri Mohan Srivastava, learned Standing Counsel for the State-respondents and Sri Sayujya Singh, Advocate appearing along with Sri Vivek Kumar Singh, learned counsel for the respondent No.2 - National Medical Commission, supported the arguments advanced by Sri Ashok Khare, learned Senior Advocate, assisted by Sri Kunal Shah, learned counsel for the respondent No.5/ Petitioner.

DISCUSSION AND FINDINGS:-

30. We have given thoughtful consideration to the arguments advanced at bar by learned counsels for the respective parties, and gone through the impugned judgment and order dated 22.12.2023

passed by learned Single Judge and the material placed on record.

31. Undisputably, the qualification criteria was prescribed for the post of Principal (Allopathy) in the advertisement dated 22.12.2021 (Notification No.3 of 2020-21). From the record as well as the submissions advanced by the learned counsels for the parties at bar, the following issues beg consideration of this Court:

(a) Since the term 'equivalent qualification' was not used in the advertisement, whether the State Government could have calculated the experience of an Additional Professor as equivalent to that of a Professor and whether this amounted to changing the terms of the advertisement.

(b) Whether the rules of the game were changed after the game had begun.

(c) Whether there was a difference in the grade pay admissible to the posts of Additional Professor and Professor, and whether the two posts could be equated even if there is difference in grade-pay.

Issue No.(a): Since the term 'equivalent qualification' was not used in the advertisement, whether the State Government could have calculated the experience of an Additional Professor as equivalent to that of a Professor and whether this amounted to changing the terms of the advertisement.

32. The equivalence between the posts of Additional Professor and Professor in a Medical College is prescribed in the 1998 Regulations. The underlying facts show that while State Medical Colleges operate under a 3-tier faculty designation system—comprising Assistant Professor, Associate

Professor, and Professor—institutions like SGPGIMS and AIIMS follow a 4-tier system, which includes Assistant Professor, Associate Professor, Additional Professor, and Professor. Consequently, State Medical Colleges do not have the post of Additional Professor.

33. The minimum qualifications for appointment as teaching staff in a Medical Institution are governed by the Regulations, 1998 established by the Medical Council of India. According to these regulations, the qualifications required for the posts of Professor and Additional Professor in a Medical College are identical in terms of research and teaching experience. Moreover, under the Regulations, 1998, promotion to either the post of Additional Professor or Professor requires at least eight years of post-PG experience. Additionally, the post of Associate Professor is the feeder cadre for both the positions of Professor and Additional Professor.

34. The Regulations, 1998 do not consider the post of Additional Professor as the feeder cadre for the post of Professor. Instead, the Associate Professor post serves as the feeder cadre for both Professor and Additional Professor roles. An individual who has served three years as an Associate Professor is eligible for promotion to either Additional Professor or Professor, depending on whether the institution follows a 4-tier or 3-tier faculty designation system.

35. The MCI has consistently maintained parity in the qualifications required for appointment to the posts of Additional Professor and Professor in a Medical College.

36. The Board of Governors, in supersession of the MCI, clarified in the

letter dated 13.12.2018 that since the academic qualifications and the teaching and research experience for the posts of Professor and Additional Professor are the same, the MCI considers both posts equivalent. The relevant excerpt from the letter dated 13.12.2018 issued by the Board of Governors is being reproduced below:

"This is with reference to your email dated 11.12.2018 and order dated 11.12.2018 passed by the Hon'ble Court in the above captioned matter. In this regard I am directed to inform you that as regards the qualification and experience prescribed for appointment as Professor/ Addl. Professor in Broad Specialties [MD/MS] in Minimum Qualification for Teachers Regulations, 1998 is as under:

Posts	Academic Qualification	Teaching & Research Experience
Professor/Addl. Professor (8 year of Post PG Experience)	A post in graduate qualification on MD/MS the concerned subject and as per the TEQ Regulation	Associate Professor in the subject for 3 years in permitted/approved/recognized medical college/institution with 4 Research Publications in Indexed Journal on Cumulative basis with minimum of 2 Research Publication during the tenure of Associate Professor as 1st Author or as corresponding author.

The above position has been notified in Minimum Qualification for Teacher Regulations, 1998 on 05.06.2017 & again 01.11.2018 copy enclosed.

Therefore, in so far as MCI norms are concerned Professor/ Addl. Professor are equivalent. However, it is for the concerned appointing authority to lay down/prescribe norms higher than that prescribed in Minimum Qualification for Teachers Regulation, 1998.

This issues with the approval of Secretary General, Board of Governors."

37. The NMC has also issued the Assessor's Guide. In Clause 11 of these guidelines, the issue of equating the post of Additional Professor in a four-tier faculty designation system with that of a Medical College's three-tier faculty designation system has been addressed. The NMC has clarified that the role of Additional Professor should be considered equivalent to that of a Professor. The relevant excerpt from the Assessor's Guide is provided below:

"11. Many Institutions follow a 4-tier faculty designation system - Assistant Professor, Associate Professor, Additional Professor and Professor. For the purposes of our assessment, which has only 3 levels, where does one equate the Additional Professor?"

Additional Professor is to be equated to a Professor."

38. Faced with the situation described above, the Hon'ble Single Judge, in response to the Writ Petition filed by the Appellant (Writ A No. 11798 of 2021, Dr. Jitendra Singh Kushwaha v. State of U.P. and Others), issued an order on 08.10.2021, later corrected on 22.10.2021. The order directed the Director General of Medical Education and Training, Uttar Pradesh, to decide on the equivalence between the posts of Professor and Additional Professor, in consultation with the NMC.

39. Following this, the Principal Secretary of the Department of Medical Education issued an order on 10.01.2022, confirming that the posts of Additional Professor at SGPGIMS and Professor at a State Medical College are equivalent. The

State Government also instructed the Public Service Commission to consider the Petitioner eligible for the post of Principal. In making this decision, the State Government considered the following factors:

(i) The absence of the post of Additional Professor in State Medical Colleges, which operate with a three-tier faculty designation system, unlike SGPGIMS, which has a four-tier system.

(ii) The time required for promotion to Additional Professor at SGPGIMS is equivalent to the time required for promotion to Professor at a State Medical College.

(iii) The duties, responsibilities, and the required research and teaching qualifications for both posts are identical.

40. Additionally, in the Writ Proceedings, the NMC submitted a Counter Affidavit. In Paragraphs 5 and 33, it was clearly stated that the posts of Additional Professor and Professor are equivalent, and the experience gained by the Petitioner/Respondent No. 5 as an Additional Professor can be counted along with his experience as a Professor for the purpose of appointment as Principal. Paragraphs 5 and 33 of the Counter Affidavit filed by Rita Singh, Under Secretary, NMC, are reproduced below:

“5. It is submitted at the outset that the petitioner is possessing teaching experience of 10 years & 6 months while working as Associate Professor, Additional Professor & Professor and out of the same he possesses teaching experience of 3 years & 10 months while specifically working as a Professor in the concerned department. As per Regulation 3.8 of the Teachers Eligibility Qualifications In Medical

Institutions Regulations, 2022, a minimum of 10 years teaching experience is required for being considered for appointment to the post of Principal, out of which at least 5 years teaching experience must have been gained while working as a Professor in the concerned department. The Postgraduate Medical Education Board of the National Medical Commission after duly considering the teaching experience of the petitioner, has observed that even though the post of Additional Professor is not provided under the now repealed Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998 nor under the Teachers Eligibility Qualifications in Medical Institutions Regulations, 2022. however, a large number of medical colleges in the Country have created the post of Additional Professor in various departments and previously the erstwhile MCI had also recognized the post of Additional Professor being equivalent to the post of Professor. Thus, the Postgraduate Medical Education Board of the National Medical Commission duly concluded that the teaching experience obtained by the petitioner while working as Additional Professor can be counted alongwith his teaching experience obtained while working as a Professor towards appointment as Principal.

33. It is further submitted that the Postgraduate Medical Education Board of the National Medical Commission after duly considering the teaching experience of the petitioner, has observed that even though the post of Additional Professor is not provided under the now repealed Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998 nor under the Teachers Eligibility Qualifications In Medical Institutions Regulations, 2022, however, a large number of medical colleges in the Country have created the post of Additional

Professor in various departments and previously the erstwhile MCI had also recognized the post of Additional Professor being equivalent to the post of Professor. Thus, the Postgraduate Medical Education Board of the National Medical Commission duly concluded that the teaching experience obtained by the petitioner while working as Additional Professor can be counted along with his teaching experience obtained while working as a Professor towards appointment as Principal. Copies of letter dated 13.12.2018, wherein it can be seen that previously the erstwhile MCI had also recognized the post of Additional Professor being equivalent to the post of Professor are annexed herewith as ANNEXURE R-2/6."

41. The Regulations, 1998 consider the roles of Additional Professor and Professor in a Medical College to be equivalent. Both the MCI and the NMC have clarified that these posts are equivalent. They have also affirmed in their affidavit that the experience gained by the Petitioner as an Additional Professor at SGPGIMS can be counted as experience on the post of Professor for the purpose of appointment as Principal. This demonstrates that the Regulations, 1998 themselves recognize the equivalence of the two posts. The equivalence between Additional Professor and Professor in a Medical College is inherently embedded within the Regulations, 1998, implying that equivalence is implicit.

42. The absence of the term "equivalent post" in the advertisement is irrelevant, as the Regulations, 1998 framed by the MCI already establish the equivalence of these two posts.

43. The advertisement must be interpreted in consonance with the

Regulations, 1998. The Hon'ble Supreme Court in **Ashish Kumar v. State of Uttar Pradesh**⁸ (Para-27), held that if a candidate meets the requirements set out in the Regulations but those in the advertisement differ, the candidate should still be considered eligible, and the statutory requirements should prevail over the advertisement. The relevant excerpt from the judgment in Ashish Kumar (Supra) is provided below:

"27. Any part of the advertisement which is contrary to the statutory rules has to give way to the statutory prescription. Thus, looking to the qualification prescribed in the statutory rules, the appellant fulfils the qualification and after being selected for the post denying appointment to him is arbitrary and illegal. It is well settled that when there is variance in the advertisement and in the statutory rules, it is the statutory rules which take precedence."

44. The Regulations, 1998 consider the posts of Additional Professor and Professor in a Medical College to be equivalent. Therefore, any experience gained as an Additional Professor should be counted towards the required experience for the post of Professor. If the Appellant's argument to exclude the experience gained as an Additional Professor from being considered as part of the required experience for a Professor is accepted, it would contradict the Regulations, 1998. Such an interpretation should be avoided. Notably, when the Hon'ble Single Judge issued the order dated 08.10.2021, in Civil Misc. Writ Petition No. 11798 of 2021 (Dr. Jitendra Singh Kushwaha v. State of U.P. and Others), directing the State Government to decide on the equivalence of the two posts, i.e. Professor and

Additional Professor, neither the Appellant nor the Commission objected. It is only after the State Government determined the equivalency in favour of the Petitioner that the Appellant is attempting to change its position. This shift is not permissible, particularly when no objections were raised before the Hon'ble Single Judge when the direction for determination of equivalence was issued, and especially since the Regulations, 1998 themselves recognize the equivalency between the posts of Additional Professor and Professor in a Medical College.

45. It is trite law that when an expert body, after considering the relevant Regulations, working conditions, and teaching experience, decides on equivalence, this decision should not be interfered with unless there is a compelling reason to do so. This principle is supported by the judgment of the Hon'ble Supreme Court in **Anand Yadav v. State of U.P.**⁹, (Paras-28, 31, and 32). In this case, the Supreme Court held that in matters of determining equivalence, the appropriate regulatory authorities responsible for setting qualifications for the posts are the proper entities to make such decisions. Once these authorities have made a decision on equivalence, it should not be challenged by others. The Supreme Court also emphasized that the employer is best positioned to decide who should be appointed, and when this decision is supported by an expert body, it should be respected and not interfered with. The relevant portion of the Supreme Court's judgment in *Anand Yadav* (Supra) is reproduced below:

28. *We must, at the inception, express our reservation about the manner in which the writ petition was filed and a*

decision was taken in the impugned order of the High Court without even calling upon the relevant authorities i.e. the UGC and NCTE to put forth their stand. The first authority is undisputedly the one to determine and specify the nomenclature of degrees, while the second is the authority of teacher education. Whatever has been the earlier position, as is sought to be relied upon, of the Gujarat High Court [Puma Gunvanttaray Vyas v. State of Gujarat, 2016 SCC OnLine Guj 10038], the same is no more in doubt. A decision based in the absence of authorities concerned is likely to and has caused confusion.

31. *The question of equivalence, as submitted by Respondent 4 UGC was to be left to NCTE. It is in view thereof that NCTE was added as a party (Respondent 5) and has, once again, put forth its position quite unequivocally. NCTE has drawn a distinction between the two degrees to the extent that while MA (Education) is a degree in the discipline of Education, the MEd degree is a practitioner's degree. Reference has also been made to a committee constituted in pursuance of the impugned judgment, which is an expert committee. In view of the recognition of the MEd programme of one-year duration, in order to acquire an MEd degree, one has to spend two years after the first degree because for an MEd degree, a BEd degree is mandatory. It is in these circumstances a conclusion was reached that, from the point of view of duration and curricular inputs, MEd qualifies itself as a Master's programme in Education and is even recognised by the UGC and NCTE as such. In a sense this puts to rest one of the controversies raised by Respondent 3 i.e. initially MEd was a one-year programme, and only subsequently converted into a two-years programme in 2015, as this very*

issue has been examined by an expert committee of NCTE, and NCTE concluded in favour of the appellants. There is also a categorical statement in the last paragraph of the counter- affidavit of NCTE to the effect that the MEd is a Master's degree recognised by apex bodies like the UGC and NCTE for appointment as Assistant Professor in Education and they are also eligible for the NET/SLET/JRF.

32. We may also notice another important aspect i.e. the employer ultimately being the best judge of who should be appointed. The choice was of Respondent 2 who sought the assistance of an expert committee in view of the representation of some of the appellants. The eminence of the expert committee is apparent from its composition. That committee, after examination, opined in favour of the stand taken by the appellants, and Respondent 2 as employer decided to concur with the same and accepted the committee's opinion. It is really not for the appellants or the contesting respondent to contend how and in what manner a degree should be obtained, which would make them eligible for appointment by Respondent 2."

46. The Appellant's argument that counting the Petitioner's experience as an Additional Professor as equivalent to experience as a Professor would effectively alter the terms of the advertisement and grant an undue relaxation to the respondent No.5/ petitioner was rightly rejected by the Hon'ble Single Judge. The learned Single Judge observed that since the Regulations 1998 recognized equivalence between these positions and the expert body, after reviewing the relevant Regulations, interpreted the role of Professor as equivalent to that of Additional Professor, this interpretation would not constitute a

*change to the advertisement's terms by any stretch of imagination. As the Regulations 1998, framed by the MCI, duly recognize the equivalence of the roles of Additional Professor and Professor in a Medical College, and this equivalence has been validated by the expert body, the judgment of the Hon'ble Single Judge is justified and cannot be questioned, therefore, **the Issue No.(a) is accordingly answered.***

Issue No. (b) Whether the rules of the game were changed after the game had begun.

47. Regarding the second submission placed by the Appellant/ respondent No.5, wherein it was claimed that equating the experience of an Additional Professor in a Medical College with that of a Professor would effectively change the rules after the game had started. It is to be noted that this argument is fundamentally flawed, as the determination of the equivalency between the two posts is merely clarificatory in nature. The Hon'ble Single Judge observed that the orders dated 10.01.2022 and 30.05.2022, issued by the State Government, which treated the posts in question as equivalent, were consistent with the notifications, guidelines, and clarifications issued by the expert body, i.e. the MCI and its successor - the NMC and were merely clarificatory in nature. The observations made by the learned Single Judge is provided below:

"24. The State Government, therefore, took a conscious decision to hold that the post of Additional Professor and Professor are equated for the purposes of experience. The State being the employer has issued clarifications and these clarifications cannot said to changing the Rules of recruitment on the post as to essential

qualification in the midst of selection process. I do not, therefore, find any good ground to hold the decision taken by the State Government to be bad, as it stands in conformity with the guidelines of the MCI.”

48. Additionally, when a candidate participates in a selection process, he/she rightfully expects the recruitment agency to follow the legal requirements. The need for clarification by the State Government arose because the Respondent Commission was not recognizing or considering the inherent equivalence prescribed in the Regulations, 1998. The orders dated 10.01.2022 and 30.05.2022 issued by the Principal Secretary of the Department of Medical Education, which clarified that the posts of Professor and Additional Professor in a Medical College are equivalent, simply acknowledged an existing situation that was already legally established in the Regulations, 1998. These orders from the State Government did not create any new rights but merely clarified a right that the Service Commission had not been properly acknowledging.

49. Since the clarification by the State Government that the two posts are equivalent was not based on any new development that occurred after the advertisement was issued, it does not amount to changing the rules after the process had begun. Instead, it is an interpretation of the rules during the ongoing process. In this regard, the Hon'ble Supreme Court's decision in **Praveen Kumar C.P. v. Kerala Public Service Commission**¹⁰, (Para-26), is relevant. The pertinent part of the Supreme Court's judgment in **Praveen Kumar C.P. (supra)** is provided below:

“26. Whether a GO would have prospective effect or relate back to an earlier date is a question which would have

to be decided on the basis of text and tenor of the respective orders. The GOs which declared appellants' degrees to be equivalent to those required as per the applicable notifications were not general orders but these two orders were person specific, relating to the two appellants. Once the Gos specifically declared that their B.Ed. degrees were equivalent to the designated subject which formed part of the employment notification, the GOs in substance have to be interpreted as clarificatory in nature and these cannot be construed to have had elevated the status or position of the degree they already had after the declaration was made in the GOs. The subject GOs only recognised an existing state of affairs so far as the nature of the degrees were concerned and did not create fresh value for the degrees which the appellants possessed. Though these equivalent orders were not in existence on the dates of issue of employment notifications, the GOs in substance recognize such status from the dates of obtaining such degrees. The GOs do not reveal any intervening circumstances which could be construed to imply that the respective degrees acquired the equivalent status because of such circumstances occurring subsequent to grant of their B.Ed. degrees. The aforesaid Notes to Clause 7 of the employment notifications postulated disclosure of the number and date of the orders on equivalence. But the GOs to which we have referred treat the equivalency to be operating on the dates of obtaining such degrees. Thus, the defect, if any, on disclosure requirement, shall stand cured on issue of the University orders followed by the GOs. The GOs also specify the context in which these were issued and refer to the appellants being included in the list of KPSC. This being the case, we do not think treating the appellants' degrees as

equivalent to those required under the applicable notifications by the GOs issued in the year 2019 would result in change in the rules of the game midway. At best, it can be termed as interpreting the rules when the game was on, figuratively speaking. Such a course would, in our opinion, be permissible."

50. Accordingly, as the orders issued by the State Government, which deemed the posts equivalent, are merely clarificatory and do not alter the rules after the game has begun; instead, they serve as an interpretation of the rules while the game is in progress, therefore, **the Issue No.(b) is answered accordingly.**

Issue No.(c) Whether there was a difference in the grade pay admissible to the posts of Additional Professor and Professor, and whether the two posts could be equated even if there is difference in grade-pay.

51. While making this submission, learned counsel for the Appellant has argued that since the grade pay for a Professor in a Medical College under the Sixth Pay Commission was Rs.10,000/- and the grade pay for an Additional Professor was Rs.9,500/-, the State Government could not have treated the posts as equivalent. This contention of the Appellant is erroneous. The State Government determined the equivalence of the posts of Additional Professor and Professor after considering that the teaching experience required for both posts is identical, the nature of work and responsibilities are the same, and the duration for a teacher to become a Professor in a Government Medical College and an Additional Professor in

SGPGIMS is equal. Given these factors, the difference in grade pay is insignificant.

52. It is worth mentioning that although the State Government's order dated 10.01.2022 clearly stated that the Petitioner met the eligibility conditions, the Commission sought clarification from the State Government regarding the equivalence of the posts of Additional Professor and Professor, considering the difference in grade pay. The State Government, in its order dated 30.05.2022, reiterated that since the qualifications, nature of duty, and work assigned to the posts of Additional Professor and Professor in a Medical College were the same, the difference in grade pay would not affect the equivalence. The relevant portion of the Government order dated 30.05.2022 is reproduced below:

क्रम	लोक सेवा आयोग की पृच्छा	आख्या
	2 शासन के पत्र दिनांक 23.03.2022 के अनुसार डा० शिव कुमार एडिशनल प्रोफेसर ग्रेड पे रु0 9500/- पर दिनांक 01.07.2013 से 30.08.2017 तक कार्यरत रहे एवं प्रोफेसर ग्रेड पे० रु० 10500/- पर दिनांक 01.07.2017 से कार्यरत है, इस संबंध कृपया यह भी अवगत कराने का कष्ट कि ग्रेड पे० रु० 9500/-, ग्रेड पे० रु० 10,000/- या ग्रेड पे० रु० 10500/- के पदों में समतुल्यता स्थापित है।	एस०जी०पी०जी०आई०, लखनऊ वेतन/भत्तों के संबंध में एम्स से समकक्षता प्रदान की गयी है। एस०जी०पी०जी०आई० लखनऊ में 04सोपान तथा राजकीय मेडिकल कालेजों में 03 सोपान की व्यवस्था के दृष्टिगत यद्यपि ग्रेड पे में समतुल्यता नहीं है किन्तु अध्यापन अनुभव, कार्य एवं दायित्व में पूरी समानता है।

53. In the case of **Sub-Inspector Rooplal and Another v. Lt. Governor through Chief Secretary¹¹, (para-17)**, the Hon'ble Apex Court emphasized that differing pay scales do not inherently render two posts "non-equivalent." The Apex Court stated that equivalence should be assessed based on the similarities in the

nature and duties of the positions, as well as the minimum qualifications required for both roles. This perspective is also in consonance with an earlier judgment of Apex Court in **Vice Chancellor L.N. Mithila University v. Dayanand Jha**¹². The relevant portion of the judgment of **Sub-Inspector Rooplal and Another (supra)** is provided below:

“17...Equivalency of two posts is not judged by the sole fact of equal pay. While determining the equation of two posts any factors other than "pay" will have to be taken into consideration, like the nature of duties, responsibilities, minimum qualification etc. It is so held by this Court as far back as in the year 1968 in the case of Union of India v. P.K. Roy [AIR 1968 SC 850 : (1968) 2 SCR 186]. In the said judgment, this Court accepted the factors laid down by the Committee of Chief Secretaries which was constituted for settling the disputes regarding equation of posts arising out of the States Reorganisation Act, 1956. These four factors are: (i) the nature and duties of a post; (ii) the responsibilities and powers exercised by the officer holding a post, the extent of territorial or other charge held or responsibilities discharged; (iii) the minimum qualifications, if any, prescribed for recruitment to the post; and (iv) the salary of the post. It is seen that the salary of a post for the purpose of finding out the equivalency of posts is the last of the criteria. If the earlier three criteria mentioned above are fulfilled then the fact that the salaries of the two posts are different would not in any way make the post "not equivalent". In the instant case, it is not the case of the respondents that the first three criteria mentioned hereinabove are in any manner different between the two posts concerned. Therefore, it should

be held that the view taken by the Tribunal in the impugned order that the two posts of Sub-Inspector in BSF and Sub-Inspector (Executive) in the Delhi Police are not equivalent merely on the ground that the two posts did not carry the same pay scale, is necessarily to be rejected. We are further supported in this view of ours by another judgment of this Court in the case of Vice Chancellor, L.N. Mithila University v. Dayanand Jha, (1986) 3 SCC 7 wherein at para 8 of the judgment, this Court held:

"Learned counsel for the respondent is therefore right in contending that equivalence of the pay scale is not the only factor in judging whether the post of Principal and that of Reader are equivalent posts. We are inclined to agree with him that the real criterion to adopt is whether they could be regarded of equal status and responsibility. The true criterion for equivalence is the status and the nature and responsibility of the duties attached to the two posts."

18. Therefore, in our opinion, the finding of the Tribunal that the posts of Sub-Inspector in BSF and Sub-Inspector (Executive) in the Delhi Police are not equivalent, is erroneous, and the same is liable to be set aside."

54. The Appellant has not disputed the findings of the State Government qua the identical eligibility conditions, teaching and research experience, and the nature of work associated with both posts. Furthermore, the Regulations, 1998 for faculty positions in Medical Colleges establish equivalency between the roles of Professor and Additional Professor. This equivalency is also acknowledged by the NMC, which recognizes that the qualifications and responsibilities for both posts are the same. As the time required for a teacher to advance to Professor in a

Government Medical College is equivalent to that for becoming an Additional Professor at SGPGIMS, the State Government has rightly clarified that both posts are equivalent. Therefore, the Appellant cannot propose an alternative interpretation that contradicts the conclusions reached by both the expert body and the State Government. Accordingly, as once the State Government has determined the equivalence of the posts, considering the similarity of qualifications, teaching experience, work nature, and responsibility, the difference in grade pay between the two posts becomes insignificant, therefore, **the Issue No.(c) is answered accordingly.**

55. Since the learned Single Judge had already examined and discussed the judgments cited by the counsel for the Appellant/Respondent No.5 in paragraphs 26 to 29 of the impugned judgment and order dated 22.12.2023, and found them distinguishable based on the facts of the case, which we agree with, hence we see no need to revisit that analysis here.

CONCLUSION:

56. In view of the aforesaid discussion, all the submissions presented by the counsel for the Appellant/Respondent No. 5 stand rejected on the ground that the MCI and NMC duly considered the posts of Additional Professor and Professor to be equivalent. The clarification of the State Government on equivalence was an interpretation of existing rules, which do not amount to changing the rules, and the difference in pay grade alone does not make the posts non-equivalent if other factors are identical, such as duties and qualifications. As such, we do not find any infirmity in the impugned judgment and order dated 22.12.2023, passed by the learned

Single Judge, which may warrant interference.

57. Accordingly, the special appeal sans merit and is dismissed.

(2024) 9 ILRA 1564
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHAUDHARY, J.

Criminal Appeal U/S 372 CR.P.C No. 274 of 2024

Abhimanyu Singh ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:

Sri Abhishek Singh, Sri Shailendra Singh,
 Sri S.K. Shukla

Counsel for the Respondents:

G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 372-Indian Penal Code, 1860-Sections 384, 506, 376(2)(n) & 354B-

अपीलकर्ता की बहन के साथ आरोपी हरिरुदन वर्मा द्वारा ब्लैकमेलिंग, बलात्कार एवं धमकी देने का आरोप था। पीडिता द्वारा विभिन्न तिथियों पर यौन शोषण की घटनाओं का उल्लेख किया गया। ट्रायल कोर्ट ने साक्ष्यों में विरोधाभास, प्रथम सूचना रिपोर्ट (FIR) और बयान में विलंब, तथा प्रस्तुत फोटोग्राफ्स को अलील की श्रेणी में न मानते हुए आरोपी को दोषमुक्त करार दिया।

अपील न्यायालय में इस निर्णय को चुनौती दी गई किन्तु उच्च न्यायालय ने भी साक्ष्यों की समीक्षा करते हुए ट्रायल कोर्ट के निर्णय को सही माना और अपील खारिज कर दी।

पीडिता के बयानों में निरंतर परिवर्तन, विरोधाभास तथा उचित मेडिकल या इलेक्ट्रॉनिक साक्ष्य की अनुपस्थिति के कारण आरोपी को संदेह का लाभ देते हुए दोषमुक्त किया गया।

(Delivered by Hon'ble Dr. Gautam Chowdhary, J.)

1. वर्तमान दाण्डिक अपील अपीलार्थी/परिवादी अभिमन्यु सिंह की ओर से मु.अ.सं. 1167/2021 अंतर्गत धारा 384/506/ 376 (2)(n)/ 354ख भा.दं.सं. थाना चकेरी जिला कानपुर से उद्भूत सत्र परीक्षण संख्या 825/2022 में अपर सत्र न्यायधीश, कक्ष सं. 20, कानपुर नगर द्वारा पारित निर्णय व आदेश दिनांक 13.03.2024, जिसके द्वारा अभियुक्त हरिसूदन वर्मा को उपरोक्त धाराओं में दोषमुक्त किया गया है, के विरुद्ध दायर की गयी है।

2. भारतीय दण्ड संहिता की धारा 228में उल्लिखित उपबन्ध व ओम प्रकाश बनाम स्टेट आफ यू०पी० 2006 (4) सुप्रीम 313 एवं प्रेमिया बनाम राजस्थान राज्य 2008 (63) एस०सी०सी० 94 एस०सी० तथा उड़ीसा राज्य बनाम सुकुल गौड़ा, ए०आई०आर० 2009 एस०सी० 1019 में माननीय उच्चतम न्यायालय द्वारा दी गयी व्यवस्था एवं निर्देशों के परिप्रेक्ष्य में पीड़िता को उसके नाम के बजाए "पीड़िता" से सम्बोधित किया जायेगा।

3. वाद के सुसंगत तथ्य संक्षेप में इस प्रकार हैं कि वादी मुकदमा / अपीलार्थी अभिमन्यु सिंह पुत्र श्री घनश्याम सिंह निवासी मकान नं०-10 आराजी संख्या-1850 संदीप नगर नियर साहू मन्दिर पुलिस चौकी सनिगवाँ, थाना चकेरी कानपुर नगर ने दिनांक 25.11.2021 को संबंधित थाने में

यह लिखित तहरीर प्रस्तुत किया कि "प्रार्थी अभिमन्यु सिंह पुत्र घनश्याम सिंह निवासी मकान नं०10 आराजी संख्या 1850 संदीप नगर नियर साहू मन्दिर पुलिस चौकी सनिगवाँ थाना चकेरी कानपुर नगर का मूल निवासी हूँ। प्रार्थी की बहन पुत्री घनश्याम सिंह जो मेरे साथ घर पर रहती है। मेरी बहन की सहेली (Y) के साथ हरिसूदन वर्मा ने एन सी सी किया था। मेरी बहन का मो० न० (Y) के पास था। (Y) का संपर्क हरिसूदन वर्मा पुत्र छोटे लाल वर्मा म०न० 62/2सावित्री नगर भाभा नगर सविगवाँ रोड चकेरी कानपुर नगर से था। जिस कारण मेरी बहन का मो०न० हरिसूदन के पास पहुँच गया। हरिसूदन उपरोक्त मेरी बहन से बात चीत करने लगा। कुछ दिन बाद मोबाइल हैक कर लिया जिसके माध्यम से करीब 2 वर्ष से मेरी बहन को ब्लैकमेल कर रहा है और धमकी देता है की मुझे रु० भेजो नहीं तो तुम्हे बदनाम कर दूँगा। मेरे मोबाइल में तुम्हारे पूरे परिवार के सदस्यों का व्हाट्सएप न० आ गये हैं, जबकि मेरी बहन की शादी फतेहपुर में तय हो गयी थी। जो दिनांक 07.12.2021 को होनी थी। दिनांक 18.11.2021 हरिसूदन एक महिला के साथ फतेहपुर पहुँचा जहाँ पर शादी होनी थी। मेरी बहन के होने वाले पति से सम्पर्क कर कहा कि पीड़िता से मेरे बहुत पहले से सम्बन्ध है और मैं उससे शादी करूँगा अगर मुझसे शादी नहीं करेगी तो मैं जहर खा कर आत्महत्या कर लूँगा नहीं तो

पीड़िता की हत्या कर दूंगा। हरिसूदन उपरोक्त की मां व भाभी का पूर्ण सहयोग है हरिसूदन ने मेरी बहन का रिश्ता तुड़वा दिया है जबकी मैंने व मेरे परिवार ने शादी की पूर्ण तैयारी कर ली थी। हरिसूदन अपराधिक किस्म का व्यक्ति है जो मुझे व मेरी बहन व पूरे परिवार को जान से मारने की धमकी देता है और मेरी बहन की अपने साथ फोटो लगा कर पीड़िता के होने वाले पति को भी दिखाई है और मेरी भाभी के व्हाट्सएप पर डाल दिया है। दिनांक 17/11/2021 को अपने घर बुला कर मेरी बहन को पकड़ कर गलत काम करने का प्रयास किया **बहन ने लोक-लाज के कारण उस समय नहीं बताया था।** इस कार्य में हरिसूदन की माँ व भाभी गलत कार्य कराने में हरिसूदन का पूर्ण सहयोग किया। मेरी बहन की फोटो अपने साथ डाल ली है। अतः महोदय से विनम्र निवेदन है कि प्रार्थी की रिपोर्ट लिख कर उचित कानूनी कार्यवाही करने की कृपा करें।" वादी मुकदमा द्वारा प्रस्तुत उक्त आशय की लिखित तहरीर के आधार पर अभियुक्तगण हरिसूदन वर्मा, मां व भाभी के विरुद्ध संबंधित थाना चकरी, जिला-कानपुर नगर पर मु०अ०सं०-1167/2021 धारा- 384, 354 व 506 भा.द.स. के अंतर्गत प्रथम सूचना रिपोर्ट पंजीकृत कर अन्वेषण की कार्यवाही प्रारंभ की गयी।

4. प्रकरण की पुलिस द्वारा विवेचना की गयी तथा विवेचना के पश्चात पुलिस

द्वारा अभियुक्त हरिसूदन वर्मा के विरुद्ध धारा-384, 506, 376 (2) (n), 354 ख भा०दं०सं० के अंतर्गत विचारण हेतु आरोप पत्र प्रेषित किया गया। तमामी विवेचना के उपरांत **विवेचक द्वारा प्राथमिकी में नामित अन्य अभियुक्तगण मां व भाभी का नाम साक्ष्य के अभाव में मुकदमें से पृथक किया गया।**

5. पुलिस द्वारा प्रेषित आरोप पत्र प्रदर्श क-11 पर न्यायालय मुख्य महानगर मजिस्ट्रेट द्वारा प्रसंज्ञान लेने के पश्चात उपरोक्त प्रकरण को दिनांक 20.05.2022 को सत्र सुपुर्द किया गया। तत्पश्चात न्यायालय सत्र न्यायाधीश, कानपुर नगर द्वारा अपने आदेश दिनांकित 27.07.2022 के माध्यम से अभियुक्त हरिसूदन वर्मा को धारा-354 बी, 384, 506, 376(2) (n) भा०दं०सं० के अपराध में आरोपित कर आरोप अभियुक्त को पढ़कर सुनाया व समझाया गया। अभियुक्त द्वारा आरोप से इंकार किया गया एवं विचारण किये जाने की मांग की गयी।

6. अभियोजन पक्ष द्वारा अपने कथन के समर्थन में अभियोजन साक्षी सं. 01 वादी अभिमन्यु सिंह , अभियोजन साक्षी सं. 02 हे. काँ. मिथिलेश कुमार, अभियोजन साक्षी सं. 03 घनश्याम, अभियोजन साक्षी सं. 04 डॉ कल्पना चतुर्वेदी, अभियोजन साक्षी सं. 05 पीड़िता तथा अभियोजन साक्षी

सं. 06 विवेचक विजय कुमार शुक्ला का परीक्षण न्यायालय के समक्ष कराया गया। दस्तावेजीय साक्ष्य में अभियोजन की ओर से तहरीर प्रदर्श क-1, प्रथम सूचना रिपोर्ट प्रदर्श क-2, जी.डी. सी.सी.टी.एन.एस प्रदर्श क-3, मेडिकोलीगल रिपोर्ट प्रदर्श क-4, बयान धारा 164 दं.प्र.सं. प्रदर्श क-5, नक्शा नजरी प्रदर्श क-6, नक्शा नजरी कागज सं. 06-क/1, प्रदर्श क-7, उपस्थिति रिपोर्ट प्रदर्श क-8, उपस्थिति पंजिका के अभिलेख प्रमाण पत्र क्रमशः प्रदर्श क-8 से प्रदर्श क 13, पीड़िता के बैंक एकाउंट का खाता विवरण प्रदर्श क-14, में पीड़िता के 161दं.प्र.सं. के बयान की वीडियो रिकॉर्डिंग वस्तु प्रदर्श-1, फोटोग्राफ वस्तु प्रदर्श-2 तथा शादी का कार्ड वस्तु प्रदर्श-3 प्रस्तुत किया गया है।

7. अभियोजन साक्षी सं. 01वादी अभिमन्यु सिंह ने सशपथ बयान किया कि "मेरी बहन मेरे साथ ही घर पर रहती है। मेरी बहन की एक सहेली (Y) है जिसकी मदद से अभियुक्त हरिसूदन वर्मा ने मेरी बहन का मोबाइल नं. प्राप्त कर लिया था व उससे बातचीत करता था। बातचीत के दौरान अभियुक्त द्वारा मेरी बहन का मोबाइल हैक कर लिया गया वह उसे दो वर्ष तक ब्लैकमेल करता रहा। फोन से वह मेरी बहन को धमकी देता था कि रुपये भेजो नहीं तो मैं तुम्हें बदनाम कर दूंगा। मेरी बहन ने लोक-लाज के भय से कई बार अभियुक्त को रुपये व सोने के जेवर दिये

व कई बार अभियुक्त ने अपने खाते में मेरी बहन से धनराशि प्राप्त की। अभियुक्त मेरी बहन से कहता था कि उसके मोबाइल में पीड़िता व उसके परिवार के सभी सदस्यों के व्हाट्सएप नं. आ चुके हैं और वह सभी को व्हाट्सएप पर मैसेज भेजकर मेरी बहन को बदनाम करने की धमकी देता था। मेरी बहन की शादी जिला फतेहपुर में दिनांक 07.12.2021 को होना तय हुयी थी। शादी के कार्डस छप गये थे। इसकी जानकारी होने पर अभियुक्त दिनांक 18.11.2021 को एक महिला के साथ फतेहपुर पहुँचा और उसके होने वाले पति को बुलाकर कहा कि मेरे सम्बन्ध तुम्हारी होने वाली पत्नी से बहुत पहले से हैं तथा उसको बहन के साथ की आपत्तिजनक फोटो दिखाकर कहा कि यदि वह मेरी बहन से शादी करेगा तो अभियुक्त आत्महत्या कर लेगा या मेरी बहन की हत्या कर देगा। इस प्रकार अभियुक्त ने मेरी बहन का रिश्ता तुड़वा दिया जबकि हमने विवाह की पूरी तैयारी कर रखी थी। अभियुक्त ने अपनी माँ व भाभी के सहयोग से अपने घर बुलाकर चाय में नशीला पदार्थ पिलाकर मेरी बहन को बेहोश कर दिया व बेहोशी के हालत में कई बार उसके साथ गलत काम किया। अभियुक्त द्वारा मेरी बहन को बेहोश हो जाने पर निर्वस्त्र करके नग्न फोटो खींचकर मेरी बहन को ब्लैकमेल किया जाता रहा इस काम में अभियुक्त की माँ व भाभी का पूरा सहयोग रहा है। दिनांक 17.11.2021

को अभियुक्त ने मेरी बहन को अपने घर बुलाकर अभियुक्त की माँ व भाभी के सहयोग से बहन की नग्न अवस्था की फोटो दिखाकर उसे ब्लैकमेल करते हुये उसके साथ बलात्कार किया। लोक-लाज के भय के कारण मेरी बहन ने परिवार के लोगों को पूरी बात नहीं बतायी थी। अभियुक्त द्वारा मेरी भाभी सुमन सिंह के मोबाइल से व्हाट्सएप के माध्यम से मेरी बहन की आपत्तिजनक फोटो भेजी गयी थी ये सभी फोटो मैंने विवेचक को दी थी। मैंने धारा-161 दं०प्र०स० के अंतर्गत अपनी बहन के साथ हुयी घटना के सम्बन्ध में बयान दिया था। मैंने थाना चकेरी में घटना की रिपोर्ट टाइप कराकर दिनांक 25.11.2021 को दी थी। टाईपशुदा प्रार्थनापत्र पत्रावली में शामिल है जिसपर मैंने अपनी मर्जी से हस्ताक्षर बनाये हैं तहरीर प्रार्थनापत्र पर प्रदर्श क-1 डाला गया।" इस साक्षी से बचाव पक्ष द्वारा विस्तृत प्रतिपरीक्षा की गयी है।

8. **अभियोजन साक्षी सं. 02** हेड कांस्टेबल मिथलेश कुमार जो कि औपचारिक साक्षी है तथा उसने अपने द्वारा कृत कार्यवाही के संबंध में बयान दिया है तथा आवश्यक फर्द प्रदर्श आदि को साबित किया है।

9. **अभियोजन साक्षी 03** घनश्याम सिंह ने सशपथ बयान किया कि "मेरा पुत्र अभिमन्यु सिंह द्वारा मेरी पुत्री के साथ

घटित घटना के सम्बन्ध में थाना चकेरी में दिनांक 27.11.2021 को एफ.आई.आर लिखायी थी। मेरी पुत्री मेरे साथ घर पर रहती थी। पुत्री का मोबाइल न. (Y) के पास था जो उसकी सहेली थी। प्रियंका का सम्पर्क हरिसूदन वर्मा से था जिस कारण से पुत्री का मोबाइल न. हरिसूदन के पास पहुँच गया। हरिसूदन मोबाइल नम्बर पहुँचने के बाद उससे बातचीत करने लगा। जो मोबाइल था हरिसूदन वर्मा द्वारा हैक कर लिया गया था। हरिसूदन वर्मा मेरी पुत्री को लगभग दो वर्षों से ब्लैकमेल करता था तथा धमकी भी देता था कि रुपया भेजो नहीं तो तुम्हें बदनाम कर देंगे तुम्हारी फोटो वायरल कर देंगे। हरिसूदन वर्मा ने मेरी पुत्री से यह भी कहा था कि हमारे पूरे परिवार के सदस्यों के व्हाट्सएप नं आ गये हैं। दिनांक 01.04.2020 को हरिसूदन ने मेरी पुत्री को अपने घर बुलाया था। जहाँ पर उसकी भाभी तथा माँ पहले से उपस्थित थीं। वहीं पर मेरी पुत्री को उसकी भाभी और मां ने चाय में नशीला पदार्थ पिलाकर उसे बेहोश कर दिया तथा मेरी पुत्री को बेहोशी की हालत में नग्न अवस्था में नग्न करके फोटो खींच ली जब मेरी पुत्री होश में आई तो उसने अपने आप को अस्त व्यस्त पाया। मेरी पुत्री को भाभी व हरिसूदन की माँ ने नग्न फोटो दिखाये थे तथा हरिसूदन ने पुत्री के साथ बलात्कार किया था। इस कार्य में हरिसूदन की माँ व भाभी ने पूरा सहयोग किया था। दिनांक 15.04.2020 को

एक लाख रुपये मेरी पुत्री ने हरिसूदन वर्मा के घर में उसकी माँ और भाभी की मौजूदगी में दिया था। पैसे ब्लैकमेलिंग न हो इसलिये दिये थे। मेरी पुत्री की शादी फतेहपुर में दिनांक 07.12.2021 को होनी थी। दिनांक 18.11.2021 को हरिसूदन एक महिला के साथ पहुँचा और मेरे होने वाले दामाद से कहा कि शादी न करो शादी करोगे तो मैं उसे मार दूँगा नहीं तो आत्महत्या कर लूँगा। इस काम में उसकी माँ व भाभी का पूर्ण सहयोग रहा मेरी पुत्री की फतेहपुर वाली शादी हरिसूदन ने जानबूझकर छुड़वा दी जबकि मैंने शादी की पूर्ण तैयारी कर ली थी तथा कार्ड वितरित हो गये थे हरिसूदन बहुत शातिर अपराधी है। इसके मुकदमें इस न्यायालय के अतिरिक्त अन्य न्यायालय में चल रहे हैं। हरिसूदन मुझे, मेरी पुत्री को एवं पूरे परिवार को जान से मारने की धमकी देता था। हरिसूदन मेरी पुत्री की अश्लील फोटो अपने साथ लगाकर उसके होने वाले पति को दिनांक 18.11.2021 को दिखाई थी तथा मेरी पुत्री की भाभी के व्हाट्सएप पर कुछ साथ की साधारण फोटो डाल दी हरिसूदन वर्मा ने मेरी पुत्री को घर बुलाकर दिनांक 17.11.2021 को बलात्कार भी किया। मेरी पुत्री ने लोक-लाज से उस समय नहीं बताया था इस कार्य में हरिसूदन की माँ व भाभी ने पूर्ण रूप से सहयोग किया हरिसूदन ने मेरी पुत्री की फोटो अपने साथ डाल दी थी। एफ.आई.आर होने के बाद यह

बात बतायी थी इसलिये बलात्कार लिखने से रह गयी थी। हरिसूदन के किये गये कार्य से हमारी सामाजिक, आर्थिक व मानसिक आघात पहुँचा व सामाजिक प्रतिष्ठा धूमिल हुयी। हम और हमारा परिवार समाज में बदनामी के कारण मुँह छिपाते हैं तथा इसी तरह से जीने को मजबूर हैं। विवेचक ने मेरा बयान अंकित किया था व विवेचक को शादी का कार्ड दिया था तथा अन्य दस्तावेजी साक्ष्य भी विवेचक को दिये थे। इस साक्षी से बचाव पक्ष द्वारा विस्तृत प्रतिपरीक्षा की गयी है।"

10. **अभियोजन साक्षी 04** डा. कल्पना चतुर्वेदी ने बयान दिया है कि पीड़िता की सहमति से उसका चिकित्सीय परीक्षण किया था, पीड़िता की माहवारी लगभग 30 दिन पहले आयी थी, उसके बाहरी अंग पर कोई भी चोट के निशान नहीं थे, आन्तरिक परीक्षण में हाइमन पुराना तथा भरा हुआ था मैंने उसकी दो वैजाइनल स्मैयर्स स्लाइड बनाकर तथा सील करके महिला कांस्टेबल को सुपुर्द कर दी थी। मेडिकोलीगल रिपोर्ट मेरे हस्तलेख द्वारा तैयार की गयी थी जो पत्रावली में शामिल की गयी है जिसमें मेरे हस्ताक्षर हैं मैं अपने हस्ताक्षर की पुष्टि करती हूँ। मेडिकोलीगल रिपोर्ट पर प्रदर्श क-4 डाला गया। इस साक्षी से बचाव पक्ष द्वारा विस्तृत प्रतिपरीक्षा की गयी है।

11. **अभियोजन साक्षी सं. 05** पीड़िता ने

सशपथ बयान किया कि "मैं हाजिर अदालत अभियुक्त हरिसूदन को पहले से नहीं जानती थी। मेरी दोस्त (Y) जो हरिसूदन की दोस्त थी तथा उससे मिलती थी उसी ने मुझे हरिसूदन से मिलवाया था। मेरा मोबाइल नम्बर सन् 2018 में जो था वह प्रियंका राय ने हरिसूदन को दिया था। इस समय मुझे वो मोबाइल नम्बर याद नहीं है। हरिसूदन उसी मोबाइल नम्बर से मुझसे बात करने लगा उसने मुझे 01.04.2020 को अपने घर बुलाया था आधे रास्ते वो मुझे लेने आया था मैं उसके घर करीब बारह साढ़े बारह बजे दोपहर में पहुँची थी। उस समय उसकी माँ व भाभी व हरिसूदन मौजूद थे। उसकी माँ व भाभी ने मुझे चाय दी थी उस चाय में कोई नशीला पदार्थ मिला हुआ था उसे पीने के 5-6 मिनट बाद मैं बेहोश हो गयी थी। पर मुझे सही से याद नहीं पर शायद मुझे आधे घण्टे बाद होश आया था। तब मैं पूरी तरह नगनावस्था में थी इसके बाद हरिसूदन की भाभी आयी और मुझे धमकी देने लगी व मेरे नगनावस्था के फोटो दिखाये और कहा कि हरिसूदन से शादी कर लो नहीं तो ये फोटो वायरल कर देंगे व मुझे जान से मारने की धमकी दी कि यह पहले भी मर्डर कर चुका है तुम्हारा भी कर देगा। जब फोटो वायरल करने की बात हुयी तब उसकी माँ व भाभी मौजूद थी। इन दोनों ने हरिसूदन से शादी के लिये दबाव डाला था। हरिसूदन ने अपनी भाभी व माँ की

मौजूदगी में मेरी मर्जी के बिना मेरे साथ शारीरिक संबंध बनाये थे। मैं हरिसूदन के घर तकरीबन ढाई से तीन घण्टा रही थी बलात्कार के बाद फोटो वायरल करने की धमकी दी व जान से मारने की धमकी दी इसके बाद तुरंत मैं अपने घर आ गयी थी। मैंने ये बात डर के मारे किसी को नहीं बताया था कि कहीं फोटो वायरल न हो जाये। इसके बाद हरिसूदन उसकी माँ व भाभी फोन करके ब्लैकमेल करने लगी। इन सब लोगों ने एक लाख रुपये की भी माँग की थी जो 15.04.2020 को मैंने नकद ले जाकर दिये थे। ये पैसे मैंने हरिसूदन के घर जाकर दिये थे उस समय ये तीनों लोग गेट पर खड़े थे। ये पैसे मेरी सेविंग्स के थे जो पापा भाई ने व मैंने ट्यूशन पढ़ाकर इकट्ठे किये थे इसके तुरंत बाद मैं घर आ गयी थी। इसके बाद हरिसूदन व उसकी माँ व भाभी ब्लैकमेल करते थे व पैसे माँगते थे। जब मैं बलात्कार की घटना के पूर्व (Y) के साथ हरिसूदन के घर गयी थी, दो तीन बार गयी थी तभी इसने मेरा फोन लेके हैक कर लिया था। मेरा खाता मेरे भाई के मोबाइल नं. से अटैच था इस वजह से जब मैंने इसे पैसे देने से मना किया तो इसने कहा कि अपनी आई.डी से नया सिम लो और मेरा नम्बर अपने अकाउण्ट में ऐड करो जिससे आसानी से गूगल पे हो जाये। मेरे नये सिम को ये ज्यादातर अपने पास ही रखता था। मैंने यूनियन बैंक के खाते से पैसा ट्रांसफर किया था 17-18 बार गूगल पे

किया था। कई बार मैंने इसको तीन हजार, पाँच हजार व बीस हजार रुपये कैश दिये थे ये काम मैं इसलिये करती थी कि ये मेरे अश्लील व नग्न फोटो वायरल न कर दे। 12.11.2021 को ये मुझे अन्ना चौराहे पर मिला था। वहाँ इसने मुझे मेरी अश्लील फोटो दिखाकर ब्लैकमेल किया और कहा गाड़ी में बैठो वहाँ से ये अपने घर ले गया वहाँ इसकी भाभी व माँ भी मौजूद थी फिर इसने पुनः बलात्कार किया उस समय साढ़े तीन-चार बजे का समय था मैं वहाँ करीब एक घण्टा रुकी थी। उसके बाद मैं अपने घर वापस आ गयी थी। जब मेरे पास पैसे नहीं होते थे तो ये लोग गहने देने के लिये कहते थे मेरी सोने की चैन, सोने का टॉप्स व सोने की बाली हरिसूदन के घर पर उसकी माँ व भाभी की मौजूदगी में कभी हरिसूदन को व कभी इसकी भाभी को दी थी। मेरी इंगेजमेण्ट हो चुकी थी 07.07.2021 को, उसमें मुझे काफी गोल्ड मिला था। हरिसूदन ने कहा इसमें से कुछ गोल्ड उसको दे दो। 18.07.2021 को मैं शाम को चार- साढ़े चार बजे दो सोने की अंगूठी व बीस हजार रुपये नकद लेकर आयी थी इन सब घटनाओं के बारे में मैंने पहले अपने घर वालों को नहीं बताया था। 18.07.2021 को जब मैं हरिसूदन के घर गयी थी तो उसकी भाभी व माँ मौजूद थी। ये लोग मेरी शादी तुड़वाने की धमकी, वीडियो वायरल करने की धमकी देते थे। 16.11.2021 को मेरा गूगल पे काम नहीं

कर रहा था तो इसने मेरा ए.टी.एम मंगाया व अन्ना चौराहे पर आई.सी.आई.सी.आई बैंक के ए.टी.एम से पहले आठ हजार व फिर नौ हजार रुपये मेरे ए.टी.एम से निकाल लिये। 17.11.2021 को भी हरिसूदन ने मुझे कांशीराम चौराहा पर बुलाया व फोटो दिखाकर फिर से पैसे मांगने लगा व मेरी शादी तुड़वाने की धमकी देने लगा फिर 17.11.2021 को भी यह मुझे अपने घर ले गया और अपनी माँ व भाभी की मौजूदगी में मेरे साथ बलात्कार किया। मेरा विवाह प्रखर सिंह के साथ मेरे घर वालों ने तय किया था। प्रखर सिंह के साथ मेरी शादी 07.12.2021 को शादी तय हुयी थी। 18.11.2021 को हरिसूदन किसी महिला के साथ प्रखर सिंह से मिला इसने प्रखर सिंह व उसके परिवार वालों को मेरी अश्लील फोटो दिखाकर शादी तुड़वा दी। सुमन सिंह, मेरी भाभी का नं. मेरे फोन से निकालकर उनके फोन पर मेरे अश्लील फोटो भेजे व फोटो इसके साथ मेरी बेहोशी के हालत की थी उन फोटो में मैं कपड़े पहने थी यह फोटो मेरी भाभी ने फैमिली मेम्बर्स को भेजी थी जब घर वालों ने फोटो देखी तो मुझसे पूछताछ की थी पर बलात्कार वाली बात मैंने डर से छुपा ली थी। इस घटना की एफ.आई.आर मेरे भाई अभिमन्यु सिंह लिखाने गये थे। अभिमन्यु के साथ मेरा छोटा भाई शैलेन्द्र प्रताप सिंह भी था। रिपोर्ट लिखाने के चार दिन बाद मैंने सबसे पहले अपनी माँ को बलात्कार के बारे में

बताया था। मम्मी ने पापा और भाइयों को बताया था फिर जब घरवालों ने पूछा तो मैंने सब कुछ बता दिया। मैंने मजिस्ट्रेट को बयान किसी के दबाव में नहीं दिया था। इस साक्षी द्वारा धारा-164 दं०प्र०सं० के बयान को प्रदर्श क-5 के रूप में साबित किया गया है। इस साक्षी से बचाव पक्ष द्वारा विस्तृत प्रतिपरीक्षा की गयी है।

12. अभियोजन साक्षी सं. 06 विवेचक विजय कुमार शुक्ला जो कि औपचारिक साक्षी है तथा उसने अपने द्वारा कृत कार्यवाही के संबंध में बयान दिया है तथा आवश्यक फर्द प्रदर्श आदि को साबित किया है तथा इस साक्षी ने यह भी कहा है कि तमामी विवेचना के उपरांत प्रथम सूचना रिपोर्ट में नामजद अभियुक्तगण व की नामजदगी गलत पायी गयी।

13. अभियोजन साक्षियों के बयान के आधार पर अभियुक्त का धारा 313 दं.प्र.सं. के अंतर्गत बयान लिया गया , जिसमें उसके विरुद्ध लगे आरोप पीड़िता को चाय में नशीला पदार्थ पिलाकर बेहोश करने के संबंध में कथन किया है जो कि गलत है व पीड़िता को ब्लैकमेल कर उससे एक लाख रुपये तथा जेवर की जबरदस्ती वसूली के सम्बन्ध में कथन किया है जो कि बिल्कुल गलत है। मैंने कभी पीड़िता से पैसा नहीं लिया और न ही कोई भी पैसा जेवर मुझे दिया। पीड़िता को आपराधिक

धमकी दिये जाने के सम्बन्ध में अभियुक्त का कथन है कि बिल्कुल गलत है। पीड़िता के साथ बलात्संग किये जाने के प्रश्न पर अभियुक्त ने कथन किया है कि बिल्कुल गलत है। वादी मुकदमा अभिमन्यु सिंह के बयान के सम्बन्ध में अभियुक्त ने कथन किया है कि बिल्कुल झूठा बयान दिया है। मेरे खिलाफ झूठा प्रार्थनापत्र तैयार कर थाने में मुकदमा लिखाया। पिता के पुलिस में होने के कारण मेरे खिलाफ गलत जाँच कराकर झूठा आरोप पत्र भी लगवा दिया। घनश्याम सिंह के बयान के सम्बन्ध में अभियुक्त का कथन है कि गलत है। झूठा बयान दिया है। पीड़िता की शादी स्वयं पीड़िता ने योजनाबद्ध तरीके से अपने होने वाले पति से बात करके एक योजना के तहत तुड़वाई थी। पीड़िता फतेहपुर में प्रखर सिंह से विवाह नहीं करना चाहती थी। पीड़िता के बयान के संबंध में अभियुक्त का कथन है कि बिल्कुल गलत है, अदालत में झूठा बयान दिया है तथा न्यायालय में अपने भाई, पिता व प्राइवेट अधिवक्ता के सिखाने पर बढ़ा-चढ़ा कर बयान दिया है। मेरी सिर्फ पीड़िता से दोस्ती थी वह मुझसे शादी करना चाहती थी, लेकिन मैंने कहा था कि अभी मैं शादी नहीं कर सकता हूँ क्योंकि मेरा मुकदमा चल रहा है। पीड़िता ने स्वयं प्रखर सिंह से बात करके शादी के लिये मना कर दिया था। मुकदमा चलने के सम्बन्ध में कथन किया

कि पीड़िता की मुझसे मित्रता थी। वह अपने घरवालों के अनुसार विवाह नहीं करना चाहती थी। उसने अपने होने वाले पति से बात करके शादी के लिये स्वयं मना कर दिया था। पीड़िता का फतेहपुर में रिश्ता टूट जाने के बाद पीड़िता के घरवालों द्वारा मेरे खिलाफ झूठा मुकदमा दर्ज करवाया गया बाद में उनकी कहानी झूठी होने पर काफी समय के बाद बलात्कार की बात बढ़ा-चढ़ा कर बता दी गयी।

14. बचाव पक्ष की ओर से मौखिक साक्ष्य के रूप में डी.डब्लू 01 दीपक कुमार, डी.डब्लू 02 नवनीत कुमार, डी.डब्लू 03 मधुसूदन वर्मा तथा डी.डब्लू 04 एस.आई. दीपक त्यागी का बयान कराया गया एवं अभिलेखीय साक्ष्य के अंतर्गत मातृ एवं बाल सुरक्षा कार्ड प्रदर्श ख-1, एस.एस.पी. व डी.जी.पी को विभिन्न तिथियों पर प्रेषित मेल की प्रतियां प्रदर्श ख-2,3, एवं 4, एवं अन्य बहुत से अभिलेखीय साक्ष्य प्रदर्श ख-5 लगायत प्रदर्श ख-26 प्रस्तुत किये गये।

15. **बचाव साक्षी सं. 01(डी.डब्लू.-1)**
दीपक कुमार ने न्यायालय में सशपथ बयान किया है कि हाजिर अदालत मुल्जिमान हरिसूदन वर्मा को मैं वर्ष 2018 से जानता हूँ। हरिसूदन वर्मा बजरंग गाउँड में बॉक्सिंग व रनिंग करते थे और बच्चों को बॉक्सिंग भी सिखाते थे। हरिसूदन वर्मा से मैंने बॉक्सिंग सीखने की इच्छा जाहिर

की। जिस पर हरिसूदन वर्मा ने मुझसे कहा तुम बॉक्सिंग न सीखो तुम्हें चोट लग जाएगी। मेरे काफी आग्रह करने पर मुझे हरिसूदन वर्मा ने बॉक्सिंग करना सिखा दिया था। मैंने 2019 में हरिसूदन वर्मा से बॉक्सिंग करना सीखना शुरू किया था। लगभग दो ढाई साल बॉक्सिंग सीखी। जहाँ पर हरिसूदन मुझे बॉक्सिंग सिखाते थे। वहाँ पीड़िता हरिसूदन से अक्सर महीने में दो-तीन बार मिलने आती थी। हरिसूदन वर्मा जब पीड़िता वहाँ आती थी तब हम लोगों को बॉक्सिंग सिखा कर कभी पीड़िता को स्कूटी में व कभी हरिसूदन अपनी बाइक में उनके साथ चले जाते थे। दोनों लोग फ्रेंड की तरह से बातचीत करते थे व हँसी मजाक किया करते थे। मैं पीड़िता को दीदी कहता था। हरिसूदन और पीड़िता के बीच प्यार मोहब्बत था या नहीं, मैंने कभी नोटिस नहीं किया। अप्रैल 2020 में देश में व कानपुर शहर में लॉकडाउन पूरी तरह से लगा हुआ था। उस दौरान हम लोगों को निकलने को नहीं मिलता था इसलिए हम लोग बॉक्सिंग सीखने नहीं जाते थे। मुझे इस बारे में जानकारी नहीं है कि हरिसूदन के ऊपर जो आरोप लगे हैं वह सही है या गलत। मैं नहीं बता सकता। मैंने कोई घटना होते नहीं देखी। मुझे उसके बारे में जानकारी नहीं है कि पीड़िता की शादी फतेहपुर जिला में लगी थी। पीड़िता और हरिसूदन जहाँ तक मैंने देखा है अच्छे दोस्त थे। एक दूसरे से हँस बोलकर मिलते

थे। मैंने कभी इन दोनों के बीच कोई लड़ाई झगड़ा होते नहीं देखा था।

16. बचाव साक्षी सं. 02(डी.डब्लू.-2)
नवनीत कुमार ने सशपथ बयान किया कि मैं हरिसूदन वर्मा की भाभी को जानता हूँ रिश्ते में यह मेरी बुआ की बहू है। मेरी पत्नी को बच्चा होना था। उसकी देखभाल के लिए हरिसूदन की भाभी व मां को बुलाया था। यह दोनों 20 मार्च 2020 को मेरे घर मेरी पत्नी (गर्भवती) की देखभाल के लिए आई थी। चूंकि मेरे घर में मेरी माता जी है जो काफी उम्दराज हैं, इसलिए इनको बुलाया था। दिनांक 22 मार्च 2020 को पूरे देश में जनता कर्फ्यू लग गया था। उसके बाद दिनांक 27.03.2020 को मेरी पत्नी के बच्चा हुआ था। उसके बाद देश में पूर्णतयः लॉकडाउन / कोरोना कर्फ्यू लग गया था। जिस वजह से ये लोग मेरे घर में ही फंस गए थे। डिलीवरी के बाद भी अपने घर भाभानगर सनिगवां नहीं जा पाए और मेरे घर पर ही रुके थे। स्मृति त्रिवेदी व पुष्पा देवी जून 2020 तक मेरे घर में ही रुकी रही। दिनांक 01.04.2020 को हरिसूदन के ऊपर जो आरोप लगा है कि उसने अपने घर में किसी लड़की का बलात्कार अपनी भाभी व मां की मौजूदगी में किया है। यह पूरी तरह से गलत है, क्योंकि उस दिन देश में लॉकडाउन लगा था और यह दोनों मेरे घर पर मौजूद थी।

17. बचाव साक्षी सं. 03(डी.डब्लू.-3)
मधुसूदन वर्मा ने सशपथ बयान किया कि

मैं प्राइवेट सेक्टर में HRA Advisor हूँ। हरिसूदन वर्मा मेरा छोटा भाई है। हरिसूदन कोई परमानेन्ट काम नहीं करता था। सिक्योरिटी व मजदूरी का काम करता था। बॉक्सिंग खेल चुका था और बॉक्सिंग की ट्रेनिंग भी देता था। हरिसूदन ने एन०सी०सी० भी की है। एन०सी०सी० सर्टिफिकेट में A ग्रेड लाया था। बॉक्सिंग में कुछ अवॉर्ड भी मिले थे। मुझे इस बात की जानकारी है कि पीड़िता ने हरिसूदन के ऊपर रेप का आरोप लगाया है। मुझे हरिसूदन के ऊपर लगाए गए आरोप की जानकारी एफ०आई०आर० के बाद हुई थी। मैं इस मुकदमें में वादी मुकदमा अभिमन्यु सिंह को दिनांक 25.11.2021 को ही जाना था। दिनांक 25.11.2021 को अभिमन्यु सिंह मेरे घर पर लगभग 4:30-5:30 शाम को आधा दर्जन पुलिस वालों को लेकर आया था। अभिमन्यु सिंह टेक सूट में था। उसने अपने आप को मुझसे बताया था कि वह UP STF/पुलिस कर्मचारी है। अभिमन्यु ने घर पर आकर पुलिस वालों के सामने मुझसे कहा था कि हरिसूदन ने मेरी बहन की शादी तुड़वाई है। आप लोग कम्प्रोमाइज कर लो नहीं तो सभी के खिलाफ मुकदमा लिखाकर जेल भिजवा देंगे। जो पुलिस वाले उसके साथ आए थे, उन्होंने भी वही कहा था। इन्होंने मुझसे कहा था शादी टूटने की वजह से हम लोगों का जो नुकसान हुआ है। उसकी भरपाई तुम लोग करो, वरना जेल भिजवा देंगे, झूठा केस लगाकर। इस

सम्बन्ध में मैंने एस.एस.पी. व डी.जी.पी. पुलिस को ई-मेल भेजा था। दिनांक 26.11.2021 रात्रि 12:30 बजे अपनी ई-मेल आईडी से एस.एस.पी. की रजिस्टर ई-मेल आईडी पर ई-मेल भेजा था। इसके बाद उसी दिन 26.11.2021 को सुबह 10:15 पर पुनः मैंने अपनी ई-मेल से एस.एस.पी. कानपुर नगर व अन्य उच्चाधिकारियों को इसी सम्बन्ध में शिकायत ई-मेल की थी। मैं अपनी ई-मेल की कॉपी जो उच्चाधिकारियों को भेजी थी, वो फेरिस्त के साथ दाखिल कर रहा हूँ। इस साक्षी ने अभियुक्त ने निर्दोष साबित करने हेतु अपने द्वारा की गयी समस्त कार्यवाही से संबंधित आवश्यक अभिलेख प्रदर्श ख-1 से प्रदर्श ख-26 तक न्यायालय में प्रस्तुत किया तथा उनकी शिनाख्त की। विद्वान सहायक जिला शासकीय अधिवक्ता (दाण्डिक) द्वारा प्रतिपरीक्षा की गयी है।

18. बचाव साक्षी सं. 04(डी.डब्लू.-4) दीपक त्यागी ने सशपथ बयान किया कि इस मुकदमें की विवेचना मुझे दिनांक 27.11.2021 को प्राप्त हुई। जब मैंने इस मुकदमें की विवेचना प्रारम्भ की तो उस समय मुकदमा धारा 384/354/506 भा०दं०स० में पंजीकृत हुआ था। इसी की विवेचना मेरे द्वारा प्रारम्भ की गई। मैंने इस मुकदमें का पहला पर्चा दिनांक 28.11.2021 को किया था। इसमें मैंने 2 पर्चे काटे। वादी मुकदमा का बयान मेरे द्वारा लिया गया। मुझे विवेचना के समय थाने से

मात्र FIR की कॉपी ही प्राप्त हुई थी और कोई दस्तावेज नहीं दिए गए थे। मुझे वादी मुकदमा ने अपने बयान में उसकी बहन निशा सिंह के साथ हरिसूदन द्वारा बलात्कार करने वाली बात नहीं बताई थी। वादी मुकदमा ने मुझे अपने बयान के समय कोई भी दस्तावेजी साक्ष्य उपलब्ध नहीं कराया था ना ही वादी ने मुझे कोई फोटो, ब्लैकमेल के सम्बन्ध में दी, न ही पूरी विवेचना जब तक मेरे पास रही तब तक मुझे कोई भी बैंक के स्टेटमेंट आदि उपलब्ध नहीं कराए थे। पर्चा नं. 02 मैंने दिनांक 04.12.2021 को किया था। दौरान विवेचना मुझे वादी से कोई मोबाइल आदि प्राप्त नहीं हुआ था। दूसरा पर्चा दिनांक 15.12.2021 को प्रिंट हुआ था। मैं अपनी विवेचना के दौरान वादी के घर केवल एक बार गया था। मेरे द्वारा इस मुकदमे की पीड़िता का कोई बयान जब तक मेरे पास रही तब तक नहीं लिया गया। मुझे पीड़िता मिली भी नहीं थी।" इस साक्षी से विद्वान सहायक जिला शासकीय अधिवक्ता (दाण्डिक) द्वारा प्रतिपरीक्षा की गयी।

19. सत्र न्यायाधीश ने मामले में दिये गये तथ्यों एवं साक्ष्यों के आधार पर उभय पक्ष के विद्वान अधिवक्ताओं के तर्कों सुनने के पश्चात् यह अभिमत व्यक्त किया है कि:-

(a) प्रस्तुत मामले में वादी अभिमन्यु सिंह जो कि पीड़िता का भाई है

उसके द्वारा इस आशय की तहरीर प्रस्तुत की गयी है कि उसकी बहन को अभियुक्त हरिसूदन ब्लैकमेल करता था, धमकी देकर रुपये एवं गहने ऐंठता था, अभियुक्त ने पीड़िता की शादी तुड़वा दी तथा पीड़िता के साथ बलात्कार किया। उल्लेखनीय है कि दुष्कर्म के मामलों में पीड़िता के अतिरिक्त कोई अन्य साक्षी उपलब्ध नहीं होता है। ऐसे मामलों की एक मात्र गवाह पीड़िता ही होती है। अतः ऐसे मामलों में न्यायालय को पीड़िता के बयानों का विश्लेषण करते समय अत्यंत सतर्कता बरतनी चाहिये।

(b) वर्तमान मामले में अभियोजन कथानक के अनुसार दिनांक 01.04.2020, दिनांक 12.11.2021 व 17.11.2021 को अभियुक्त द्वारा पीड़िता के साथ बलात्कार किया जाना बताया गया है। इस सम्बन्ध में यदि पीड़िता के बयानों का अवलोकन किया जाये तो पीड़िता द्वारा अपनी मुख्य परीक्षा में दिनांक 01.04.2020, दिनांक 12.11.2021 व दिनांक 17.11.2021 को अभियुक्त द्वारा पीड़िता के साथ अपने घर ले जाकर अपनी भाभी व माँ की मौजूदगी में बलात्कार किये जाने की बात कही गयी है। किन्तु जिरह के दौरान पीड़िता द्वारा यह कहा है कि दिनांक 01.04.2020 को वह स्वयं लॉकडाउन के दौरान हरिसूदन के घर गयी थी, हनुमान मंदिर के पास हरिसूदन उसे लेने आया था मैं उसके घर करीब बारह साढ़े बारह बजे दोपहर में पहुंची थी। उस समय उसकी माँ व भाभी व हरिसूदन

मौजूद थे। उसकी माँ व भाभी ने मुझे चाय दी थी उस चाय में कोई नशीला पदार्थ मिला हुआ था उसे पीने के 5-6 मिनट बाद मैं बेहोश हो गयी थी पर मुझे सही से याद नहीं पर शायद मुझे आधे घण्टे बाद होश आया था। जब मुझे होश आया था तब मैं पूरी तरह नगनावस्था में थी इसके बाद हरिसूदन की भाभी आयी और मुझे धमकी देने लगी व मेरे नगनावस्था के फोटो दिखाये और कहा कि हरिसूदन से शादी कर लो नहीं तो ये फोटो वायरल कर देंगे, जब फोटो वायरल करने की बात हुयी तब उसकी माँ व भाभी मौजूद थी। इन दोनों ने हरिसूदन से शादी के लिये दबाव डाला था। हरिसूदन ने अपनी भाभी व माँ की मौजूदगी में मेरी मर्जी के बिना मेरे साथ शारीरिक सम्बन्ध बनाये थे। इस सम्बन्ध में यदि पीड़िता के 161 दं०प्र०सं० व 164 दं०प्र०सं० के बयानों का अवलोकन किया जाये तो **पीड़िता द्वारा अपने सर्वप्रथम पुलिस के समक्ष दिये गये 161 दं०प्र०सं० के बयान में उसके साथ बलात्कार होने के विषय में कोई कथन नहीं किया गया है** तथा 164 दं०प्र०सं० के बयान में पीड़िता द्वारा मात्र यह कहा गया है कि वर्ष 2020 के शुरू में अभियुक्त अपनी माँ व भाभी से मिलाने ले गया तो उसकी मम्मी शादी के लिये कहने लगी तो मैं वापस आ गयी। फिर कुछ दिन बाद मुझे अपने घर ले गया तारीख याद नहीं है उस दिन माँ तथा भाभी ने चाय पिलाई जिसे पीकर मैं बेहोश हो

गयी तब मेरे बिना कपड़ों के फोटो खींच लिये गये व अभियुक्त द्वारा बलात्कार किया गया। आगे कहा कि दिनांक 12.11.2021 को पुनः बलात्कार किया था। विवेचक द्वारा पीड़िता के पुनः मजिद बयान अंतर्गत धारा-161 दं०प्र०सं० लिये गये जिसमें पीड़िता द्वारा 01.04.2020 व 12.11.2021 को बलात्कार होने की बात कही गयी। इस प्रकार पीड़िता द्वारा उक्त समस्त बयानों में दिनांक 17.11.2021 को उसके साथ अभियुक्त द्वारा बलात्कार किये जाने के सम्बन्ध में कोई कथन नहीं किया गया है। वादी मुकदमा द्वारा लिखायी गयी प्रथम सूचना रिपोर्ट में भी अभियुक्त द्वारा पीड़िता के साथ बलात्संग किये जाने के सम्बन्ध में कोई कथन नहीं किया गया है।

(c) इस मामले में प्रत्येक स्तर पर पीड़िता द्वारा अपने कथनों में सुधार किया गया है व ऐसा प्रतीत होता है कि यह सुधार पीड़िता द्वारा सोच विचार के उपरांत किये गये हैं। पी.डब्लू.-6 विवेचक विजय कुमार शुक्ला द्वारा अपनी प्रतिपरीक्षा के दौरान यह कहा गया है कि पीड़िता द्वारा दिये गये अपने बयानों में मुझे 01.04.2020 को बलात्कार की बात नहीं बतायी थी। इस साक्षी द्वारा जिरह के दौरान एक प्रश्न के उत्तर में यह कहा गया कि पीड़िता ने मुझे उक्त दिवस को दिये गये बयान में इन दो दिनों में अभियुक्त हरिसूदन द्वारा उसका बलात्कार करने वाली बात नहीं बतायी थी। इस साक्षी

द्वारा इस सम्बन्ध में ही पूछे गये एक अन्य प्रश्न में यह कहा गया कि पीड़िता ने दिनांक 30.12.2021 तक बलात्कार करने वाली बात नहीं बतायी थी। पीड़िता द्वारा 164 दं०प्र०सं० के बयान में दिनांक 01.04.2020 को उसके साथ हरिसूदन द्वारा बलात्कार करने वाली बात नहीं बतायी थी। विवेचना के दौरान कोई अश्लील वीडियो नहीं पाया गया था। आगे कहा पीड़िता ने मुझे दिनांक 12.11.2021 फोटो दिखाकर ब्लैकमेल करने वाली बात नहीं बतायी थी केवल धमकाने वाली बात बतायी थी। पीड़िता की माँ द्वारा भी अभियुक्त द्वारा पीड़िता के साथ विभिन्न तिथियों पर बलात्कार करने की बात नहीं बतायी गयी।

(d) पी. डब्लू. 3 घनश्याम सिंह जो कि पीड़िता का पिता है, ने अपने बयान में कहा है कि उसे एफ.आई.आर होने के चार-पांच दिन बाद बलात्कार के घटना की जानकारी हुई है। इस प्रकार अभियोजन साक्षी सं. 02 अभिमन्यु सिंह एवं अभियोजन साक्षी सं. 03 घनश्याम सिंह दोनों के द्वारा एफ.आई.आर लिखाने के चार-पांच दिन बाद सम्पूर्ण घटना की जानकारी होना बताया गया है तथा पूरे परिवार द्वारा सलाह मशविरे के उपरान्त रिपोर्ट लिखाये जाने की बात कही गयी है। यहां यह उल्लेखनीय है कि पी.डब्लू. 03 घनश्याम सिंह स्वयं पुलिस विभाग में उपनिरीक्षक के पद पर कार्यरत है तब ऐसे में उससे यह अपेक्षित है कि उसे प्रक्रिया

संबंधी समस्त जानकारी होगी परन्तु उसके द्वारा जिरह के दौरान इस विषय में यह स्पष्टीकरण दिया गया है कि अन्य बातों को एफ.आई.आर में शामिल कराने हेतु इसलिए प्रार्थनापत्र नहीं दिया गया कि मुकदमे के विवेचक बदलते रहे जो कि किसी प्रकार से स्वीकार्य नहीं है तथा अभियोजन कथानक को दूषित करता है।

(e) प्रस्तुत मामले में यदि पीड़िता की साक्ष्य का सूक्ष्मता से अवलोकन किया जाये तो पीड़िता द्वारा न्यायालय में यह बयान दिया गया है कि वह हाजिर अदालत हरिसूदन को पहले से नहीं जानती थी उसकी दोस्ती हरिसूदन की दोस्त (Y) से हुई, (Y) ने उसे हरिसूदन से मिलवाया, (Y) ने हरिसूदन को पीड़िता का मोबाइल न. दिया हरिसूदन उसी मोबाइल से पीड़िता से बात करता था, एक दिन हरिसूदन ने पीड़िता को घर बुलाया तथा वह आधे रास्ते में वह पीड़िता को लेने आया, पीड़िता उसके घर पहुंची, हरिसूदन की मां व भाभी ने पीड़िता को चाय में कोई नशीला पदार्थ मिलाकर पीने को दिया, जिससे पीड़िता बेहोश हो गयी, जब पीड़िता को होश आया तब वह पूरी तरह नगनावस्था में थी, हरिसूदन की भाभी आयी और पीड़िता को उक्त फोटो दिखाकर हरिसूदन से शादी करने को कहा तथा शादी न करने पर फोटो वायरल करने की धमकी दी। हरिसूदन ने अपनी भाभी व मां की मौजूदगी में मेरी मर्जी के बिना मेरे साथ शारीरिक संबंध

बनाये थे। पीड़िता के प्रतिपरीक्षा के बयान की भी समीक्षा की गयी, जिसमें बलात्कार की घटना से पूर्व के कुछ व्यक्तिगत फोटो थे, जो कथित तौर पर अभियुक्त द्वारा पीड़िता को उसका मोबाइल हैक करके भेजे गये थे, वह फोटो क्या थे इस विषय में पीड़िता द्वारा कोई स्पष्टीकरण नहीं दिया गया है न ही इससे पूर्व इस आशय के कोई कथन किये गये हैं। पीड़िता के भाई अभिमन्यु सिंह के द्वारा भी जिरह के दौरान यह कहा गया है कि दिनांक 01.04.2020 से पूर्व मेरी बहन के साथ कोई घटना नहीं हुई। उसके बयान के समीक्षा से यह परिलक्षित होता है कि पीड़िता किसी डर की वजह से नहीं, बल्कि स्वेच्छा से दिनांक 01.04.2020 को अभियुक्त के घर गयी थी तथा अभियुक्त व पीड़िता के मध्य पूर्व से घनिष्ठता थी।

(f) जहां तक दिनांक 12.11.2021 व 17.11.2021 की घटना का प्रश्न है उनके विषय में पीड़िता द्वारा यह कहा गया है कि अभियुक्त द्वारा उसे उपरोक्त दिनांक पर पीड़िता के अश्लील फोटो वायरल करने की धमकी देकर उसके साथ जबरदस्ती बलात्संग किया गया, तब ऐसे में वह फोटो जिनके आधार पर अभियुक्त द्वारा पीड़िता को डराया धमकाया गया उनका अवलोकन किया जाना भी आवश्यक प्रतीत होता है। उल्लेखनीय है कि अभियोजन द्वारा पत्रावली पर बतौर वस्तु प्रदर्श-2 एक लिफाफा दाखिल किया गया है जिसके अंदर

चार फोटो हैं, उक्त फोटोग्राफ के अवलोकन से यह प्रकट होता है कि दो फोटोग्राफ में अभियुक्त व पीड़िता मंदिर में खड़े हैं व दो फोटो में पीड़िता अभियुक्त के कन्धे पर सिर रखकर अधलेटी अवस्था में सोते हुये दिख रही है। न्यायालय के अभिमत में उपरोक्त समस्त फोटोग्राफ अश्लील फोटोग्राफ्स की श्रेणी में नहीं आते हैं। पी. डब्लू., 1 अभिमन्यु सिंह द्वारा अपनी जिरह कहा गया है कि मैंने उन मोबाइलों को फॉरेंसिक जाँच के लिये दरोगा जी को दिया था फिर कहा मोबाइल नहीं नम्बर दिये थे। मोबाइलों की कोई 'फॉरेंसिक जाँच नहीं हुई नम्बर दिये थे, इस प्रकार सर्वप्रथम तो उन फोटोग्राफ्स की जो कि पत्रावली पर दाखिल हैं उनकी प्रमाणिकता ही संदिग्ध है व इसके अतिरिक्त उक्त, फोटोग्राफ्स को किसी भी प्रकार से अश्लील फोटोग्राफ्स की श्रेणी में नहीं रखा जा सकता है, तब इन फोटोग्राफ्स के आधार पर पीड़िता का अभियुक्त से डरना तर्कसंगत प्रतीत नहीं होता है। वर्तमान मामले में पीड़िता के कथन स्वयं में ही विरोधाभासी हैं व अन्य साक्षियों के साक्ष्य से भी उनकी सम्पुष्टि नहीं हो रही है।

(g) यहाँ यह भी उल्लेखनीय है कि पीड़िता द्वारा कथित रूप से उसके साथ जो बलात्संग की घटना बतायी गयी है वह अभियुक्त के घर में भूतल पर अभियुक्त की भाभी के कमरे में होना बताया गया है जबकि नक्शानजरी प्रदर्श क

7 में जो घटनास्थल दर्शाया गया है वह अभियुक्त के घर में प्रथम तल पर दर्शाया गया है। न्यायालय के अभिमत में किसी भी घटना में घटनास्थल की नक्शानजरी वादी मुकदमा / पीड़िता के बताने पर ही विवेचक द्वारा तैयार किया जाता है। वर्तमान मामले में पीड़िता द्वारा घटनास्थल अभियुक्त के घर में भूतल पर स्थित कमरे को बताया गया है जबकि विवेचक द्वारा नक्शानजरी में प्रथम तल पर स्थित कमरे को दर्शाया गया है जो कि परस्पर विरोधाभासी है व अभियोजन कथानक को संदिग्ध बनाता है।

(h) न्यायालय के अभिमत में भारतीय समाज में कुछ रिश्ते बहुत सम्मानित होते हैं जिनमें माँ व पुत्र का सम्बन्ध तथा भाभी व देवर का सम्बन्ध भी शामिल है। वर्तमान मामले में अभियोजन कथानक के अनुसार जो समस्त घटनाक्रम होना बताया गया है वह अभियुक्त की माँ व भाभी की मौजूदगी में व उनके सहयोग से घटित होना कहा गया है जोकि नितान्त अविश्वसनीय है। न्यायालय के अभिमत में यह समझ से परे है कि कोई भी व्यक्ति अपनी माँ व भाभी की मौजूदगी में किसी लड़की को निर्वस्त्र करेगा व उसके साथ बलात्संग करेगा तथा उसकी माँ व भाभी के द्वारा इसमें सहयोग प्रदान किया जायेगा। यहाँ यह तथ्य भी महत्वपूर्ण है कि अभियुक्त की माँ व भाभी को यद्यपि प्राथमिकी में नामित किया गया

था परंतु दौरान विवेचना विवेचक द्वारा उनकी अपराध में किसी भी प्रकार की संलिप्तता को न पाते हुये मुकदमें से पृथक कर दिया गया था। अभियोजन द्वारा जिसप्रकार से प्रकरण में उनको उल्लिखित करने का प्रयास किया गया है उससे ऐसा प्रतीत होता है कि अभियोजन जानबूझकर मामले को रंग देने के आशय से उपरोक्त दोनों की संलिप्तता को प्रत्येक स्तर पर दर्शा रहा है परंतु इससे अभियोजन कथानक और संदिग्ध होता है।

(i) अभियोजन साक्षी सं० 01- वादी अभिमन्यु सिंह, अभियोजन साक्षी सं० 03- घनश्याम सिंह, अभियोजन साक्षी सं० 5- पीड़िता के बयानों की समीक्षा करने से यह पाया जाता है कि यद्यपि अभियोजन पक्ष द्वारा निरंतर यह कहा गया है कि अभियुक्त का फोन हैक कर लिया गया था परंतु इस सम्बन्ध में पत्रावली पर कोई साक्ष्य उपलब्ध नहीं है व स्वयं पीड़िता द्वारा यह कहा गया कि उसने अपना फोन जाँच हेतु विवेचक को नहीं दिया था। यहाँ यह भी उल्लेखनीय है कि पीड़िता द्वारा अपनी जिरह के दौरान यह कहा गया है कि उसका फोन उसकी शादी टूटने की दिनांक तक हैक था। न्यायालय के अभिमत में पीड़िता की शादी टूटने के उपरांत जब समस्त घटनाक्रम पीड़िता के घर वालों के समक्ष खुल गया था तब पीड़िता के घर वालों द्वारा भी फोन हैक होने की जाँच न करवाना मामले को संदिग्ध बनाता है।

(j) इसके अतिरिक्त एक उच्च शिक्षित वयस्क महिला है, उसके द्वारा सर्वप्रथम इस बात की जानकारी होने पर कि उसका फोन हैक हो गया है। इस सम्बन्ध में कार्यवाही न करना या किसी को सूचित ना करना भी घटनाक्रम को संदेह में लाता है।

(k) पीड़िता ने अपने धारा 164 दं०प्र०सं० के बयान में कथन किया कि मैंने बहुत सारे नम्बरों से व्हाट्सएप काल करने की बात दरोगा जी को बता दी थी। 164 दं०प्र०सं० के बयानों में भी बता दिया था। 164 दं०प्र०सं० के बयान में मैं बहुत रो रही थी तो हो सकता है कि मजिस्ट्रेट साहब ये बात न लिख पायी हो। 9555849196 ये नम्बर मेरा ही है मेरी ही आईडी पर हरिसूदन ने जबरदस्ती जारी करवाया था मैंने इस नम्बर को बन्द कराने के लिये कोई एप्लीकेशन नहीं दी ये नम्बर ज्यादातर हरिसूदन के पास ही रहता था इस नम्बर से हरिसूदन से मेरी बात होती थी आगे कहा जुलाई 2020 में मैंने गूगल एकाउंट बनाया था वो भी हरिसूदन के कहने पर आगे कहा मैंने हरिसूदन को 18-19 बार गूगल पे किया है। टोटल रुपये नहीं बता सकती लेकिन कभी बीस हजार तो कभी चालीस हजार रुपये भेजे हैं फिर कहा फोन नम्बर 9555849196 से भी प्रखर से बात होती थी हरिसूदन इस नम्बर से बात करने के लिये जबरदस्ती करता था। फिर कहा मुझे याद नहीं है कि गूगल पे का

पिन किसने जनरेट किया था गूगल पे का इस्तेमाल करने पर उसका मैसेज मेरे ही फोन पर आता था। यह बात सही है कि गूगल पे का इस्तेमाल करने पर वह हर बार पिन माँगता है और पिन डालने के बाद ही पेमेण्ट होता है। मैं जब भी गूगल पे से पेमेण्ट करती थी तो उसको पूरा करने के लिये पिन डालता था। फिर कहा घटना के समय फोन मेरे पास रहता था सिम कभी मेरे पास कभी हरिसूदन के पास रहती थी। मैंने ये बात 161/164 के बयान में महिला मजिस्ट्रेट व विवेचक को बता दी थी सिम हरिसूदन घर के बाहर जबरदस्ती ले लेता था। पीड़िता द्वारा यह भी कहा गया कि हरिसूदन के ही कहने पर उसके द्वारा बैंक में अपने अकाउण्ट के साथ यही फोन नम्बर अपने घर वालों से झूठ बोलकर अटैच करवाया गया और कई बार अभियुक्त की आईडी पर पैसा ट्रांसफर किया गया। पत्रावली के अवलोकन से विदित होता है कि पत्रावली पर दाखिल पीड़िता के बैंक अकाउण्ट का विवरण कागज संख्या-13 ख/80 लगायत 13 ख/80 में फरवरी 2020 से लेकर के अगस्त 2020 तक पीड़िता के बैंक अकाउण्ट के स्टेटमेंट अभियोजन द्वारा दाखिल किया गया है जिसपर प्रदर्श क-14 पड़ा है परंतु उक्त स्टेटमेंट मात्र एक सीमित अवधि का है व बैंक द्वारा प्रमाणित नहीं है मात्र छायाप्रति है व वह भी कई जगह अपठनीय है। पी.डब्लू.-6 विवेचक विजय कुमार शुक्ला

द्वारा अपने बयानों के दौरान यह कहा गया है कि उक्त ट्रांजेक्शन के सम्बन्ध में उसके द्वारा अभियुक्त के बैंक खाते से सत्यापन नहीं करवाया गया था। उक्त ट्रांजेक्शन में अभियुक्त की आईडी होना कहा गया है उसका एकाउण्ट नम्बर नहीं तथा उस आई.डी को भी सत्यापित नहीं करवाया गया है। इसके अतिरिक्त यदि तर्कवश इस ट्रांजेक्शन को सही भी माना जाये तो इसके अनुसार अभियुक्त की कथित आई.डी. से पीड़िता के अकाउण्ट में भी पैसा क्रेडिट होना दर्शित है इस प्रकार यह ट्रांजेक्शन उभयपक्षीय है। अतः ऐसे में अभियोजन का यह कथन स्वीकार किये जाने योग्य नहीं है।

(l) यहाँ यह भी उल्लेखनीय है कि अभियोजन द्वारा पीड़िता के यूनियन बैंक ऑफ इण्डिया के खाते की दिनांक 01.11.2021 से 30.11.2021 तक की अवधि की स्टेटमेंट की प्रमाणित प्रतिलिपि दाखिल की गयी है जिसमें दिनांक 16.11.2021 को 9,000/- रु० व 8,000/-रु० निकलना दर्शाया गया है परंतु इससे उक्त विज्ञापन अभियुक्त द्वारा ही किया गया है यह प्रदर्शित नहीं होता है। अतः इसका कोई लाभ अभियोजन को नहीं दिया जा सकता है।

(m) पत्रावली के अवलोकन से विदित होता है कि पीड़िता द्वारा यह कहा गया है कि अभियुक्त ने पीड़िता का पुराना नं. बन्द करवाकर उसे डरा-धमकाकर नया

सिम दिलवा दिया जिसे वह ज्यादातर अपने पास रखता था, अभियुक्त के डराने धमकाने की वजह से ही पीड़िता ने अपने अकाउण्ट नम्बर को नये मोबाइल नम्बर से अटैच करवा लिया जिसके लिये उसके द्वारा अपने घरवालों से झूठ भी बोला गया परंतु इस दौरान पीड़िता द्वारा इस सम्बन्ध में कहीं कोई शिकायत नहीं की गयी। न्यायालय के अभिमत में पीड़िता द्वारा जो अभियुक्त का डर होना बताया गया है व जिसके कारण उसके द्वारा यह सब कार्य किये गये उस स्तर के डर का कोई कारण होना पत्रावली पर प्रदर्शित नहीं होता है। पीड़िता के इस प्रकार के व्यवहार से यह प्रतीत होता है कि पीड़िता व अभियुक्त के मध्य मधुर सम्बन्ध थे जिस कारण पीड़िता द्वारा यह समस्त कार्य इन सम्बन्धों के अधीन किये जाते थे।

(n) पत्रावली में अभियुक्त के ऊपर पीड़िता को जान से मारने की धमकी देने का भी आरोप है उक्त के परिप्रेक्ष्य में पी.डब्लू.-6 विवेचक द्वारा यह कहा गया है कि पीड़िता द्वारा व्हाट्सएप काल पर अभियुक्त द्वारा जान से मारने की धमकी देने की बात बतायी थी। पीड़िता को किस नं. से अभियुक्त द्वारा धमकी दी, वीडियो काल पर दी गयी थी यह नं. पीड़िता ने नहीं बताया था। आगे कहा पीड़िता को धमकी देने की प्रमाणिकता हेतु सी.डी.आर नहीं निकलवायी गयी थी। यह बात सही है कि सी.डी.आर नहीं निकलवायी गयी थी

इसलिये मैं नहीं बता सकता कि वीडियो काल पर धमकी दी गयी थी या नहीं। इस प्रकार साक्ष्य के अभाव में अभियोजन यह आरोप भी सिद्ध कर पाने में असफल रहा है।

(o) अभियोजन द्वारा यह भी कहा गया कि अभियुक्त हरिसूदन द्वारा दिनांक 18.11.2021 को किसी महिला के साथ फतेहपुर जाकर पीड़िता के होने वाले पति प्रखर सिंह को पीड़िता व हरिसूदन के साथ की फोटो दिखाकर उसका रिश्ता तुड़वा दिया गया। प्रखर सिंह के विषय में पत्रावली के अवलोकन से यह विदित होता है कि बचाव पक्ष की ओर से प्रदर्शित ख-5 जन सूचना अधिकार के तहत पूर्वांचल विद्युत निगम से प्रखर सिंह के बारे में माँगी गयी सूचना की ई-मेल प्रति व प्रदर्शित ख-7 इस सम्बन्ध में पूर्वांचल विद्युत वितरण निगम द्वारा प्रेषित उत्तर की ई-मेल प्रति जिसके अनुसार प्रखर सिंह कार्यकारी सहायक दिनांक 17.11.2021 व 18.11.2021 को कार्यालय में उपस्थित रहे हैं, दाखिल की गयी है। बचाव पक्ष की ओर से न्यायालय के समक्ष यह भी कहा गया कि प्रखर सिंह जब दिनांक 18.11.2021 को अपने कार्यालय स्थल प्रतापगढ़ में उपस्थित थे तब अभियुक्त द्वारा फतेहपुर जाकर उससे मिलकर पीड़िता व अपनी फोटो दिखाकर शादी तोड़ने की धमकी देने की बात अविश्वसनीय है। अभियोजन की ओर से न्यायालय के समक्ष यह तर्क प्रस्तुत किया

गया कि जनपद फतेहपुर से प्रतापगढ़ की दूरी मात्र 130 किमी है अतः ऐसे में कार्य समयोपरांत फतेहपुर आना संभव है। न्यायालय के अभिमत में इस सम्बन्ध में सर्वोत्तम साक्षी स्वयं प्रखर सिंह हो सकते थे व उसी के द्वारा यह बताया जाना भी अपेक्षित था कि हरिसूदन दिनांक 18.11.2021 को उससे फतेहपुर मिलने गया था अथवा नहीं व उसके द्वारा प्रखर सिंह को पीड़िता की कोई अश्लील फोटो या अपने साथ की कोई फोटो दिखायी गयी थी अथवा नहीं परंतु अभियोजन द्वारा उसको न्यायालय के समक्ष प्रस्तुत नहीं किया गया है। अतः ऐसे में अभियोजन कथानक साक्ष्य के अभाव में संदिग्ध प्रतीत होता है।

(p) जहाँ तक दिनांक 15.04.2020 की घटना का प्रश्न है जिसके अनुसार पीड़िता द्वारा कथित तौर पर अभियुक्त के घर जाकर उसे, उसकी भाभी व उसकी माँ को एक लाख रुपये दिये गये इस सम्बन्ध में पत्रावली पर कोई साक्ष्य उपलब्ध नहीं है। पीड़िता द्वारा अपनी जिरह के दौरान पीड़िता द्वारा यह कहा गया कि मैंने एक लाख रुपये की एक गड़्डी बनायी थी जो कि पालीथीन में भरके उसके घर ले जाकर उसकी भाभी के हाथों में दिया था जहाँ तीनों लोग मौजूद थे रुपये की मैंने कोई फोटो नहीं खींची थी। दोपहर का समय था रुपये लेकर आने-जाने में मुझे एक घण्टे के आस-पास का समय लगा था। पी.डब्लू. 06 विवेचक के बयानों का इस सम्बन्ध में

यदि अवलोकन किया जाये तो उसके द्वारा यह कहा गया कि इस सम्बन्ध में उसे कोई भौतिक साक्ष्य नहीं मिला था। पीड़िता ने नकद एक लाख देना बताया था परंतु पैसा कहाँ से आया था यह नहीं बताया था। पीड़िता ने पैसे कहाँ दिये यह भी नहीं बताया था। तब ऐसे में साक्ष्य के अभाव में अभियोजन का यह कथन स्वीकार्य नहीं है। तर्कवश यदि पीड़िता की इस बात को सही भी माना जाये तो पत्रावली के अवलोकन से यह विदित होता है कि अभियुक्त की भाभी जिसके हाथ में पीड़िता द्वारा पैसे देने की बात कही गयी है वह सरकारी स्कूल में अध्यापिका है तथा आर्थिक रूप से सक्षम है उसके द्वारा मात्र एक लाख रुपये के लिये इस प्रकार का कृत्य करना तार्किक रूप से ग्राह्य नहीं है।

(q) यह भी उल्लेखनीय है कि पीड़िता द्वारा समय समय पर अभियुक्त व उसकी भाभी को जेवर देने की बात कही गयी है परंतु इस सम्बन्ध में पत्रावली पर कोई साक्ष्य उपलब्ध नहीं है व पी.डब्लू.-06 विवेचक द्वारा जिरह के दौरान स्पष्ट रूप से यह कहा गया है कि जेवर देने के सम्बन्ध में कोई बिल रसीद अथवा अन्य कोई दस्तावेज नहीं दिया गया था। पीड़िता ने जेवर अपने बताये थे। इसलिये किसी दुकान में कोई सत्यापन नहीं किया था। जेवर के सम्बन्ध में ना तो पीड़िता द्वारा कोई साक्ष्य प्रस्तुत किया गया व ना ही मेरे द्वारा कोई साक्ष्य एकत्रित किया गया।

अभियुक्त के पास से पीड़िता द्वारा बताये गये किसी भी जेवर की कोई रिकवरी नहीं हुयी थी। उल्लेखनीय है कि कोई कथन तब तक स्वीकार्य नहीं है जबतक उसकी पुष्टि साक्ष्य से ना हो। वर्तमान मामले में पीड़िता द्वारा यद्यपि यह कहा गया है कि उसके द्वारा अभियुक्त व उसकी भाभी व माँ को जेवर दिये गये परंतु उन जेवरों को विनिर्दिष्ट रूप से नहीं बताया गया है ना ही उनके सम्बन्ध में अन्य कोई पुष्टिकारक साक्ष्य दिया गया है। अतः साक्ष्य के अभाव में अभियोजन का यह कथन स्वीकार किये जाने योग्य नहीं है।

उल्लेखनीय है कि **अब्बास अहमद चौधरी बनाम असम राज्य 2010 C.R.L.J 2060 SC** में माननीय न्यायालय द्वारा यह प्रतिपादित किया गया है कि:- *We are conscious of the fact that in the matter of rape, the statement of the prosecutrix must be given primary consideration. But at the same time the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption tuidi a prosecutrix would always tell the entire story truthfully.*

(r) दाण्डिक विधि का मूलभूत सिद्धांत है कि अभियोजन पक्ष को अपना कथानक स्वयं के सबूतों के आधार पर संदेह से परे साबित करना चाहिए। **हरेन्द्र बनाम स्टेट ऑफ यू0 पी0 2008 (एस.सी.) पेज 2469 एवं दिनेश बनाम स्टेट ऑफ यू० पी० 2009 (67) ए.सी.पी. (एस.सी.) पेज 464** में यह विधि व्यवस्था पारित की गई

है कि अभियोजन पक्ष को अपने विश्वसनीय साक्ष्य से अभियुक्त पर लगाये गये आरोपों को सन्देह से परे साबित करना होता है। वर्तमान मामले में उपरोक्त विश्लेषण के निष्कर्ष के अनुसार अभियोजन अपना मामला संदेह से परे सिद्ध कर पाने में असफल रहा है।

(s) प्रस्तुत प्रकरण में अभियोजन पक्ष द्वारा परीक्षित साक्षीगण के बयानों के सम्यक विश्लेषण से यह स्पष्ट हो गया है कि अभियोजन द्वारा अभियुक्त के विरुद्ध लगाये गये आरोप को सन्देह से परे साबित करने में अभियोजन पक्ष पूरी तरह से विफल रहा है जबकि अभियोजन पर अपना मामला सन्देह से परे साबित करने का पूर्ण उत्तरदायित्व होता है। अतः माननीय न्यायालय की उपरोक्त सन्दर्भित विधि व्यवस्थाओं के आलोक में अभियुक्त हरिसूदन वर्मा आरोपित अभियोग अन्तर्गत धारा-354 बी, 384, 506, 376 (2) (n) भा० दं० सं० में सन्देह का लाभ देते हुए दोषमुक्त किये जाने योग्य है।

(t) उपरोक्त आधार पर सत्र न्यायाधीश ने अभियोजन पक्ष के परीक्षित साक्षीगण के बयानों के सम्यक विश्लेषण से यह स्पष्ट हो गया है कि अभियोजन द्वारा अभियुक्त के विरुद्ध लगाये गये आरोप को संदेह से परे साबित करने में अभियोजन पक्ष पूरी तरह से विफल रहा है जबकि अभियोजन पर अपना मामला संदेह से परे साबित करने का पूर्ण उत्तरदायित्व होता है।

अतः उपरोक्त संदर्भित विधि-व्यवस्थाओं के आलोक में अभियुक्त हरिसूदन वर्मा को अपराध अंतर्गत धारा 354बी, 384, 506, 376 (2)(एन) भा०दं०वि० में संदेह का लाभ देते हुए दोषमुक्त किया गया है।

20. अपीलार्थी के विद्वान अधिवक्ता श्री एस.के. शुक्ला एवं विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली एवं विचारण न्यायालय के मूल अभिलेख का परिशीलन किया।

21. अपीलार्थी के विद्वान अधिवक्ता द्वारा यह तर्क प्रस्तुत किया गया कि विपक्षी संख्या 2 और उसके परिवार के सदस्यों द्वारा पीड़िता को नशीला पेय पदार्थ पिलाया गया तथा उसके बाद नशे की हालत में विपक्षी संख्या 2 द्वारा पीड़िता के साथ बलात्कार किया गया तथा उसका फोटो और वीडियो तैयार किया गया। विपक्षी संख्या 2 द्वारा लिए गए फोटो और वीडियो के आधार पर पीड़िता को बार-बार बुलाया गया तथा धमकी देकर उसके साथ बलात्कार किया गया कि यदि वह विवाह के लिए नहीं मानेगी तो उसकी अश्लील फोटो और वीडियो वायरल कर दी जाएगी तथा उक्त फोटो और वीडियो दिखाकर उसकी सगाई तोड़ने की धमकी दी गयी एवं नकदी और आभूषण के रूप में मोटी रकम की मांग की गई। उनका यह भी कथन है कि अभियोजन पक्ष के साक्षीगण के बयानों और

जांच अधिकारी द्वारा जांच के दौरान एकत्र किए गए साक्ष्यों से विपक्षी संख्या 2 के विरुद्ध धारा 384, 506, 376(2)(एन), 254-ख, भा०दं०वि० के तहत अपराध पूरी तरह से साबित होता है।

उनके द्वारा यह भी तर्क प्रस्तुत किया गया कि डी.डब्लू.-1 दीपक कुमार ने अपने बयान में कथन किया है कि उसने घटना नहीं देखी है, लेकिन जब विपक्षी संख्या 2 बॉक्सिंग के लिए जा रहा था, तब उसने पीड़िता को बुलाया और उसके बाद वे दोनों उसकी बाइक पर साथ-साथ गए, और बचाव पक्ष के अन्य गवाहों के बयान से पता चलता है कि विपक्षी संख्या 02 ने पीड़िता को कुछ अंतराल पर बुलाया था। चूंकि यह भी विदित है कि पीड़िता का बयान जो न्यायालय में हुआ है उसे गलत नहीं कहा जा सकता है, क्योंकि कोई भी व्यक्ति अपनी प्रतिष्ठा की कीमत पर किसी को फंसाना नहीं चाहेगा। उनका यह भी कथन है कि इस प्रकरण में विचारण न्यायालय द्वारा पारित प्रश्नगत निर्णय अभिलेख के विपरीत है तथा उसे विपक्षी संख्या 02 तथा परिवार के सदस्यों द्वारा धोखा दिया गया तथा वे एक दूसरे को कैसे जानते हैं, यह उसके बयान में पहले ही स्पष्ट किया जा चुका है तथा जांच के दौरान एकत्र साक्ष्य से भी यह प्रतिबिंबित होता है।

22. इस न्यायालय ने पीड़िता के विद्वान अधिवक्ता एवं विद्वान अपर

शासकीय अधिवक्ता को, इस अपील के अंगीकरण के प्रश्न पर विस्तारपूर्वक सुना एवं पत्रावली तथा विचारण न्यायालय के मूल अभिलेख एवं प्रश्नगत निर्णय का परिशीलन किया।

विचारण न्यायालय द्वारा इस प्रकरण में साक्ष्यों की गहनतापूर्वक समीक्षा की गयी है एवं सभी साक्षियों के बयान के अवलोकन के आधार पर यह पाया है कि अभियोजन अपने पक्ष को संदेह से परे सिद्ध करने में असफल रहा है और जहां तक अभियुक्त को विचारण न्यायालय द्वारा उसे दोषमुक्त किये जाने के पक्ष में पारित निर्णय के विरुद्ध अपील दाखिल किये जाने का आधार है, यह सर्वसिद्ध है कि ऐसे प्रकरणों में अपीलीय न्यायालय द्वारा तभी हस्तक्षेप की आवश्यकता होती है, जब विचारण न्यायालय का निर्णय विधि विरुद्ध हो या साक्ष्यों का मूल्यांकन गलत तरीके से किया गया हो या उपलब्ध साक्ष्यों पर अभियुक्त की दोषसिद्धि के अतिरिक्त साक्ष्यों के विपरीत कोई दूसरा अभिमत व्यक्त करते हुए निर्णय पारित किया जाना संभव न हो, तब ऐसे मामलों में अपीलीय न्यायालय द्वारा हस्तक्षेप किया जाना उचित होता है। इस संबंध में माननीय उच्चतम न्यायालय द्वारा **Babu Sahebagouda Rudragoudar v. State of Karnataka, 2024 SCC OnLine SC 561** निर्णय में प्रतिपादित पैरा 39 और 40

वर्तमान उद्देश्यों के लिए प्रासंगिक हैं, जो निम्न हैं:-

"39. Thus, it is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised within the four corners of the following principles:-

(a) That the judgment of acquittal suffers from patent perversity;

(b) That the same is based on a misreading/omission to consider material evidence on record;

(c) That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

40. The appellate Court, in order to interfere with the judgment of acquittal would have to record pertinent findings on the above factors if it is inclined to reverse the judgment of acquittal rendered by the trial Court."

प्रस्तुत प्रकरण में दिए गए सबूतों के मूल्यांकन पर हमें विचारण न्यायालय के निर्णय में ऐसी कोई विकृति नहीं मिली, जिससे संबंधित विचारण न्यायालय द्वारा दिए गए निष्कर्षों में हस्तक्षेप किया जा सके। संबंधित न्यायाधीश द्वारा निकाले गए निष्कर्ष, अभिलेख पर रखे गए सबूतों के मददेनजर पारित किए गए हैं, जिसको गहनतापूर्वक अवलोकन करने से यह स्पष्ट है कि संबंधित न्यायाधीश द्वारा किसी भी तथ्य व साक्ष्यों की अनदेखी नहीं की गयी है। पत्रावली पर रखे साक्ष्यों के आधार पर

अभियुक्त द्वारा ही अपराध कारित करने की कोई धारणा बनाना संभव नहीं है। ऐसी स्थिति में इस अपीलीय न्यायालय का मानना है कि धारा 384 दं०प्र०सं० के अंतर्गत विचारण न्यायालय द्वारा पारित निर्णय में हस्तक्षेप करने के लिए कोई पर्याप्त आधार नहीं है, जिसके कारण यह अपील सरसरी तौर पर अंगीकरण के स्तर पर निरस्त किये जाने योग्य है।

23. तदनुसार, अपीलार्थी की ओर से प्रस्तुत यह दाण्डिक अपील अंगीकरण के स्तर पर ही अविलंब निरस्त की जाती है तथा विचारण न्यायालय द्वारा पारित निर्णय दिनांक 13.03.2024 की पुष्टि की जाती है।

24. 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 जाए।

(2024) 9 ILRA 1587
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.09.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matter Under Article 227 No. 4400 of 2024

Tejpal Singh

Versus

...Petitioner

U.O.I. & Ors.

...Respondents

Counsel for the Petitioner:

Alok Saxena Khan

Counsel for the Respondents:

A.S.G.I., Arvind Kumar, Brajendra Amiy

Civil Law-The Constitution of India,195 0-Article 227 - The Limitation Act,1963 - Section 5 - The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 17 - Petition for expeditious disposal of Securitisation Application-

Securitisation application was filed with a delay of about 939 days while the limitation period prescribed under Section 17 is 45 days---When this Court from a perusal of the record available before it, finds that the DRT has passed orders in violation of well-settled principles of law, the Court, under the power of superintendence conferred by Article 227 of the Constitution of India, not only has the power to set aside those orders but it is also the responsibility of this Court to set aside the orders passed illegally---A persual of Debt Recovery Tribunal's order sheet duly establishes that while condoning the delay of 939 in presenting the petition on 20/08/2024, on the same day opportunity to file objection against the petition against the securitisation application was closed. Before the application under Section 5 of the Limitation Act was accepted, the securitisation application itself was not admitted and therefore in such circumstances accepting the amendment in that application and closing the opportunity to present objection against the application is an action contrary to well-established judicial principles.---Petition is disposed of with the direction that the learned Debt Recovery Tribunal will ensure to take further action after passing an order on the application for review of the order dated 20.08.2024, after giving adequate opportunity of being heard to the parties in accordance with law. (Para 20, 24 & 32) (E-15)

List of Cases cited:

Shalini Shyam Shetty & anr. Vs Rajendra Shankar Patil (2010) 8 SCC 329

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

1. याचिकाकर्ता के विद्वान अधिवक्ता श्री आलोक सक्सेना, विपक्षी संख्या 1 भारत संघ के विद्वान अधिवक्ता श्री अरविन्द कुमार, विपक्षी संख्या 3 पंजाब नेशनल बैंक के विद्वान अधिवक्ता श्री प्रशान्त कुमार श्रीवास्तव को सुना तथा पत्रावली का अवलोकन किया।

2. भारतीय संविधान के अनुच्छेद 227 के अंतर्गत प्रस्तुत इस याचिका द्वारा याचिकाकर्ता ने विपक्षी संख्या 2 ऋण वसूली न्यायाधिकरण, लखनऊ को प्रतिभूतिकरण प्रार्थना-पत्र (Securitisation Application) प्रार्थना-पत्र संख्या 617 सन 2022 को नियत तिथि दिनांक 17.09.2024 अथवा इस न्यायालय द्वारा नियत की गयी समयावधि में निर्णीत करने का निर्देश देने का अनुरोध किया है।

3. उपरोक्त प्रतिभूतिकरण प्रार्थना-पत्र (1)- मे. आर.के. प्रोबिल्डकॉन प्राइवेट लिमिटेड, (2)- रविन्द्र, (3)- बिजेन्द्र यादव, (4)- तेजपाल सिंह तथा (5)- देवेन्द्र यादव ने विपक्षी संख्या 3 पंजाब नेशनल बैंक के विरुद्ध दिनांक 29.08.2022 को धारा 5 परिसीमा अधिनियम के अंतर्गत एक प्रार्थना-पत्र के साथ प्रस्तुत किया था। याचिका के साथ मात्र प्रतिभूतिकरण प्रार्थना-पत्र की प्रति संलग्न की गयी तथा धारा 5, परिसीमा अधिनियम के अंतर्गत प्रस्तुत प्रार्थना-पत्र की प्रति संलग्न नहीं की गयी है। याचिका में यह कथन भी नहीं किया गया है कि प्रतिभूतिकरण प्रार्थना-पत्र विलंब के साथ प्रस्तुत किया गया था तथा इसके साथ विलम्ब को क्षमा करने हेतु प्रार्थना-पत्र प्रस्तुत किया गया था।

4. प्रार्थना-पत्र को प्रस्तुत करने में हुए विलंब को क्षमा किये बिना प्रतिभूतिकरण प्रार्थना-पत्र अंगीकृत नहीं हो सकता, किन्तु विलंब क्षमा करने के पूर्व ही ऋण वसूली न्यायाधिकरण ने याचिकाकर्ता द्वारा प्रार्थना-पत्र के संशोधन हेतु प्रस्तुत प्रार्थना-पत्र दिनांक 17.04.2023 द्वारा स्वीकार कर लिया। उक्त आदेश में यह अंकित है कि विपक्षी संख्या 3 पंजाब नेशनल बैंक के विद्वान अधिवक्ता ने यह आपत्ति की कि प्रतिभूतिकरण प्रार्थना-पत्र परिसीमा अवधि से बाधित था तथा परिसीमा का प्रश्न पहले निर्णीत किया जाना चाहिए इसके उपरान्त भी ऋण वसूली न्यायाधिकरण ने याचिकाकर्ता का संशोधन प्रार्थना-पत्र स्वीकार कर लिया तथा विपक्षी संख्या 3 पंजाब नेशनल बैंक को प्रतिभूतिकरण प्रार्थना-पत्र

विलंब क्षमा करने हेतु प्रार्थना-पत्र, दोनों के ही विरुद्ध आपत्ति प्रस्तुत करने का निर्देश दिया। दिनांक 18.05.2023 को ऋण वसूली न्यायाधिकरण ने एक आदेश पारित किया, जिसमें यह अंकित है कि याचिकाकर्ता ने कथन किया कि विवादित संपत्ति का भौतिक अध्यासन उनके पास है तथा उक्त आदेश दिनांक 18.05.2023 द्वारा ऋण वसूली न्यायाधिकरण ने पक्षों को यथास्थिति बनाए रखने का निर्देश दे दिया।

5. दिनांक 24.07.2024 को विपक्षी संख्या 3 पंजाब नेशनल बैंक के विद्वान ने पुनः यह अनुरोध किया कि प्रतिभूतिकरण प्रार्थना-पत्र परिसीमा अवधि से बाधित है और यह प्रश्न पहले निर्णीत किया जाना चाहिए। इस पर न्यायाधिकरण ने अंतरिम आदेश को प्रभावी रखते हुए नीलामी में संपत्ति क्रय करने वाले व्यक्ति को पक्षकार बनाने के प्रार्थना-पत्र के निस्तारण हेतु दिनांक 31.07.2024 की तिथि नियत कर दी।

6. दिनांक 20.08.2024 के आदेश से ऋण वसूली न्यायाधिकरण ने प्रार्थना-पत्र प्रस्तुत करने में हुए विलंब को क्षमा कर दिया। इसी आदेश में न्यायाधिकरण ने यह भी अंकित किया कि विपक्षीगण को आपत्ति प्रस्तुत करने के लिए दिया गया अवसर समाप्त किया जाता है। नीलामी खरीददार को पक्षकार बनाने के लिए प्रस्तुत प्रार्थना-पत्र भी इसी आदेश से स्वीकार किया गया।

7. दिनांक 27.08.2024 को विपक्षी संख्या 3 पंजाब नेशनल बैंक के अधिवक्ता का वकालतनामा प्रस्तुत किया गया तथा दिनांक 30.08.2024 के आदेश में यह अंकित है कि नीलामी खरीददार को प्रतिभूतिकरण प्रार्थना-पत्र की प्रति उसी दिन उपलब्ध करायी गयी। ऋण वसूली न्यायाधिकरण ने अगली तिथि दिनांक 06.09.2024 को प्रकरण में अंतिम बहस सुनने के लिए नियत कर दी।

8. दिनांक 06.09.2024 के आदेश में अंकित है कि विपक्षी संख्या 3 पंजाब नेशनल बैंक के विद्वान अधिवक्ता ने आपत्ति करते हुए कथन किया कि इस प्रकरण में कोई विशेष शीघ्रता सम्मिलित नहीं है, तब भी बहुत छोटे अंतराल पर तिथियाँ अंकित की जा रही हैं। इस पर न्यायाधिकरण ने दिनांक 17.09.2024 की तिथि अंतिम बहस के लिए नियत कर दी।

9. याचिकाकर्ता के विद्वान अधिवक्ता का कथन है कि याचिकाकर्ता एक 85 वर्षीय वृद्ध व्यक्ति है, जिसको उसके घर से बाहर कर दिया गया है तथा घर को नीलाम कर दिया गया है।

याचिकाकर्ता वर्ष 2023 से बिना किसी निवास के अपना गुजर-बसर कर रहा है और इस कारण से यह याचिका स्वीकार करते हुए ऋण वसूली न्यायाधिकरण को यह निर्देश दिया जाना चाहिए कि वह नियत तिथि दिनांक 17.09.2024 को प्रतिभूतिकरण प्रार्थना-पत्र का अंतिम रूप से निस्तारण कर दें।

10. इसके विरुद्ध आपत्ति करते हुए विपक्षी संख्या 3 पंजाब नेशनल बैंक के विद्वान अधिवक्ता श्री प्रशान्त कुमार श्रीवास्तव ने कहा कि ऋण वसूली न्यायाधिकरण द्वारा पारित आदेशों से स्पष्ट होता है कि न्यायाधिकरण इस प्रकरण में अनुचित शीघ्रता से कार्यवाही कर रहा है, जैसा कि अन्य प्रकरणों में सामान्यतः नहीं किया जाता है। ऐसी परिस्थिति में ऋण वसूली न्यायाधिकरण को प्रकरण का और शीघ्र निस्तारण का निर्देश दिये जाने का कोई औचित्य नहीं है।

11. विपक्षी संख्या 3 पंजाब नेशनल बैंक के विद्वान अधिवक्ता ने यह भी कथन किया कि उन्होंने विलंब क्षमा करने के आदेश दिनांक 20.08.2024 के पुनरावलोकन के लिए एक प्रार्थना-पत्र प्रस्तुत किया है, जिसका निस्तारण अभी तक नहीं हुआ है तथा उक्त प्रार्थना-पत्र के निस्तारण के बिना प्रतिभूतिकरण प्रार्थना-पत्र का अंतिम निस्तारण न्यायिक प्रक्रिया के विपरीत है।

12. पक्षों के विद्वान अधिवक्ता के तर्कों को सुना तथा पत्रावली का अवलोकन किया।

13. भारतीय संविधान के अनुच्छेद 227 के अंतर्गत प्रस्तुत यह याचिका ऋण वसूली न्यायाधिकरण के समक्ष लंबित वाद के शीघ्र निस्तारण के संबंध में है तथा उस वाद के सभी पक्षकार इस याचिका में आवश्यक पक्षकार हैं। ऋण वसूली न्यायाधिकरण के समक्ष प्रार्थी संख्या 1, 2, 3 तथा 5 इस याचिका में न तो प्रार्थी बनाये गये हैं और न ही विपक्षी तथा इस कारण से इस याचिका में आवश्यक पक्षों के कुसंयोजन का दोष है।

14. प्रतिभूतिकरण प्रार्थना-पत्र लगभग 939 दिन के विलंब से प्रस्तुत किया गया था, जो तथ्य इस याचिका में कहीं अभिकथित नहीं किया गया है। अतः याचिका में संगत तथ्यों के विलोपित किये जाने का भी दोष है।

15. ऋण वसूली न्यायाधिकरण के आदेश-पत्र के अवलोकन से स्पष्ट है कि दिनांक 20.08.2024 को याचिका प्रस्तुत करने में हुए 939 दिन के विलंब को क्षमा करने के साथ ही उसी दिन याचिका के विरुद्ध प्रतिभूतिकरण प्रार्थना-पत्र के विरुद्ध

आपत्ति देने का अवसर समाप्त कर दिया गया। धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र स्वीकार होने के पूर्व प्रतिभूतिकरण प्रार्थना-पत्र अंगीकृत ही नहीं हुआ था और ऐसी परिस्थिति में उस प्रार्थना-पत्र में संशोधन स्वीकार करना तथा प्रार्थना-पत्र के विरुद्ध आपत्ति प्रस्तुत करने का अवसर समाप्त कर देना सुस्थापित न्यायिक सिद्धान्तों के विपरीत की गयी कार्यवाही है।

16. धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र प्रस्तुत कर देने मात्र से पक्षकार यह नहीं मान सकते कि वह प्रार्थना-पत्र निश्चय की स्वीकार किया जायेगा। धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र अस्वीकार करने की स्थिति में प्रतिभूतिकरण प्रार्थना-पत्र के विरुद्ध आपत्ति प्रस्तुत करने का कोई अवसर उत्पन्न नहीं होता। ऐसी परिस्थिति में धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र स्वीकार किये जाने के पूर्व प्रतिभूतिकरण प्रार्थना-पत्र के विरुद्ध आपत्ति प्रस्तुत करने का कोई औचित्य नहीं था। धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र स्वीकार करने के साथ ही प्रतिभूतिकरण प्रार्थना-पत्र के विरुद्ध आपत्ति का अवसर समाप्त कर देना सुस्थापित न्यायिक प्रक्रिया के विपरीत पारित किया हुआ आदेश प्रतीत होता है तथा यह आदेश विधि में संघर्ष नहीं है।

17. याचिकाकर्ता के विद्वान अधिवक्ता ने इस स्तर पर तर्क दिया कि ऋण वसूली न्यायाधिकरण द्वारा पारित आदेश 20.08.2024 की वैधता को इस न्यायालय के समक्ष चुनौती नहीं दी गयी है और इस कारण से उक्त आदेश के संदर्भ में इस न्यायालय को कोई टिप्पणी नहीं करनी चाहिए।

18. भारतीय संविधान के अनुच्छेद 227 के प्राविधान निम्नवत् हैं-

"227. सभी न्यायालयों के अधीक्षण की उच्च न्यायालय की शक्ति:-

(1) प्रत्येक उच्च न्यायालय, उन राज्यक्षेत्रों में सर्वत्र, जिनके सम्बन्ध में वह अपनी अधिकारिता का प्रयोग करता है, सभी न्यायालयों और अधिकरणों का अधीक्षण करेगा।

(2) पूर्वगामी उपबन्ध की व्यापकता पर प्रतिकूल प्रभाव डाले बिना, उच्च न्यायालय-

(क) ऐसे न्यायालयों से विवरणी मांग सकेगा;

(ख) ऐसे न्यायालयों की पद्धति और कार्यवाहियों के विनियमन के लिए साधारण नियम बना सकेगा और जारी कर सकेगा तथा प्ररूप विहित कर सकेगा; और

(ग) किन्हीं ऐसे न्यायालयों के अधिकारियों द्वारा रखी जाने वाली पुस्तकों, प्रविष्टियों और लेखाओं के प्ररूप विहित कर सकेगा।

(3) उच्च न्यायालय उन फीसों की सारणियां भी स्थिर कर सकेगा जो ऐसे न्यायालयों के शेरिफ तथा सभी लिपिकों और अधिकारियों को तथा उनमें विधि-व्यवसाय करने वाले अटार्नियों, अधिवक्ताओं और वकीलों को मिल सकेगी;

परन्तु खण्ड (2) या खण्ड (3) के अधीन बनाए गए कोई नियम, विहित किए गए कोई प्ररूप या स्थिर की गई कोई सारणी तत्समय प्रवृत्त किसी विधि के उपबन्ध में असंगत नहीं होगी और इनके लिए राज्यपाल के पूर्व अनुमोदन की अपेक्षा होगी।

(4) इस अनुच्छेद की कोई बात उच्च न्यायालय को सशस्त्र बलों से सम्बन्धित किसी विधि द्वारा या उसके अधीन गठित किसी न्यायालय या अधिकरण पर अधीक्षण की शक्तियां देने वाली नहीं समझी जाएगी।

19. शालिनी श्याम शेट्टी बनाम राजेन्द्र शंकर पाटिल (2010) 8 SCC 329 के निर्णय में माननीय उच्चतम न्यायालय ने भारतीय संविधान के अनुच्छेद 227 द्वारा उच्च न्यायालयों को प्रदत्त शक्तियों की व्याख्या करते हुए यह कहा कि माननीय उच्चतम न्यायालय उपरोक्त प्राविधान में प्रदत्त अधीक्षण की शक्तियों का प्रयोग अपने अधीनस्थ न्यायालयों तथा न्यायाधिकरणों को उनके क्षेत्राधिकार की सीमा में आबद्ध रखने के उद्देश्य से कर सकते हैं। इस शक्ति का प्रयोग यह सुनिश्चित करने के लिए किया जाना चाहिए कि न्यायालय तथा न्यायाधिकरण उनमें निहित क्षेत्राधिकार का प्रयोग करें एवं ऐसा करने से अस्वीकार न करें तथा न्यायालय तथा न्यायाधिकरण विधि का अनुपालन करें। उपरोक्त के अतिरिक्त उच्च न्यायालय अधीक्षण की शक्ति का प्रयोग उस परिस्थिति में भी कर सकता है जब प्राकृतिक न्याय के सिद्धान्तों का उल्लंघन हुआ हो अथवा न्याय की विफलता होना स्पष्ट रूप से परिलक्षित हो रहा हो। भारतीय संविधान के अनुच्छेद 227 द्वारा उच्च न्यायालय को प्रदत्त शक्ति संविधान की मूलभूत संरचना का

अंश है तथा इसको किसी अन्य विधि द्वारा अथवा संवैधानिक संशोधन द्वारा भी सीमित नहीं किया जा सकता। यह शक्ति विवेकाधीन है तथा समुचित प्रकरणों में इसका प्रयोग उच्च न्यायालय द्वारा स्वयंमेव भी किया जा सकता है। यह शक्ति व्यापक एवं बंधनविहीन है तथा इसका उद्देश्य उच्च न्यायालयों द्वारा प्रशासनिक तथा न्यायिक नियंत्रण बनाये रखना है, जिससे कि न्यायिक व्यवस्था सुगमतापूर्वक तथा सम्यक रूप से कार्य करती रहे और इसका अपयश न हो। इसका उद्देश्य यह है कि न्याय के पहिये की गति रुक न जाय तथा न्याय की धारा निर्मल तथा अप्रदूषित रहे, जिससे न्यायालयों तथा न्यायाधिकरणों की कार्य प्रणाली पर जनता का विश्वास बना रहे।

20. जब यह न्यायालय अपने सम्मुख उपलब्ध अभिलेख के अवलोकन से यह पाती है कि ऋण वसूली न्यायाधिकरण ने विधि के सुस्थापित सिद्धान्तों के उल्लंघन में आदेश पारित किये हैं तो न्यायालय भारतीय संविधान के अनुच्छेद 227 द्वारा प्रदत्त अधीक्षण की शक्ति में उन आदेशों को अपास्त करने का न सिर्फ अधिकार रखता है अपितु यह इस न्यायालय का उत्तरदायित्व भी है कि ऋण वसूली न्यायाधिकरण द्वारा अवैधानिक रूप से पारित आदेशों को निरस्त करे।

21. प्रस्तुत प्रकरण में प्रतिभूतिकरण और वित्तीय आस्तियों के पुनर्गठन और प्रतिभूति हित का प्रवर्तन अधिनियम, 2002 की धारा 17 के अंतर्गत प्रार्थना-पत्र 939 दिन के विलंब से प्रस्तुत किया था, जबकि धारा 17 में 45 दिन की परिसीमा अवधि निर्धारित है।

22. व्यवहार प्रक्रिया संहिता के आदेश 41 नियम 3क में यह प्राविधान है कि जहाँ कोई अपील परिसीमा अवधि समाप्त होने के उपरान्त विलंब क्षमा करने हेतु प्रार्थना-पत्र के साथ प्रस्तुत की जाती है, जब तक अपील सुनवाई हेतु अंगीकृत न हो जाय, न्यायालय कोई अंतरिम आदेश पारित नहीं करेगा। यद्यपि व्यवहार प्रक्रिया संहिता के प्राविधान ऋण वसूली अधिकरण पर लागू नहीं होते हैं किन्तु व्यवहार प्रक्रिया संहिता में सम्मिलित प्रक्रियात्मक सिद्धान्त सभी न्यायालयों के न्यायाधिकरणों, जिसमें ऋण वसूली अधिकरण सम्मिलित है, पर लागू होते हैं।

23. विलंब क्षमा होने के पूर्व प्रार्थना-पत्र अंगीकृत नहीं हुआ तथा प्रार्थना-पत्र अंगीकरण के पूर्व अंतरिम आदेश पारित करने का कोई औचित्य नहीं था। इसके बाद भी ऋण वसूली न्यायाधिकरण ने परिसीमा से बाधित प्रार्थना-पत्र पर विलंब क्षमा करने के पूर्व ही दिनांक 18.05.2023 को याचिकाकर्ता के पक्ष

में अंतरिम आदेश पारित करते हुए पक्षों को यथास्थिति बनाये रखने का आदेश दे दिया, जो न्यायोचित नहीं था। इस न्यायालय के समक्ष याचिकाकर्ता के विद्वान अधिवक्ता ने तर्क दिया है कि याचिकाकर्ता का घर नीलाम करके उसको घर से बाहर कर दिया गया है तथा वह वर्ष 2023 से बेघर होकर रह रहा है, जबकि ऋण वसूली न्यायाधिकरण के आदेश दिनांक 18.05.2023 में अंकित है कि याचिकाकर्ता के विद्वान अधिवक्ता ने कहा कि संपत्ति का भौतिक अध्यासन याचिकाकर्ता के पास है और उसी दिनांक को ऋण वसूली न्यायाधिकरण ने पक्षों को यथास्थिति बनाये रखने का अंतरिम आदेश पारित कर दिया। इस न्यायालय के समक्ष याचिकाकर्ता के विद्वान अधिवक्ता द्वारा दिया कथन, याचिकाकर्ता विवादित संपत्ति के अध्यासन में नहीं है, से यह प्रतीत होता है कि ऋण वसूली न्यायाधिकरण के समक्ष दिनांक 18.05.2023 को उनके द्वारा किया गया कथन, कि याचिकाकर्ता संपत्ति के भौतिक अध्यासन में है, सत्य नहीं है और ऐसी तथ्यात्मक परिस्थिति में याचिकाकर्ता के पक्ष में अंतरिम आदेश पारित किये जाने का कोई औचित्य नहीं था।

24. ऋण वसूली न्यायाधिकरण के आदेश-पत्र के अवलोकन से स्पष्ट है कि दिनांक 20.08.2024 को याचिका प्रस्तुत करने में हुए 939 दिन के विलंब को क्षमा करने के साथ ही उसी दिन याचिका के विरुद्ध प्रतिभूतिकरण प्रार्थना-पत्र के विरुद्ध आपत्ति देने का अवसर समाप्त कर दिया गया। धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र स्वीकार होने के पूर्व प्रतिभूतिकरण प्रार्थना-पत्र अंगीकृत ही नहीं हुआ था और ऐसी परिस्थिति में उस प्रार्थना-पत्र में संशोधन स्वीकार करना तथा प्रार्थना-पत्र के विरुद्ध आपत्ति प्रस्तुत करने का अवसर समाप्त कर देना सुस्थापित न्यायिक सिद्धान्तों के विपरीत की गयी कार्यवाही है।

25. धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र प्रस्तुत कर देने मात्र से पक्षकार यह नहीं मान सकते कि वह प्रार्थना-पत्र निश्चय की स्वीकार किया जायेगा। धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र अस्वीकार करने की स्थिति में प्रतिभूतिकरण प्रार्थना-पत्र के विरुद्ध आपत्ति प्रस्तुत करने का कोई अवसर उत्पन्न नहीं होता। ऐसी परिस्थिति में धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र स्वीकार किये जाने के पूर्व प्रतिभूतिकरण प्रार्थना-पत्र के विरुद्ध आपत्ति प्रस्तुत करने का कोई औचित्य नहीं था। धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र स्वीकार करने के साथ ही प्रतिभूतिकरण प्रार्थना-पत्र के विरुद्ध आपत्ति का अवसर समाप्त कर देना सुस्थापित न्यायिक प्रक्रिया के विपरीत पारित किया हुआ आदेश प्रतीत होता है तथा यह आदेश विधि में संधार्य नहीं है।

26. ऋण वसूली न्यायाधिकरण ने आदेश दिनांक 20.08.2024 द्वारा प्रार्थना-पत्र प्रस्तुत करने में हुए 939 दिन के विलंब को क्षमा किया तथा तभी प्रार्थना-पत्र अंगीकृत हुआ माना जायेगा और इसके उपरान्त विपक्षीगण को प्रार्थना-पत्र पर आपत्ति प्रस्तुत करने का समुचित अवसर दिया जाना चाहिए किन्तु ऋण वसूली न्यायाधिकरण दिनांक 20.08.2024 को ही विपक्षीगण द्वारा आपत्ति प्रस्तुत किये जाने का अवसर समाप्त कर दिया, जो आदेश प्राकृतिक न्याय के सिद्धान्तों के उल्लंघन में पारित किया गया है तथा इससे न्याय के मूलभूत उद्देश्यों की क्षति होती है। इस कारण से विपक्षीगण द्वारा आपत्ति प्रस्तुत किये जाने का अवसर समाप्त करने का आदेश निरस्त किये जाने योग्य है।

27. जब कि अभी तक विपक्षीगण को आपत्ति प्रस्तुत करने का समुचित अवसर नहीं मिला है, प्रकरण को अंतिम बहस के लिए नियत करना भी वैधानिक रूप से उचित नहीं है तथा यह आदेश भी प्राकृतिक न्याय के सिद्धान्तों के उल्लंघन में पारित किया गया है।

28. जबकि ऋण वसूली न्यायाधिकरण के आदेश पत्रावली पर उपलब्ध है, जिनके अवलोकन से न्यायिक सिद्धान्त का उल्लंघन होना सुस्पष्ट रूप से सिद्ध होता है, भारतीय संविधान के अनुच्छेद 227 के अंतर्गत प्रदत्त शक्तियों के अंतर्गत यह न्यायालय उपरोक्त टिप्पणी करने के लिए न सिर्फ अधिकृत है अपितु बाध्य भी है।

29. उपरोक्त तथ्यों तथा परिस्थितियों से यह प्रतीत होता है कि इस प्रकरण में ऋण वसूली न्यायाधिकरण बिना विपक्षीगण को सुनवाई का समुचित अवसर देते हुए अवैधानिक रूप से कार्यवाही कर रहा है तथा ऋण वसूली न्यायाधिकरण के पीठासीन अधिकारी न्यायिक प्रक्रिया के सुस्थापित सिद्धान्तों के उल्लंघन में विपक्षीगणों के हितों के विरुद्ध कार्यवाही कर रहे हैं, जो एक न्यायाधिकरण के पीठासीन अधिकारी से वांछित आचरण के विपरीत है।

30. अतः दिनांक 20.08.2024 का आदेश इस सीमा तक निरस्त किया जाता है, जिसके द्वारा विपक्षीगण द्वारा आपत्ति प्रस्तुत किये जाने का अवसर समाप्त कर दिया गया तथा प्रकरण को अंतिम सुनवाई हेतु नियत कर दिया गया।

31. जहाँ तक आदेश दिनांक 20.08.2024 द्वारा धारा 5 परिसीमा अधिनियम का प्रार्थना-पत्र स्वीकार किये जाने का प्रश्न है, इस संबंध में एक पुनरावलोकन प्रार्थना-पत्र प्रस्तुत किया जा

चुका है, जिस पर ऋण वसूली न्यायाधिकरण पक्षों को सुनवाई का समुचित अवसर देते हुए विधि उपरान्त आदेश पारित करेगा। पुनरावलोकन प्रार्थना-पत्र स्वीकार होने की स्थिति में किसी अग्रिम कार्यवाही की आवश्यकता नहीं रहेगी। पुनरावलोकन प्रार्थना-पत्र निरस्त होने की स्थिति में पक्षों को सुनवाई का समुचित अवसर देते हुए अग्रिम कार्यवाही विधिनुसार करना सुनिश्चित किया जायेगा।

32. अतः यह याचिका इस निर्देश के साथ निस्तारित की जाती है कि विद्वान ऋण वसूली न्यायाधिकरण आदेश दिनांक 20.08.2024 के पुनरावलोकन के लिए प्रस्तुत प्रार्थना-पत्र पर विधिनुसार, पक्षों को सुनवाई का समुचित अवसर देते हुए आदेश पारित करने के उपरान्त आगे की कार्यवाही करना सुनिश्चित करेंगे।

33. यह न्यायालय ऋण वसूली न्यायाधिकरण के पीठासीन अधिकारी से यह अपेक्षा करती है कि इस प्रकरण में अग्रिम कार्यवाही में अपने द्वारा पूर्व में सुस्थापित न्यायिक प्रक्रिया के विरुद्ध अपनायी गयी कार्यशैली को दोहराएंगे नहीं तथा न्यायिक प्रक्रिया की शुचिता तथा पवित्रता को बनाये रखते हुए न्यायपूर्ण ढंग से विधिनुसार अग्रिम कार्यवाही करना सुनिश्चित करेंगे।
