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(2025) 1 ILRA 4
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2025

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Criminal Misc. Bail Application No. 23378 of
2024

Bajarangi Singh Yadav ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:

P.K. Singh, Praveen Kumar Singh, Sunil Kumar Pandey

Counsel for the Opposite Party:

G.A.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8/21 & 37 - Bail - As per prosecution story, contraband (Heroine) recovered from vehicle in four packets, total weighting 1 kg, vehicle was being driven by applicant/driver in which two other persons were also sitting - When police intercepted vehicle, search was conducted as per established procedure and three packets of 250 gms. each were found from pocket of all three persons sitting in vehicle & anr.packet containing 250 gms contraband (Heroine) was found beneath seat of applicant - Applicant submitted that necessary compliance u/s 50 and 52-A of Act were not done and sample were not prepared and sent for chemical examination - Co-accused already enlarged on bail and languishing in jail since 28.03.2024. (Para 3,4)

Held, argument raised by applicant stands adjudicated on basis of guidelines summarized by Apex Court in judgment rendered in case of Kashif (infra). (Para 27)

Looking to huge recovery of contraband (Heroine) from joint possession of

applicant and co-accused, also from alleged vehicle, no ground to release applicant on bail - Five other criminal cases registered against applicant and recovery made was above commercial quantify. (Para 28)

Bail application rejected. (E-13)

List of Cases cited:

1. Simarnjit Singh Vs St. of Pun., Criminal Appeal No.1443/2023, 2023 Supreme (SC) 658
2. Mangilal Vs St. of M. P., 2023 Supreme (SC) 703
3. U.O.I. Vs Mohanlal & anr, 2016 Supreme (SC) 82
4. U.O.I. Vs Ram Samujh & anr., (1999) 9 SCC 429, (Para 7, 8)
5. U.O.I. Vs Shiv Shanker Kesari, (2007) 7 SCC 798, (Para 6, 7)
6. U.O.I. Vs Rattan Mallik @ Habul, (2009) 1 SCC (Cri) 831, (Para 14)
7. St. of Kerala Etc. Vs Rajesh Etc., AIR 2020 SC 721, (Para 20, 21)
8. U.O.I.Vs Prateek Shukla AIR 2021 SC 1509
9. St. (NCT of Delhi) Narcotics Control Bureau Vs Lokesh Chadha, (2021) 5 SCC 724
10. U.O.I.through Narcotics Control Bureau, Lucknow Vs Mohd. Nawaz Khan, (2021) 10 SCC 100, (Para 23, 25, 26, 28, 29)
11. Megh Singh Vs St. of Pun., 2003 CRI. L.J. 4329, (Para 9 to 13,16)
12. Dehal Singh Vs St. of H. P., 2011 (72) ACC 661
13. Narcotics Control Bureau Vs Kashif, Criminal Appeal No.5544 of 2024, arising out of SLP (Cri.) No.12120 of 2024, decided on 20.12.2024, (Para 20, 21, 23, 24, 31 to 39)
14. Pooran Mal Vs Director of Inspection (Investigation) New Delhi & ors., (1974) 1 SCC 345

15. St. of Punjab Vs Baldev Singh, (1999) 6 SCC 172

16. St. of H.P. Vs Pirthi Chand & anr., (1996) 2 SCC 37

17. St. of Pun. Vs Makhan Chand, (2004) 3 SCC 453

18. U.O.I. Vs Mohanlal & anr., (2016) 3 SCC 379

19. Yusuf @ Asif Vs St., 2023 SCC Online SC 1328

20. Mohammed Khalid & anr.Vs St. of Telangana, (2024) 5 SCC 393

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

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

2. By means of the present bail application, the applicant seeks bail in Case Crime No. 130 of 2024, under Section 8/21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (*hereinafter referred to as "NDPS Act"*), Police Station- Kotwali, District- Ghazipur, during the pendency of trial.

3. The prosecution story, as unfolded from the First Information Report (FIR) is that Contraband (Heroin) has been recovered from Scorpio No.UP 32 LK4587 in four packets, total weighting 1 kg. The vehicle in question was being driven by the applicant in which two other persons were also sitting. When the police had intercepted the vehicle, the search was conducted as per the established procedure and three packets of 250 gms. Each were found from the pocket of all the three persons sitting in the scorpio vehicle and another packet containing 250 gms Contraband (Heroin) was found beneath

the seat of the applicant who was driving the vehicle.

4. Learned counsel for the applicant submitted that the applicant is Driver of the said vehicle and has no concerned with the aforesaid Contraband, which is alleged to have been recovered from the vehicle. It is further contended that the applicant has a criminal history of 5 cases in which he is on bail. It is next contended that necessary compliance under Section 50 and 52-A of the Act were not done and the sample were not prepared and sent for chemical examination. The other two accused have already been enlarged on bail. It was lastly contended that the applicant is languishing in jail since 28.03.2024. Reliance has been placed upon decision of Apex Court rendered in **Simarnjit Singh vs. State of Punjab 2023 Supreme (SC) 658; Mangilal vs. State of Madhya Pradesh 2023 Supreme (SC) 703; and, Union of India vs. Mohanlal & Anr. 2016 Supreme (SC) 82.**

5. Learned A.G.A. has opposed the bail application and submitted that the applicant was apprehended on spot along with two other co-accused who were carrying 1 kg. of Contraband (Heroin). The recovered quantity from applicant is well above the commercial quantity. It is further submitted that the recovery was made from the vehicle and it amounts to conscious possession and necessary compliance was done. He further submitted that the sample of the recovered contraband was sent of chemical analysis and the report of FSL had come wherein the recovered material was found to be Contraband (Heroin).

6. I have heard learned counsel for the parties and perused the material on record.

7. This is a case where contraband (Heroin) amounting to 1 kg. has been recovered from the possession of the applicant and other co-accused.

8. Section 37 of the NDPS Act governs the field for grant of bail in offences which are cognizable and non-bailable. Section 37 is extracted here as under;

"37. Offences to be cognizable and non-bailable.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity 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.

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

9. According to the aforesaid provisions, the Court, before granting bail, has to record reason that there are reasonable ground that the applicant is not guilty of such offence and furthermore that

he is not likely to commit any offence while on bail.

10. Apex Court, while dealing with aforesaid provision in case of **Union of India Vs. Ram Samujh and Another, (1999) 9 SCC 429**, held as under;

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didien v. Chief Secretary, Union Territory of Goa. (1990) 1 SCC 95 as under:

"24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing

deleterious effects and deadly impact on the society as a whole, the Parliament in the wisdom has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine,"

8. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that accused is not guilty of such offence; and

(ii) that he is not likely to commit while on bail."

11. In Union of India Vs. Shiv Shanker Kesari, (2007) 7 SCC 798, Apex Court elaborated and explained the conditions for granting of bail as provided under Section 37 of the NDPS Act. Relevant paragraph Nos. 6 and 7 are extracted here as under;

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief

contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged."

12. In Union of India Vs. Rattan Mallik @ Habul, (2009) 1 SCC (Cri) 831, Apex Court observed as under;

"14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

13. In State of Kerala Etc. Vs. Rajesh Etc. AIR 2020 SC 721, Apex Court considered the scope of Section 37 and relying upon earlier decision in **Ram Samujh (supra)** held as under;

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any

person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

14. The Apex Court in *Union of India vs. Prateek Shukla* AIR 2021 SC 1509 held that merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind. The provision of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail is made out.

15. In *State (NCT of Delhi) Narcotics Control Bureau Vs. Lokesh*

Chadha (2021) 5 SCC 724 the Court held as under :

".....Section 37 of the NDPS Act stipulates that no person accused of an offence punishable for the offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail, where the Public Prosecutor oppose the application, unless 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."

16. In a recent judgment of *Union of India through Narcotics Control Bureau, Lucknow vs. Mohd. Nawaz Khan* (2021) 10 SCC 100, Hon'ble Apex Court while cancelling the bail of accused held that the High Court should consider that in case the accused is enlarged on bail, there should be reasonable ground to believe that he will not commit an offence in future. Relevant paras of the judgment reads hereas under :

"23. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed.

.....

25. We shall deal with each of these circumstances in turn. The respondent has been accused of an offence under Section 8 of the NDPS Act, which is

punishable under Sections 21, 27-A, 29, 60(3) of the said Act. Section 8 of the Act prohibits a person from possessing any narcotic drug or psychotropic substance. The concept of possession recurs in Sections 20 to 22, which provide for punishment for offences under the Act. In *Madan Lal v. State of H.P.* [*Madan Lal v. State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664] this Court held that : (SCC p. 472, paras 19-23 & 26)

"19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja* [*Supt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja*, (1979) 4 SCC 274 :

1979 SCC (Cri) 1038] to work out a completely logical and precise definition of "possession" uniform[ly] applicable to all situations in the context of all statutes.

23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."

26. What amounts to "conscious possession" was also considered in *Dharampal Singh v. State of Punjab* [*Dharampal Singh v. State of Punjab*, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431], where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In *Mohan Lal v. State of Rajasthan* [*Mohan Lal v. State of Rajasthan*, (2015) 6 SCC 222 : (2015) 3 SCC (Cri) 881], this Court also observed that the term "possession" could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

....

28. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in *Union of India v. Rattan Mallik* [*Union of India v. Rattan Mallik*, (2009) 2 SCC 624 : (2009) 1 SCC (Cri) 831], a two-Judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the "possession" of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court.

29. In line with the decision of this Court in *Rattan Mallik* [*Union of India v. Rattan Mallik*, (2009) 2 SCC 624 : (2009) 1 SCC (Cri) 831], we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act."

17. Supreme Court while dealing with the question of possession and application of Section 50 in case of **Megh Singh Vs. State of Punjab, 2003 CRI. L.J. 4329**, held that word "possession" includes conscious possession. Further Section 50 applies in case of personal search of a person and it does not extend to search of a vehicle or container or a bag or premises. Relevant paragraph nos. 9 to 13 and 16 are extracted here as under;

"9. The expression 'possession' is a polymorphous term which assumes

different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.* (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

10. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

11. As noted in *Gunwantlal v. The State of M.P.* (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

12. The word 'possession' means the legal right to possession (See *Health v. Drown* (1972) (2) All ER 561 (HL)). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness* (1976 (1) All ER 844 (QBD)).

13. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in *Madan Lal and Anr. v.*

State of Himachal Pradesh (2003 (6) SCALE 483).

16. *A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See Kalema Tumba v. State of Maharashtra and Anr. (JT1999 (8) SC 293), The State of Punjab v. Baldev Singh (JT1999 (4) SC 595), Gurbax Singh v. State of Haryana(2001(3) SCC 28). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance."*

18. While dealing with the provision of Section 50 of the Act, Apex Court in case of **Dehal Singh Vs. State of Himachal Pradesh, 2011 (72) ACC 661**, held that Section 50 relates to the search of a person and not of the vehicle and thus there was no requirement for informing the applicant of the right to be searched in presence of a gazetted officer of Magistrate.

19. Reliance placed by applicant's counsel on the judgments of Apex Court is of no help as the State has come with the case that necessary compliance of Section 50 of the Act has been done and as per report of FSL, Contraband recovered was found to be Heroine.

20. Section 52A was inserted by the Act 2 of 1989 and came into effect from 29.05.1989. Prior to insertion of Section 52A, Central Government had issued a notification on 17.03.1986 in exercise of

power under the NDPS Act and constituted Narcotics Control Bureau (NCB). The NCB had issued Standing Instructions No.1 of 88 datd 15.03.1988. The necessity to insert Section 52A arose in view of International Convention of 1988 held by United Nations.

21. After the said insertion of Section 52A, Standing Order No.1 of 1989 was followed. From time to time, Central Government had been issuing notifications in respect of disposal of narcotic drugs and psychotropic substances, controlled substances and conveyances. The matter in regard to compliance of Section 52A of the Act came up for consideration before Hon'ble Apex Court in case of **Narcotics Control Bureau vs. Kashif in Criminal Appeal No.5544 of 2024** arising out of Special Leave Petition (Crl.) No.12120 of 2024, which was decided on 20.12.2024.

22. Hon'ble Supreme Court considering the legislative intent and the history of the NDPS Act and insertion of Section 52A held that the heading of Section 52A itself leave no room of doubt that the provision was inserted for an early disposal of the seized narcotic drugs and psychotropic substances, as one of the measures required to be taken to implement the provisions of the International Conventions on Narcotics Drugs and Psychotropic Substances. Relevant paras 20, 21, 23 and 24 of the judgment are extracted here as under :-

"20. Now, so far as Section 52A is concerned, the language employed therein itself is very clear that the said provision was inserted for an early disposal of the seized narcotic drugs and psychotropic substances, having regard to the hazardous nature, vulnerability to theft,

substitution, constraints of proper storage space and other relevant considerations. Apart from the plain language used in the said section, its Heading also makes it clear that the said provision was inserted for the Disposal of the seized narcotic drugs and psychotropic substances. As per the well settled rule of interpretation, the Section Heading or Marginal note can be relied upon to clear any doubt or ambiguity in the interpretation of any provision and to discern the legislative intent. The Section Heading constitutes an important part of the Act itself, and may be read not only as explaining the provisions of the section, but it also affords a better key to the constructions of the provisions of the section which follows than might be afforded by a mere preamble. (Eastern Coalfields Limited vs. Sanjay Transport Agency and Another, (2009) 7 SCC 345)

21. *The insertion of Section 52A with the Heading “Disposal of seized narcotic drugs and psychotropic substances” along with the insertion of the words “to provide for the forfeiture of property derived from or used in, illicit traffic in narcotics drugs and psychotropic substances, to implement the provisions of International Conventions on Narcotics Drugs and Psychotropic Substances”, in the long title of the NDPS Act, by Act 2 of 1989 w.e.f. 29.05.1989, leaves no room of doubt that the said provision of Section 52A was inserted for an early disposal of the seized narcotic drugs and psychotropic substances, as one of the measures required to be taken to implement the provisions of the International Conventions on Narcotics Drugs and Psychotropic Substances. The Heading of Section 52A i.e. Disposal of seized narcotic drugs and psychotropic substances delineates the object and reason of the insertion of said provision and such*

Heading cannot be underscored. From the bare reading of Section 52A also it is very much discernable that sub-section (1) thereof empowers the Central Government, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, to specify narcotic drugs, psychotropic substances for the purpose of their disposal as soon as may be after their seizure, by such officer and in such manner as the Central Government may determine after following the procedure specified in sub-section (2).

.....

23. As demonstrated above, sub-section (2) of Section 52A specifies the procedure as contemplated in sub-section (1) thereof, for the disposal of the seized contraband or controlled narcotic drugs and psychotropic substances. Any deviation or delay in making the application under subsection (2) by the concerned officer to the Magistrate or the delay on the part of the Magistrate in deciding such application could at the most be termed as an irregularity and not an illegality which would nullify or vitiate the entire case of the prosecution. The jurisprudence as developed by the courts so far, makes clear distinction between an “irregular proceeding” and an “illegal proceeding.” While an irregularity can be remedied, an illegality cannot be. An irregularity may be overlooked or corrected without affecting the outcome, whereas an illegality may lead to nullification of the proceedings. Any breach of procedure of rule or regulation which may indicate a lapse in procedure, may be considered as an irregularity, and would not affect the outcome of legal proceedings but it can not be termed as an illegality leading to the nullification of the proceedings. 24. Section 52A was inserted only for the purpose of early disposal of the

seized contraband drugs and substances, considering the hazardous nature, vulnerability to theft, constraint of proper storage space etc. There cannot be any two opinions on the issue about the early disposal of the contraband drugs and substances, more particularly when it was inserted to implement the provisions of International Convention on the Narcotics Drugs and Psychotropic Substances, however delayed compliance or non-compliance of the said provision by the concerned 23 officer authorised to make application to the Magistrate could never be treated as an illegality which would entitle the accused to be released on bail or claim acquittal in the trial, when sufficient material is collected by the Investigating Officer to establish that the Search and Seizure of the contraband substance was made in due compliance of the mandatory provisions of the Act.”

23. The Apex Court further considered the scope of Section 52A in light of the decision of Constitution Bench in case of **Pooran Mal vs. Director of Inspection (Investigation) New Delhi and others, (1974) 1 SCC 345** and Constitution Bench decision in case of **State of Punjab vs. Baldev Singh (1999) 6 SCC 172** as well as decision in case of **State of H.P. vs. Pirthi Chand and Another (1996) 2 SCC 37** and **State of Punjab vs. Makhan Chand (2004) 3 SCC 453** and held that evidence collected during course of investigation in legal and proper manner and sought to be used in course of trial with regard to the seized contraband substances could not be simply brushed aside on the ground of procedural irregularity if any, committed by the concerned officer authorized in making application to the Magistrate as contemplated under Section 52A of the Act. Relevant paras 31, 32 and 33 of the

judgment in case of **Kashif (supra)** are extracted here as under :-

“31. From the above decisions, the position that emerges is that this Court in catena of decisions, has approved the procedure of spot searches and seizures in compliance with the Standing Orders and the Notifications issued by the NCB and the Central Government, and upheld the convictions on being satisfied about the search and seizure made by the officers as per the provisions of the Act and being satisfied about the scientific evidence of F.S.L. reports etc. Even otherwise, in 28 view of the law laid down by the Constitution Benches in case of **Pooran Mal** and in case of **Baldev Singh**, any procedural illegality in conducting the search and seizure by itself, would not make the entire evidence collected thereby inadmissible. The Court would have to decide the admissibility of evidence in the context and the manner in which the evidence was collected and was sought to be used during the course of trial. The evidence collected during the course of investigation in legal and proper manner and sought to be used in the course of trial with regard to the seized contraband substance could not be simply brushed aside, on the ground of procedural irregularity if any, committed by the concerned officer authorised in making application to the Magistrate as contemplated under Section 52A of the Act.

32. Significantly, the Authorised Officer can make the application under subsection (2) of Section 52A for three purposes – (a) for certifying the correctness of the inventory prepared by him; or (b) taking in presence of such magistrate, photographs of the seized drugs, substances and conveyances and certifying such photographs as true; or (c)

allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate, and certifying the correctness of any list of samples so drawn. The use of the conjunction “OR” made in between the three purposes mentioned therein, itself makes it explicitly clear that the purposes for which the application could be made under sub-section (2) are alternative and not cumulative in nature. Such provision specifying multiple alternative purposes could not be construed as a mandatory provision muchless its non-compliance fatal to the case of prosecution.

33. Though it is true that the inventory certified, photographs taken and the list of samples drawn under sub-section (2) has to be treated by the Court as primary evidence in view of sub-section (3), nonetheless the documents like Panchnama, seizure memo, arrest memo etc. prepared by the Investigating Officer on the spot or during the course of investigation are also primary evidence within the meaning of Section 62 of the Evidence Act, carrying the same evidentiary value as any other primary evidence. Such primary evidence with regard to Search and Seizure of the contraband substance could not be overlooked merely because some lapse or non-compliance is found of Section 52A of the Act.”

24. The Apex Court further went on to hold that in the decision rendered in case of **Union of India vs. Mohanlal and Another (2016) 3 SCC 379**, the issue of pilferage of contraband was the main issue. The prime focal in case of **Mohanlal (supra)** was disposal of seized contraband goods as contemplated in Section 52A. Relevant paras 34 and 35 of the judgment in **Kashif (supra)** are extracted here as under :-

“34. In our opinion reliance placed by the High Court on the decision of this Court in **Union of India Vs. Mohanlal and Another (2016) 3 SCC 379**, is thoroughly misplaced. In the said case, the issue of pilferage of contraband was the main issue. The Court after noticing the non-compliance of the procedure laid down in the Standing Order No. 1 of 89 dated 13.06.1989, and the possibility of the pilferage of contraband goods and their return to the market place for circulation, had appointed an amicus curiae for making a realistic review of the procedure for search, disposal or destruction of the narcotics and remedial steps that need to be taken to plug the loopholes, if any. The Court, thereafter, had raised the queries with regard to the seizure, storage, disposal/destruction and also with regard to the judicial supervision in respect of the seized narcotic drugs and psychotropic substances. The prime focal in case of Mohanlal was the disposal of seized contraband goods as contemplated in Section 52A. Though it held that the process of drawing samples has to be done in presence of and under the supervision of the Magistrate, it nowhere held that non-compliance or delayed compliance of the procedure prescribed under Section 52A (2) would vitiate the trial or would entitle the accused to be released on bail.

35. None of the provisions in the Act prohibits sample to be taken on the spot at the time of seizure, much less Section 52A of the said Act. On the contrary, as per the procedure laid down in the Standing Orders and Notifications issued by the NCB and the Central Government before and after the insertion of Section 52A till the Rules of 2022 were framed, the concerned officer was required to take samples of the seized contraband substances on the spot of recovery in

duplicate in presence of the Panch witnesses and the person in whose possession the drug or substance recovered, by drawing a Panchnama. It was only with regard to the remnant substance, the procedure for disposal of the said substance was required to be followed as prescribed in Section 52A.”

25. While considering the recent judgment of Apex Court rendered in case of **Simarnjit vs. State of Punjab (Criminal Appeal No.1443/2023); Yusuf @ Asif vs. State 2023 SCC Online SC 1328 and Mohammed Khalid and Another vs. State of Telangana (2024) 5 SCC 393; the Apex Court in Kashif (supra)** in paras 36, 37 and 38 held as under :-

*“36. At this stage, we must deal with the recent judgments in case of **Simarnjit vs. State of Punjab, (Criminal Appeal No.1443/2023), in case of Yusuf @ Asif vs. State (2023 SCC Online SC 1328), and in case of Mohammed Khalid and Another vs. State of Telangana ((2024) 5 SCC 393)** in which the convictions have been set aside by this Court on finding non-compliance of Section 52A and relying upon the observations made in case of Mohanlal. Apart from the fact that the said cases have been decided on the facts of each case, none of the judgments has proposed to lay down any law either with regard to Section 52A or on the issue of admissibility of any other evidence collected during the course of trial under the NDPS Act. Therefore, we have considered the legislative history of Section 52A and other Statutory Standing Orders as also the judicial pronouncements, which clearly lead to an inevitable conclusion that delayed compliance or noncompliance of Section 52A neither vitiates the trial*

affecting conviction nor can be a sole ground to seek bail. In our opinion, the decisions of Constitution Benches in case of Pooran Mal and Baldev Singh must take precedence over any observations made in the judgments made by the benches of lesser strength, which are made without considering the scheme, purport and object of the Act and also without considering the binding precedents.

37. It hardly needs to be reiterated that every law is designed to further ends of justice and not to frustrate it on mere technicalities. If the language of a Statute in its ordinary meaning and grammatical construction leads a manifest contradiction of the apparent purpose of the enactment, a construction may be put upon it which modifies the meaning of the words, or even the structure of the sentence. It is equally settled legal position that where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law. In Maxwell on Interpretation of Statutes, Tenth Edition at page 229, the following passage is found: -

“Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. ... Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used.”

38. *As observed by this Court in K.P. Varghese vs. Income Tax Officer, Ernakulam and Another (1981) 4 SCC 173, a statutory provision must be so construed, if it is possible, that absurdity and mischief may be avoided. Where the plain and literal interpretation of statutory provision produces a manifestly absurd and unjust result, the Court may modify the language used by the Legislature or even do some violence to it, so as to achieve the obvious intention of the Legislature and produce a rational construction and just result."*

26. The Apex Court, in para 39 of the judgment, had laid down the guidelines in regard to consideration of bail application in cases under the NDPS Act and the purpose of Section 52A and disposal of seized narcotics drugs and psychotropic substances, which are extracted hereas under :-

"39. The upshot of the above discussion may be summarized as under:

(I) The provisions of NDPS Act are required to be interpreted keeping in mind the scheme, object and purpose of the Act; as also the impact on the society as a whole. It has to be interpreted literally and not liberally, which may ultimately frustrate the object, purpose and Preamble of the Act.

(ii) While considering the application for bail, the Court must bear in mind the provisions of Section 37 of the NDPS Act which are mandatory in nature. Recording of findings as mandated in Section 37 is sine qua non is known for granting bail to the accused involved in the offences under the NDPS Act.

(iii) The purpose of insertion of Section 52A laying down the procedure for disposal of seized Narcotic Drugs and

Psychotropic Substances, was to ensure the early disposal of the seized contraband drugs and substances. It was inserted in 1989 as one of the measures to implement and to give effect to the International Conventions on the Narcotic drugs and psychotropic substances.

(iv) Sub-section (2) of Section 52A lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone.

(v) Any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out whether any serious prejudice has been caused to the accused.

(vi) Any lapse or delay in compliance of Section 52A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under Section 54 of the NDPS Act."

27. The argument raised from the applicant's side stands adjudicated on the basis of guidelines summarized by the Apex Court in the recent judgment rendered in case of **Kashif (supra)**.

28. Looking to the huge recovery of contraband (Heroin) from the joint possession of the applicant as well as other

co-accused and from the vehicle in question, I do not find any reasonable ground in terms of Section 37 of NDPS Act to release the applicant on bail. Moreover, there are five other criminal cases registered against the applicant and the recovery made is above the commercial quantify.

29. Thus, taking into account the submission made by learned counsel for the parties and the evidence on record and the complicity of the applicant in offence in question, this Court do not find any ground to release the applicant on bail.

30. In the result, the bail application stands **rejected**.

(2025) 1 ILRA 17
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2025

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Bail Application No. 25993 of
2024

Smt. Rekha **...Applicant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:
Rahul Upadhyay

Counsel for the Opposite Party:
G.A., R.P.S. Chauhan

Criminal Law - Indian Penal Code, 1860 - Sections 363, 302 & 201 - Code of Criminal Procedure, 1973 - Section 309 - Constitution of India, 1950 - Articles 15(3), 21, 21-A, 45, 47, 39(e) & 39(f) - Juvenile Justice (Care and Protection of Children) Act, 2015 - Sections 2(14) (v), 2

(22), 2(21), 30, 31 & 37 - Right of Children to Free and Compulsory Education Act, 2009 - Sections 2(d), 3, 4, 13, 14 & 15 - UP Jail Manual, 2022 - Rule 335, 336, 337, 339 - Model Prison Manual, 2016 - Rules 26.36 to 26.44 - Legal Services Authorities Act, 1987 - Sections 2(c), 12 & 13 - Bail - Issue before Court was education, welfare, holistic environment for growth, development of strong moral fabric and ethical framework in children of jail inmates who reside in jails with them - Applicant was in jail since 16.10.2023 - Bail application was rejected by trial court on 14.05.2024 - Applicant's 5 year old son was residing with her in prison after her incarceration and entirely dependent on her. (Para 4)

Held, applicant has been identified as principal offender who murdered her minor step child and threw his body in tank situated in house and dead body was recovered at pointing out of her - Applicant had motive to commit offence which was grave - Likelihood that applicant had committed offence - No case for bail was made out - Thus, directions to trial court to expedite trial and also to concern officers to prepare child care plan for son of applicant within two months after due consultation with various authorities and experts. (Para 93, 96, 114)

Bail application dismissed. (E-13)

List of Cases cited:

1. Ramu Vs St. of U.P., 2024 SCC OnLine All 4618
2. Anil Gaur @ Sonu @ Sonu Tomar Vs St. of U.P., 2022 SCC OnLine All 623
3. Junaid Vs St. of U.P., 2021 (6) ADJ 511
4. Aman Vs St. of U.P., 2023 (8) ADJ 523
5. Bhanwar Singh @ Karamvir Vs St. of U.P., 2023 SCC OnLine All 734
6. Noor Alam Vs St. of U.P., 2024 (5) ADJ 766

7. Anurudh Vs St. Of U.P., 2024 (8) ADJ 469
8. Avinash Mehrotra Vs U.O.I.& ors., 2009 (6) SCC 398, (Para 28, 30, 32, 33)
9. R.D. Upadhyay Vs St. of A.P., (2007) 15 SCC 337, (Para 45)
10. Pratap Singh Vs St. of Jharkhand, 2005 (3) SCC 551, (Para 63.A)
11. Rajiv Kumar Vs St. of U.P., 2019 (4) ADJ 316, (Para 38, 39)
12. M.C. Mehta Vs St. of T.N., 1996 (6) SCC 756, (Para 17)
13. In Re: Right to Privacy of Adolescents, 2024 SCC OnLine SC 2055, (Para 28.2, 29.1)
14. Sheela Barse Vs Children's Aid Society, 1987 (3) SCC 50, (Para 5)
15. Lakshmi Kant Pandey Vs U.O.I., 1984 (2) SCC 244, (Para 6, 7)
16. Jan Adalat, Centre of Para-Legal Services and Legal Aid A Society Vs St. of Maharashtra, Through Secretary, Home Development Department, 2017 SCC OnLine Bom 239, (Para 38)
17. Babul Khan Vs St. of Karnataka, 2020 SCC OnLine Kar 3438, (Para 96)
18. Sumpurnanand Vs St. of U.P. reported at 2018 (11) ADJ 550, (Para 32 to 35)
19. Oil and Natural Gas Commission & anr.Vs Collector of Central Excise, 1995 Supp (4) SCC 541, (Para 3, 4)
20. Oil & Natural Gas Commission Vs Collector of Central Excise, 2004 (6) SCC 437, (Para 3)
21. Elizabeth Jacob Vs District Collector, Idukki & ors., 2008 (15) SCC 166, (Para 19)
22. Society for enlightenment and voluntary Action & anr. Vs U.O.I., 2024 SCC OnLine SC 2922, (Para 3)

23. Junaid Vs St. of U.P., 2021 (6) ADJ 511, (Para 58)
24. The New India Assurance Comp. Ltd. Vs Sri Yamin & ors., 2023 (10) ADJ 421, (Para 48 to 51)
25. Junaid Vs St. of U.P. & anr., 2021 SCC OnLine All 463 (Para 42)
26. Rajendra Prasad Vs St. of U.P., Criminal Misc. Bail Application No. 30292 of 2024, (Para 9, 10, 13)
27. Bhanwar Singh @ Karamvir Vs St. of U.P., 2023 SCC OnLine All 734
28. Jitendra Vs St. of U.P., Criminal Misc. Bail Application No. 9126 of 2023
29. Noor Alam Vs St. of U.P., 2024 (5) ADJ 766

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

1. The judgement is being structured in the following conceptual framework to facilitate the discussion:

I	Introduction		
II	Submissions of learned counsels for the parties		
III	Legal issues arising in this case & Bail Jurisdiction		
IV	Children:		
		A	General
		B	Constitution and Children
		C	Education and Holistic Development of Children
		D	International Instruments
V	Children in Jail : Invisible trial and caged childhood A Study		
VI	Statutory Framework:		
		A	Juvenile Justice (Care & Protection of Children) Act, 2015
		B	The Right of Children to

			Free and Compulsory Education Act, 20092
		C	UP Jail Manual, 2022
		D	The Model Prison Manual, 2016
		E	Legal Services Authorities Act, 1987
		F	Constitutional law discourse : Case Laws
VII			
		A	Child Protection System: Duties of stakeholders & Directions
		B	Training of stakeholders
		C	Response of the State Government and achieving concert between different departments
VIII	Implementation of Law and Role of Courts : Junaid Vs. State of U.P.3 and Rajendra Prasad Vs. State of U.P.4		
IX	Order in Bail Application		
		A	Merits of bail and directions to expedite trial
		B	Directions to create a child care plan and realize the rights of the applicant's minor child
X	Circulation of copies for compliance		

I. Introduction

1. Rights of children who get confined to jail with their parents consequent to rejection of bail of the latter arise for

consideration in this case (apart from other grounds for bail).

II. Submissions of learned counsels for the parties

2. Shri Rahul Upadhyay, learned counsel for the applicant made the following submissions:

i. The applicant's son who is 5 years of age is residing with her in prison after her incarceration. The rights of the applicant's child flowing from Article 21-A of the Constitution of India read with other beneficial legislations are being violated on account of his confinement in prison.

ii. The prison does not have requisite support systems to ensure the holistic growth of the minor child as contemplated in the aforesaid provisions of law.

iii. In view of the above the jail stay will cast a shadow on the child's life and mar his future.

iv. The applicant is entitled to bail on this ground alone.

Submissions on behalf of State

3. Shri Ashok Mehta, learned Additional Advocate General assisted by Shri Paritosh Kumar Malviya, learned AGA-I made the following submissions:

I. The State Government have an unconditional commitment to provide a congenial environment and build adequate support systems as contemplated under the Constitution and in various beneficial legislations for children who reside in jail consequent to imprisonment of their parent.

II. The State Government shall make all endeavours to realize the

fundamental rights of the said class of children as enunciated in holdings of constitutional courts and the rights vested by applicable statutory enactments.

III. The State are conscious of the fact that all children including those who are residing in jail with their parents need to be nurtured into dutiful citizens of the country.

IV. Referencing the affidavit filed on behalf of the State it is contended that the State Government will create the proper infrastructure, activate statutory support systems and provide all facilities to children as directed earlier by this Court by order dated 01.10.2024. The State Government are taking steps to comply with the said directions; and are not an adversarial party to this litigation. Though it was fairly submitted that full coordination and cooperation between different departments is taking time.

III. Legal Issues arising in this case & Bail Jurisdiction

4. The 5 year old son of the applicant is entirely dependant on her. Denial of bail to the applicant in the instant case will cause the five year old child to perforce reside in the jail premises with her. Family circumstances and social roots are among the criteria which are factored in while deciding the bail application of an accused.

5. The collateral damage inflicted upon a child as a result of denial of bail to their⁶ parent becomes most significant when the child has to reside in prison with the accused parent. The Court cannot shut its eyes to the plight of such children consequent to their confinement in jail by default.

6. Every parent has a duty to ensure the well-being, education and well rounded development of their child. However, parents cannot fulfil these obligations if they are imprisoned. Each child has a fundamental right to education, and an environment conducive to their⁷ development as a dutiful citizen of the country. Neglect of rights of children who suffer from such default confinement in jail will reflect the failure of the State and inadequacy of the judicial process. Deprivation of rights of these children will put a question mark on the ability of the State and the capacity of the judicial process to uphold the constitution and the laws. Avoiding such germane issues which squarely arise for consideration in bail jurisdiction will amount to abdication of judicial functions. Such course has been abjured by good and consistent authorities in point.

7. Fair administration of justice in bail jurisdiction commands this Court to ensure that adverse consequences accruing to the child as a result of rejection of the bail application of their parent (mother in this case) are mitigated and the rights of minor children of inmates residing in jails are protected.

8. Constitutional status of this Court is not denuded in bail jurisdiction. While exercising bail jurisdiction various legal issues may arise for consideration in the facts and circumstances of a case which directly impact fair administration of justice. The Court is possessed of jurisdiction to determine such issues as per law while deciding bail applications.

9. Determining such issues in accordance with law for dispensing fair justice in bail jurisdiction is enjoined by

various authorities of this Court. [Ref: **Ramu Vs. State of U.P.8, Anil Gaur @ Sonu @ Sonu Tomar v. State of U.P.9, Junaid Vs State of U.P.10, Aman Vs. State of U.P.11, Bhanwar Singh @ Karamvir Vs. State of U.P.12, Noor Alam Vs. State of U.P.13 and Anurudh vs State Of UP14]**

Rights of Children : Constitutional provisions & Statutory and Legal Frameworks

IV(A). General

10. Children hold Nature's promise of unquenchable optimism in a world riven by constant strife. Children are the most precious asset of humankind but also the most vulnerable segment of human species. The children have always been regarded a separate class in law.

IV (B). Constitution and Children

11. The constitution makers acknowledged that children are the most precious assets of the nation, and understood the special needs of children. A distinct space for children was created in the Constitution. Various provisions devoted to children in the Constitution attest the paramount place accorded to the welfare of children in our Constitutional scheme.

12. The relevant provisions of the Constitution of the India in this regard are extracted hereunder:

I. Article 15 (3) of the Constitution of India enables the State Government to make special provisions for children:

"15(3) Nothing in this article shall prevent the State from making any special provision for women and children."

II. Free and compulsory education for children is mentioned as a directive principle for formation of State Policy. Article 45 of the Constitution of India states thus:

"45. Provision for free and compulsory education for children: The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

III. Article 21-A of the Constitution of India elevates the rights of education of children between 6-14 of age to a fundamental right.

"21(A) The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

IV. Article 47 of the Constitution of India reads:

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

V. Article 39(e) and Article 39(f) of the Constitution of India contemplate a role of the State to protect children against the scourge of exploitation and to create opportunities and facilities for children to develop into worthy citizens.

"39(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

39 (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

IV(C). Children : Education and Holistic Development

"If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be"

~Thomas Jefferson

13. Education is the bulwark of a nation's freedom and the engine of economic prosperity. Education has assured the preservation of the human species, and guarantees the advancement of human civilization.

14. Education is not only book learning imparted in a classroom to secure employment. The concept of education is wide enough to embrace various aspects of human existence and touches every facet of human life. The ability of the homo sapiens to understand and evolve themselves by knowing their place and relation to the universe around them is also comprised in education.

15. Education contemplates a holistic environment which is congenial to the growth of human faculties along the lines of excellence. Inculcation of healthy lifestyle habits, development of robust ethical values and character, and imbibing of vocational and academic knowledge

form part of a vision of education of any nation ruled by law.

16. Education is the primary instrument to achieve our constitutional vision. Sarvepalli Radhakrishnan's view that "The aim of government is not so much efficiency as education is true for all times" is a guiding factor in the nation's governance. Right of education was incorporated as a fundamental right under Article 21A of the Constitution of India to realize our constitutional goals succinctly depicted in the Preamble. The legislature also created comprehensive frameworks and detailed mechanisms for realizing the fundamental right to education by enacting the Right to Education Act, 2009.

17. Children of jail inmates who reside with the latter in prisons live in conditions of confinement. The prison does not provide an environment for holistic development and impedes the growth of a well rounded personality. The children are cut off from the real world and are unable to mix freely with their age group. They are also susceptible to negative influences in jail. Jail environment is not congenial for the education of this class of children. Infact the right to education guaranteed to children by Article 21A of the Constitution of India, and vested in them by Right to Education Act, 2009 can be effectively negated by the limiting conditions of jails.

18. The sacred place of education in constitutional scheme and the pressing necessity of providing the same to the children of prisoners was elaborated thus by the Supreme Court in **Avinash Mehrotra Vs. Union of India and others**¹⁵:

"28. Education occupies a sacred place within our Constitution and culture...

30. In the years since the inclusion of Article 21-A, we have clarified that the right to education attaches to the individual as an inalienable human right. We have traced the broad scope of this right in *R.D. Upadhyay v. State of A.P.* [(2007) 15 SCC 337 : AIR 2006 SC 1946] holding that the State must provide education to all children in all places, even in prisons, to the children of prisoners. We have also affirmed the inviolability of the right to education.

(emphasis supplied)

32. Education remains essential to the life of the individual, as much as health and dignity, and the State must provide it, comprehensively and completely, in order to satisfy its highest duty to citizens.

33. Unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent or guardian of every child, and on the child herself. Article 21-A, which reads as follows, places one obligation primarily on the State:

“21-A. *Right to education.*—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”

(emphasis supplied)

IV(D). International Instruments

19. The consensus of comity of nations to improve the lives of children is depicted in international instruments of law relating to the rights of the children.

20. While acknowledging the applicability of international law to the Juvenile Justice legislation, the Supreme Court in **Pratap Singh Vs. State of Jharkhand**¹⁶ held as under:

“63.Â The legislation relating to juvenile justice should be construed as a step for resolution of the problem of juvenile justice which was one of tragic human interest which cuts across national boundaries. The said Act has not only to be read in terms of the Rules but also the Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for the Protection of Juveniles.”

21. This Court in **Rajiv Kumar Vs. State of U.P.**¹⁷ had noted the development of international law and the convergence of international legal values in various international instruments:

“38. The condition of children in conflict with law engaged the concerns of the world community. The concerns were put in the consciousness of the international community by the adoption of the Beijing Rules in 1985 and the UN Standard Minimum Rules for Administration of Juvenile Justice.

39. The United Nations Standard Minimum Rules For The Administration of Juvenile Justice is a document which reflects the consensus of international opinion and convergence of values amongst civilized nations. Infact, the United Nations Standard Minimum Rules For The Administration of Juvenile Justice is a statement of universal values. The Juvenile Justice Acts in India trace their origin to the aforesaid international standards and other UN Conventions on the subject. As will be seen the courts have readily incorporated the international treaties and conventions into the corpus of our case law jurisprudence.”

22. Reference can also be profitably be made to the judgment rendered by Supreme Court in **M.C. Mehta Vs. State of T.N.**¹⁸ :

“17. It would be apposite to apprise ourselves also about our commitment to world community. For the case at hand it would be enough to note that India has accepted the Convention on the Rights of the Child, which was concluded by the UN General Assembly on 20-11-1989. This Convention affirms that children's rights require special protection and it aims, not only to provide such protection, but also to ensure the continuous improvement in the situation of children all over the world, as well as their development and education in conditions of peace and security. Thus, the Convention not only protects the child's civil and political right, but also extends protection to child's economic, social, cultural and humanitarian rights.”

V. Children in Jail : Invisible Trial and caged childhood— A Study

23. Various expert bodies have investigated the condition of children of inmates residing in jails. A leading study in this regard was conducted by **Tata Institute of Social Sciences, Mumbai**¹⁹. The relevant part of the said study revealing how jail environment wreaks havoc in the psyche of children, and blights their lives is extracted hereinunder:

Caged childhood: Children inside the prison with mothers

Just living is not enough... one must have sunshine, freedom, and a little flower.

Hans Christian Andersen

Contact with the adult criminal justice system can be detrimental to children and families. Living in custody amongst women accused or convicted for committing various crimes can never be normal for any child of the tender age of six years or below. The prison environment

is just not conducive for the holistic development of children. Many children who are born in prison never experience a normal family life, sometimes till the permitted age of six years. The confinement of children along with their mothers leads to the confinement of their psyche. Due to prolonged stay in a negative and custodial environment, the socialisation patterns of these children get severely affected. The only image of male figures is that of authoritative police and prison officials. They are unaware of the concept of a home, as normal children understand it. The effect of their environment on their psyche is so strong that boys may be found impersonating and talking like the female gender, having grown up only among women confined in the female ward. Unusual sights, like that of stray animals on the road (seen on the way to court with the mother) are frightening to them. There are common instances of children getting frequently transferred (due to overcrowding) with their mothers from one prison to another, which leads to their uprooting and unsettling. Such children become violent and aggressive, or alternatively, show withdrawn behaviour in prison. They also become victims of physical beatings by their mothers who sometimes take out their frustrations on their loved ones.

VI. Statutory Framework

24. Statutory frameworks which regulate and govern the rights of vulnerable children and applicable to this case include Juvenile Justice (Care and Protection of Children) Act 2015²⁰, Legal Services Authorities Act 1987, Right of Children to Free and Compulsory Education Act 2009²¹, UP Jail Manual 2022, and Model Prison Manual, 2016.

VI (A). Juvenile Justice (Care and Protection of Children) Act, 2015

25. The JJ Act is a comprehensive enactment provides for identification of children who belong to marginalized classes or are otherwise in need of care and protection. The enactment also creates authorities and mechanisms for bringing the rights of children to fruition.

26. Parents who are in jail are unable to take measures for well being of their children. The said class of children are within the ambit of Section 2(14) (v) of JJ Act:

“Section 2 (14) "child in need of care and protection" means a child—

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

Section 2 (22) "Committee" means Child Welfare Committee constituted under section 27

Section 2(21) "child care institution" means Children Home, open shelter, observation home, special home, place of safety, Specialised Adoption Agency and a fit facility recognised under this Act for providing care and protection to children, who are in need of such services;”

27. Section 30 of the JJ Act prescribes the functions and responsibilities of Child Welfare Committee. The legislative intent of the provision is also to bring the aforesaid category of children within the scope of the duties of CWC:

“Section 30- The functions and responsibilities of the Committee shall include—

(i) taking cognizance of and receiving the children produced before it;

(ii) conducting inquiry on all issues relating to and affecting the safety and well-being of the children under this Act;

(iii) directing the Child Welfare Officers or probation officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a report before the Committee;

(iv) conducting inquiry for declaring fit persons for care of children in need of care and protection;

(v) directing placement of a child in foster care;

(vi) ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard;

(vii) selecting registered institution for placement of each child requiring institutional support, based on the child's age, gender, disability and needs and keeping in mind the available capacity of the institution;

(viii) conducting at least two inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government;

(ix) certifying the execution of the surrender deed by the parents and ensuring that they are given time to reconsider their decision as well as making all efforts to keep the family together;

(x) ensuring that all efforts are made for restoration of abandoned or lost children to their families following due process, as may be prescribed;

(xi) declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;

(xii) taking suo motu cognizance of cases and reaching out to children in need of care and protection, who are not produced before the Committee, provided that such decision is taken by at least three members;

(xiii) taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012);

(xiv) dealing with cases referred by the Board under sub-section (2) of section 17;

(xv) co-ordinate with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Government;

(xvi) in case of a complaint of abuse of a child in any child care institution, the Committee shall conduct an inquiry and give directions to the police or the District Child Protection Unit or labour department or childline services, as the case may be;

(xvii) accessing appropriate legal services for children;

(xviii) such other functions and responsibilities, as may be prescribed.”

28. Section 31 of the JJ Act contemplates production of children in need of care before the CWC. Children of prisoners who live in jails with the latter

are also liable to be produced before the CWC. Jail authorities and the police authorities fall within the description of “any public servant” under the provision.

“31. Production before Committee.—

(1) Any child in need of care and protection may be produced before the Committee by any of the following persons, namely:—

(i) any police officer or special juvenile police unit or a designated Child Welfare Police Officer or any officer of District Child Protection Unit or inspector appointed under any labour law for the time being in force;

(ii) any public servant;

(iii) Childline Services or any voluntary or non-governmental organisation or any agency as may be recognised by the State Government;

(iv) Child Welfare Officer or probation officer;

(v) any social worker or a public spirited citizen;

(vi) by the child himself; or

(vii) any nurse, doctor or management of a nursing home, hospital or maternity home: Provided that the child shall be produced before the Committee without any loss of time but within a period of twenty-four hours excluding the time necessary for the journey.

(2) The State Government may make rules consistent with this Act, to provide for the manner of submitting the report to the Committee and the manner of sending and entrusting the child to children’s home or fit facility or fit person, as the case may be, during the period of the inquiry.”

29. The nature orders to be passed by the CWC are enumerated in Section 37 of the JJ Act:

“37. Orders passed regarding a child in need of care and protection.—

(1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report 1 [***] and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely:—

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

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

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

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

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other

developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for—

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed”

30. The functions of CWC were set forth by the Supreme Court in **In Re: Right to Privacy of Adolescents**²³ as under:

“28.2 If a child is residing with a person who has injured, exploited or abused the child or has violated any other law for the time being in force meant for the protection of the child, the said child becomes a child in need of care and protection. Thus, if a child who is a victim of an offence under the POCSO Act is residing with the accused, the child becomes a child in need of care and protection. Even a child who has a parent or guardian and if such parent or guardian is found to be unfit to take care of the child, in such a case, the child is covered by the definition under sub-section (14) of Section 2 of the JJ Act. Therefore, the CWC has to exercise the power to provide basic needs and protection to such children in need of care and protection.

29.1 Under clause (vi) of Section 30, it is the duty of the CWC to ensure care, protection, appropriate rehabilitation or restoration of children in need of care and protection based on the child's

individual care plan. The CWC cannot wait till the children in need of care and protection are produced before it. Under clause (xii) of Section 30, the CWC must take suo motu cognizance of the cases and reach out to the children in need of care and protection. What is important here is clause (xiii) of Section 30, which mandates that it is the duty of the CWC to take action for the rehabilitation of sexually abused children who are children in need of care and protection.”

VI (B). Right of Children to Free and Compulsory Education Act, 2009

31. The Right to Education Act, 2009 which was enacted in the aftermath of Article 21A of the Constitution of India is the legal instrument to carry out the constitutional intent of providing for free and compulsory education to all children in the country.

32. Some of the provisions of the Right to Education Act, 2009 relevant to this case shall now be discussed.

33. The children who reside with their parents in jail also suffer from various disadvantages owing to their special and adverse circumstances. The said children come within the category of Section 2(d) of Right to Education Act, 2009:

“2 (d) "child belonging to disadvantaged group" means [a child with disability or] a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification;

34. Section 3 vests the right of free and compulsory education in children:

Section 3. Right of child to free and compulsory education.

[(1) Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of section 2, shall have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education.]

(2) For the purpose of sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education.

(3) A child with disability referred to in sub-clause (A) of clause (ee) of section 2 shall, without prejudice to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), and a child referred to in sub-clauses (B) and (C) of clause (ee) of section 2, have the same rights to pursue free and compulsory elementary education which children with disabilities have under the provisions of Chapter V of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995:

Provided that a child with "multiple disabilities" referred to in clause (h) and a child with "severe disability" referred to in clause (o) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999) may also have the right to opt for home-based education.]”

35. Section 4 of Right to Education Act, 2009 contains special provisions for children who are not admitted to or have not completed elementary education:

“Section 4. Special provisions for children not admitted to, or who have not completed, elementary education-

Where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he or she shall be admitted in a class appropriate to his or her age:

Provided that where a child is directly admitted in a class appropriate to his or her age, then, he or she shall, in order to be at par with others, have a right to receive special training, in such manner, and within such time-limits, as may be prescribed:

Provided further that a child so admitted to elementary education shall be entitled to free education till completion of elementary education even after fourteen years.”

36. Section 13 of Right to Education Act, 2009 directs no capitation fee and provide for screening procedure for admission:

“Section 13 No capitation fee and screening procedure for admission.

(1) No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardian to any screening procedure.

(2) Any school or person, if in contravention of the provisions of sub-section (1),--

(a) receives capitation fee, shall be punishable with fine which may extend to ten times the capitation fee charged;

(b) subjects a child to screening procedure, shall be punishable with fine which may extend to twenty-five thousand rupees for the first contravention and fifty

thousand rupees for each subsequent contraventions.”

37. Section 14 of Right to Education Act, 2009 mandates that no child shall be denied admission in school for lack of age proof:

“Section 14. Proof of age for admission.

(1) For the purposes of admission to elementary education, the age of a child shall be determined on the basis of the birth certificate issued in accordance with the provisions of the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886) or on the basis of such other document, as may be prescribed.

(2) No child shall be denied admission in a school for lack of age proof.”

38. Section 15 of Right to Education Act, 2009 visualizes admission of the child even after the commencement of the academic year.

“Section 15. No denial of admission.

A child shall be admitted in a school at the commencement of the academic year or within such extended period as may be prescribed:

Provided that no child shall be denied admission if such admission is sought subsequent to the extended period:

Provided further that any child admitted after the extended period shall complete his studies in such manner as may be prescribed by the appropriate Government.”

39. The constitutional right guaranteed under Article 21-A of the Constitution of India and the right to education vested in

children by virtue of the Right to Education Act, 2009 apply with full force to children who are residing in jail with their inmate parents. The said children of jail inmates are fully entitled to quality education as their more fortunately circumstanced counterparts. The State Government as well as local authorities are bound by law to realize the right to education of the aforesaid children.

40. The State have to discharge the imperative constitutional obligations and mandatory statutory functions to create support systems for children in jails to facilitate the realization of their constitutional and statutory rights to education. The Courts have to observe their sacrosanct duty to uphold the rights of the children including the right to education.

41. Activities in kindergartens and play schools are critical to the growth of children in those formative years. Professionally designed pedagogy and activities in such play schools and kindergartens influence toddlers in a big way. Activity based learning created by experts for little learners can contribute to their physical development, mental growth and emotional stability. Learning and activities of this nature enhances the meaning of life for children in that age group. Children shall also be admitted to preschool/kindergarten/play schools/primary schools as per their eligibility by the State authorities/local administration. The schools shall be located outside of the jail premises.

VI (C). Uttar Pradesh Jail Manual, 2022

42. The welfare of the children who remain in jail with their mothers' is

protected in UP Jail Manual, 2022. The Jail Manual enshrines their rights and casts a duty upon the jail authorities to uphold the aforesaid rights:

“335. Children born in jail

(a) As far as possible and provided that the female prisoner has a suitable option, the Superintendent shall apprise the concerned court, and shall send the report of the fact accompanied with the medical statement, in order to enable the court to consider the possibility of releasing the pregnant prisoner on bail.

(b) Births in prison, shall be registered in the local birth registration office but the fact that the child has been born in the prison shall not be recorded in the certificate. Only the address of the locality shall be mentioned.

(c) As far as circumstances permit, all facilities for the naming rites (Namkaran Sanskar) of children born in prison shall be extended.

(d) Religious rites may be allowed to be performed for the child so born, on the expenses borne by the parent.

(e) A child shall not be treated as an undertrial or a convict while in jail.”

336. Children to be allowed to remain with their mothers

In special circumstance the Superintendent shall allow mother in prison to keep her children with her in jail without court orders till they attain the age of six years.

337. Cases in which a child cannot be kept in a jail

(a) When a child has achieved the age of 6 years or a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned who shall arrange for the proper care of the child. If the concerned relative (s) are unwilling to support the child, the

District Magistrate shall either place the child in an approved institution or a home run by the State Social Welfare Department.

(b) Children kept under the protective custody in an institution or a home run by department of social welfare shall be allowed to meet the mother at least once a week. The Director, social welfare department, shall ensure that such children are brought to the prison for this purpose on the dates fixed by the Superintendent.

339. Care of children

(a) There shall be a crèche and a nursery attached to the prison where the children of women prisoners shall be looked after. Children below three years of age shall be allowed in the crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crèche and nursery in the prison premises.

(b) The children of female prisoners living in the jail shall be given proper education and recreational opportunities. While their mothers are at work in jail, the children shall be kept in a creche or a nursery under the charge of a female head warder or a female warder. The facility of the crèche or a nursery may be extended to children of warders and other female prison staff.

(c) Children of prisoners shall have the right to visitation.

(d) Children shall be regularly examined by the Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts of each child shall be kept in the records. Extra clothing, diet and medical treatment, if required, shall be provided for.

(e) In the event of a woman prisoner falling ill, alternate arrangements to look after her children shall be made.

(f) Children between the age group of 4 to 6 years shall be admitted to an educational institution outside prison after obtaining the consent of the mother and proper arrangement and conveyance shall be made on the Government expenses charged on appropriate budget head.”

43. Rule 339 (f) of UP Jail Manual, 2022 has to be read in consonance with the Right of Children to Free and Compulsory Education Act, 2009 and Article 21-A. Even parents cannot deny education to their children who are staying in jail. Refusal of consent of the parents to admit the said children in school will be violative of Article 21-A of the Constitution and the RTE Act. Denial of consent by inmate parents to admit their child to school will be void. Every child who is residing in jail with their²⁴ parents will be compulsorily admitted to school in light of Article 21-A of the Constitution of India and RTE Act and the directions in this judgement. The parents of the child will be informed that the right to education vested by Article 21-A and RTE Act and the directions in this judgement are inviolable.

VI (D). The Model Prison Manual, 2016

44. The Model Prison Manual, 2016 also contains various provisions for the protection and holistic growth of children even in trying circumstances of jail life:

“26.36 Children kept under protective custody in a home of the Department of Social Welfare shall be allowed to meet their mothers at least once a week. The Director, Social Welfare

Department will ensure that such children are brought to the prison on the dates fixed for this purpose by the Superintendent of Prison.

Guidelines issued by the Supreme Court for children of women prisoners (R.D. Upadhyay v. State of A.P., AIR 2006 SC 1946)

>A jail must have adequate facilities for prenatal and post-natal care for female prisoners as well as their children.

>Gynaecological examination of female prisoners shall be performed in the District Government Hospital. Proper prenatal and post-natal care shall be provided to the prisoner as per medical advice

> As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility,

>Pregnant women in jails should be able to give birth outside the prison facility (except in some extreme cases), so as to ensure that the new-born is given proper care.

>The fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned

> Within the prisons, children should be able to have access to food, shelter medical assistance when required, education and a recreational space.

>Children shall be regularly examined by the lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child

shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.

> Women can keep their children with them until the children reach the age of six. Then they should be handed over to welfare institutions maintained by the Social Welfare Department, preferably within the same city or town.

>The child can remain in such an institution until the mother is released or the child is capable of earning a livelihood.

>Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet their mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons

>The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mothers are complied with in letter and spirit.

Welfare of the children of the Women Prisoners

26.37 Prison administration should ensure holistic development of children of inmates confined in the prisons. To the extent possible, prison administration shall strive to create a suitable environment for children's upbringing which is as close as possible to that of a child outside prison. The Board of visitors shall inspect these facilities at regular intervals."

45. The other provisions of Model Prison Manual, 2016 of relevance pertain to education of children and diet:

Education

“26.38 The children of women prisoners living in the prison shall be given proper education and recreational opportunities. There shall be a well-equipped creche and a nursery school attached to a prison for women where the children of women prisoners shall be looked after while the mothers work in prison. Children below three years of age shall be allowed in the creche and those between three and six years shall be looked after in the nursery school. These facilities may also be extended to the children of warders and other female prison staff.

26.39 The creche and nursery school shall be run by the prison administration preferably outside the prison with the assistance of NGOs or state welfare services. In the event the prison administration considers it difficult to run a crèche, arrangements should be made to send the children to a privately run crèche under proper security. The transportation charges involved in the process and crèche fee shall be borne by the prison administration.

26.40 Children in prison shall be provided with adequate clothing suiting the local climatic requirements. For this the State/UT Government shall lay down appropriate scales. Articles, like diapers and others as required, should be provided to women prisoners who are caring for their infant children.

26.41 In addition to regular requirement, two cakes of 150 grams each of soaps/detergent shall be provided to women prisoners with children.

Diet/Food:

26.42 Scales of diet for children shall be decided keeping in view the calorific requirements of growing children as per medical norms and climatic conditions. Separate utensils of suitable

size and material should also be provided to each mother prisoner for feeding her child.

26.43 In the event a woman prisoner with children falls ill, alternative arrangements should be made by the prison staff for looking after any children falling under her care.

Health care

26.44 Adequate health facilities shall be provided to children of women prisoners (in collaboration with community health services), Children shall be regularly examined by a Lady Medical Officer to monitor their physical growth who shall also be vaccinated for various diseases including polio and small-pox at the appropriate time. Extra clothing and diet may also be provided to such children on the written recommendations of the Medical Officer.”

VI (E). Legal Services Authorities Act 1987

46. Legal Services Authorities Act, 1987 vests the right of legal services and legal aid in various eligible classes of citizens. The relevant provisions for the purposes of this instant controversy are extracted hereinunder:

“2 (c) “legal service” includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter;

12-Criteria for giving legal services:-

(c) a woman or a child;

13. Entitlement of legal services.

(1) Persons who satisfy all or any of the criteria specified in section 12 shall be entitled to receive legal services provided that the concerned Authority is

satisfied that such person has a prima facie case to prosecute or to defend.

(2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.”

47. Secretary, District Legal Services Authority (DLSA hereinafter) of the respective districts have to provide necessary legal aid whether by way of legal advice or counsel to the parents of the said category of children to apprise them of rights and entitlements of children. Secretary, DLSA of respective districts shall also alert the statutory authorities about their obligations to realize the rights of the said children as discussed in this judgement.

VI (F). Constitutional law discourse : Case Laws

48. The rights of children were embedded in constitutional law discourse in **Sheela Barse v. Children's Aid Society**²⁵, wherein the Supreme Court observed as under:

“5. Children are the citizens of the future era. On the proper bringing up of children and giving them the proper training to turn out to be good citizens depends the future of the country. In recent years, this position has been well realised. In 1959, the Declaration of all the rights of the child was adopted by the General Assembly of the United Nations and in Article 24 of the International Covenant on Civil and Political Rights, 1966. The importance of the child has been appropriately recognised. India as a party to these international Charters having ratified

the Declarations, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way.”

49. Similarly the Supreme Court in **Lakshmi Kant Pandey Vs. Union of India**²⁶ while interpreting the rights of children in the backdrop of constitutional provisions underscored the importance of children as national assets of supreme value, and underlined the need for the State to create conditions to protect children from abuse and provide an environment for growth with dignity:

“6. It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a “supremely important national asset” and the future well-being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: “Child shows the man as morning shows the day” and the Study Team on Social Welfare said much to the same effect when it observed that “the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages”. The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fullness of physical and vital energy and the utmost breath, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing

realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented preambulatory introduction

(emphasis supplied)

“The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.”

The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the preambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen family ties “so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment”. The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance, education and training of orphan and destitute children. There is also provision made in the National Policy for constitution of a National Children's Board and pursuant to this provision, the Government of India has constituted the National Children's Board with the Prime Minister as the chair-person. It is the function of the National Children's Board to provide a focus for planning and review and proper co-ordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and co-ordination of all the essential services. The National Policy also stresses the vital role

which the voluntary organisations have to play in the field of education, health, recreation and social welfare services for children and declares that it shall be the endeavour of State to encourage and strengthen such voluntary organisations.

7. There has been equally great concern for the welfare of children at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on November 20, 1959. The Declaration in its Preamble points out that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", and that "mankind owes to the child the best it has to give" and proceeds to formulate several Principles of which the following are material for our present purpose:

"Principle 2.—The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration.

Principle 6.—The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate

means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

Principle 9.—The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

Principle 10.—The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men."

50. The Supreme Court in **R. D. Upadhyay v. State of A.P.**²⁷, while considering the plight of children living with their inmate parents issued following directions:

"45. In light of various reports referred to above, affidavits of various State Governments, Union Territories, the Union of India and submissions made, we issue the following guidelines:

1. A child shall not be treated as an undertrial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.

3. Childbirth in prison:

(a) As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security

risk or cases of equivalent grave descriptions can be denied this facility.

(b) Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.

(c) As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

4. Female prisoners and their children:

(a) Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.

(b) No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimise undue hardships on both mother and child due to physical distance.

(c) Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.

(d) Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet their mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.

(e) When a female prisoner dies and leaves behind a child, the

Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the relative(s) concerned be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.

5. Food, clothing, medical care and shelter:

(a) Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/UT Government shall lay down the scales.

(b) State/UT Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.

(c) A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis.

(d) Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.

(e) Clean drinking water must be provided to the children. This water must be periodically checked.

(f) Children shall be regularly examined by the lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.

(g) In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.

(h) Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.

(i) Children of prisoners shall have the right of visitation.

(j) The Prison Superintendent shall be empowered in special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.

6. Education and recreation for children of female prisoners:

(a) The children of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crèches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.

(b) There shall be a crèche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crèche and nursery outside the prison premises.

7. In many States, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth.

(emphasis supplied)

8. The stay of children in crowded barracks amidst women convicts, undertrials, offenders relating to all types of crimes

including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.

(emphasis supplied)

51. The Bombay High Court in **Jan Adalat, Centre of Para-Legal Services and Legal Aid A Society Vs. State of Maharashtra, Through Secretary, Home Development Department**²⁸ invoked **R.D. Upadhyay (supra)** and issued the following directions in regard to prisoners in Maharashtra:

“38..(h) As regards the children staying with their respective mothers in Jail, necessary arrangement for their benefit shall be made in terms of the directions of the Apex Court and as observed in Paragraph No. 23 of the Judgment within a period of six months from today;

(i) The State Government shall evolve a Scheme for ensuring that the women prisoners are able to meet their minor children (who are not staying with them) at frequent intervals. Formulation of such Scheme will be necessary as the persons or the institutions having the custody of the children may not encourage them to meet their respective mothers. If necessary amendment may be proposed to the Maharashtra Prisons (Facilities to the Prisoners) Rules, 1962”.

52. The Karnataka High Court in **Babul Khan Vs. State of Karnataka**²⁹ made the following observations as regards rights of children. Though the observations were made in regard to children of foreign nationals, they are applicable to this case as well:

“96. If the child belonged to a foreign national and where both the parents

or one of the parent particularly mother is in jail, then necessary steps should be taken in lieu of the law that, the child must always enjoy all the rights as set forth in the United Nations declaration of the rights of the Child whether it is outside or inside the jail without distinction or discrimination on account of race, colour, language, origin of political or other national or social by birth or other status. Further, the child shall enjoy the special protection and shall be given opportunities and facilities by law and other means to enable it to develop physically, mentally and socially in a healthy and normal manner with dignity. The child is also entitled to receive education which shall be free and compulsory at least in the elementary stages even if the child happens to be in the jail or detention center along with its mother. The concerned states while framing the laws particularly in Detention Centers, shall respect the right of the child, who is actually separated from one or both the parents and the State should make arrangement to safeguard the interest of such child.”

Article 21 and Children

53. This Court while examining the scope and constitutional law holdings of the meaning of “life” under Article 21 of the Constitution of India in **Sumpurnanand Vs. State of U.P. reported at 2018 (11) ADJ 550** held as under:

“32. The probe into the purpose of life has traditionally been the province of the philosophers. The framers of the constitution, brought the word "life" in the ambit of the constitution. Constitutional law put the meaning of life in the domain of the courts. "Life" is very much the

concern of the courts. The search for the meaning of life is the business of the courts. Indeed, the discovery of the meaning of life is central to realizing the fundamental rights guaranteed under the Constitution.

33. The enquiry of the courts into the meaning of life was guided by law and logic and controlled by reason and precedent, but bent to no authority save the mandate of the constitution and the conscience of the court. Ultimately, the meaning of life was given by life itself. All facets of life and its realities touched the courts. It was for the courts to touch life in all its facets and to feel its reality. Life reveals its true meaning to those whose thoughts are noble and deeds are righteous and to those who live selflessly.

34. The courts in India, knew early on that understanding the significance of life was the key to providing the security of justice. While interpreting Article 21 of the Constitution of India, the Hon'ble Supreme Court, embraced life in all its breadth and profundity and eschewed a narrow interpretation. The law laid down by the Hon'ble Supreme Court while construing Article 21 of the Constitution of India brought a citizen's reputation within its sweep.

35. A defining moment came when the Hon'ble Supreme Court, liberated life from the fetters of mere physical existence. While examining the meaning of life under Article 21 of the Constitution of India, the Hon'ble Supreme Court added meaning to life in the case of *Olga Tellis v. Bombay Municipal Corpn.* Reported at (1985) 3 SCC 545 held thus:

"As we have stated while summing up the petitioners' case, the main plank of their argument is that the right to life which is guaranteed by Article 21 includes the right to livelihood and since,

they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate

because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas, J. in *Baksey* [347 US 442, 472 : 98 L Ed 829 (1954)] that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in *Munn v. Illinois* [(1877) 94 US 113] means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in *Kharak Singh v. State of U.P.* [AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329]. "

54. Article 21 was set on a course of constantly expanding boundaries and the ambit of life was progressively enlarged.

55. The meaning of life for children as contemplated in Article 21 of the Constitution of India has to be understood in a nuanced manner. Regard has to be paid to various constitutional provisions relating to children, the holdings of constitutional courts and international instruments to which India is a party.

56. Article 39 of the Constitution of India as seen earlier in *Lakshmi Kant Pandey (supra)* has become the basis of

various policies of the government in respect of children. In fact Article 39 (e) & (f) of Constitution of India is now irretrievably entrenched in Article 21 of the Constitution of India and plays a critical role in determining the meaning of life for children. Article 39 (e) & (f) of the Constitution of India contain not merely Directive Principles of State Policy but enshrine mandatory tenets of State action for the benefit of children.

57. Article 21 of the Constitution of India contemplates a congenial environment and support systems for children which foster the growth of a well rounded personality, are conducive to development of exemplary character traits, apart from good health and wellness. Educational needs and intellectual advancement of children clearly come within the ambit of Article 21 of the Constitution. Prison walls cannot obstruct the onrush of the fruits of Article 21 for children. At the cost of repetition it is stated that the State has to create an environment and build support systems which facilitate access of children to their rights under Article 21 and 21-A of the Constitution of India.

58. Learning environment and support systems flowing from Article 21 of the Constitution of India have to be age appropriate and sensitive to circumstances in their development and nuanced in their application to children. The aforesaid environment and support systems are irrevocable entitlements of children of inmates residing with the latter in jails. The protective armour of Article 21 of the Constitution of India entails insulation of said category of children from negative influences in the jails, and also envisages

their holistic development and balanced growth of children.

59. Life of a child under Article 21 will not be defined by the adverse circumstances presented by fortuitous events, but their³⁰ right to life will be determined by the luminous mandate of Article 21 and Article 21-A of the Constitution of India propounded in constitutional law.

VII (A). Child Protection System: Duties of Stakeholders : Directions

60. Relevant statutory provisions become activated and the respective statutory and State authorities are immediately triggered into action, the moment a child is confined to prison by default after the arrest of their³¹ parents.

61. Each child is unique. Children are not units in a crowd. Every child in distress is a victim of peculiar adversities. The baleful influence of jail environment on the said category of children are externalities (circumstances which are not caused by them and over which they have no control). Nature endows children with special gifts and potentialities which are peculiar to each child. Influences which negatively impact a child's psychology have to be addressed in facts of each case. Potentialities which a child possesses have to be nurtured to their full stature on a child to child basis. Individual care of this nature is the essence of the child rights jurisprudence as evolved by the legislatures and the courts alike. The aforesaid object can be achieved by preparing an individual care plan for every child who is lodged in prison after the incarceration of their³² parent.

62. Various authorities have been created under the JJ Act and other legal instruments to uphold the rights of children who reside in prisons consequent to incarceration of their parents. The police, Child Welfare Committee, District Legal Services Authorities, medical authorities, education authorities, district administration are enjoined to provide the entitlements and support systems to children by virtue of constitutional law holdings and statutory enactments. Duties are also imposed on jail authorities under the Jail Manual and pronouncements of constitutional courts. The said authorities are liable to cooperate with each other in attaining the constitutional and statutory goals for the benefit of children.

63. Duties of the authorities in regard to the aforesaid class of children and corresponding directions to be executed by them are set out in the succeeding paragraphs:

VII A (I). The State Government

64. Principal Secretary, Women and Child Development, Government of U.P. has to ensure that the State executes following directions:

I. To create a structured programme/scheme with supporting infrastructure for education, health, wellness and holistic development of children of inmates who reside with latter in jails and to protect them for negative influences resulting from the stay in jail.

II. The aforesaid programme shall be created in consultation and coordination with different departments of the State Government like Education Department, Health Department, other relevant departments and expert institutions.

III. The aforesaid programme shall cater to all aspects related to the lives of the said class of children. Few exemplars of activities and support systems to be included in the said programme are:

a. Health and Nutrition of children;

b. Exposure of children to sunlight and fresh air;

c. Educational needs including admission to preschool/kindergarten schools and primary schools in the facts and circumstances of each case. The schools shall not be located in the prison premises;

d. Creative pursuits, outdoor activities and access to playgrounds. Existence of separate spaces in prisons for children;

e. Programme for emotional and psychological development of children;

f. Maximizing interaction and activities of the said children in schools with their schoolmates;

g. Exclude negative influences and prevent contact with other prisoners. Areas where children reside should not be accessed by other prisoners;

h. Development of appropriate pedagogy of children of this category;

i. Attachment with CCIs for evening activities;

j. Appointment of mentor teachers.

The aforesaid activities are illustrative in nature, and not the exhaustive list of elements of the said programme. The programme shall also be compliant with constitutional law holdings discussed in this judgement and relevant statutory provisions.

IV. It is open to the State Government to enlarge the list of activities and support systems as and when required. Other ministries and authorities including

the ministries/departments of Law, Jails, Education, Medical and Health and any other department of the state as may be required shall fully cooperate with the Department of Women and Child Development, Government of U.P.

V. The State Government may also consult with NIMHANS, Bangalore and other expert institutions and universities for development of the aforesaid programme for children.

VI. To implement relevant provisions of the Jail Manual.

VII. To support development of individual child care plans and facilitate their implementation.

VIII. Regular oversight of implementation of the directions at State and district level and creation of a system of accountability at various levels.

VII A (II). District Administration

65. District Administration of respective districts shall execute the following directions:

I. Respective authorities of the local administration shall implement the programme framed by the State Government in compliance of the directions in this judgement.

II. To ensure admission of children in preschool/kindergarten/primary school in the facts of each case.

III. To aid the development and execution of individual child care plans by the DPO.

VIIA (III) Jail Department

66. Principal Secretary, Department of Jail, Director General (Prisons), as well as Jail Authorities of district jails shall execute the following directions:

I. The concerned jail authorities shall inform the CWC about the child confined to jail consequent to the imprisonment of their³³ parent. The jail authorities shall also provide access to CWC to the child who is residing in jail. The child shall be produced before the CWC.

II. The children shall reside with their respective parents in separate barracks which should be effectively separated/barricaded from other prisoners. It shall be ensured that the children have no contact with other prisoners.

III. The jail authorities in coordination with the local administration shall ensure admission of the children to preschool/kindergarten/playschool/primary school in the facts of each case. The said schools shall not be located in the jail premises.

IV. The jail authorities shall provide access to playgrounds and other support systems to the said class of children to participate in outdoor activities and creative pursuits with other children of their age group outside the jail premises.

V. Creches shall be maintained in the jail premises where children of the aforesaid classes are residing.

VI. Jail Authorities shall ensure to provide quality medical care and proper nutrition to children who are lodged in jail after the imprisonment of the latter.

VII. Jail Authorities to implement the policy of the State Government which will be developed in pursuance to the directions given earlier.

VIII. To support the implementation of individual child care programmes.

IX. To implement the provisions relating to children in the Jail Manual/Model Jail Manual.

VII A (IV) Police Authorities

67. The police authorities of respective districts to execute the following directions:

I. Local police authorities to promptly inform the CWC and DPO about the child who is lodged in jail after the arrest of the parent.

II. Inform the court hearing the bail application about production of the child before the CWC.

VII A (V) Child Welfare Committee

68. The CWC of respective districts to execute the following directions:

(1) To visit jails and investigate the conditions of children residing in jails with their parents.

(2) CWC shall promptly frame a report regarding the status of the child and shall also make findings in regard to various relevant aspects including the following parameters:

- A. Health,
- B. Education facilities
- C. Overall development,
- D. Insulation from other prisoners
- E. Compliance of the directions in this judgement

F. Execution of the scheme of government made in pursuance of this judgement.

G. Implementation of the individual child care plan to be created by District Probationary Officer.

(3) CWC shall submit the aforesaid report to the court at the hearing of bail application of the parent of the child.

(4) CWC shall also submit the said report to respective State authorities and authorities of district administration.

(5) Submit reports before competent authorities to ensure that children above 6 years who are residing with their parents (under trials/convicts) in jails are sent to Observation Homes.

(6) CWC shall examine each case of children below 6 years.

VII A (VI) District Probationary Officers

69. The DPOs of respective districts to execute the following directions:

(i) To create individual care plan for holistic development of each child in prison residing with their parent in jail, after consultation with experts.

(ii) The individual care plan shall include various parameters including the following:

- A. Health
- B. Nutrition Plan
- C. Exposure to sunlight and fresh air
- D. Education
- E. Sports, extra-curricular and creative activities
- F. Overall well rounded development
- G. Maximum interface of the children with their school mates and other children of their age outside the jail premises.

H. Appointment of mentor teacher at school

These activities are only exemplars and not exhaustive.

(iii) The individual care plan shall provide or shielding the child from negative influences in jails, and prevent contact of the child with other prisoners.

(iv) Implement the plan in coordination with government authorities at the local level.

VII.B Training of Stakeholders/respective department of the State Government for framing individual care plans for each child:

70. Constant supervision and regular training of stakeholders is the key to prevent the violation of rights of children who are lodged in prisons with their parents, and are indispensable for realizing the rights of the said class of children as discussed in this judgement.

71. Respective departments of the State Government shall organize regular training programmes for following stakeholders to sensitize the latter of their duties and to build their capacities to execute the directions in this judgement:

1. Police
2. CWC
3. Jail Authorities
4. District Probationary Officers – DPOs in particular will need special training for drawing up Child Care Plans
5. Medical authorities

VII (C) Response of the State Government and achieving concert between different departments

72. The affidavit filed on behalf of Principal Secretary (Women and Child Development) Government of UP, Lucknow discloses that proper cooperation and coordination between various departments of the State has not been achieved. Lack of coordination and cooperation between various State departments is obstructing the implementation of law and delaying the realization of rights of children in jails. This situation cannot go on and has to be addressed squarely and promptly.

73. Experience of governance shows that at times departments act in silos which causes impediments in achieving policy objectives. Consequences of lack of coordination between departments has also engaged the attention of the Supreme Court.

74. While dealing with issues of inter departmental cohesion and the need for inter departmental concert the Supreme Court in **Oil and Natural Gas Commission and Another Vs. Collector of Central Excise**³⁵, directed the setting of an interdepartmental committee:

“3. We direct that the Government of India shall set up a Committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to Court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation. Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline.

4. It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with.”

75. Subsequently **Oil & Natural Gas Commission Vs. Collector of Central Excise**³⁶ held as under:

“3. The purpose of setting up this High-Powered Committee was to ensure that, as far as possible, the controversies between a Ministry and a Ministry of the Government of India, a Ministry and a public sector undertaking of the Government of India and between public sector undertakings themselves are resolved by recourse to the High-Powered Committee and that time-consuming and expensive litigation is avoided.”

76. The need for inter-departmental cooperation and coordination for efficient functioning of government was also emphasized in **Elizabeth Jacob Vs. District Collector, Idukki and others**³⁷:

“19. This case demonstrates, though in a very limited manner, the lack of cooperation and coordination between government departments. All departments should function in the interest of the public and for public good. Merely because a particular department or an authority functions under a particular statute, it does not follow that they should or could ignore the provisions of other statutes. Interdepartmental cooperation and coordination is vital for the smooth and successful functioning of the Government. But unfortunately there is thriving interdepartmental rivalries and a mutual non-caring attitude towards the functioning of other departments and enforcement of other statutes. Non-cooperation between the Revenue Department and the Forest Department, the Revenue Department and the Mines and Minerals Department, the Forest Department and the Mines and Minerals Department, are too well known.

Unless immediate and serious steps are taken for improving the coordination, cooperation and understanding among various departments, offenders will escape, violators will walk away, national resources will be swindled, and public interest will suffer. Be that as it may.”

77. The Supreme Court in **Society for enlightenment and voluntary Action and Anr vs Union of India**³⁸ held as under:

“3. Convergence and Continuity of Services

3.1. The Chief Secretaries of all States/UTs shall designate an appropriate authority who shall ensure the convergence of services across various government departments and agencies to create a cohesive support system for vulnerable and at-risk communities. This includes:

3.1.1. Regular inter-departmental meetings to coordinate efforts and resources among education, health, social welfare, and law enforcement sectors to address the multifaceted nature of child marriage; and

3.1.2. Establishing community-based resource centres that provide information and support related to education, legal rights, and social services to families at risk of child marriage.”

78. Synergy in policy and concert in action between various government departments is an imperative necessity to realize the rights of children. Having perused the affidavit filed by Principal Secretary (Women and Child Development) Government of UP, Lucknow, and the judgments in **Society for enlightenment and voluntary Action (Supra)**, **Oil & Natural Gas Commission (Supra)**, **Elizabeth Jacob (Supra)** this Court is of the definite opinion that

coordination among various departments of the State Government namely Child and Women Welfare, Health, Police, Jails, Basic Education can only be attained by directing the Chief Secretary, to convene a meeting of the heads of the said departments and any other relevant departments and frame a policy for implementation of child rights as discussed in this judgement.

79. Accordingly the Chief Secretary, Government of U.P. is directed to execute the following directions:

A. To call for a meeting of various Principal Secretaries and other responsible officials of different ministries including Women and Child Development, Law, Jails, Education, Health, DGP. Other ministries and authorities may also be called if deemed appropriate. The Committee of the different departments shall have proper coordination to ensure timely preparation of the scheme and infrastructure for welfare, education, holistic development and realization of rights of children of the aforesaid class as discussed in this judgement. The Department of Women and Child Development shall be the nodal ministry to execute this task.

B. The process shall be concluded within a period of two months from the date of receipt of a certified copy of this order.

80. Shri Ashok Mehta, learned Additional Advocate General shall cause the copies of this judgement to be served upon respective heads of departments (as mentioned above) and advise them on the compliance of the above directions.

VIII. Implementation of Law and Role of Courts : Junaid Vs. State of UP. and Rajendra Prasad Vs. State of U.P.

81. Constitutional oversight on the rights of children is perpetual, and the courts are permanent guardians of children. A old writer made the following observations as regards the role of law and duties of instruments of law towards children:

“The law protects their persons, preserves their rights and estates, excuseth their laches and assists them in their pleadings, the judges are their counsellors, the jury are their servants and law is their guardian.”

82. The child rights jurisprudence as embedded in the Constitution of India, international instruments, statutes and judicial precedents as applicable to the current controversy converge on these first principles:

(1) Recognition of the vulnerability of children to abuse and exploitation, the inability of children to resist or rise over their circumstances, and incapacity of children to defend themselves against abuse or unhealthy influences.

(2) Duty of the State to provide a protective environment and support systems for shielding children from unhealthy influences and exploitation and to foster their well rounded growth and holistic education.

(3) Affirmation of the obligations of the courts to realize childrens' rights.

83. Rights of children of prisoners who are residing with them in jails are traceable to multiple statutes and legal instruments. Diverse statutes and multiple agencies do not manifest disparate legislative aims. This Court faced a with similar situation blended the statutes to

realize a common legislative intent in **Junaid Vs. State of UP**³⁹ held as under:

“58. What then is the task of the Court? The task of the Court is to achieve the overarching and underlying legislative intent by integrating the various statutes into an unified legal framework. This requires corraling up the assortment of statutory bodies under a single legal umbrella, establishing synergy in aims, and ensuring concert in action of said authorities.”

84. This Court in **The New India Assurance Company Limited Vs. Sri Yamin and others**⁴⁰ realized the overreaching legislative aim permeating several enactments by blending the statutes:

“48. M.V. Act and E.C. Act are separate statutes which cover distinct fields and envisage proceedings in different tribunals. However, diversity of statutes does not necessarily depict disparate legislative intendments and multiplicity of forums cannot cause denial of legal entitlements. Comparative examination of the statutes made in the preceding paragraphs also manifests the overlapping areas of operation of the two enactments. The overarching congruency of purpose and the underlying similarity of objects of the two statutes evidenced in the common fields of operation can be achieved by an integrated interpretation of the enactments. Provisions of one statute and authorities thereunder can be applied by analogy to the other enactment to realise the legislative intent of the latter.

49. Integrated approach of statutory construction will ensure that the claimants are not denied their legal entitlements under the enactments merely because one forum is chosen in preference

to proceedings under the other Act. Integrated interpretation will entail a composite reading of the statutes and conflated application of analogous judicial authorities. The statutes will be read as part of an extended legislative scheme to the extent of their overlapping and consistent fields of operation.

50. Now the caution. Before invoking the integrated method of statutory interpretation certain prerequisites have to be established and while applying it various limitations have to be observed. Firstly, it has to be established for a fact that the claimants had a right to equally approach either of the two tribunals under the respective statutes. Secondly, the legal entitlements of the claimants have to be affirmed in the facts of a case. Thirdly this line of enquiry shall be applied only in common and overlapping areas of the statutes. Lastly this method of construction shall not extend to provisions which disclose a contrary intent or fields which are covered by specific provisions under the respective enactments.

51. The endeavour of the Court should be to realise the statutory intent of both enactments by benefiting the claimants without prejudice to other party. The Court cannot depart from any express provisions or Act in a manner contrary to the statutory scheme of either enactment.”

85. Responsibility is cast on the courts/magistrates considering the bail applications of prisoners to uphold the rights of their children who reside in jails with the latter.

86. The rights and entitlements of said class of children as discussed earlier can be realized at the stage of bails and during the trials only by bringing the concerned statutory authorities like Child Welfare

Committee (CWC), medical authorities, police authorities, and relevant district authorities, jail authorities within the scope of the jurisdiction of the learned courts (including magistrates and trial courts) hearing bail applications. The Courts have to alert the said authorities of their duties towards the said class of children. The said authorities shall remain accountable to the courts (including magistrates and trial courts) for the purposes of implementing the rights of the aforesaid children as propounded in the preceding discussion during the course of bail proceedings of their parents. The courts have to ensure that the authorities discharge their statutory duties and that beneficent provisions of law for children are enforced.

87. During the bail hearing, the said authorities namely the police and CWC have to respectively apprise the court about the manner in which the rights of children of the accused as determined in this judgment have been implemented. The courts are under an obligation of law to examine the said reports, make relevant enquiries from the said competent authorities, and record their satisfaction as regards implementation of the rights of the children of prisoners who are staying in jail. The court can issue appropriate directions to the authorities to implement the rights of the said class of children as expounded in this judgement.

88. The narrative can be fortified by authorities in point. In **Junaid v. State of U.P. and another**⁴¹, wherein it was held:

"42. However, the said judgments are not entirely bereft of precedential value for Allahabad High Court. The application has to be nuanced. It has to be stated that the said judgments of Delhi High Court and

Bombay High Court enrich legal debate, and elevate the concerns of child rights to the conscience of the court. The judgments have sensitized the process of law and ameliorated the plight of child victims by acknowledging the responsibilities of the courts and making the CWC, Legal Services Authorities and police officials accountable to courts in bail applications. These recognizable principles of law can be clearly distilled from Reena Jha (supra), Miss G (supra), Arjun Kishanrao Malge (supra)."

89. Similarly this Court in **Rajendra Prasad Vs. State of U.P.**⁴² while dealing with child victims made the following observations to remove all impediments which come in the way of realization of child rights during legal proceedings:

"9. Various authorities have been created under the POCSO Act to uphold the rights of victims. The said authorities like police, Child Welfare Committee, District Legal Services Authorities, medical authorities, district administration are enjoined by the statute to provide the entitlements under the POCSO Act to victims like support persons, medical specialists, legal aid, beneficial schemes of the government and so on. Responsibility is cast on the courts/magistrates considering the bail applications in POCSO offences to ensure that entitlements of the victims are provided and the rights conferred by the said enactment are enforced. Faithful execution of the said responsibilities will ameliorate the disadvantages faced by child victims in legal proceedings.

10. The rights and entitlements of the victims under the POCSO Act can be realized at the stage of bails and during the trials only by bringing the concerned statutory authorities like Child Welfare

Committee (C.W.C.), medical authorities and the police authorities within the scope of the jurisdiction of the learned magistrates/learned trial courts. The said authorities shall remain accountable to the learned magistrates/trial courts for the purposes of implementing the rights of the aforesaid victims during the course of various legal proceedings including bails. The said authorities have to apprise the trial court about the manner in which the rights of victims under the POCSO Act have been implemented. The learned trial courts are under an obligation of law to consider the said reports, make relevant enquiries from the said competent authorities and record their satisfaction as regards access of victims to their entitlements and support systems under the POCSO Act.

13. The reports depicting compliance of the above parameters and details of the facilities and support systems provided to the child victims as per law shall be submitted by the Child Welfare Committee (CWC) and the police respectively before the court at the hearing of the bail applications. The learned trial courts shall examine the aforesaid reports at the time of hearing of the bail applications and if required shall issue appropriate directions.”

IX. Order in bail application

A. Merits of bail & directions to expedite trial

90. This is the first bail application.

91. By means of this bail application the applicant has prayed to be enlarged on bail in Case Crime No. 0590 of 2023 at Police Station - Modi Nagar, District Ghaziabad, under Sections 363, 302, 201

IPC. The applicant is in jail since 16.10.2023.

92. The bail application of the applicant was rejected by the trial court on 14.05.2024.

93. The applicant has been identified as the principal offender who murdered her minor step child and threw his body in a tank situated in the house. The dead body was recovered at the pointing out of the applicant. The applicant had the motive to commit the offence. The offence is grave. There is likelihood that the applicant had committed the offence. At this stage, no case for bail is made out.

94. Without going into the merits of the case, the bail application is dismissed.

95. Learned counsel for the applicant contends that the trial is moving at a snail's pace and shows no sign of early conclusion. The prosecution is deliberately delaying the conduct of the trial to prolong the incarceration of the applicant. Various other aspects delaying the trial have also been highlighted including the failure of the trial court to faithfully implement the mandate of Section 309 Cr.P.C. Other bottlenecks which cause delay in trials in the State of U.P. like failure of the police to promptly serve the summons and execute coercive measures issued by the trial court to compel the appearance of the witnesses have also been brought to the notice of the Court. Learned counsel's submissions are well founded and are liable to be addressed.

96. Considering the gravity of the offence, interest of justice will be served by

directing the learned trial court to expedite the trial.

97. Though no specific time frame to conclude the trial has been set out in the Cr.P.C., yet the legislative intent of Section 309 Cr.P.C. is explicit. The scheme of the provision clearly shows that the legislative intent is to conclude the trial in an expeditious time frame. In the facts of this case, the learned trial court shall make all endeavours to conclude the trial expeditiously. Preferably the trial court shall set for itself a reasonable time frame to conclude the trial say one year from the date of receipt of a certified copy of this order.

98. The trial court has also to be conscious of the rights of the accused persons and is under obligation of law to ensure that all expeditious, necessary and coercive measures as per law are adopted to ensure the presence of witnesses. Counsels or parties who delay or impede the proceedings should not only be discouraged from doing so but in appropriate cases exemplary costs should also be imposed on such parties/ counsel.

99. All witnesses and counsels are directed to cooperate with the trial proceedings.

100. The learned trial court shall issue summons by regular process as per Section 62 Cr.P.C. and also by registered post as provided under Section 69 Cr.P.C. to expedite the trial.

101. The learned trial court shall promptly take out all strict coercive measures against all the witnesses in accordance with law who fail to appear in the trial proceeding. Counsels or parties

who delay or impede the proceedings should not only be discouraged from doing so but in appropriate cases exemplary costs should also be imposed on such parties/ counsel.

102. The police authorities shall ensure that warrants or any coercive measures as per law taken out by the learned trial court to ensure that the attendance of the witnesses are promptly executed.

103. Deputy Commissioner of Police, Ghaziabad shall file an affidavit before the trial court on the date fixed regarding status of execution of the warrants/service of summons taken out by the learned trial court.

104. The delay in the trials caused by the failure of the police authorities to serve summons or execute coercive measures to compel the appearance of witnesses at the trial despite a statutory mandate, is an issue of grave concern. The said issue had arisen for consideration before this Court in **Bhanwar Singh @ Karamvir Vs. State of U.P.**⁴³ & **Jitendra v. State of U.P.**⁴⁴ This Court in **Bhanwar Singh @ Karamvir (supra)** & **Jitendra (supra)** had issued certain directions to the police authorities regarding their statutory duty to promptly serve summons and execute coercive processes to compel the appearance of witnesses.

105. The Director General of Police, Government of U.P. as well as Principal Secretary (Home), Government of U.P. had taken out relevant orders in compliance of judgements in **Bhanwar Singh @ Karamvir (supra)** & **Jitendra (supra)** and nominated the Senior Superintendent of Police of the concerned districts as the

nodal officials for implementing the said judgments.

106. The counsels as well as the learned trial court are directed to comply with the directions issued by this Court in **Noor Alam Vs. State of U.P.**⁴⁵ In case any strike happens during the course of the trial, the learned trial court is directed to ensure full compliance of the directions issued in **Noor Alam (supra)** to prevent delay in the trial.

107. In case the police authorities are failing to comply with the directions issued by this Court in **Bhanwar Singh @ Karamvir (supra) & Jitendra (supra)** and do not implement the said directions of the Director General of Police, Government of U.P. & the Home Secretary, Government of U.P. in regard to service of summons and execution of coercive measures to compel the appearance of witnesses, the learned trial court shall direct the concerned Senior Superintendent of Police to file an affidavit in this regard.

108. The learned trial court shall be under an obligation to examine whether the judgements of this Court in **Bhanwar Singh @ Karamvir (supra) & Jitendra (supra)** as well as directions of Director General of Police, Government of U.P. & the Home Secretary, Government of U.P. issued in compliance thereof have been implemented or not and to take appropriate action as per law.

109. The learned trial court shall also take appropriate measures in law after receipt of such affidavit which may include summoning the concerned officials in person.

110. It is further directed that in case any accused person who has been enlarged

on bail does not cooperate in the trial or adopts dilatory tactics, the learned trial court shall record a finding to this effect and cancel the bail without recourse to this Court.

111. The trial judge shall submit a fortnightly report on the progress of trial and the steps taken to comply with this order to the learned District Judge.

112. A copy of this order shall also be communicated to the learned trial judge through the learned District Judge, Ghaziabad as well as Deputy Commissioner of Police, Ghaziabad by the Registrar (Compliance) by E-mail.

IX (B). Directions to create a child care plan and realize the rights of the applicant's minor child

113. Directions are issued to the District Magistrate, Jail Superintendents, CWC of district Jhansi to ensure that the rights and entitlements of the minor child of the applicant are realized by taking appropriate steps as directed in this judgement. In particular it shall be ensured that child is admitted to a school which is situated outside the jail premises. The child shall not have any contact with other prisoners (except his mother) and parents of similarly situated children who are residing in jail.

114. Ms. Richa Upadhyay, Additional District Judge/Secretary, DLSA, Gautam Budh Nagar shall in coordination with District Probationary Officer, Jhansi prepare an individual child care plan for the son of the applicant in light of this judgement. The child care plan shall be prepared within two months from the date of receipt of a copy of this order after due

consultation with various authorities and experts.

115. The State Government to provide necessary support to Ms. Richa Upadhyay, HJS/Secretary, DLSA, Gautam Budh Nagar and the District Probationary Officer, Jhansi to accomplish this task. Copy of the said individual child care plan shall be provided to the jail authorities, CWC and BSA. The District Magistrate, Jhansi shall also ensure that the aforesaid child care plan is duly implemented by the concerned authorities of the local administration.

116. The CWC, Jhansi shall prepare a regular report regarding implementation of the aforesaid plan and submit a report to the concerned authorities.

X. Circulation of copies for compliance

117. Learned Additional Advocate General to ensure service of copy of this judgement for necessary compliance upon the following authorities:

- i. Principal Secretary, Women and Child Development, Government of U.P.
- ii. Principal Secretary, Law/Legal Remembrancer, Government of U.P.
- iii. Director General of Police, Government of UP
- iv. Principal Secretary, (Prisons), Government of UP
- v. Principal Secretary (Basic Education), Government of UP
- vi. Principal Secretary, Health and Medical Education, Government of UP
- vii. CWC members in all districts
- viii. District Jail Superintendents of all district jails
- ix. Police Chiefs of all districts

- x. District Probationary Officers of all districts
- xi. Director, JTRI, Lucknow
- xii. District Magistrate, Jhansi

118. Registrar General to ensure that a copy of this order is provided to Ms. Richa Upadhyay, Additional District Judge/Secretary, DLSA, Gautam Budh Nagar.

119. A copy of this order translated in Hindi to be served to the applicant.

(2025) 1 ILRA 53

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 21.01.2025

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Criminal Misc. Bail Application No. 29850 of 2020

Sreedhar Prasad

...Applicant

Versus

State of U.P.

...Opposite Party

Counsel for the Applicant:

Counsel for the Opposite Party:

Criminal Law - Indian Penal Code, 1860 - Sections 420, 467, 468 & 120-B - Information Technology Act, 2000 - Section 66 - Code of Criminal Procedure, 1973 - Section 362 (Now Section 403, BNSS 2023) - Bail - Application for modification of order - Maintainability - High Court vide order dated 12.10.2020 enlarged applicant on bail on his furnishing a personal bond of Rs. 1 Lac with two sureties (one should be of his family members) each in like amount to satisfaction of Court concerned. (Para 2)

Applicant contended that he lodged in jail for long time and unable to arrange sureties and can be released on filing personal bonds without monetary obligations. (Para 4)

Held, taking note of fact that applicant though released earlier on bail has remained in custody since 15.07.2019 on account of non-fulfilment of condition of providing one surety of his family member, prayer for modification of condition granted - Thus, by allowing said application, Court deleted condition mentioned in impugned order. (Para 15, 17)

Modification application allowed. (E-13)

List of Cases cited:

1. Rakesh Kumar Paul Vs St. of Assam reported in 2017(15) SCC 67
2. Hussainara Khatoon & ors. Vs Home, Secretary, St. of Bihar, 1980 (1) SCC 81
3. R. D. Upadhyay Vs St. of Andhra Pradesh, 1996 (3) SCC 422
4. Girish Gandhi Vs The St. of U. P., Writ Petition No. 149 of 2024, order dated 12.10.2020, (Para 22, 23)
5. Narayan Prasad Vs St. of Bihar & ors., reported in 2019(14) SCC 726
6. Sanjeev Kapoor Vs Chandana Kapoor & ors., reported in 2020 (13) 172
7. Ramadhar Sahu Vs The St. of M. P., reported in 2023 LiveLaw (SC) 945, (Para 4, 5)

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

In Ref.: Criminal Misc.
Modification Application

1. This is an application seeking modification of the order dated 12.10.2020

passed in Criminal Misc. Application No. 29850 of 2020 to the extent of removing the condition of one family member as a surety and direct the release of the applicant on his furnishing a personal bond along with any two sureties each in the like amount to the satisfaction of the court concerned or pass any other and further orders in the interest of applicant considering the present facts and circumstances of the case.

2. It is contended that the applicant filed Criminal Misc. Bail Application aforementioned seeking regular bail in Case Crime No. 0816 of 2017, under Sections 420, 467, 468, 120-B IPC and Section 66 of Information Technology Act, Police Station Kotwali City, District Bijnore. This Court vide order dated 12.10.2020 was pleased to enlarge the applicant on bail on his furnishing a personal bond of Rs. 1 Lac with two sureties (one should be of his family members) each in the like amount to the satisfaction of the Court concerned.

3. It has been submitted that the applicant has not been able to obtain bail on account of the fact that he has not been able to arrange a family member to stand as his security as directed by this Court while granting bail vide order dated 12.10.2020 and has been languishing in jail since 15.07.2019. His father has expired and his family comprises of his Mother and Wife, who are home makers and two daughters, one of whom is working in Vishakhapatnam and the other studying in Mumbai.

4. Learned counsel has placed reliance upon the Apex Court decision in the case of **Rakesh Kumar Paul Vs. State of Assam** reported in **2017(15) SCC 67** to buttress

the point that in matters of personal liberty and Article 21 of the Constitution of India it is not always advisable to be formalistic or technical and the bail order is liable to be modified as prayed to enable the applicant to avail the benefit of the bail order. Placing further reliance upon **1980 (1) SCC 81 (Hussainara Khatoon & others Vs. Home, Secretary, State of Bihar)** as also **1996 (3) SCC 422 (R. D. Upadhyay Vs. State of Andhra Pradesh)**. It is contended that accused lodged in jail for long time and unable to arrange sureties can be released on filing personal bonds without monetary obligations.

5. Learned counsel for the applicant has invited attention to Para 22 of the decision of the Apex Court in the case of **Girish Gandhi Vs. The State of Uttar Pradesh (Writ Petition No. 149 of 2024)**, quoted herein-below to submit that the order dated 12.10.2020 be suitably modified.

"22. Whether it is to get individuals, to stand as a guarantor for a loan transaction or as a Surety in a criminal proceeding, the choice for a person is very limited. It will very often be a close relative or a longtime friend. In a criminal proceeding, the circle may get even more narrowed as the normal tendency is to not disclose about the said criminal proceeding to relatives and friends, to protect one's reputation. These are hard realities of life in our country and as a court of law we cannot shut our eyes to them. A solution, however, has to be found strictly within the framework of the law.

23. From time immemorial, the principle has been that the excessive bail is no bail. To grant bail and thereafter to impose excessive and onerous conditions,

is to take away with the left hand, what is given with the right. As to what is excessive will depend on the facts and circumstances of each case. In the present case, the petitioner is experiencing a genuine difficulty in finding multiple sureties. Sureties are essential to ensure the presence of the accused, released on bail. At the same time, where the court is faced with the situation where the accused enlarged on bail is unable to find sureties, as ordered, in multiple cases, there is also a need to balance the requirement of furnishing the sureties with his or her fundamental rights under Article 21 of the Constitution of India. An order which would protect the person's fundamental right under Article 21 and at the same time guarantee the presence, would be reasonable and proportionate. As to what such an order should be, will again depend on the facts and circumstances of each case."

6. The modification application has been vehemently opposed by the learned AGA by submitting that the application seeking modification of the bail order is hit by the embargo imposed by Section 362 Cr.P.C. and hence not maintainable and the remedy lies elsewhere.

7. I have heard the learned counsel for the applicant, learned AGA for the State and have given my anxious consideration to the submissions advanced by the respective counsels.

8. Section 362 Cr.P.C. contained in Chapter XXVII of the Cr.P.C. reads as under:-

"362. Court not to alter judgment.

Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

9. The equivalent Section 403 contained in Chapter XXIV of the BNSS 2023 read as under:-

"403. Court not to alter judgment.

Save as otherwise provided by this Sanhita or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

10. The embargo put on the criminal court by Section 362 Cr.P.C. (Section 403 BNSS) is with a purpose and object. The criminal justice delivery system does not clothe criminal courts with power to alter or review the judgment or final order disposing of the case except to correct the clerical or arithmetical error. After the judgment delivered by a criminal court or passing of the final order disposing of the case the court becomes functus-officio and any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law.

11. The expression "Save as otherwise provided by this Code/Sanhita or by any other law for the time being in force" contained in Section 362 Cr.P.C./Section 403 BNSS, 2023 is relaxed in following two conditions"-

(i) Save as otherwise provided by the Code of Criminal Procedure/BNSS, 2023

(ii) Any other law for the time being in force.

12. Section 362 Cr.P.C. of which Section 403 BNSS is pari-materia has been interpreted by the Courts of law. The Apex Court in the case of **Narayan Prasad Vs. State of Bihar and others**, reported in **2019(14) SCC 726** has held that the prohibition under Section 362 Cr.P.C. is absolute; after the judgment is signed even the High Court in exercise of its inherent power under Section 482 Cr.P.C. has no authority or jurisdiction to alter/review the same. The judgment further held that inherent power under Section 482 Cr.P.C. was purported to avoid the abuse of the process of the Court and to secure the ends of justice. Such power cannot be exercised to do something which is expressly barred under the Code.

13. In the case of **Sanjeev Kapoor Vs. Chandana Kapoor and others**, reported in **2020 (13) 172** after analyzing various decisions, however, held that the embargo as contained in Section 362 Cr.P.C. was clearly relaxed in proceedings under Section 125 Cr.P.C. and the maintenance proceedings initiated by the wife under Section 125 Cr.P.C. which had been finally disposed off with terms of settlement arrived at Section the husband and wife were rightly restored on the application of the wife seeking recall on non compliance of the conditions by the husband.

14. Recently, the Apex Court in the case of **Ramadhar Sahu Vs. The State of Madhya Pradesh** reported in **2023 LiveLaw (SC) 945** observed that Section 362 which prohibits modification of a judgment or final order will not be applicable in an order for refusal of bail.

The relevant paras of the decision of the Apex Court is quoted hereunder:-

"4. The opinion of the High Court, in the impugned order, is that in the event the High Court granted bail to the appellant without compliance of the conditions specified in the earlier order of a Coordinate Bench, that would constitute modification of the order and Section 362 of the Code prohibits such modification of a judgment or final order.

5. An order for refusal of bail however, inherently carries certain characteristics of an interlocutory order in that certain variation or alteration in the context in which a bail plea is dismissed confers on the detained accused right to file a fresh application for bail on certain changed circumstances. Thus, an order rejecting prayer for bail does not disempower the Court from considering such plea afresh if there is any alteration of the circumstances. Conditions of bail could also be varied if a case is made out for such variation based on that factor. Prohibition contemplated in Section 362 of the Code would not apply in such cases. Hence, we do not think the reasoning on which the impugned order was passed rejecting the appellant's application of bail can be sustained. The impugned order is set aside and the matter is remitted to the High Court. The bail petition of the appellant before the High Court shall revive to be examined afresh by the High Court in the light of our observations made in this order"

15. In view of the above, taking note of the fact that the applicant though released on bail vide order dated 12.10.2020 has remained in custody on account of non-fulfillment of the condition of providing one surety of his family

member, I am inclined to grant the prayer for modification of the condition, to meet the ends of justice.

16. In view of the above, the modification application stands **allowed**.

17. Accordingly, in the 4th & 5th line of the order dated 12.10.2020 is modified to the extent that the condition mentioned as **"one of the surety should be of his family member"** is hereby deleted.

(2025) 1 ILRA 57
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2025

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 35494 of
2024

Om Prakash Kushwaha **...Applicant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:

Himanshu Mishra, Kamlesh Kumar Dwivedi,
Suvansit Kumar Jaiswal

Counsel for the Opposite Party:

G.A., Vijay Kumar Mishra

A. Criminal Law – Bharatiya Nyaya Sanhita – Sections 64, 74 & 351 – Evidence Act, 1875 – Section 65B – Rape – CCTV footage show the presence of applicant and victim together in a hotel and WhatsApp chatting proof that applicant was taking advantage of withdrawing the case lodged by him against the victim's brother and used it to make physical relation with her – There is no inconsistency in the FIR version and St.ment of victim u/s 180 and 183 of BNSS – Effect – Held, from the medical

examination report, it reflects that on protesting, victim was beaten by the applicant. The said factual aspects of the matter are corroborated from the CCTV footage of hotel – WhatsApp chatting, which is supported by a certificate of victim u/s 65B of the Indian Evidence Act also, the aforesaid allegations of the victim is prima-facie corroborated – The alleged act of the applicant is serious blow to victim's supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim – High Court found no good ground to disbelieve the St.ment of victim. (Para 6 and 8)

Bail application rejected. (E-1)

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

1. By means of this application under Section 483 of BNSS, applicant Om Prakash Kushwaha, who is involved in Case Crime No. 402 of 2024, under Sections 64, 74, 351 BNS, police station Sikandara, district Agra seeks enlargement on bail during the pendency of trial.

2. Heard Mr. K.K. Dwivedi, learned counsel for the applicant, Mr. Deepak Mishra, learned Additional Government Advocate representing the State and Mr. Vijay Kumar Mishra, learned counsel appearing on behalf of the first informant / complainant.

3. As per prosecution case, in brief, the victim got a first information report lodged on 19.07.2024 for the alleged offence under Sections 64, 74 and 351 BNS against the applicant making allegations inter alia that the applicant had an evil eye on her, but she always used to address him as brother from beginning. The accused's younger daughter Ritika and her younger brother Aman were friends since

childhood. Due to which applicant managed to send her younger brother to jail in a false case, who is minor. The bail application of her younger brother was rejected by the High Court on 18 September 2023, taking advantage thereof, on 19 September 2023, Om Prakash Kushwaha, called her and asked her to meet him. When she refused to meet him, applicant threatened her that if she did not come to meet him, he would implicate her elder brother Salman and brother-in-law also in a false case. Due to fear, she went to meet the applicant in Subhash Park, where the applicant held her hand and said that he likes her very much. If she marries him, he will buy a separate flat for her and only then he will withdraw the case against her younger brother. When she refused for marriage, then the applicant said that if she cannot marry him, then have physical relation with him and he will take the case back. As such applicant used to call her everyday in this manner and called her to meet at different places. Many time the applicant used to call her to meet him in the car by luring her to withdraw her brother's case and made her to put her hand inside his pant (jeans) and when she went to his house he used to ask her for nude photos and made a video call on WhatsApp and asked her to remove her clothes. Every time he used to say the same thing that if she make him happy, he will take back her brother's case. The F.I.R. further alleges that the victim weeps a lot but applicant used to take advantage of her helplessness every time. The applicant made obscene video of her while sitting in car, and threatened to make them viral and asked her to have physical relation. On 18.07.2024, the applicant called her to meet him and took her to Room No. 206 of Hotel Sikandara Pind Baluchi, Opposite Gurudwara, where he took her into

confidence in the hotel by writing on a paper and making a signature that he will get the case of her brother withdrawn and made physical relation with her. He also done carnal intercourse with her and put his penis in her mouth. Her brother Salman and mother Afsana came at the spot and informed the police at 112 from the hotel, on which police brought the victim and applicant to Sikandra Police Station gate. Applicant's wife and brother took him away from the gate of police station itself.

4. It is argued by learned counsel for the applicant that the applicant has been falsely implicated in this case on account of enmity with the victim and her family members because on 02.06.2022, he had lodged F.I.R. at Case Crime No. 0322 of 2022 at police Station Jagdishpura, Agra under Section 363 and 366 IPC against the victim's brother-Aman Khan for kidnapping his daughter. Much emphasis has been given by contending that victim herself took the applicant to hotel giving prior information to her family members. Otherwise there was no occasion for the family members to reach the hotel. It next submitted that in fact victim was mounting pressure upon the applicant to withdraw his case against her younger brother. Investigating officer has neither conducted fair investigation nor collected any substantive evidence against the applicant. No such incident took place as alleged by the victim in the F.I.R. Medical examination report of the victim is inconsistent with prosecution case. The victim was never blackmailed or terrorized for having physical relation with him. No obscene photographs or video or any electric device was recovered from the possession of the applicant. The applicant does not have any criminal history to his credit, hence he may be released on bail.

5. Per contra, learned A.G.A. for the State as well as learned counsel for the informant vehemently opposed the prayer for bail of the applicant reiterating the prosecution case as mentioned in the F.I.R. by contending that applicant continuously made phone call to the victim and made pressure for compromise putting a condition that in lieu thereof, she would have to make physical relation with him. The victim was medically examined on 19.07.2024 at about 06:15 PM and four external injuries in the nature of multiple soft scabbed abrasion and reddish contusions were found on her body. Duration of the same was about one day old, which corroborate the prosecution case. The accused-applicant (Om Prakash Kushwaha) was apprehended along with the victim at the hotel. The applicant had called the victim on the pretext of withdrawing the case lodged by him against the victim's brother. During investigation, the investigating officer collected the CCTV footage of Hotel Pind Baluchi, in which applicant and victim were seen together at the reception of the hotel and went to hotel room no. 206 at about 12:22 PM and stayed there till 12:43 PM. It is also pointed out that from the contents of WhatsApp chatting between the victim and accused-applicant clearly indicates that applicant was taking advantage of withdrawing the case lodged by him against the victim's brother and used to make physical relation with her. The applicant is a notorious person, hence in case of granting bail, there is every possibility of his misusing the liberty of bail and tampering with the witnesses and evidence, therefore, bail application of the applicant is liable to be rejected.

6. Having heard learned counsel for the parties and examined the matter in its

entirety, I find that main allegation of the victim against the accused-applicant is that the applicant for making comprise and withdrawing his case against the victim's brother put a condition that in lieu thereof she will have to make physical relation with him. The facts of this case is very rare. The modus operandi adopted by the accused to satisfy his lust under the garb of giving assurance of compromising and withdrawing the criminal case lodged against victim's brother by the applicant is an example of dehumanizing and heinous act, which is unlawful intrusion on the right of privacy and chastity of a female. The prosecutrix/ victim has made serious allegations of rape etc. against the applicant giving vivid description of the incident in the F.I.R. and the same has been reiterated by her in her statements recorded under Section 180 and 183 of BNS. There is no inconsistency in the allegation of victim, so far as allegation of rape / making forceful physical relation by the applicant against her wishes is concerned. From the statement of victim, I also find that she has stated inter-alia that applicant lastly on 18.07.2024 called her to meet him at Hotel Pind Baluchi. Then she told her sister Tanisha, who asked her to send her live location and informed her mother and brother, then her mother and brother came there and informed the police at 112. The presence of applicant with prosecutrix / victim in the hotel has been admitted on behalf of the applicant in his bail application. From the medical examination report, it reflects that on protesting, victim was beaten by the applicant. The said factual aspects of the matter are corroborated from the CCTV footage of hotel, medical examination report dated 19.07.2024 of victim and other materials on record. Not only this but from the WhatsApp chatting between

the applicant-Om Prakash Kushwaha and victim, which is supported by a certificate of victim under Section 65B of the Indian Evidence Act also, the aforesaid allegations of the victim is prima-facie corroborated. The said WhatsApp chatting is a part of the case diary and same has been filed on record by the victim through her counter affidavit, but in order to avoid tarnishing the image of the victim, this Court is not mentioning the contents of said inappropriate WhatsApp chatting. The alleged act of the applicant is serious blow to victim's supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim, it leaves behind a traumatic experience, a rapist not only cause physical injuries, but more indelibly leaves a blot on the most cherished possession of a women i.e. dignity, honor, reputation and not the least her chastity.

7. This Court is also of the view that the applicant's alleged conduct of leveraging the victim's familial challenges and exploiting her for personal gain constitutes a serious offence. The exploitation of a vulnerable individual's circumstances by the accused to achieve ulterior motives and his lust is an act that violates the principles of justice and living with dignity enshrined in the Constitution. The victim's statement outlines a clear picture that accused-applicant misusing the vulnerable situation of victim compelled her to enter into unwilling acts of making physical relation with him, which is apparent from the evidences collected during investigation.

8. In view of the above, at this stage, I do not find any good ground to disbelieve

the statement of victim and presume the false implication of the applicant.

9. Considering the overall facts and circumstances of the case as well as keeping in view the submissions advanced on behalf of parties as noted above, role assigned to applicant, gravity of offence, severity of the punishment and the manner in which the offence has been committed, as well as threat to the safety and dignity of the victim, I do not find any good ground to release the applicant on bail.

10. Accordingly, the bail application is rejected.

11. It is made clear that the observation contained in the instant order is confined to the issue of bail and shall not affect the merit of the trial.

(2025) 1 ILRA 61
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.01.2025

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 39835 of
2024

Suraj Kumar @ Vishwapratap Singh
...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Akhilesh Kumar Dwivedi

Counsel for the Opposite Parties:
R.A. Ram, Shyam Chandra, G.A.

**Criminal Law - Bharatiya Nyaya Sanhita,
2023 - Sections 63, 65(2), 351(2) &
332(c) - Rape - The Protection of Children**

from Sexual Offences Act, 2012 - Sections 3/4, 2(1)d, 29 - Bharatiya Nagarik Suraksha Sanhita, 2023 - Sections 180, 183 - Bail - As per FIR, informant woke up in morning, not find his daughter on bed - Noticed that another room locked from inside and when peeped through window, he saw applicant was committing rape upon his daughter by pressing her mouth - When informant shouted and called his wife, applicant by opening door, ran away by pushing him extending threat of dire consequences. (Para 3)

Applicant submitted that FIR was lodged after delay of 17 hours, without any plausible explanation, informant in his St.ment reiterated prosecution case but there are contradictions in St.ments of victim. (Para 4)

Held, from perusal of St.ments of victim, it was clear that applicant had forcibly took her to another room, bolted room and committed misdeed with her. (Para 10)

As per medical examination report of victim, there was no sign of any force was concerned, it was misconceived as in supplementary medico-legal examination report, final opinion was reserved pending on availability of FSL report, sexual violence cannot be ruled out - No any material on record to presume false implication of applicant and to disbelieve St.ments of minor victim, thus no any ground to release applicant on bail. (Para 15, 18)

Bail application rejected. (E-13)

List of Cases cited:

1. Ram Swaroop Vs St. of Raj., 2004 Law Suit (SC) 293
2. Attorney General for India Vs Satish & anr., (2021) 4 SCC 712
3. St. of Punjab Vs Gurmit Singh & ors., (1996) 2 SCC 384
4. St. of Madhya Pradesh Vs Mahendra @ Golu, (2022) 12 SCC 442

5. St. of A.P. Vs Bodem Sundara Rao, 1995 (6) SCC 230

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

1-By means of this bail application, applicant-Suraj Kumar alias Vishwapratap Singh, who is involved in Case Crime No. 188 of 2024, under Sections 65(2), 351(2), 332(c) of B.N.S. and Sections 3/4 POCSO Act, Police Station Cantt, District Prayagraj seeks enlargement on bail during the pendency of trial.

2-Heard Mr. Akhilesh Kumar Dwivedi, learned counsel for the applicant, Mr. Deepak Mishra, learned Additional Government Advocate representing the State, learned counsel appearing on behalf of the informant/complainant and perused the record.

3-The facts that formed the bedrock of the instant bail application are that the informant, who is father of the victim, got a first information report lodged on 05.09.2024 at about 23:20 hours with regard to an incident which took place on the same day at about 05:30 hours for the alleged offence under Sections 65(2), 351(2) B.N.S. and Sections 9/10 POCSO Act against the applicant making allegations inter-alia that in the morning, when he woke up, he did not find his daughter on the bed. However, he noticed that another room was locked from inside and when he peeped through the window, he saw that the applicant was committing rape upon his daughter by pressing her mouth. F.I.R. further alleges that when the informant shouted and called his wife, applicant by opening the door, ran away by pushing him extending threat of dire consequences. Thereafter, the informant

took the assistance of women helpline number 1090.

4-The main substratum of argument of learned counsel for the applicant is that in this case, first information report was lodged after delay of 17 hours, without any plausible explanation. It is next submitted that though the informant in his statement under Section 180 BNSS has reiterated the prosecution case as mentioned in the F.I.R. but there are contradictions in the statements of the victim recorded under Section 180 and 183 BNSS. In this regard, it is further pointed out that the informant, in the F.I.R., has stated that the applicant was committing rape upon his daughter whereas the victim in her statement under Section 180 BNSS has stated that the applicant, after disrobing her forcefully, started molesting and committed misdeed with her. The victim in her statement under Section 183 BNSS has stated that the applicant, after disrobing her started touching her inappropriately and when her father came, applicant fled away from the place of incident extending threat to her father. On the strength of the aforesaid facts, much emphasis has been given by contending that the victim, in her statements, has not specifically stated that there was any penetration of penis in her vagina, hence there was no sexual intercourse, therefore, no offence of rape is made out against the applicant. Referring the medical examination report as recorded by the investigating officer in case diary, it is argued that no sign of any force was found in the medical report, hence, the prosecution case is not corroborated from the medical evidence. Referring the paragraph nos. 16 and 17 of the bail application, it is submitted that the applicant was shown to be arrested on 06.09.2024 whereas correct fact is that on

05.09.2024 at about 05:00 AM, the first informant and his family members forcibly dragged him inside the house and thereafter, they called the police and falsely implicated in the present case. Learned counsel for the applicant, in support of his submission, placed reliance upon the judgment of the Apex Court in the case of **Ram Swaroop vs. State of Rajasthan, 2004 Law Suit (SC) 293**. Lastly, it is submitted by the learned counsel for the applicant that there is no chance of the applicant of fleeing away from the judicial process or tampering with the prosecution evidence. The applicant has no criminal antecedents to his credit. The applicant who is a student of law is languishing in jail since 06.09.2024, therefore he is entitled to be released on bail.

5-On the other hand, learned A.G.A. as well as learned counsel appearing on behalf of the complainant vehemently opposed the submissions of learned counsel for the applicant by contending that the victim was aged about 11 years, 7 months and 27 days on the day of incident dated 05.09.2024, therefore as per Section 2(1)d of POCSO Act, she is a small child. The father of the victim is an eye witness of the incident, which took place in his own house. Much emphasis has been given by contending that the victim, in her statements under Section 180 and 183 BNSS has supported the prosecution case and made specific allegation of outraging her modesty against the applicant giving vivid description of the incident. It is also contended that the act and conduct of the applicant, as mentioned in the F.I.R. and statements of the victim, clearly comes under the preview of definition of rape. Learned A.G.A. placing reliance upon the judgment of the Apex Court in the case of **Attorney General for India vs. Satish**

and Another, (2021) 4 SCC 712 submits that to constitute an offence of rape, penetration of penis is not required. It is also submitted that in view of Section 29 of POCSO Act, the Court shall presume that the accused has committed offence unless the contrary is proved by the offender. Considering the gravity of the offence, bail application of the applicant is liable to be rejected.

6-Before proceeding further, it would be apposite to quote Section 63 of Bhartiya Nyaya Sanhita (B.N.S.).

Section 63 of B.N.S.

A man is said to commit "rape" if he---

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

(i) against her will;

(ii) without her consent;

(iii) with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt;

(iv) *with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;*

(v) *with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent;*

(vi) *with or without her consent, when she is under eighteen years of age;*

(vii) *when she is unable to communicate consent.*

7-Now coming to the instant case, so far as the first contention of learned counsel for the applicant with regard to delay in lodging the first information report is concerned, the same has been discussed by Hon'ble the Apex Court in the case of **State of Punjab vs. Gurmit Singh and Others, (1996) 2 SCC 384**. The relevant paragraph of the said judgment reads as under:-

"In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix of her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is also after giving it

a cool thought that a complaint of sexual offence is generally lodged."

8-So far as the second contention of learned counsel for the applicant that there are contradictions in the statement of the victim under Sections 180 and 183 of BNSS, therefore prosecution case is liable to be disbelieved is concerned, the same is misconceived inasmuch as the victim, in her statements under Section 180 and 183 of BNSS, has specifically stated that the applicant had committed misdeed with her and also threatened her father for dire consequences.

9-For better appreciation, the statements of the victim under Section 180 and 183 BNSS are reproduced herein below:-

Statement of the victim under Section 180 BNSS

"मैं गौरव पब्लिक स्कूल में पढ़ती हूँ क्लास 4 में पढ़ रही हूँ 3 वर्ष पूर्व मैं स्कूल आते जाते समय सूरज नाम का लडका मेरा पीछा करता था यह बात मैंने अपनी मम्मी पापा को बताया तो मेरे पापा मुझे स्कूल छोड़ने व लेने जाते थे दि० 05/09/24 की सुबह 5 बजे मैं वशरूम गयी थी वापस आयी तो सूरज मेरे घर में घुस आया और मुंह दबाकर कर पटक दिया और मेरे कपड़े उतार दिये और जोर जबरदस्ती कर अश्लील हरकत करते हुए मेरे साथ गलत काम करने लगा और धमकी दिया कि इस बात को अगर किसी से बताया तो जान से मार दूंगा मैं काफी डरी हुई थी मैं काफी देर तक वशरूम से नहीं आयी तो मेरे पापा मुझे इधरउधर ढूँढन लगे तो दूसरा रूम बन्द था। मेरे पिता जी ने खिड़की से देखा तो सूरज मेरे साथ मुंह दबाकर गलत काम कर रहा था मेरे पापा ने दरवाजा जोरजोर से खटखटाया तो सूरज धमकी देते हुए बोला कि अगर ये बात पुलिस या किसी को बताया तो जान से मार दूंगा मैंने दौड़कर दरवाजा खोल दिया और सूरज धमकी देते हुए मुझे धक्का देकर वहाँ से भाग गया मेरे पापा ने पुलिस को फोन किया हम लोग बहुत डरे हुए थे।"

Statement of the victim under Section 183 BNSS

"दिनांक 05.09.2024 को मैं सुबह 5.30 बजे वाशरूम गयी थी फिर जब वापस अपने कमरे में जाने लगी तो पीछे

से सूरज आया मेरे घर का दरवाजा खुला था सूरज ने मुझे पकड़ लिया बेड पर पटक दिया मेरे कपड़े उतारे और मुझे छुने लगा तभी मेरे पापा अचानक से आ गये तो उसने पापा को जान से मारने की धमकी दी और भाग गया।"

10-From perusal of statements of the victim under Section 180 and 183 BNSS, it is clear that the applicant had forcibly took her to another room, bolted the room and committed misdeed with her.

11-This Court is of the view that the meaning of what victim said in her above noted statements recorded under Section 180 and 183 BNSS is same. Even deposition of honest and truthful witnesses may differ in some details because power of observation, retention and reproduction differ with individuals. It is well known that every person has a different way of expressing their words and feelings in their local language. The disclosure made by the victim clearly denotes the sexual act in common parlance. It is well settled that the minor discrepancies which do not shake the basic version of the prosecution should not be discarded. Hence contention of the learned counsel for the applicant that there are material contradictions and under the facts of the case, no offence of rape is made out are not liable to be accepted at this stage.

12-The third contention of learned counsel for the applicant that since the victim, in her statements, has not specifically stated that there was any penetration of penis in her vagina, as such, no offence of rape is made out against the applicant is concerned, this Court is of the view that the said issue has already been discussed by Hon'ble Supreme Court in the case of **State of Madhya Pradesh vs. Mahendra alias Golu, (2022) 12 SCC 442**, where the Supreme Court has laid

down the distinction between 'Preparation' and 'Attempt' to commit rape and explained the three stages of commission of a crime, which are as under :-

"It is settled proposition of Criminal Jurisprudence that in every crime, there is first, Mens Rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit. If the third stage, that is 'attempt' is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. 'Attempt' is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission."

13-In the instant case, the allegation against the applicant that he had committed misdeed with the victim comes under the stage beyond attempt to commit it, as such, applicant is guilty of the offence punishable under Section 63 BNS. Even if, for the sake of argument, it is assumed that there was no penetration, even then the applicant is liable to be punished under Section 65(2) BNS as the victim is aged below 12 years. The said act of the accused is covered by the definition of rape provided under Section 63 of BNS.

14-Hon'ble Supreme Court in **State of A.P. vs. Bodem Sundara Rao, 1995 (6) SCC 230** has cautioned the Courts while dealing with the cases of sexual crime against women in the following words:-

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self esteem and dignity. It degrades

and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with the cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely."

15- The last contention of learned counsel for the applicant that as per medical examination report of the victim, there was no sign of any force is concerned, the same is misconceived as in supplementary medico-legal examination report of the victim, final opinion is reserved pending on the availability of FSL report and sexual violence cannot be ruled out. As on date, I do not find any material on record to presume the false implication of the applicant and to disbelieve the statements of minor victim, which is primary for considering the bail application of accused in rape cases.

16- In **Ram Swaroop (Supra)** relied upon by the learned counsel for the applicant, the nature of assault described by Pws 8 and 9 was inconsistent with medical report. Further the version given by PW 8 in the course of deposition was quite different from that he mentioned in the FIR. Whereas in the instant case, the statement of the victim and the informant is intact. Therefore, said case is distinguishable on the facts of this case, hence the same is not helpful to the applicant. This Court is also of the view that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In the light of circumstantial flexibility, one additional or different fact may make a word of difference between conclusion in two cases.

17-The Court must keep in mind while appreciating the evidence of the prosecutrix the values prevailing in the country, particularly in

rural India. It would be unusual for girl to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. In our country, a minor girl, victim of sexual aggression, would rather suffer silently than to falsely implicate somebody. Any statement of a rape victim is an extremely humiliating experience for her and until she is a victim of sex crime, she would not blame anyone but the real culprit.

18-Considering the overall facts and circumstances of the case as well as keeping in view the submissions advanced on behalf of parties, gravity of offence, role assigned to applicant and severity of punishment, I do not find any good ground to release the applicant on bail.

19-Accordingly, the bail application is *rejected*.

20-It is clarified that observations made herein above are limited to the extent of determination of this bail application and will in no way be construed as an expression on the merits of the case.

21-The trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence to be adduced by the parties.

(2025) 1 ILRA 66
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.01.2025

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 41474 of
2024

Sarvajeet Singh	...Applicant
State of U.P.	...Opposite Party
Versus	

Counsel for the Applicant:

Mayank Mohan Dutt Mishra, Sudhanshu Pandey

Counsel for the Opposite Party:

G.A.

Criminal Law — Indian Penal Code, 1860 - Sections 302 & 307- Criminal Procedure Code, 1973 - Section 439-Bail — Second Bail Application — Prolonged Incarceration — Delay in Trial — Article 21 of the Constitution of India — Accused in custody for over 7 years and 9 months — Trial remained stalled due to pendency of challenge to summoning order under Section 319 Cr.P.C. before Supreme Court — Only 3 of 16 prosecution witnesses examined — No likelihood of conclusion of trial in near future — Held, prolonged detention without progress in trial is violative of right to speedy trial under Article 21 — Bail not to be withheld as punishment — Bail granted. (Paras 15,16, and 17)

HELD:

It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA. (Para 15)

It is deeply regrettable that the applicant has been languishing in jail for approximately seven years and nine months, with the trial having remained stagnant since 25.10.2019. Such prolonged incarceration, coupled with the complete lack of progress in the trial, is a serious infringement on the applicant's fundamental right to a speedy trial as guaranteed under Article 21 of the Constitution of India. Keeping the applicant in custody under these circumstances, when there is no realistic possibility of the trial being concluded in the near future, is both unjust and unwarranted. Justice demands that the applicant's continued

detention be reconsidered, and appropriate relief be granted without delay. (Para 16)

Having heard learned counsels for the parties, taking into consideration the circumstances of the instant case as three accused persons are still absconding, there being no likelihood of conclusion of trial in near future and the fact that there are sixteen witnesses to be examined of which three have been examined; furthermore in the case of summoning additional accused U/s 319 Cr.P.C., the St.ments of already examined witnesses are to be recorded again and the trial shall almost proceed de-novo as also in the light of aforesaid judgments of the Supreme Court, and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed. (Para 17)

Bail application allowed. (E-14)

List of Cases cited:

1. Javed Gulam Nabi Shaikh Vs St. of Mah., 2024 INSC 645
2. Gudikanti Narasimhulu Vs Public Prosecutor, (1978) 1 SCC 240
3. Gurbaksh Singh Sibbia Vs St. of Pun., (1980) 2 SCC 565
Lalita Kumari v. Govt. of U.P., (2014) 2 SCC 1
4. Hussainara Khatoon Vs St. of Bihar, (1980) 1 SCC 81
5. U.O.I. Vs K.A. Najeeb, (2021) 3 SCC 713
6. Mohd Muslim Vs St. (NCT of Delhi), 2023 INSC 311
7. Satender Kumar Antil Vs CBI, (2022) 10 SCC 51
8. Indrani Pratim Mukerjee Vs CBI, 2022 SCC OnLine SC 695
9. V. Senthil Balaji Vs Deputy Director, ED, 2024 INSC 739

10. Sheikh Javed Iqbal Vs St. of U.P., 2024 LiveLaw (SC) 486

11. Partha Chatterjee Vs ED, 2024 SCC OnLine SC 3729

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

1. List has been revised.

2. Counter affidavit filed by learned A.G.A. is taken on record.

3. Heard Sri Mayank Mohan Dutt Mishra and Sri Sudhanshu Pandey, learned counsel for the applicant as well as Sri Sunil Kumar, learned A.G.A. for the State and perused the record.

4. Applicant seeks bail in Session Trial No.480 of 2017 (State vs. Sarvajeet Singh), pending in the court of Sessions Judge/E.C. Act, Gorakhpur, arising out of Case Crime No.156 of 2017, under Sections 302, 307 I.P.C., Police Station- Jhangaha, District- Gorakhpur, during the pendency of trial.

5. This is the second bail application on behalf of the applicant. The first bail application was rejected by the Co-ordinate Bench of this Court vide order dated 3.12.2020 passed in Criminal Misc. Bail Application No.33241 of 2020.

6. Learned counsel for the applicant has stated that the trial is not moving ahead and is at a standstill. There is no likelihood of conclusion of trial in near future. The applicant is incarcerated since 23.5.2017, i.e. for a period of more than seven years and nine months. The fundamental right of the applicant enshrined under Article 21 of the Constitution of India stands violated as he has been incarcerated for a substantial period of time for no fault of his. The applicant is ready to cooperate with trial. In

case, the applicant is released on bail, he will not misuse the liberty of bail.

7. Per contra, the bail application has been opposed on the ground that applicant is the main accused person as it was he who had fired at the deceased person causing his death.

8. This Court had called the status of trial from the trial court concerned and the report of Additional Sessions Judge/Special Judge (E.C. Act), Gorakhpur dated 10.12.2024 is on record. Perusal of the said report reveals as under:

(i) The final report (charge-sheet) was filed in the instant case on 16.8.2017 and after framing the charge on 25.1.2018, prosecution evidence was recorded.

(ii) Three witnesses of fact, namely, PW-1 Ram Bilas Yadav (informant), PW-2 Farchina Devi (injured) and PW-3 Kamlesh, were examined in court on 5.2.2018, 5.6.2018 and 6.12.2018, respectively, and after that the prosecution moved an application U/s 319 Cr.P.C. for summoning the other accused persons who were exonerated by the police during investigation, the same was allowed by the trial court vide order dated 23.7.2019 as such summoned other five accused persons, namely, Surya Nath Singh, Pinkal Singh, Varudhan Singh, Arjun Singh and Meena Singh U/s 147, 148, 149, 302, 307, 323, 504, 506 I.P.C.

(iii) The aforesaid accused persons challenged the said summoning order before the Supreme Court by filing SLP No.9360 of 2019. Supreme Court was pleased to order for staying the proceedings of the trial court vide its order dated 25.10.2019.

(iv) The trial court issued non-bailable warrants against the said five

accused persons summoned U/s 319 Cr.P.C. vide its order dated 8.12.2023, as such, the said order of the trial court was also placed before the Supreme Court and the same was again stayed.

(v) The Supreme Court was pleased to dispose of the said SLP vide its order dated 21.2.2024, as such, again the trial court issued non-bailable warrants against the said 05 accused persons vide order dated 21.3.2024. In the meantime, the court was informed that one of the accused persons, namely, Arjun Singh had expired, as such, his death report was sent for verification.

(vi) One of the five accused persons summoned, Surya Nath Singh surrendered before the court on 13.9.2024 and his bail application was disposed of on 18.9.2024, but his bail application was allowed by this Court vide order dated 12.11.2024.

CONCLUSION:

9. Allowing the bail of the accused in **Javed Gulam Nabi Shaikh Vs. State of Maharashtra and Another¹**, the Supreme Court has observed as follows:

"7. Having heard the learned counsel appearing for the parties and having gone through the materials on record, we are inclined to exercise our discretion in favour of the appellant herein keeping in mind the following aspects:

(i) The appellant is in jail as an under-trial prisoner past four years;

(ii) Till this date, the trial court has not been able to even proceed to frame charge; and

(iii) As pointed out by the counsel appearing for the State as well as NIA, the prosecution intends to examine not less than eighty witnesses.

8. Having regard to the aforesaid, we wonder by what period of time, the trial will ultimately conclude. Howsoever serious a crime may be, an accused has a right to speedy trial as enshrined under the Constitution of India.

9. Over a period of time, the trial courts and the High Courts have forgotten a very well settled principle of law that bail is not to be withheld as a punishment.

*10. In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in **Gudikanti Narasimhulu & Ors. v. Public Prosecutor, High Court²**. We quote:*

"What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said [R v. Rose, (1898) 18 Cox]:

"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial."

*11. The same principle has been reiterated by this Court in **Gurbaksh Singh Sibba v. State of Punjab³**, that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment.*

*12. Long back, in **Hussainara Khatoon v. Home Secy., State of Bihar⁴**, this court had declared that the right to speedy trial of offenders facing criminal*

charges is "implicit in the broad sweep and content of Article 21 as interpreted by this Court". Remarking that a valid procedure under Article 21 is one which contains a procedure that is "reasonable, fair and just" it was held that:

"Now obviously procedure prescribed by law for depriving a person of liberty cannot be "reasonable, fair or just" unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21."

13. The aforesaid observations have resonated, time and again, in several judgments, such as **Kadra Pahadiya & Ors. v. State of Bihar**⁵ and **Abdul Rehman Antulay v. R.S. Nayak**⁶. In the latter the court re-emphasized the right to speedy trial, and further held that an accused, facing prolonged trial, has no option:

"The State or complainant prosecutes him. It is, thus, the obligation of the State or the complainant, as the case may be, to proceed with the case with reasonable promptitude. Particularly, in this country, where the large majority of accused come from poorer and weaker sections of the society, not versed in the ways of law, where they do not often get competent legal advice, the application of

the said rule is wholly inadvisable. Of course, in a given case, if an accused demands speedy trial and yet he is not given one, may be a relevant factor in his favour. But we cannot disentitle an accused from complaining of infringement of his right to speedy trial on the ground that he did not ask for or insist upon a speedy trial."

14. In **Mohd Muslim @ Hussain v. State (NCT of Delhi)**⁷, this Court observed as under:

"21. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

22. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in **A Convict Prisoner v. State** reported in **1993 Cri LJ 3242**, as "a radical transformation" whereby the prisoner:

"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."

23. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal" (also see Donald Clemmer's 'The Prison Community' published in 1940). Incarceration has further deleterious effects where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

15. The requirement of law as being envisaged under Section 19 of the National Investigation Agency Act, 2008 (hereinafter being referred to as "the 2008 Act") mandates that the trial under the Act of any offence by a Special Court shall be held on day-to-day basis on all working days and have precedence over the trial of any other case and Special Courts are to be designated for such an offence by the Central Government in consultation with the Chief Justice of the High Court as contemplated under Section 11 of the 2008.

16. A three-Judge Bench of this Court in **Union of India v. K.A. Najeeb**⁸ had an occasion to consider the long incarceration and at the same time the effect of Section 43-D(5) of the UAP Act and observed as under: (SCC p. 722, para 17)

"17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both

the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."

17. In the recent decision, **Satender Kumar Antil v. Central Bureau of Investigation**⁹, prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that Section 436A (which requires inter alia the accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:

"We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the

adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code."

18. Criminals are not born out but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juvenile and adult. Indeed, every saint has a past and every sinner a future. When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.

19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.

20. We may hasten to add that the petitioner is still an accused; not a convict. The over-arching postulate of criminal jurisprudence that an accused is presumed to be innocent until proven guilty cannot be brushed aside lightly, howsoever stringent the penal law may be."

10. The Supreme Court has also allowed the bail of the accused on ground of her long period of incarceration i.e. 6½ years and there being no likelihood of conclusion of trial in near future in the case of **Indrani Pratim Mukerjea v. CBI**¹⁰.

11. In the money laundering case of **V. Senthil Balaji V. The Deputy Director, Directorate of Enforcement**¹¹, the accused was incarcerated for more than 15 months as such the Supreme Court declared "inordinate delay in the conclusion of the trial and the higher threshold for the grant of bail cannot go together".

12. In a significant judgment of **Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari v. State of Uttar Pradesh**¹² granting bail to an undertrial prisoner facing charges under the Unlawful Activities (Prevention) Act, 1967 (UAPA), the Supreme Court held that a constitutional court can grant bail despite statutory restrictions if it finds that the right to speedy trial under Article 21 of the Constitution has been infringed.

13. While granting bail to ex-West Bengal minister in **Partha Chatterjee v. Enforcement Directorate**¹³, the Supreme Court reiterated the principle that "a suspect cannot be held in custody indefinitely and that undertrial incarceration should not amount to punitive detention."

"The Court would, nevertheless, ensure that affluent or influential accused do not obstruct the ongoing investigation, tamper with evidence, or influence witnesses, namely, actions that undermine the fundamental doctrine of a fair trial," observed the bench.

14. Learned AGA could not bring forth any exceptional circumstances which would warrant denial of bail to the applicant.

15. It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA.

16. It is deeply regrettable that the applicant has been languishing in jail for approximately seven years and nine months, with the trial having remained stagnant since 25.10.2019. Such prolonged incarceration, coupled with the complete lack of progress in the trial, is a serious infringement on the applicant's fundamental right to a speedy trial as guaranteed under Article 21 of the Constitution of India. Keeping the applicant in custody under these circumstances, when there is no realistic possibility of the trial being concluded in the near future, is both unjust and unwarranted. Justice demands that the applicant's continued detention be reconsidered, and appropriate relief be granted without delay.

17. Having heard learned counsels for the parties, taking into consideration the circumstances of the instant case as three accused persons are still absconding, there being no likelihood of conclusion of trial in near future and the fact that there are sixteen witnesses to be examined of which three have been examined; furthermore in the case of summoning additional accused U/s 319 Cr.P.C., the statements of already

examined witnesses are to be recorded again and the trial shall almost proceed de-novo as also in the light of aforesaid judgments of the Supreme Court, and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is **allowed**.

18. Let the applicant- **Sarvajeet Singh** involved in aforementioned case crime number be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

(i) The applicant shall not tamper with evidence.

(ii) The applicant shall remain present, in person, before the Trial Court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C./351 B.N.S.S. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

19. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

20. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2025) 1 ILRA 74
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.01.2025

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 351 of 2005
And
Criminal Appeal No. 532 of 2005
And
Criminal Appeal No. 402 of 2005

Annu Khatik & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

C.L.Yadav, A A Zaidi, Bipin Kumar Rai,
Mohd. Shahnawaz Khan, Nagendra Kumar
Dwivedi, P.K. Mishra, R K Dwivedi,
S.K.Srivastava, Sagar Singh, Shatrughan
Yadav, Shri Ram Maurya

Counsel for the Respondent:

Govt. Advocate

A. Criminal Law - Murder - Indian Penal Code, 1860 - Section 302 - Indian Evidence Act, 1872 - Section 8 - Motive - In cases based on the direct evidence of witnesses, the same should be decided on the basis of the quality and probative value of such eye-witnesses. Where the direct evidence is worthy of credence and can be believed, the question of motive becomes more or less academic. Motive does not have a major role to play in cases based on eye-witness account of the incident. It assumes importance only in cases that rest on circumstantial evidence. Mere absence of proof of motive for the commission of a crime cannot be a ground to presume the innocence of an accused if his involvement is otherwise established. Prosecution is not obliged to prove those facts which are either impossible to prove or are locked up in the mind of the

accused as to what made them commit the crime. In the instant case, the family of the deceased and the accused were having enmity regarding a land. The accused had made hindrance in the access of the informant to the said land, and altercations had occurred many times regarding the same. (Paras 28, 29)

B. Criminal Law - Credibility of Related Witnesses - Natural witness - Indian Evidence Act, 1872 - Sections 3, 118 & 134 - Merely because the witnesses are close relatives of the victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects the credibility of a witness. A relative would not conceal the actual culprit and make allegations against an innocent person. If the prosecution witnesses, who claim to have seen the incident, are natural witnesses and their presence at the place of occurrence is natural and cannot be doubted, then their relationship with the deceased or the informant is not of much importance. However, the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible. (Para 39)

C. Criminal Law - Murder - Indian Evidence Act, 1872 - Independent witness - If an independent witness has not been produced by the prosecution, the same may not be sufficient to discard the evidence of other prosecution witnesses, who in the opinion of the Court, appears to be the natural witnesses of the incident. (Para 43)

D. Criminal Law - Murder - Indian Evidence Act, 1872 - Credibility of Witnesses contradictions, embellishments in the evidence of the prosecution witnesses - Court must bear in mind the set up and the circumstances in which the crime is committed, the quality of evidence, nature and temperament of the witnesses, the level of understanding and power of perception and examination of individual witness and probability in

ordinary course of nature about the act complained of as might have been witnessed by the witnesses. Endeavour must be to find out the truth from the evidence on record. At the same time, it must not be forgotten that there cannot be a prosecution case with a cast iron perfection in all respects. Obligations lies upon the courts to analyze, sift and assess the evidence on record, with reference to trustworthiness and truthfulness of the prosecution case, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the evidence without being obsessed by an air of total suspicion about the case of the prosecution. The contradictions, infirmities, that might have been pointed out in prosecution case must be assessed with the yardsticks of probabilities of the existence of a fact or not. Unless, infirmities and contradictions are of such nature as to undermine the substratum of the evidence and found to be tainted to the core of the prosecution case, over emphasis may not be applied to such contradictions and infirmities. To judge the credibility of the evidence of witness, one has to look to his evidence, and if any discrepancies found in the ocular account of the witnesses not affecting the root of the say of the witness, the witness may not be labeled as not credit worthy. At the same time, seeking rule of corroboration, mathematical niceties may not be expected. The account of the witnesses must be read as a whole and once the impression is formed that the account contains ring of truth, jettisoning whole of the evidence would amount to doing injustice to a reliable and honest witness. Even honest and truthful witnesses may differ in some details, which may not be related to the main cause of prosecution case, and their evidence therefore must be appreciated keeping in mind the power of observation, retention and reproduction of the same by the witness to be judged by human standard. (Par 46)

E. Criminal Law - Murder - Indian Penal Code, 1860 - Section 302 - Code of Criminal Procedure, 1973 - Section 157 -

Where the F.I.R. is recorded without delay and investigation has started on its basis, delay in dispatch of its copy to the Magistrate cannot, by itself, justify a conclusion that the investigation was tainted. Delay under Section 157 Cr.P.C. for doubting the authenticity of the F.I.R. is not just any delay but only extraordinary and unexplained delay. Delay which is properly explained cannot be said to be fatal to the prosecution. In the instant case, the deceased, who was injured at that time, was first taken to the police station and thereafter to the District Hospital, Faizabad. Only after that, P.W.-1 again went to the police station and lodged the F.I.R. The same cannot be termed either ante-timed or lodged with delay. The prosecution has explained the little delay which occurred in lodging of the F.I.R. properly and with documentation. The Court held that the prosecution's case could not be doubted only on this score. (Paras 32, 33, 34)

F. Criminal Law – Murder – Indian Penal Code, 1860 – Sections 34 & 149 – Constructive Criminality – Common Intention and Common Object. Sections 34 & 149 of the IPC both deal with the concept of constructive criminality, i.e., vicarious liability of one person for the acts of others. However, a clear distinction exists between common intention u/s 34 and common object u/s 149. Common intention requires a pre-arranged plan and concerted action, supported by evidence of prior meeting of minds. In contrast, common object under Section 149 does not necessitate prior concert or preplanning. While Section 34 requires active participation in the crime, especially where physical violence is involved, Section 149 imposes liability merely by virtue of membership in an unlawful assembly sharing a common object, even without active participation. Existence of common intention must be established by the prosecution with credible evidence. Notably, Section 34 is not attracted by mere common intention unless some act is done in furtherance of that intention. In cases where fewer than

five accused are finally convicted under Section 149 due to acquittals, the Court may invoke Section 34 instead, depending on the facts. However, substitution of Section 34 for Section 149 should not prejudice the accused unless the common object necessarily involves a common intention. In the present case the evidence established that the three appellants arrived together, assaulted the deceased inside his house, dragged him outside and assaulted him again in front of the temple, and then fled together. Their coordinated actions demonstrated a pre-designed plan and shared common intention. Therefore, they were rightly convicted under Section 34 IPC in place of Section 149 IPC. (Para 64)

Dismissed. (E-5)

List of Cases cited:

1. Marudanal Augusti Vs St. of Kerala; 1980 SCC (Cri) 985
2. Ishwar Singh Vs The St. of U.P. AIR 1976 SC 2423
3. Lakshmi Singh & ors. etc. vs St. of Bihar AIR 1976 SC 2263
4. Arjun Marik Vs St. of Bihar reported in MANU/SC/1037/1994 : 1994 Supp (2) SCC 372
5. Sukhram Vs St. of Mah. MANU/SC/3346/2007 : (2007) 7 SCC 502
6. Sunil Clifford Daniel (Dr.) Vs St. of Pun. MANU/SC/0740/2012 : (2012) 8 SCALE 670
7. Pannayar Vs St. of T.N. by Inspector of Police MANU/SC/1462/2009 : (2009) 9 SCC 152
8. Molu & ors. Vs St. of Har. MANU/SC/0143/1976 : AIR 1976 SUPREME COURT 2499
9. Praful Sudhakar Parab Vs St. of Mah., MANU/SC/0689/2016 : AIR 2016 SUPREME COURT 3107
10. Ishwar Singh & ors. Vs St. of U.P. MANU/SC/0120/1976 : AIR 1976 SC 2423
11. Anil Rai Vs St. of Bihar, MANU/SC/1586/2001
12. Sucha Singh & ors. Vs St. of Pun., MANU/SC/0527/2003
13. Dharnidhar & ors. Vs St. of U.P. & ors., MANU/SC/0480/2010
14. Gangabhavani Vs Rayapati Venkat Reddy & ors. (04.09.2013 - SC) : MANU/SC/0897/2013
15. Bhagaloo Lodh & ors. Vs St. of U.P. reported in MANU/SC/0700/2011
16. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. as reported in AIR 1983, 753, MANU/SC/0090/1983
17. Mahendran & ors. Vs St. of T.N. and Ors. Reported in MANU/SC/0257/2019
18. Baljinder Singh & ors. Vs St. of Pun., MANU/SC/1063/2024
19. Madhusudan & ors. Vs St. Of M.P., Criminal Appeal No.1509 of 2010 dt 05.05.2024

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard Shri Rajesh Kumar Dwivedi, learned Amicus for appellant- Chunni Lal and Raj Kumar Yadav, who have been released from the prison after remission has been granted to them in Criminal Appeal Nos. 351 of 2005 and 532 of 2005, Shri Chandra Shekher Pandey for appellant- Sanjay Yadav in Criminal Appeal No. 402 of 2005 and Shri Bipin Kumar Rai for appellant- Annu Khatik and Shri A.A. Zaidi for appellant- Munna Khatik in Criminal Appeal No. 351 of 2005 and Shri Prabhat Adhaulia, learned A.G.A. for the State and perused the record.

2. All these appeals have been preferred by the convict appellants against the same impugned judgment and order and thus for the sake of convenience all these three appeals are being disposed off by this common judgment.

3. These criminal appeals have been preferred by appellants- Annu Khatik, Munna Khatik and Chunnilal in Criminal Appeal No.351 of 2005, appellant- Raj Kumar Yadav in Criminal Appeal No. 532 of 2005 appellant- Sanjay Yadav in Criminal Appeal No. 402 of 2005, under Section 374(2) Cr.P.C. against the judgment and order dated 18.02.2005 passed by Special Judge (S.C./S.T. Act), Faizabad convicting and sentencing the appellants under Sections 147 IPC for one year rigorous imprisonment each, under Section 452 IPC for three years rigorous imprisonment with fine of Rs. 1000/- each and under Section 302 read with Section 149 IPC for life imprisonment with fine of Rs. 500/- each, the appellant no.3/Chunni Lal in Criminal Appeal No. 351 of 2005 under Section 3(1)(X) SC/ST Act for two years rigorous imprisonment with fine of Rs. 1000/- and in default of payment of fine the rigorous imprisonment for one year year each, acquitting the appellants no.1 and 2 under Section 3(1)(X) of SC/ST Act and acquitting the appellants under Sections 504 and 506 IPC each in S.T. No. 400/1996, arising out of Case Crime No. 1747/1991, under Sections 147, 452, 506/149, 504/149, 302/149 IPC and 3(1) (X) SC/ST Act, Police Station Kotwali Nagar, District Faizabad.

4. Brief facts necessary for disposal of the instant appeals are in terms that the informant Nirmala lodged a First Information Report at Police Station Kotwali Nagar Faizabad on 25.11.1991 at 22.30 hours by moving a written application alleging therein that she is resident of Mohalla Khurdabad

and on 25.11.1991 at about 6.00 p.m. accused persons Raj Kumar Yadav, Chunnilal Kahar, Sanjay, Munna, Annu and others came to her house and called her son Raju and when she replied that he is coming in a while, accused Raj Kumar entered into her house, hurling filthy abuses and assaulted her son and on an alarm raised by her, her son Putti Lal and many others persons of the locality arrived and at that moment accused persons dragged her son outside the house and started assaulting him with lathi and hockey on his head with the intention to kill him and thinking that he is died they all fled away. The head of her son was fractured from many places, he became unconscious. It is also stated in the end that she had admitted her son in a hospital.

5. On the basis of above written information an FIR at case Crime No. 1747 of 1991, under Sections 147, 452, 323, 308, 504, 506 IPC and 3(1) (X) of the SC/ST Act was registered and the investigation was entrusted to Sub Inspector Shri Santosh Kumar Yadav.

6. The injured Raju was taken to District Hospital Faizabad and following injuries were found on his person by Dr. K.N. Kaushal:-

"(i) Lacerated wound on left side of skull 2 c.m.x 5 c.m. x muscle deep 4 c.m. above left eye brow bleeding present.

(ii) Lacerated wound 4 c.m. x 5 c.m. bone deep on the left side, 1 c.m. above injury no.1, bleeding present.

(iii) Lacerated wound 7c.m. x 5 c.m. x bone deep on right side of skull 6 c.m. of above right eye brow.

(iv) Lacerated wound 1.5 c.m. x 0.5 c.m. muscle deep on right side of forehead 3.5 c.m. above eye brow.

(v) *Lacerated wound 2.5 c.m. x 0.5 c.m. bone deep on right side of head 2 c.m. above the injury no.2.*

(vi) *Lacerated wound 3.5 x 1.0 c.m. x bone deep on right side of head 9 c.m. above right eye bleeding present.*

(vii) *Contused swelling 2x1 c.m. on middle of forehead 3 c.m. above bridge of nose.*

(viii) *Abrasion 1.5 c.m. x 1 c.m. on the bridge of the nose."*

All these injuries were fresh and kept under observation x-ray of skull was advised and in the opinion of the doctor these injuries had been caused by hard and blunt object. The injured was found conscious and he was bleeding from his injuries.

7. The deceased died during the course of treatment and as Sub Inspector Santosh Kumar Yadav was not present at the Police Station, Sub Inspector of Police Indra Prakash Singh proceeded to spot and prepared inquest report of the deceased and also necessary papers for the purpose of postmortem and forwarded the dead body of the deceased for the purpose of postmortem.

8. The postmortem on the dead body of the deceased was conducted by Dr. Santosh Kumar Singh on 27.11.1991 at 4.15 p.m. and following injuries were found on the dead body of the deceased:-

"(i) Stitched wound 2 c.m. long 1 stitched present on the left side of the head, 4 c.m. above left eye.

(ii) Stitched wound 7 c.m. long 4 stitches present at right side of skull, 6 c.m. above of right eye brow.

(iii) Stitched wound 4 c.m. long 2 stitches present left side of the head, 1 c.m. above injury no.1.

(iv) Stitched wound 10 c.m. long 5 stitches present on right side of forehead 4 c.m. above eye brow.

(v) Stitched wound 2.5 c.m. long 1 stitch present on right side of skull, c c.m. above injury no.3.

(vi) Stitched wound 3.5 c.m. long 2 stitches present right side of skull.

(viii) contusion 2 c.m. x 1 c.m. on middle of nose.

viii) Abrasion 1.5 c.m. x 0.1 c.m. on the bride of the nose.

(ix) Black discoloration of right eye."

9. On internal examination parietal, occipital and frontal bones of the skull were found fractured. The membranes were found lacerated and 3 ounce clotted blood was also found in the skull and 4 ounce liquid has been found abdominal cavity and as per the opinion of the doctor the death of the deceased had occurred due to shock on account of 'ante- mortem' injuries.

10. The second Investigating Officer of the case Sub-Inspector Pannalal prepared site plan of the spot and also recorded the statement of the witnesses and thereafter the investigation of the case was transferred to Sub Inspector Santosh Kumar Yadav who also recorded the statement of various witnesses and also moved an application for recording the statement of the witnesses, namely, Nirmala, Putti Lal and Tara under Section 164 Cr.P.C. and after finding sufficient material/ evidence, he forwarded charge sheet against all the accused persons except Munna Khatik under Sections 147, 149, 452, 504, 506, 302 IPC and Section 3(1) (X) of the SC/ST Act. The Investigating Officer has submitted a separate charge sheet under the same penal section against Munna Khatik separately.

11. The trial court framed charges against the accused persons under Sections 147, 452, 506/149, 504/149, 302/149 IPC and under Section 3(1) (X) of the SC/ST Act. All accused persons denied the charges and claimed trial.

12. Prosecution in order to prove its case presented before the trial court P.W.1- Nirmala, P.W.2- Putti Lal, P.W.3- Sub Inspector Santosh Kumar Yadav, P.W.4- Inra Prakash Singh, P.W.5- Dr. K.N. Kaushal, P.W.6- Dr. Santosh Kumar Singh.

13. **P.W.1- Nirmala** is the informant of the instant case. She stated before the trial court that on the relevant day and time there was a feast in the house of accused persons- Annu Khatik and Munna Khatik as a bride had arrived in their house and accused persons Raj Kumar Singh and Chunni Lal have arrived in their house to participate in the ceremony and at about 6-7 p.m. when she was at her house the accused persons arrived and asked about her son Raju and when she informed that Raju is inside the house, they entered the house and dragged Raju out of the house and took him towards the temple and assaulted him brutally and thinking that he has died they left him there. She also stated that the deceased was assaulted by Raj Kumar and Sanjay with 'lathi', while Chunni Lal was carrying a 'hockey' and Munna and Annu were carrying 'bottles' and they assaulted the deceased with the same. She also stated to have taken the injured/deceased to the Police Station and also that the police personnel advised her to take the injured to the hospital and she after admitting her son in the hospital came back to the police station and had given written application on the basis of which the FIR was lodged.

14. **P.W.2- Putti Lal** is claiming himself to be the eye witness of the crime

and he has stated that at the relevant day at about 6.00 p.m. when he was at his house the accused persons Raj Kumar, Chunni Lal and Sanjay arrived and asked about Raju and when his mother informed that he is in the house, accused persons Raj Kumar and Chunni Lal with 'lathi' and Sanjay Yadav with 'hockey' assaulted Raju in his house and dragged him out of his house and on hue and cry made by Raju, Annu and Munna and many other persons assembled and after seeing them the accused persons fled away. He also stated that injured Raju has sustained many injuries on his head and was taken to Kotwali from where they were directed to take the injured to the hospital and to lodge the report thereafter.

15. **P.W.3- Sub Inspector Santosh Kumar Yadav** is the second Investigating Officer who has submitted the charge sheet against the accused persons under the relevant penal sections and he stated to have recorded the statement of many witnesses and to have submitted charge sheet against the accused persons, Sanjay Yadav, Chunni Lal, Annu Khatik and Raj Kumar Yadav and also against Munna Khatik separately. He has also proved the Chick FIR as well as the copy of the General Diary by stating that the same was written by Constable Ram Lakhan and he is conversant with his hand writing as they have remained posted together at a police station.

16. **P.W.4- Indra Prakash Singh** has stated to have prepared the inquest report of the deceased and necessary papers for the postmortem.

17. **P.W.5- Dr. K.N. Kaushal** is stated to have examined the injuries of the injured Raju at 8.35 p.m. on 25.11.1991 and the description of his injury has been

given at the appropriate place in this jugemnt.

18. **P.W.6-Dr. Santosh Kumar Singh** has stated to have prepared the postmortem report of the deceased and proved the same as Ext. Ka-16 and the injuries noted by him as well as internal examination conducted by him has been recorded in the postmortem report, which has been mentioned at an appropriate place in this judgment herein-before. He has also stated that the death of the deceased, in his opinion, was caused by 'shock' as a result of ante-mortem injuries.

19. Apart from the above mentioned oral evidence the prosecution has also relied on various documentary evidence e.g. written information, Chick FIR, G.D. Kayami, Site Plan, injury report of the deceased Raju who at that point of time was alive, postmortem report, necessary papers prepared for the purpose of sending the body to postmortem, inquest report and charge sheets.

20. After conclusion of the evidence of the prosecution, the statement of the accused persons under Section 313 of the Cr.P.C. was recorded wherein they denied all the evidence produced by the prosecution and further stated that the deceased was a person of bad character and also a police informer and he has been done to death by unknown persons in the darkness of night and on the basis of enmity a false case has been framed against the accused persons.

21. The trial court after appreciating the evidence available on record found the case of the prosecution proved against the accused persons beyond reasonable doubt and convicted all of them under Section

147 IPC, 452 IPC and 302 IPC read with Section 149 IPC and 3(1)(X) of the SC/ST Act and sentenced accordingly. However, all the accused persons were acquitted of the charges framed against them under Sections 504, 506 IPC.

22. Learned counsels for the appellants while challenging the impugned judgment and order of the trial court, submitted that the trial court has committed manifest illegality in appreciating the evidence available on record and has passed the judgment of conviction only on the basis of '*surmises and conjectures*'. It is submitted that the F.I.R. is doubtful as P.W.-1/Nirmala and P.W.-2/Putti Lal both have stated that they had first gone to the police station and from there they were directed to take the injured to the hospital and after admitting the injured in the hospital P.W.-1/Nirmala came back to the police station for the purpose of lodging the F.I.R. while there is no G.D. entry with regard to the same and the F.I.R. appears to have been interpolated as it has been written in that F.I.R. with a different ink that the injured has been admitted in the hospital.

It is further submitted that the case of the prosecution is that the deceased was dragged from his house upto the temple, in front of which he was done to death, but there was no dragging marks found by the investigating officer and even no blood was found by the investigating officer on spot.

It is also submitted that it is admitted to the prosecution that the injured was alive and had died during the course of treatment after his admission in the hospital, however, no attempt has been made to record his dying declaration so the truth may surface.

It is next submitted that there is a huge delay in lodging the F.I.R. and the same has not been explained and a copy of the F.I.R. was also not forwarded to the magistrate, as required under Section 157 of the Cr.P.C. and no specific weapon has been assigned to any particular accused person, to have been used in the assault.

23. Shri Chandra Shekhar Pandey, learned counsel appearing for the convict-Sanjay Yadav, vehemently submits that the improbability in story of the prosecution would be evident from the fact that though father of the deceased is alive and was also present in the village but he was kept completely out of the scene as he has neither taken the injured to the hospital nor he had gone with his wife, namely, P.W.-1/Nirmala to the police station or hospital and this itself speaks volumes about the falsity of the case of the prosecution as when he was present at the time of inquest why he did not go to the hospital or police station.

It is further submitted that even after lodging of the F.I.R. the investigating officer has not visited the injured person for the purpose of recording of his statement under Section 161 Cr.P.C. It is also highlighted that it appears to be an admitted fact that on the day of the incident there was a ceremony in the house of Munna Khatik and Annu Khatik as the bride of Annu Khatik had arrived in his house and the other three accused persons, namely, Raj Kumar Yadav, Chunni Lal Yadav and Sanjay Kumar Yadav had come as guests in the dinner/get-together and, therefore, there was no opportunity available to them to have participated in the 'marpeet' without there being any reason and it is not clear from the evidence of the prosecution witnesses as to why the accused persons

would assault the deceased on that day when there is a feast organized at the house of Munna Khatik and there were several persons of the village attending the same.

It is further submitted that accused persons Annu Khatik and Munna Khatik were shown carrying bottles in their hands and also to have assaulted the deceased with the same, however, there is no injury found on the person of the deceased which may relate to these bottles.

It is also submitted that only two witnesses of fact have been presented by the prosecution while the testimony of both these witnesses is highly suspicious, contradictory and is not reliable and the trial court has committed an illegality in relying on the testimony of these untruthful witnesses.

It is vehemently submitted that P.W.-1/Nirmala Devi and P.W.-2/Putti Lal are mother and son and, thus, no independent witness has been produced and apart from the fact that their testimony is not reliable and having sufficient contradictions the same could also not be accepted as they are related witnesses.

24. Shri Rajesh Kumar Dwivedi, learned Amicus for the appellants- Raj Kumar Yadav and Chunni Lal has relied on following cases propounded by the Hon'ble Supreme Court;

1- 1980 SCC (Cri) 985
(Marudanal Augusti vs. State of Kerala)

2- AIR 1976 SC 2423 **(Ishwar Singh vs. The State of U.P.)**

3- AIR 1976 SC 2263 **(Lakshmi Singh and others etc. vs State of Bihar).**

25. Learned A.G.A. on the other hand submits that P.W.-1/Nirmala Devi and P.W.-2/Putti Lal are the natural witnesses of incident they have seen the incident and

have given detailed account of the incident and accused Annu Khatik and Munna Khatik are sons of the *jethani* of P.W.-1/Nirmala and Rajkumar is the person to whom the disputed land has been given by *jethani* Lalli and it is an admitted fact that the parties were having inimical relationship on account of claim and counter claim on a piece of agricultural land and also that the prosecution witnesses have given truthful account of the incident and keeping in view all the facts and circumstances of the case, no illegality appears to have been committed by the trial court.

26. Perusal of the record in the light of the submissions made by learned counsels for the parties would reveal that so far as submission of Ld counsel for the appellant with regard to inadequacy of motive is concerned P.W.-1/Nirmala Devi in her statement has stated that her husband Ram Autar and father of accused Munna Khatik were real brothers and they have divided their properties and were living separately since long. She further stated that some land was lying near her house wherein she and accused Munna Khatik were having equal share and some days before the incident mother of Munna Khatik and Annu Khatik, namely, Lalli had asked her not to go towards that land and they were having enmity with regard to the same land. She also stated that her *jethani* Lalli had given this land to the accused Raj Kumar Yadav. It is also evident from the statement of this witness that accused persons Sanjay and Chunni Lal are the friends of Raj Kumar while Chuuni Lal is a resident of Gonda but he had come to reside in the house of his maternal uncle Ram Autar 'kahar' and when Lalli Devi had given the disputed land to Raj Kumar these all five persons started making hindrance in

the access of the informant on that land and altercation had occurred many times with regard to the same.

27. Thus, it is evident that the parties were inimical towards each other on the basis of above piece of land wherein P.W.-1/Nirmala Devi and Munna Khatik were having equal share and the said land was given by the mother of Munna, namely, Lalli Devi (*jethani* of the informant Nirmala) to accused Raj Kumar Yadav. The accused in their statements recorded under Section 313 Cr.P.C. have denied the fact that they were having enmity with the informant side. However, they apart from saying that deceased was a person of bad character and was also a police informer and has been done to death by some unknown person have further stated that they have been implicated in this case on the basis of '*ranjish*' (enmity). Thus, the element of enmity has also been admitted by the accused persons/convicted appellants. Thus, it was proved before the trial court that the informant Nirmala and accused person Munna Khatik and his family were having inimical relationship and the basis of this enmity was a piece of land jointly owned by Nirmala and Lalli, which was given by the mother of Munna, namely, Lalli Devi to accused Raj Kumar.

28. In *Arjun Marik v. State of Bihar* reported in MANU/SC/1037/1994 : 1994 Supp (2) SCC 372, the Supreme Court explained that:

"...mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial

evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anyone else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused."

It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest on circumstantial evidence. In the cases of *Sukhram v. State of Maharashtra* MANU/SC/3346/2007 : (2007) 7 SCC 502, *Sunil Clifford Daniel (Dr.) v. State of Punjab* MANU/SC/0740/2012 : (2012) 8 SCALE 670, *Pannayar v. State of Tamil Nadu by Inspector of Police* MANU/SC/1462/2009 : (2009) 9 SCC 152], this principle has been highlighted.

29. A three Judges Bench Of Hon'ble Supreme Court in *Molu and others v. State of Haryana* MANU/SC/0143/1976 : AIR 1976 SUPREME COURT 2499 opined as under:-

"11. Finally it was argued by the appellants, following the reasons given by the Sessions Judge, that there was no adequate motive for the accused to commit murder of two persons and to cause injuries to others. It is wellsettled that where the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes, however, the motive is shrouded

in mystery and it is very difficult to locate the same. If, however, the evidence of the eye-witnesses is credit-worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is any motive or not becomes wholly irrelevant. For these reasons, therefore, we agree with the High Court that the prosecution has been able to prove the case against the appellants beyond reasonable doubt."

*In **Praful Sudhakar Parab v. State of Maharashtra**, MANU/SC/0689/2016 : AIR 2016 SUPREME COURT 3107 Hon'ble Supreme Court stated as under:-*

*"16. One of the submissions which has been raised by the learned amicus curiae is that the prosecution failed to prove any motive. It is contended that the evidence which was led including the recovery of bunch of keys from guardroom was with a view to point out that he wanted to commit theft of the cash laying in the office but no evidence was led by the prosecution to prove that how much cash were there in the pay office. Motive for committing a crime is something which is hidden in the mind of accused and it has been held by this Court that it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person. This Court in **Ravinder Kumar and another v. State of Punjab**, MANU/SC/0536/2001 : 2001 (7) SCC 690: (AIR 2001 SC 3570), has laid down following in paragraph 18:*

"18 It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. In this connection we deem it useful to refer

to the observations of this Court in ***State of Himachal Pradesh v. Jeet Singh*** {MANU/SC/0165/1999 : 1999 (4) SCC 370: (AIR 1999 SC 1293)}:

"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

Keeping in view the above stated law we are of the considered opinion that the prosecution is not obliged to prove those facts which are either impossible for the prosecution to prove or which are locked up in the mind of the accused persons, as to what made them to commit the crime. Therefore, the cases which are based on direct evidence of the witnesses should be decided on the basis of the quality and probative value of the evidence of such eye witnesses.

30. Learned counsel for the appellants has also assailed the Judgment of the trial court on the ground that there is inordinate delay in lodging of the F.I.R. and also on the score that F.I.R. is ante-timed as the copy of the F.I.R. has not been forwarded to 'Ilaka Magistrate' as provided under Section 157 of the Code of Criminal Procedure.

In this regard, learned Amicus Shri Rajesh Kumar Dwivedi has relied on the law laid down by the Hon'ble Supreme Court in ***MANU/SC/0120/1976 : AIR 1976 SC 2423 (Ishwar Singh and others vs. State of U.P.)***.

31. At first, it is to be highlighted that in the law relied on by learned Amicus, the extraordinary delay in sending the copy of the F.I.R. to 'Ilaka Magistrate' was not the only ground for recording the judgment of acquittal and for doubting the prosecution case as there were many other factors also which have rendered the case of the prosecution as highly improbable.

32. Hon'ble Apex Court in ***Anil Rai vs. State of Bihar, MANU/SC/1586/2001***, held as under :-

"30. This provision is designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and, if necessary, to give appropriate direction under Section 159 of the Code of Criminal Procedure. But where the F.I.R. is shown to have actually been recorded without delay and investigation started on the basis of the F.I.R., the delay in sending the copy of the report to the Magistrate cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable Pala Singh and Anr. v. State of Punjab MANU/SC/0199/1972 : AIR 1972 SC 2679. Extraordinary delay in sending the copy of the F.I.R. to the Magistrate can be a circumstance to provide a legitimate basis for suspecting that the first information report was recorded at much later day than the stated day affording sufficient time to the prosecution to introduce improvement

and embellishment by setting up a distorted version of the occurrence. The delay contemplated under Section 157 of the Code of Criminal Procedure for doubting the authenticity of the F.I.R. is not every delay but only extraordinary and unexplained delay. However, in the absence of prejudice to the accused the omission by the police to submit the report does not vitiate the trial. This Court in Sarwan Singh and Ors. v. State of Punjab MANU/SC/0169/1976 : AIR 1976 SC 2304, held that delay in despatch of first information report by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when it is found on facts that the prosecution had given a very cogent and reasonable explanation for the delay in despatch of the F.I.R."

33. Perusal of the record would reveal that the F.I.R. of the instant case has been lodged at 22:30 hours i.e. 10:30 pm. on 25.11.1991 pertaining to an incident which had occurred at about 6:00 pm. It is the case of the prosecution that after the commission of the incident by the accused persons, the injured was taken to the police station by P.W.-1/Nirmala with a written application, however, she was directed by the police personnels to first make arrangements for the treatment of her son as he was not in a good condition and it is on this basis the informant had taken the deceased immediately to the hospital and after admitting him there, She came back to the police station and lodged the F.I.R. In this regard, the time when the injured, who later on died, was examined by Doctor K.N. Kaushal at district hospital Faizabad/Ayodhya is relevant as the injuries on the person of injured Raju were examined by Dr. K.N. Kaushal at district hospital Faizabad on 25.11.1991 at 8:35

pm. Thus, it is evident that before 8:35 pm. the injured/deceased would have been admitted in the hospital. The truthfulness of the fact that the informant was directed by the police personnel to first go to the hospital is also evident from the perusal of the F.I.R. wherein this fact that she had admitted the injured in the hospital has been written in a different ink and pen.

Perusal of the Chik F.I.R. would further reveal that the substance of the information so given by the informant in writing has been entered in the General Diary of the police station, which is also available on record and has also been proved by the prosecution. Thus, having regard to the fact that the deceased, who at that point of time was injured, was first taken to the police station and thereafter he was admitted in the district hospital Faizabad and thereafter P.W.-1/Nirmala had again came to the police station and lodged the F.I.R., The same could not be termed as either ante-timed or lodged with delay.

34. It is to be recalled that every delay in lodging of the F.I.R. is not fatal. The delay, which has not been properly explained by the prosecution could only be held fatal for the prosecution and in our considered opinion, the prosecution has explained the little delay which has occurred in lodging of the F.I.R. in this case properly and with documentation. Thus, the case of the prosecution could not be doubted only on this score.

So far as the fact that the copy of the F.I.R. of the instant case has been sent to the Magistrate with delay could also not be a ground to doubt the otherwise truthful testimony of the eye witnesses. Perusal of the record would further reveal that there is

an endorsement on the Chik F.I.R. of the circle officer of the police dated 29.11.1991 of forwarding the Chik F.I.R. to the Magistrate, which reflects that the copy of the F.I.R. has been sent by the C.O. to the magistrate with some delay. But keeping in view that fact that F.I.R. was lodged quickly, injured was admitted to the hospital and his injuries were examined at 8:30 pm., we do not find this delay to be fatal to the prosecution.

34. It has also been highlighted by learned counsel for the appellants that P.W.-1/Nirmala is the mother of the deceased Raju while P.W.-2/Putti Lal is the brother of the deceased and, therefore, their evidence could not be accepted as independent public witnesses have not been presented by prosecution before the trial court.

35. So far as this submission of learned counsel for the appellant is concerned that the evidence of these two witnesses, namely, P.W.-1/Nirmala Devi and P.W.-2/Putti Lal could not be believed only on the score that they are mother and son and related to the deceased, we do not find any substance therein. The evidence of these witnesses could not be rejected on this score alone that they are related to the deceased or related to each other.

36. In ***Sucha Singh and Ors. vs. State of Punjab***, MANU/SC/0527/2003 Hon'ble Supreme Court has observed as follows :-

"15. In Dalip Singh and Ors. v. The State of Punjab MANU/SC/0031/1953 : [1954]ISCR145 it has been laid down as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be

tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely, Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

16. The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan MANU/SC/0107/1973 : 1974CriLJ331 in which Vadivelu Thevar v. State of Madras MANU/SC/0039/1957 : 1957CriLJ1000 was also relied upon.

17. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness. should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. It the foundation for such an observation is based on the fact that the

witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan MANU/SC/0036/1951 : 1952CriLJ547 . we find, however, that it unfortunately still persists, it not in the judgements of the Courts, at any rate in the arguments of counsel."

37. In **Dharnidhar and Ors. vs. State of U.P. and Ors.**, MANU/SC/0480/2010, Hon'ble Supreme Court has observed as follows :-

"8. The arguments raised on behalf of the appellants, in fact, can be discussed together inasmuch as they are based upon somewhat common submissions. There is no doubt that PW1 and PW2, both are related to the deceased. The contention raised before us is that both of them are interested witnesses and have not stated true facts before the Court and thus, their statements should be entirely disbelieved. We are unable to find any merit in this contention. It has come on record that Pyare Lal was pursuing a case in which members of the family of the accused persons were involved in a murder. There was apparently some anger and rift between the families. According to the story of the prosecution, they had come prepared to kill Bahadur Singh as well as Pyare Lal as they were carrying guns, sphere etc. The deceased were attacked by the accused in the presence of their brothers, who could not intervene and save them because of the fear of the gun fire and the manner in which the incident occurred.

It was but natural for the prosecution to produce PW1 and PW2 as the main eye witnesses as they had actually seen the occurrence and they have been believed by the trial Court, as well as by the High Court. Even before us, no serious attempt has been made and infact, nothing appears from the record to show that these two witnesses were not present on the site. There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of **Jayabalan v. U.T. of Pondicherry MANU/SC/1801/2009 : (2010)1 SCC 199**, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under:

"23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

"Similar view was taken by this Court in **Ram Bharosey v. State of U.P.**

MANU/SC/1829/2009 : AIR 2010 SC 917, where the Court stated the dictum of law that a close relative of the deceased does not, *per se*, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown over- board, but has to be examined carefully before accepting the same. In the light of the above judgments, it is clear that the statements of the alleged interested witnesses can be safely relied upon by the Court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so called 'interested witnesses' cannot be relied upon by the Court. In the present case, the circumstances are such that we cannot find any error in the concurrent findings of fact recorded by the Trial Court, as well as by the High Court that these two witnesses were present at the respective places and had actually seen the occurrence. Their statements about gun fires, as well as the injuries caused by the kulhari and sphere respectively are duly supported by the medical evidence, as well as by the statements of the investigating officers. Thus, we find that the contention raised on behalf of the appellants is liable to be rejected."

38. In **Gangabhavani vs. Rayapati Venkat Reddy and Ors.** (04.09.2013 - SC)

: **MANU/SC/0897/2013** Hon'ble Supreme Court held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (Vide: *Bhagaloo Lodh and Anr. v. State of U.P.* MANU/SC/0700/2011 : AIR 2011 SC 2292; and *Dhari and Ors. v. State of U.P.* MANU/SC/0848/2012 : AIR 2013 SC 308).

12. In **State of Rajasthan v. Smt. Kalki and Anr.** MANU/SC/0254/1981 : AIR 1981 SC 1390, this Court held:

"5A. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased".....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W. 1

had no interest in protecting the real culprit, and falsely implicating the Respondents.”(Emphasis added)(See also: Chakali Maddilety and Ors. v. State of A.P. MANU/SC/0609/2010 : AIR 2010 SC 3473).

13. In Sachchey Lal Tiwari v. State of U.P. MANU/SC/0865/2004 : AIR 2004 SC 5039, while dealing with the case this Court held:

“7....Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. 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 where people are less formal and more casual, at any rate in the matter explaining their presence.”

14. In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased.”

39. In Bhagaloo Lodh and Ors. vs. State of U.P. reported in MANU/SC/0700/2011 it was held as under :-

“14. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased. (Vide: M.C. Ali and Anr. v. State of Kerala MANU/SC/0247/2010 : AIR 2010 SC 1639; Myladimmal Surendran and Ors. v. State of Kerala MANU/SC/0670/2010 : AIR 2010 SC 3281; Shyam v. State of Madhya Pradesh MANU/SC/7112/2007 : (2009) 16 SCC 531; Prithi v. State of Haryana MANU/SC/0532/2010 : (2010) 8 SCC 536; Surendra Pal and Ors. v. State of U.P. and Anr. MANU/SC/0713/2010 : (2010) 9 SCC 399; and Himanshu @ Chintu v. State (NCT of Delhi) MANU/SC/0006/2011 : (2011) 2 SCC 36).

In view of the law laid hereinabove, no fault can be found with the evidence recorded by the courts below accepting the evidence of closely related witnesses.”

It is therefore settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the

evidence to find out, whether it is cogent and credible evidence.

40. The aforesaid legal position propounded by the Hon'ble Supreme Court would reveal in categorical terms that the relationship of the witnesses with the deceased or informant may not be the only ground to reject their evidence if the prosecution witnesses, who are claiming themselves to have seen the incident, are natural witnesses and their presence at the place of occurrence is natural and could not be doubted. Their relationship with the deceased or informant may not be of much importance if their evidence is otherwise truthful and reliable. However, the testimony of these witnesses is required to be appreciated with a little amount of caution.

41. It is recalled that, in the F.I.R. lodged by P.W.-1/Nirmala, she has stated that there were many residents of the 'mohalla' who had assembled at the scene of the incident and during the course of her examination before the trial court she has also mentioned the name of one Nazar Ali, however, Nazar Ali was not produced as a witness.

42. In **Appabhai and Ors. vs. State of Gujarat**, MANU/SC/0028/1988 The Supreme Court held as under :-

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the

general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused."

43. This Court also could not turn its eye away from the fact what is happening in the society. We are living in a society where nobody wants to get himself involved in the matter of others and when the matter is with regard to a criminal case people, who have seen the incident are reluctant to become witnesses due to various reasons. They want to keep themselves away from the difficulties of Court and police procedure and also they do not want to create any trouble for themselves in near future and, therefore, the prosecution is bound to rely on those prosecution witnesses who are having courage to depose before the Court. In this background, if an independent witness has not been produced by the prosecution, the same may not be sufficient to discard the evidence of the two prosecution witnesses, who in the considered opinion of this Court, appears to be the natural witnesses of the incident having regard to the time on which the incident is said to have occurred.

44. Learned counsel for the appellants have also laid much emphasis on the alleged contradictions, embellishments which according to them have emerged in the evidence of the two witnesses of fact i.e. P.W.-1/Nirmala and P.W.-2/Putti Lal to show that these witnesses are not

trustworthy and, therefore, the trial Court has committed an illegality in recording the judgment of conviction.

45. The manner in which the evidence of prosecution eye witnesses, who are claiming themselves to have seen the incident, is to be appreciated is now no more *res integra* and has been set at rest by Catena of Judgments passed by the Hon'ble Supreme Court

46. While appreciating the evidence on record with reference to the contentions raised, the court is required to exercise due diligence though the standard of such exercise would be of an exercise by prudent person. The Court must bear in mind the set up and the circumstances in which the crime is committed, the quality of evidence, nature and temperament of the witnesses, the level of understanding and power of perception and examination of individual witness and probability in ordinary course of nature about the act complained of as might have been witnessed by the witnesses. The endeavour must be to find out the truth from the evidence on record. At the same time, it must not be forgotten that there cannot be a prosecution case with a cast iron perfection in all respects and reason being that the perfection to that degree in ordinary course of human life is an Utopian thought. However, nevertheless, obligations lies upon the courts to analyze, sift and assess the evidence on record, with reference to trustworthiness and truthfulness of the prosecution case, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the evidence without being obsessed by an air of total suspicion about the case of the prosecution. What is to be insisted upon is *simpliciter* proof emanating from the

circumstances of the case and a ring of truth. The contradictions, infirmities, that might have been pointed out in prosecution case must be assessed with the yardsticks of probabilities of the existence of a fact or not. Unless, infirmities and contradictions are of such nature as to undermine the substratum of the evidence and found to be tainted to the core of the prosecution case, over emphasis may not be applied to such contradictions and infirmities. To judge the credibility of the evidence of witness, one has to look to his evidence, and if any discrepancies found in the ocular account of the witnesses not affecting the root of the say of the witness, the witness may not be labeled as not credit worthy. At the same time, seeking rule of corroboration, mathematical niceties may not be expected. The account of the witnesses must be read as a whole and once the impression is formed that the account contains ring of truth, jettisoning whole of the evidence would amount to doing injustice to a reliable and honest witness. Even honest and truthful witnesses may differ in some details, which may not be related to the main cause of prosecution case, and their evidence therefore must be appreciated keeping in mind the power of observation, retention and reproduction of the same by the witness to be judged by human standard. The attending circumstances of the case on and the probabilities must be judged keeping in mind the human conduct and occurring of the evidents in ordinary course of nature.

47. In *Gangabhavani vs. Rayapati Venkat Reddy and Ors. Reported in MANU/SC/0897/2013* held as under:-

"In State of U.P. v. Naresh MANU/SC/0228/2011 : (2011) 4 SCC 324, this Court after considering a large number

of its earlier judgments held: In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

A similar view has been reiterated by this Court in Tehsildar Singh and Anr. v. State of U.P. MANU/SC/0053/1959 : AIR 1959 SC 1012; Pudhu Raja and Anr. v. State, Rep. by Inspector of Police MANU/SC/0761/2012 :

JT 2012 (9) SC 252; and Lal Bahadur v. State (NCT of Delhi) MANU/SC/0333/2013 : (2013) 4 SCC 557).

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence."

*48. Honble Apex Court long back in the matter of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat as reported in AIR 1983, 753, MANU/SC/0090/1983** held that: "Apex Court observed and settled following principles for appreciation of evidence without entering into re-appraisal or re-appreciation of the evidence in the context of minor discrepancies:*

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one

person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

49. Thus it is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be

considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission.

50. Hon'ble Supreme Court of India in ***Mahendran and Ors. Vs. State of Tamil Nadu and Ors. Reported in MANU/SC/0257/2019*** : in para 38 of the report held as under:-

"38. The argument that the entire case set up is based on falsehood and thus not reliable for conviction of the Appellants, is not tenable. It is well settled that the maxim "falsus in uno, falsus in omnibus" has no application in India only for the reason that some part of the statement of the witness has not been accepted by the trial court or by the High Court. Such is the view taken by this Court in Gangadhar Behera's case, wherein the Court held as under:

15. To the same effect is the decision in State of Punjab v. Jagir Singh

MANU/SC/0193/1973 : (1974) 3 SCC 277 and *Lehna v. State of Haryana*, MANU/SC/0075/2002 : (2002) 3 SCC 76. Stress was laid by the Accused- Appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "*falsus in uno, falsus in omnibus*" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an Accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an Accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other Accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "*falsus in uno, falsus in omnibus*" has no application in India and the witnesses cannot be branded as liars. The maxim "*falsus in uno, falsus in omnibus*" has not received general acceptance nor has this maxim come to occupy the status of Rule of law. It is merely a Rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory Rule of evidence". (See *Nisar Alli v. State of U.P.* MANU/SC/0032/1957 : AIR 1957 SC 366) Merely because some of the Accused persons have been acquitted, though evidence against all of them, so far as

direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the Accused who had been acquitted from those who were convicted. (See *Gurcharan Singh v. State of Punjab* MANU/SC/0122/1955 : AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound Rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab v. State of M.P.* MANU/SC/0254/1972 : (1972) 3 SCC 751 and *Ugar Ahir v. State of Bihar* MANU/SC/0333/1964 : AIR 1965 SC 277.) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background

against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. MANU/SC/0093/1952 : AIR 1954 SC 15 and Balaka Singh v. State of Punjab MANU/SC/0087/1975 : (1975) 4 SCC 511.)..... "

39 . Therefore, the entire testimony of the witnesses cannot be discarded only because, in certain aspects, part of the statement has not been believed."

Thus, the evidence of above mentioned two prosecution witnesses, namely, P.W.-1/informant Nirmala Devi and eye witness P.W.-2/Putti Lal is to be appreciated in the background of the aforesaid legal propositions.

51. At the cost of repetition, it is to be recalled that the case of the prosecution is that, on 25.11.1991 at about 6:00pm. appellants Raj Kumar Yadav, Chunni Lal 'Kahar', Sanjay Yadav, Munna Khatik and Annu Khatik had arrived at the house of the informant and had called the deceased Raju and when the informant said that he is coming, the appellant Raj Kumar Yadav entered her house and assaulted him and thereafter the deceased was dragged out of his house and was taken in front of a temple situated nearby and was further assaulted there as a result of which, he sustained multiple injuries on his head. It is also stated in the F.I.R. that the appellants had assaulted the deceased with '*lathi and hockey*' on his head.

P.W.-1/Nirmala in her evidence recorded before the trial court, has stated that she is having dispute with Munna Khatik pertaining to a piece of land and the mother of Munna Khatik and Annu Khatik, Lalli Devi had warned her not to go towards the said land and had also given

that land to the appellant Raj Kumar. She has also stated that appellant Sanjay and Chunni Lal are the friends of Raj Kumar. Thus, the enmity between the two families, who are also related to each other, is evident and the same was pertaining to a piece of land which was jointly owned by them and the mother of Munna Khatik and Annu Khatik had given that land to the appellant Raj Kumar. This witness i.e. Nirmala has further stated that at the relevant point of time all five accused persons had come to her home and inquired about Raju (deceased) and also that Raj Kumar and Sanjay were possessing sticks in their hands while appellant Chunni Lal was possessing 'hockey' and Munna Khatik & Annu Khatik were armed with bottles and they all entered her house and dragged Raju out of her house while assaulting him and dragged him to the temple. She has also admitted while under cross-examination that on that day there was a feast in the house of Annu Khatik and Mannu Khatik as on that day the bride of Annu Khatik had arrived in their house and Raj Kumar Yadav, Chunni Lal and Sanjay were also invited in that feast. However, she was contradicted on the factum that she has not stated in the F.I.R. that all accused persons had entered her house, pertaining to which, she replied that, she could not give any explanation for that. She also stated that there were blood stains in the house as well as at the place in front of the temple where her son was assaulted. She was also contradicted with her statement recorded under Section 161 Cr.P.C. on the point that she has not stated the place from where she has seen the incident, which according to her had occurred in front of the temple. She admitted while under cross-examination that, at first her son was assaulted in the house and after assaulting him in the house

thereafter he was dragged to the temple and this distance of the temple from her house is about 20 paces.

52. While giving detailed account of the incident, she had stated that appellant Sanjay was possessing a 'hockey' and she had seen him assaulting Raju in the house as well as in front of the temple and appellant Chunni Lal who was possessing a 'hockey', but in her cross-examination, she has not assigned the role of assault to Chunni Lal as she has stated that Chunni Lal was possessing a hockey. She further stated that appellant Annu Khatik and Munna Khatik were holding bottles and they had assaulted her son with the bottles. However, she clarified that the glass of the bottles was not broken and was not inserted anywhere on the body of the deceased as the bottles had not broken. She assigned the role of assaulting with 'lathi' to appellant Raj Kumar. She further stated that all these persons were highly intoxicated. She has also admitted that Annu Khatik and Munna Khatik had given invitation to all but she was not invited. Thus, this witness has given detailed account of the incident and assigned the role of assault with 'lathi' and 'hockey' to Raj Kumar, Chunni Lal and Sanjay while the role of assaulting with 'bottles' to Annu Khatik and Munna Khatik.

53. We will discuss this aspect of the matter i.e. the role assigned to the Munna Khatik and Annu Khatik of having assaulted the head of the deceased with bottles later on in this Judgment. Now so far as the appellants Raj Kumar, Chunni Lal and Sanjay are concerned, they have been assigned the role of assault with 'lathi and hockey' by this witness.

P.W.-2/Putti Lal, who is the son of the informant P.W.-11/Nirmala and

brother of deceased, whose evidence was recorded before the trial court after 09 years of the incident, has stated that at that point of time Raj Kumar, Chunni Lal and Sanjay had arrived at his house and asked about deceased Raju and thereafter they (Raj Kumar, Chunni Lal and Sanjay) entered his house and Raj Kumar and Chunni Lal were carrying 'lathi' while Sanjay was having 'hockey' and they started assaulting his brother inside the house and dragged him out of his house and on an alarm raised Annu Khatik and Munna Khatik and many other persons assembled. He also stated that his brother has sustained many injuries on his head and also that his brother was taken first to the Kotwali and thereafter to the hospital where he died. He was subjected to lengthy cross examination. In his cross-examination, he stated that appellants at first assaulted his brother inside the house and thereafter he was dragged out of house and was further assaulted in front of the temple and he stated that when appellants (Raj Kumar, Chunni Lal and Sanjay) were assaulting the deceased in his house they had raised an alarm. He has further clarified that when appellants Raj Kumar, Chunni Lal and Sanjay had entered his house and assaulted his brother Raju, electricity bulb was lighted inside the house and he had seen them assaulting the deceased. He has given detailed account of the incident. There appears only slight contradictions in his testimony pertaining to the weapon possessed by the accused persons, but having regard to the period of 09 long years, which has elapsed since the incident had occurred and recording of his evidence, the same, in our considered opinion, appears to be without negligible. Significantly, while under cross-examination, this witness has admitted categorically that on the day of the incident

the bride of Annu Khatik had arrived in their house and there was a feast organized and they (Annu Khatik and Munna Khatik) were busy in attending to their relatives and they have neither entered into his house nor have assaulted the deceased-Raju. He also stated that he could not recall as to whether Annu Khatik and Munna Khatik was mentioned by him before the Magistrate or to the investigating officer.

Thus, the evidence of P.W.-2/Putti Lal would reveal in categorical terms that his evidence is trustworthy and reliable so far as the involvement of the appellants Raj Kumar, Chunni Lal and Sanjay is concerned in committing the incident, while he has exonerated Annu Khatik and Munna Khatik and stated that they have not assaulted the deceased nor they have entered into his house.

54. We are also in agreement with the evidence given by this witness and we find him to be more reliable than P.W.-1/Nirmala, who in our considered opinion, might have taken the name of Annu Khatik and Munna Khatik, as she was having enmity with them with regard to a piece of land which the mother of Annu Khatik and Munna Khatik, namely, Lalli Devi had given to appellant Raj Kumar.

55. One more fact which is persuading us to doubt the presence of Annu Khatik and Munna Khatik at that point of time inside the house of the deceased or near the temple and to have participated in the 'marpeet' is that, it appears to be an admitted case of the prosecution that on the day when the incident had allegedly taken place there was a feast organized by the Annu Khatik and Munna Khatik at their house, as the bride of Annu Khatik had come to their house and the relatives were invited and these two persons were busy in

attending to them. If this situation is tested on the anvil of probability, it is highly improbable for a person in whose house a feast is going on and relatives are coming and dining that he will go to the house of another and would cause any incident and would indulge in 'marpeet' and to our mind P.W.-2/Putti Lal has given a more reliable account of the incident than P.W.-1/Nirmala. Thus, we do not have any reason to disbelieve the testimony of P.W.-2/Putti Lal. It is again recalled that the principle of *falsus in uno and falsus in omnibus* is not applicable in India and the duty of the Court is to draw out truth from the evidence of witnesses. Thus, having considered the evidence of P.W.-1/Nirmala, we are of the considered opinion that her evidence is reliable with regard to appellants Raj Kumar, Sanjay Yadav and Chunni Lal. Hence, keeping in view the evidence of P.W.-1/Nirmala and P.W.-2/Putti Lal in totality, we are of the considered view that their evidence is reliable, trustworthy and may be accepted so far as the commission of the offence only by appellants Raj Kumar, Chunni Lal and Sanjay is concerned.

56. There are many other minor points which have been highlighted by learned counsels for the parties like the 'lathi' and 'hockey', which is said to have been used by the accused persons in the incident, has not been recovered or no blood was found on the clothes of P.W.-1/Nirmala and P.W.-2/Putti Lal, who have taken the injured/deceased to the hospital and also that no 'Dying Declaration' has been recorded by the doctor or investigating officer. All these arguments, which have been advanced by learned counsels for the parties, in our considered opinion, are not having any force. If the investigating officer has not conducted the investigation

in right perspective, the same may not be sufficient to demolish the case of the prosecution and similarly if the investigating officer has not acted diligently and has not proceeded with promptness to the hospital in order to record the statement of the deceased u/s 161 Cr.P.C. which could also be used as 'Dying Declaration', the same may not be held sufficient enough to discard the otherwise reliable evidence of the two eye witnesses, who in our considered opinion are reliable, trustworthy and their evidence is having a ring of trust around it. It is also to be recalled that crimes are not committed with prior notice and the prosecution could not be compelled to answer/explain each and every hypothesis put forth by the accused persons and it would be sufficient that they have succeeded in proving this case beyond reasonable doubt.

57. The other argument, which has been advanced, is with regard to the alleged contradictions in medical evidence and the oral account of the incident.

58. We have perused the evidence available on record and find that, the assault is stated to have been committed with '*lathi*' and hockey. **P.W.-5/Dr. K.N. Kaushal**, who has first examined the deceased, has noticed 06 lacerated wounds all around the head and face of the deceased along with one contusion on his forehead and one abrasion over his neck. He stated that all these injuries were fresh and the heartbeat of the injured was about 110 per minute, he was in his senses and his blood pressure was 110/70 mm. He has categorically opined that all these injuries may be inflicted on 25.11.1991 at about 6:00 pm. and may be caused by '*lathi and hockey*'. The fact that during the course of treatment of the deceased/injured in the

hospital these injuries were stitched and in the postmortem report these injuries have been found as 'stitched wounds' may not be sufficient enough to cast any doubt with regard to the case of the prosecution.

P.W.-6/Dr. Santosh Kumar, who has conducted the postmortem on the body of the deceased, has categorically opined that the deceased had died on 27.11.1991 at 2:50 am. at district hospital Faizabad. He has also noticed 06 stitched wounds all around his head and face apart from one abrasion at nose and blackening of his right eye and on internal examination, the parietal, occipital and frontal bones of the deceased were found fractured and membranes were lacerated and according to him the death of the deceased has been caused due to 'shock' on account of ante-mortem injuries. As the injuries were stitched, he stated that he is not in a position to tell as to from which weapon these injuries may be caused.

59. As we have already explained that **P.W.-5/Dr. K.N. Kaushal** who had examined the deceased in his lifetime has specifically stated that these injuries may be caused by '*lathi*' and '*hockey*' and were fresh and he has also noticed the nature of the wounds as lacerated wounds contusion and abrasion, there appears no contradiction of medical evidence with ocular evidence of the incident and in fact the medical evidence in this case is in support of the ocular version of the incident.

In this regard, the argument advanced by Shri Chandra Shekhar Pandey, learned counsel appearing for the appellant-Sanjay Yadav in terms that the lacerated wounds could not be stitched, also appears to be not having any force, The medical

science has advanced much so far as surgery is concerned and we do not want to devote much time on this argument, as in our considered opinion, a lacerated wound may very well be stitched by a skilled surgeon.

60. Another argument which have been advanced by learned counsels for the appellants is that the father of the deceased, namely, Ram Autar is wholly out of picture in this case while the witnesses have admitted that he was present in the house. He did not attempt to save the deceased nor had gone to the Kotwali or hospital and this suggests that true account of the incident is not being given by the prosecution. At first we cannot accept this argument to doubt the case of the prosecution moreso when the defence has not made any attempt to summon the father of the deceased as their witness, moreover, Ram Autar has never claimed to have seen the incident as according to P.W.-1/Nirmala and P.W.-2/Putti Lal, only they in the family, have seen the incident and it has come in the evidence of P.W.-1/Nirmala that her daughter-in-law had also asked about the incident and she has narrated to her as to what had actually happened and, thus, the only circumstance that the father of the deceased did not go to the police station or to the hospital may not be a circumstance on the basis of which the otherwise reliable evidence of the prosecution eye witness may be doubted.

61. Keeping in view all the facts, circumstances and the evidence available on record, in our considered view, it has been proved by the two prosecution eye witnesses P.W.-1/Nirmala and P.W.-2/Putti Lal with certainty that on 25.09.1991 at about 6:00 pm. appellants Raj Kumar Yadav, Chunni Lal Kahar and Sanjay had

entered into the house of the deceased Raju and assaulted him with 'lathi' and hockey and also dragged him out of his house and he was further assaulted by them in front of a temple and the incident was seen by the two prosecution witnesses, namely, P.W.-1/Nirmala and P.W.-2/Putti Lal. These witnesses have been subjected to lengthy cross-examination and even after lengthy cross-examination the evidence of P.W.-1/Nirmala Devi could only be doubted with regard to the involvement of the two appellants, namely, Munna Khatik and Annu Khatik, for the reasons we have already recorded herein-before and also admitted in categorical terms by the P.W.-2/Putti Lal. There is no contradiction of medical evidence vis-a-vis the oral account of the incident, as narrated by P.W.-1/Nirmala and P.W.-2/Putti Lal. An argument may be advanced to reject the evidence of P.W.-1/Nirmala Devi, as she has also involved co convicts Annu Khatik and Munna Khatik by stating that they were also involved in the assault. It is to be recalled that P.W.-1/Nirmala is not having any cordial relations with Munna Khatik and Annu Khatik, who are the sons of her *jethani* Lalli Devi and if in this context the evidence of P.W.-2/Putti Lal is perused, it would emerge that the three appellants, namely, Raj Kumar Yadav, Chunni Lal Kahar and Sanjay Yadav at first had entered into the house of the deceased and dragged him outside his house and it is at that moment on an alarm was raised by them, and it was on hearing the alarm raised by him, Annu Khatik and Munna Khatik and many other persons had assembled. Therefore, it may be suspected by P.W.-1/Nirmala especially when there was a crowd assembled at the scene of crime that these two persons have also participated in the 'marpeet', while the P.W.-2/Putti Lal has cleared in his evidence

that these two appellants, namely, Annu Khatik and Munna Khatik had neither entered his house nor have assaulted the deceased. We do not have any reason to doubt the reliable and trustworthy account of the incident given by natural witnesses P.W. 1/ Nirmala and P.W.-2/Putti Lal at it may be accepted. The witnesses sometimes deliberately or sometimes under illusion tend to give false statements while under cross examination, however, if a witness has spoken some untruthful facts in his evidence, his whole evidence could not be discarded on this score, as the duty of the Court is to appreciate their evidence in order to separate the falsehood from the truth and if the falsehood could be separated from the truth, it is the duty of the Court to accept the truth which has been so separated, but if the truth and falsehood are so intermixed that they could not be separated, then it would be safe for the Court to discard such testimony. In our considered opinion, the testimony of P.W.-1/Nirmala Devi though is containing some amount of falsehood, so far as the involvement of Munna Khatik and Annu Khatik in the incident is concerned but the same may not be sufficient to discard her evidence in toto, and if the evidence of PW 1/Nirmala is read with the evidence of P.W.-2/Putti Lal it would emerge that Annu Khatik and Munna Khatik had arrived at the scene of the crime after hearing the alarm and they did not participate in the 'marpeet' nor had entered the house of the deceased. We also do not find any injury which may be caused by bottles on the person of the deceased and it would be hard to believe that despite being assaulted with bottles, they would remain intact and would not cause any injury of sharp incised nature on the body of the deceased. Thus, the involvement of the appellant Annu Khatik and Munna Khatik is not proved from the

evidence available on record and thus, the trial court, in our considered opinion, has committed an illegality in convicting them and they, in our considered opinion, are entitled to be acquitted of all the charges framed against them.

62. The trial court has convicted the appellants with the aid of Section 149 I.P.C.. Since we have found that the Annu Khatik and Munna Khatik have not participated in the 'marpeet', now only three appellants remained and, thus, Section 149 I.P.C. could not be invoked against them.

63. Hon'ble Supreme Court in **Baljinder Singh and Ors. Vs. State of Punjab, MANU/SC/1063/2024** has opined as under :-

"22. In this connection, we may refer to paragraph 14 of the decision of this Court in Chittarmal v. State of Rajasthan MANU/SC/0008/2003 : 2003:INSC:5 : (2003) 2 SCC 266. The relevant excerpt from such decision reads:

14. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the Sections deal with combinations of persons who become punishable as sharers in an offence. Thus, they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial

*difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge Under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the Accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of Section 149 is, therefore, no bar in convicting the Appellants Under Section 302 read with Section 34 Indian Penal Code, if the evidence discloses commission of an offence in furtherance of the common intention of them all. [See **Barendra Kumar Ghosh v. King Emperor** MANU/PR/0064/1924 : AIR 1925 PC 1, **Mannam Venkatadari v. State of A.P.**, MANU/SC/0137/1971 : (1971) 3 SCC 254, **Nethala Pothuraju v. State of A.P.**, MANU/SC/0479/1991 : 1991:INSC:226 : (1992) 1 SCC 49, **Ram Tahal v. State of U.P.**, MANU/SC/0171/1971 :1971:INSC:318 : (1972) 1 SCC 136]"*

64. Hon'ble Supreme Court in **Criminal Appeal No.1509 of 2010 Madhusudan & Ors. v/s State Of Madhya Pradesh**, decided on may 5, 2024 held as under;-

"15. There is a significant distinction between Section 34 and Section 149 of IPC. Section 34 requires active participation and prior meeting of minds

whereas Section 149 assigns liability merely by membership of an unlawful assembly and has a wider scope than Section 34 IPC. The Supreme Court in **Virendra Singh v. State of M.P, (2010) 8 SCC 407** noted the differences as under:

"46 (i) Section 34 does not by itself create any specific offence, whereas Section 149 does so;

(ii) Some active participation, especially in crime involving physical violence, is necessary under Section 34, but Section 149 does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime;

(iii) Section 34 speaks of common intention, but Section 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention; and

(iv) Section 34 does not fix a minimum number of persons who must share the common intention, whereas Section 149 requires that there must be at least five persons who must have the same common object."

16. In **Chittarmal vs. State of Rajasthan, (2003) 2 SCC 266** this Court examined the distinction and similarity between Section 34 and 149 of IPC and also the circumstances when both Sections are simultaneously applicable. The Court analyzed the earlier decisions on the issue and made the following pertinent observations:-

"14. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers

in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See **Barendra Kumar Ghosh v. King Emperor** [AIR 1925 PC 1 : 26 Cri LJ 431], **Mannam Venkatadari v. State of A.P.** [(1971) 3 SCC 254 : 1971 SCC (Cri) 479 : AIR 1971 SC 1467], **Nethala Pothuraju v. State of A.P.** [(1992) 1 SCC 49 : 1992 SCC (Cri) 20 : AIR 1991 SC 2214] and **Ram Tahal v. State of U.P.** [(1972) 1 SCC 136 : 1972 SCC (Cri) 80 : AIR 1972 SC 254])”

18. A reference to the recent Three Judge Bench decision in **Rohtas v. State of Haryana**, (2021) 19 SCC 465 would also aid us on the issue. It was noted that there could be shortfall of five accused needed for conviction under Section 149, due to acquittals. In such a situation, the Court has the flexibility to alter the charge and seek aid of Section 34 IPC. The Court’s relevant observations are extracted: - “17. This does not, however, imply that courts cannot alter the charge and seek the aid of Section 34IPC (if there is common intention), or that they cannot assess whether an accused independently satisfies the ingredients of a particular offence. Sections 211 to 224 CrPC which deal with framing of charges in criminal trials, give significant flexibility to courts to alter and rectify the charges. The only controlling objective while deciding on alteration is whether the new charge would cause prejudice to the accused, say if he were to be taken by surprise or if the belated change would affect his defence strategy. [Nallapareddy Sridhar Reddy v. State of A.P., (2020) 12 SCC 467 : (2020) 4 SCC (Cri) 162, paras 16-21] The emphasis of Chapter XVII CrPC is thus to give a full and proper opportunity to the defence but at the same time to ensure that justice is not defeated by mere technicalities. Similarly, Section 386CrPC bestows even upon the appellate court such wide powers to make amendments to the charges which may have been erroneously framed earlier. Furthermore, improper, or non-framing of charge by itself is not a ground for acquittal under Section 464CrPC. It must necessarily be shown that failure of justice has been caused, in which case a retrial may be ordered. [Kantilal Chandulal Mehta v. State of Maharashtra, (1969) 3 SCC 166 : 1970 SCC (Cri) 19]”

19. While it is true that it is permissible for Courts to alter charges, it

can only be done by careful analysis of evidence in the case. It is most essential to identify the ingredients of "common intention", before implicating any accused with the aid of Section 34 IPC. The existence of common intention in a given case must necessarily be established by the Prosecution with relevant evidence. The Court also has the responsibility to analyze and assess the evidence before convicting a person with the aid of Section 34 of the IPC. Importantly, a mere common intention per se may not attract Section 34 IPC without action in furtherance of such common intention."

The evidence available on record clearly suggests that the three appellants, namely, Raj Kumar Yadav, Chunni Lal Kahar and Sanjay Yadav had arrived in the house of the deceased together and assaulted him inside the house and after dragging him out of his house assaulted him in-front of the temple and they also fled together and, thus, they were sharing a "common intention" to commit the offence in pursuance of a pre designed plan, which could be inferred from the fact that they came together and departed together from the scene of the crime and all of them have participated in the assault given to the deceased. Thus in our considered opinion there is sufficient evidence available on record which suggests that the assault was made by appellants Raj Kumar Yadav, Chunni Lal Kahar and Sanjay Yadav in pursuance of the pre designed plan and they were sharing common intention to cause the death of deceased and they all deserved to be convicted with the help of section 34 of IPC in place of section 149 IPC.

65. Keeping in view the reasons given herein-before, we **allow** the appeals filed by the appellant **Annu Khatik** and **Munna Khatik**. The judgment and order

of the Trial Court is set aside to this extent and they are acquitted of all the charges framed against them and the Judgment and order of the trial Court dated 18.02.2005 is, hereby, set-aside to this extent.

66. So far as the appeals filed by the appellants- **Raj Kumar Yadav, Chunni Lal** and **Sanjay Yadav** are concerned, we do not find any force therein and the same are hereby dismissed and the judgment and order of the trial court is affirmed in this regard.

67. However having regard to the acquittal of co-accused Munna Khatik and Annu Khatik, Appellants Raj Kumar Yadav, Chunni Lal Kahar and Sanjay Yadav are now convicted under Section 302 read with section 34 of the I.P.C..

68. The conviction of the above appellants and sentence passed by the trial court with regard to other offences would remain the same as passed by the trial court.

69. Appellants Munna Khatik and Annu Khatik appear to be on bail. They need not to surrender anywhere unless they are wanted in any other criminal case, however they shall file their personal bonds along with two sureties of Rs. 25,000/- before the trial Court within 30 days from today, as provided under Section 437-A of the Code of Criminal Procedure (Now Section 481 of the B.N.S.S.).

70. Appellants- Raj Kumar Yadav and Sanjay Yadav are shown to have been released by the State Government after granting remission and the same has also been recorded by this Court in its order dated 08.08.2022 and 07.11.2023. They

also need not to surrender as they have already been released on remission.

71. So far as the appellant Chunni Lal Kahar is concerned, he appears to be on bail. He will surrender before the trial court within 15 days from today to serve out the sentence as imposed by the trial court.

72. Shri Rajesh Kumar Dwivedi, who has represented appellants- **Raj Kumar Yadav** and **Chunni Lal** as Amicus Curiae will get Rs. 11,000/- as honorarium, which would be paid by the Uttar Pradesh State Legal Services Authority within 60 days from today.

73. A copy of this order be sent to the trial Court along with the trial court's record as well as to the Member Secretary Uttar Pradesh State Legal Services Authority for compliance.

(2025) 1 ILRA 104
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.11.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Criminal Appeal No. 651 of 1983
 With
 Criminal Appeal No. 652 of 1983

Jagdish Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
 Keshav Sahai, Apul Misra, Dileep Kumar,
 Rajrshi Gupta, Satyendra Narayan Singh,
 Upendra Vikram Singh

Counsel for the Respondent:
 D.G.A.

Criminal Appeal-Eye Witnesses-Eye-
 witnesses were not there on the spot at all- eye witnesses not recognized the dacoits and only to implicate certain known inimical persons, the first information report got lodged-FIR was also ante-timed-the case of the prosecution does not inspire confidence - cooked up story only to implicate known persons who were impugned judgment set aside.

Appeals allowed. (E-9)

List of Cases cited:

1. Iqbal & anr. Vs St. of U.P. reported in (2015) 6 SCC 623
2. Lakshman Prasad Vs St. of Bihar reported in AIR 1981 SC 1388
3. Prem & ors. Vs St. of U.P. reported in 2022 (6) ADJ 529 (DB)
4. Shrishti Narain Vs Bindeshwar Jha & ors., 2009 (6) SCC 457

(Delivered by Hon'ble Siddhartha Varma, J.
 &
 Hon'ble Syed Qamar Hasan Rizvi, J.)

1. When an incident which allegedly took place in the night of 12/13.01.1977, a first information report was lodged on the very same day at around 4:30am on the 13th January 1977. As per the first information report, which had been got lodged by one Harihar Singh son of Jung Bahadur Singh, in the night of 12/13th January 1977 while he himself had gone to sleep after having food etc., in the varandah of the house along with his son Hridya Narayan Singh and other elderly relatives by the names of Deo Nath Singh and Ramagya Singh then at around 1:30AM in the night Jagdish Singh, Amardeo Singh, Durvasha Singh, Jai Shankar @ Dondha Singh, Deo Narayan @ Bhukhad Singh, Munda @ Raj Narayan Singh, Sriram Singh, Siyaram Singh, Rama Singh, Sagar

Singh, Vijendra along with 7 to 8 other dacoits entered the premises which contained the Baithaka and quarters where women were sleeping. When the dacoits entered as per the allegations made in the first information report, the dogs of the first informant started barking which made the first informant and his son wake up. When the first informant and his son started making a hue and cry, one of the dacoits chased the son of the first informant and hit him by a lathi which had injured the right wrist of the son. Of the so many dacoits who had entered the premises of the first informant, the dacoits Deo Narayan Singh, Jagdish Singh, Raj Narayan Singh, Sri Ram Singh and 2 or 3 other dacoits entered the room where the two elderly persons namely, Ramagya Singh and Deo Nath Singh were sleeping and asked for the keys of the locker. The other dacoits kept guard outside the place where the two elderly persons were sleeping. They were throughout saying that if the elderly persons were not giving the keys then they be shot dead. Thereafter the dacoits shot at Ramagya Singh and Deo Nath Singh and they were killed. Thereafter the dacoits went towards the tenements where the ladies of the house were sleeping. They broke open the door and entered the premises and started looting the valuables. The locker (tijori) was brought out in the courtyard, which the dacoits tried to open with various tools which were available with them. They were kudal, farsa and chheni. In the first information report it had been stated that in order to frighten the villagers intermittently the dacoits were also firing in the air. It has also been stated in the first information report that while the looting was being done the dacoits were saying that they had taken the revenge of the murder of Deena Nath Singh. Because of the hue and cry raised by the first

informant and the various ladies of the house, the cousin of the first informant Janmey Singh (P.W.3) and the nephew of the first informant Govardhan @ Radhey Shyam along with the Pradhan of the village, Shyam Bihari Yadav and Ram Surat Singh came on the spot. They saw the dacoits looting and rummaging the house. They had recognized the dacoits in the light of torches and in the light which came out of the burning "pual". The ladies of the house had also recognized the dacoits in the light of the lanterns and the various torches which they possessed. It had been stated that the wife of the first informant was also injured by one of the dacoits. The Pradhan of the village Parmanand Singh and one Rama Nand Singh fired from their firearms and thereafter the dacoits went away. The first informant and the other villagers chased the dacoits but all the time the dacoits turned around and warned them with dire consequences. It had been categorically mentioned in the first information report that vis-a-vis Jagdish Singh and others there was old enmity existing and it was for that reason that they had killed the two elderly persons, namely, Ramagya and Deo Nath. In the first information report, the lost articles which were stolen were also mentioned. The investigation thereafter commenced and such torches and lanterns which were to be found on the spot were taken into the custody and the recovery memos of things taken into custody were prepared and were numbered as exhibit - ka3. The locker and the locks which had been broken by the dacoits were also taken in the custody of the Police and their recovery memo was prepared and numbered as Exhibit - Ka4. Such articles which were left behind by the dacoits were also recovered by the Police and memo of which were prepared and exhibited as Exhibit - Ka 11 and 12. The

police had also recovered certain lathies and shoes and recovery memo with regard to them was prepared as Exhibit Ka36. The empty cartridges and pads etc. of the bullets which were fired were also recovered and the memo with regard to which was prepared and exhibited as Exhibit Ka37. The clothes which had blood on them of Deo Nath Singh were also taken into custody and their memo was prepared and exhibited as Exhibit ka 34. Ramagya's clothes were also similarly taken into custody and memo with regard to them was prepared and exhibited as Exhibit Ka 35.

2. Thereafter, as per the case of the prosecution, a panchayatnama was conducted on 13.1.1977 which commenced at 6:35am and concluded at 7:05am. Thereafter, the two dead bodies were sent for post mortem and post mortem was conducted on the dead bodies on 14.01.1977 at 11:00am. The police after it had concluded its investigation submitted its report and the Magistrate took cognizance of the case.

3. The Trial Judge, namely, Sri N.S. Shamsbery, the 6th Additional Sessions Judge, Varanasi, on 23.09.1978 framed charges against the various accused persons. Vis-a-vis Jagtoo and Ram Dhani charges were framed under Section 396 IPC; vis-a-vis Smt. Sahdeiya and Kalawati charges were framed under Section 412 IPC; vis-a-vis Jagdish Singh, Amardeo Singh, Durbasa Singh, Jai Shankar @ Dhondha, Deo Narain @ Jhakkar, Munda @ Raj Narain, Sri Ram Singh, Siya Ram, Rama Singh, Sagar Singh, Bijendra Singh, Lakshmi Noniya, Dulare Singh, Kamla Singh, Lallan @ Lalla Singh and Kattal @ Katwaru Mahhal charges were framed under Section 396 IPC. Thereafter when the accused denied the charges, trial commenced.

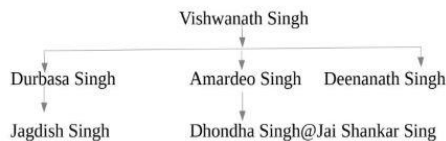
4. From the side of the prosecution as many as 25 prosecution witnesses were examined. When the trial concluded and the judgement was delivered on 11.3.1983 whereby Jagdish Singh, Amardeo Singh, Durbasa Singh, Jai Shanker Singh @ Dhondha, Deo Narain @ Jhakkar, Raj Narain Singh @ Munda, Siya Ram Singh, Shri Ram Singh, Sagar Singh, Brijendra Singh @ Bijendra Singh, Rama Singh and Kattal alias Katwaroo were sentenced to undergo life imprisonment for offences committed under Section 396 IPC, they preferred criminal appeals being criminal appeals No. 651 and 562 of 1983 in this Court.

5. Jagdish Singh, Durbasa Singh, Deo Narain Singh, Raj Narain Singh, Sri Ram Singh and Kattal @ Katwaroo filed Criminal Appeal No. 651 of 1983; whereas Amar Deo, Jai Shankar Singh, Sagar Singh and Brijendra Singh filed Criminal Appeal No. 652 of 1983. The other accused persons were acquitted of the charges as were levelled against them.

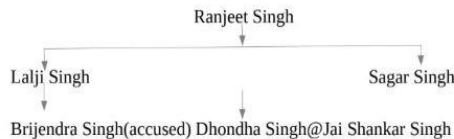
6. During the pendency of the Appeal in Criminal Appeal No. 651 of 1983, Jagdish Singh, Durbasa Singh, Deo Narain Singh and Raj Narain Singh and Kattal died and, therefore, the Criminal Appeal vis-a-vis them have abated. For the appellants, Sri Ram Singh, Siya Ram and Ram Singh, the Appeal was argued by **Sri Apul Mishra** and **Sri Rajrshi Gupta**.

7. In Criminal Appeal No. 652 of 1983, the appellants Amar Deo Singh and Sagar Singh died during the pendency of the appeal and the appeal vis-a-vis them has already abated. For the appellants no. 2 and 4 Jai Shankar Singh and Bijendra Singh, the appeal was argued by **Sri Apul Mishra** and **Sri Rajrshi Gupta**.

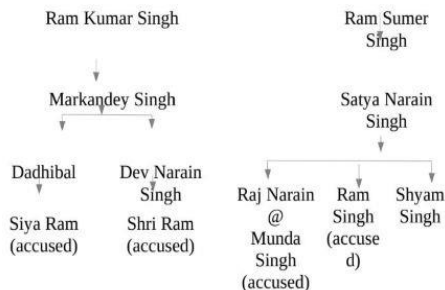
8. During the trial, the P.W.-1, Harihar Singh, appeared in the witness box and very emphatically and graphically described about the relationships which existed between the accused persons. With regard to the appellants Durbasa Singh, Amar Singh, Jagdish Singh and Jai Shankar Singh through his statement he illustrated as to how they were descendents through one Vishwanath. As per the statement before the Court, the following pedigree emerged :-



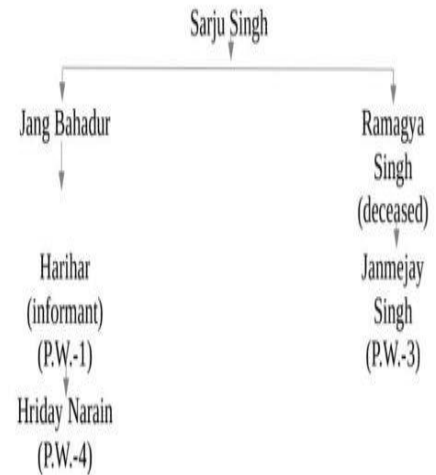
9. For the accused Brijendra Singh, as per the statement made by the P.W.-1, the following pedigree emerged:



10. For the accused Deo Narain Singh, Siya Ram Singh, Sri Ram, Raj Narain, Ram Singh and Shyam Singh a third pedigree emerged from the statement of P.W.-1:-



11. From the side of the complainants also a pedigree as has been shown below which emerged from the statements made by the P.W.-1:



12. The P.W.-1 has, in fact, stated after giving out the relationships between the accused persons that all the accused were known to each other and he has very categorically stated that P.W.-1 was inimical to all the three families. He has in so many words also narrated the enmities which existed between the informants' side and the accused. They are being enumerated here as under: -

1. An occurrence took place on 9.5.1973 in which Deena Nath brother of accused Durbasha was murdered. Informant Harihar Singh was accused and accused Deo Narain was prosecution witness.

2. Prior to the present occurrence on the application of accused Jagdish license of informant Harihar Singh was cancelled (Kindly see exhibit Ka-8 & Ka-9).

3. During the pendency of murder case proceedings under Section 107/116 were initiated between the parties.

4. In the year 1972 proceedings under Section 133, Cr.P.C. were initiated in which Harihar Singh was on one side,

accused Deena Nath, accused Durbasha, accused Amar Deo and accused Jagdish Singh were arrayed on other side.

5. A civil suit no. 405/1975 was filed in the court of Munsif Hawali Varanasi (Harihar Singh Vs. Durbasha) and the Suit related to a passage and the civil suit was pending at the time of incident.

6. Ram Nandan was the father of P W. Shyam Bihari.

7. In the year 1951 Ram Nandan father of P.W Shyam Bihari was prosecuted under Section 302 I.P.C. for causing death of one Shanker in which Lalji father of accused Sagar and Brijendra was a prosecution witness against Ram Nandan Singh.

13. In the statement before the Court P.W.-1 had stated that Ramagya's hands were tied at the back and, thereafter, he was shot at and in a similar manner Deo Nath Singh was also shot at. He has once again reiterated that the named persons in the first information report had stated that they had taken revenge of the murder of Dina Nath Singh (Dina Nath Singh was the real brother of Durvasa Singh and Amar Deo Singh as is clear from the pedigree given above).

14. He has stated that Amar Deo was living in a house which was 20 steps away from the house of the first informant. Shyam Bihari was living around 200 latthas away. To the east of the house of Amar Deo, Harihari Singh's (P.W.-1) new house was located. He has further stated that around 150 latthas away from his khalihan, Shyam Bihari's house (P.W.-2) was situate. He has stated that he was surrounded by the houses of his own enemies. He has further stated in his evidence that all the houses of the named accused persons were adjoining

the house of P.W.-1. He has very categorically stated that when the firing was being done, he was standing at a distance of around 20 steps. He has also stated that none of the accused persons had covered their faces with dhata. He has stated that no accused was trying to hide his or her face. He has stated that he had not mentioned anything in the first information report with regard to the fact that the hands of Deo Narain Singh were tied behind him.

15. In paragraph no. 34 of the statement made by P.W.-1 on 5.7.1980, he had stated in his cross-examination, upon a pointed question being asked by the Court as to whether faces of the accused persons were covered. He had averred that in fact they were not hiding their faces. He has in paragraph no. 35 stated that while the dacoity and the shooting etc was taking place he had called Jagdish Singh, Deo Narain Singh and Sri Ram Singh by their names and yet the accused persons had not fired at him.

16. Upon being asked as to whether, he had given the description of the dacoits whose name he had not mentioned in the first information report, the P.W.-1 had stated that he had not given any description of those persons whom he had not named.

17. The P.W. -2, Shyam Bihari, lived in the neighborhood of P.W.-1. P.W.-1 in his testimony before the Court had given a reason as to why there was enmity between Shyam Bihari and the accused. He had stated that in 1951 Ram Nandan, the father of the P.W.-2, was prosecuted under Section 302 IPC for having caused the death of one Shanker and in that case Lalji the father of the accused and Bijendra Singh had come to the Court as prosecution

witnesses against Ram Nandan Singh and the father of Shyam Bihari. In this context, the statement of P.W.-2 becomes relevant. He has also very categorically stated that he had been knowing all the accused persons from before and that they were all of his village. He has also stated that he had gone for the test identification parade to the jail for identifying such of the accused whose names had not been mentioned. He has, upon a pointed question being asked that why he had not mentioned about the descriptions of the accused who were not mentioned in the statement under Section 161 Cr.P.C., he had replied that he did not know as to why he had not mentioned about their descriptions under Section 161 Cr.P.C. He has, in paragraph no. 17 of his cross-examination, upon being questioned as to why he had not mentioned about the names of the persons who were already named in the first information report in his statement under Section 161 Cr.P.C., he had replied that his statement was taken on 13.1.1977 at 8:00am but till that time he had not known the names of the dacoits who had done the dacoity the previous night. He had also reiterated the fact that none of the dacoits had covered their faces.

18. The P.W.-3, Janmejay Singh, is a cousin of P.W.-1. He has also mentioned about the enmity which he bore vis-a-vis the accused Deo Narain Singh and he has stated that the accused Deo Narain Singh had given evidence against him in a murder case. He had also reiterated that the dacoits had also not covered their faces. He had also stated that the accused Deo Narain Singh had a gun in his hands and Jagdish had a lathi in his hands. Munda Singh @ Raj Narain Singh was carrying a ballam. Ram Singh was also carrying a lathi. He has stated that the dacoits had also fired towards the place where he was standing.

19. The P.W. - 4, Hriday Narain Singh s/o Harihar Singh, the P.W.-1, while giving his testimony, also reiterates what his father had stated and has described the manner in which the dacoits had hit him on his wrist. In his statement in the Court he had also mentioned the names of the accused persons. He, in his cross-examination, admitted that before the incident had occurred there was a definite enmity between the accused and him and because of the statement given by him and his father earlier in another case the accused had been in jail for five year. He had also reiterated the fact that none of the accused persons had tied/covered their faces.

20. Since the P.W.- 1, 2, 3 and P.W.- 4 were witnesses of facts their statements have been looked into in detail. The statements of P.W.-24 who was the investigating officer, is also relevant for the decision of this case and therefore the relevant portion of his statement is being reproduced here as under:-

“चिक एफ०आई०आर० इक्ज क-20 पर सी०ओ० के हस्ताक्षर है और यह 20-1-77 के है। मैं कारण नहीं बता सकता कि सी०ओ० के दस्तखत 20-1-77 के क्यों हुये। यह गलत है यह देर से भेजा गया था इसलिये देर से दस्तखत हुये।”

21. At page 230 of the paper book, in paragraph no. 24, he had stated that the chik FIR, Exhibit Ka-20 contained the signature of the Circle Officer, which was dated 20.1.1977. He has, however, stated that he did not know as to why the signature of the Circle Officer was made on the chik FIR on 20.1.1977 with regard to the compliance of Section 157 Cr.P.C.. The investigating officer had stated that he had no idea as to when exactly the special report was sent. Also with regard to the fact as to whether when the dead body was sent

for post mortem whether the chik report had accompanied the papers, he had stated that there was no law/rule to send the first information report along with the post mortem. He, however, had stated that traditionally the first information report was sent with the post mortem and had, thereafter, categorically stated that along with the exhibit ka-16 and ka-15 i.e. the letters which were sent for the post mortem of the two dead bodies no first information report had been sent. At page 32 of the paper book, he had mentioned that he had not prepared the memo with regard to the ashes which he had found at the place of incident which were supposed to be there because of the fact that haystack (puwal) was burnt. He has stated that he had definitely not shown the place in the site plan where the ash was to be found. He has stated that on the papers Exhibit Ka-13 and Ka-14 which were prepared on 13.1.1977 nowhere was the fact written that it pertained to the case “State vs. Jagdish and others”.

22. Thereafter, the statements of the accused persons were recorded under Section 313 Cr.P.C. In the statements under Section 313 Cr.P.C., the accused persons had denied having committed the crime.

23. When the appeals were argued, the learned counsel for the appellants had submitted that the case as had been brought forth by the prosecution was a highly improbable case. To substantiate this argument, learned counsel made the following submissions:

I. Learned counsel for the appellants states that when a dacoity takes place and specially when the dacoits were known to the informant's side then definitely they would try to conceal their

identification and in the instant case he submits that none of the accused had covered their faces.

II. Learned counsel for the appellants further states that, in fact, the P.W.-1, P.W.-2, P.W.-3 and P.W.-4, all have stated that they had called the accused persons by name. Learned counsel for the appellants submits that this calling the dacoits by name would have been suicidal and the statement made in this regard shows that the prosecution witnesses were, in fact, not there and they were only trying to show their presence at the place.

III. Learned counsel for the appellants states that enmity was writ large between the accused persons and the people on the side of the first informant. He has submitted that, in fact, if a simple case of dacoity had taken place the informant would not know as to who was the accused. However, he states that the first information report was lodged and the accused had given out the names of the persons who were living in an around their village near the houses of the first informant and their relatives and thereafter they had tried to take revenge from them. In this regard, learned counsel for the appellants relied upon a judgement of Supreme Court in the case of **Iqbal & another vs. State of U.P** reported in **(2015) 6 SCC 623** Since the learned counsel read out the paragraphs no. 10, 16 and 17 of the judgement, they are being reproduced here as under:-

10. In cases of dacoity, usually, the offence is committed by unknown persons with the criminal background. It is only in very few cases, are the accused dacoits known to the victim. PW 1 Patia Singh and PW 2 Jay Singh have stated that they had witnessed the incident from a distance of three-and-a-half yards. PW 3

Begraj also stated that he had witnessed the incident from a distance of five-six yards in the feeble torchlight. Admittedly, according to the witnesses, there was no electricity at the time of incident in their houses. They claimed that they could see the accused persons with the help of their torchlights. In the courts below, on behalf of the accused persons, it was argued that the night of incident was an amavasya-new moon night. On a perusal of calendar of that month in that year, it is seen that the intervening night of 21-9-1979/22-9-1979 was a new moon night i.e. "amavasya".

16. It is pertinent to note that in the present case no recovery of articles which are the subject of dacoity was made from the appellants or other non-appealing accused persons. In his complaint, PW 1 gave a list enumerating fifty expensive items, such as gold jewellery, silver articles, sarees and clothes and also cash. As per the recovery memo, what was recovered was just three kilograms of ghee in a claypot. In his deposition, PW 8 Nepal Singh (investigating officer) has stated that at the instance of Kripa, he had recovered a "chaptaghu" and an "attire". However, in the recovery memo, only three kilograms of ghee is mentioned which is said to have been recovered on the disclosure statement of accused Kripa. From the appellants as well as from the non-appealing accused persons, not a single valuable item out of the whole list of stolen articles was recovered. It is quite unbelievable that within a short span of time i.e. from 21-9-1979 (date of incident) to 9-10-1979 (date of arrest), the accused would have converted or sold out all the valuable items. Even if we accept that they had done so, the prosecution ought to have adduced evidence as to how and in what manner the articles which were the subject-matter of dacoity were either disposed of or

converted. Murder and robbery were part of the same transaction. Consequent upon the disclosure statement, only three kilograms of ghee was recovered.

17. In order to bring home the guilt of the accused persons, it is the duty of the prosecution to prove that the stolen property was in the possession of the accused persons or that the accused had knowledge that the property was a stolen property or the accused persons had converted the stolen property. No such recovery was made to connect the appellants and other non-appealing accused persons with the crime.

Further learned counsel for the appellants relied upon **Lakshman Prasad vs. State of Bihar** reported in AIR 1981 SC 1388. Since the learned counsel has specifically relied upon paragraph no. 3 of the judgement, the same is being reproduced here as under:-

3. The central evidence against the appellant consisted of the testimony of PWs 1 and 2 who were the servants of complainant PW 4 Baijnath Prasad. It appears from the evidence that Baijnath Prasad was a rich businessman of the locality and the accused-appellant Lakshman Prasad was his next door neighbour having a double storey house. Both the courts below have accepted the prosecution case that a dacoity took place in the house of Baijnath Prasad in the course of which cash and other articles were stolen away. In the instant case, counsel for the appellant has not challenged this finding of the courts below. We are also satisfied that a dacoity undoubtedly took place in the house of Baijnath Prasad. The only question that falls for consideration is whether or not the appellant participated in the crime. PWs 1,

2 and 4 have supported the prosecution case that the appellant clearly participated in the dacoity and was, in fact, the leader of the dacoits. After going through their evidence, we do find that there is some amount of consistency in their evidence but mere congruity or consistency are not the sole test of truth. Sometimes even falsehood is given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface. This appears to be one of those cases. There are many inherent improbabilities in the prosecution case so far as the participation of appellant is concerned. In the first place, admittedly the appellant was a respectable man in the sense that he was possessed of sufficient means and was a well known homeopath doctor and also the neighbour of the complainant. In this view of the matter, it is difficult to believe that he would commit dacoity in the house of his own neighbour and that too in the early hours of the evening, so that he may be caught any moment and take the risk of a conviction under Section 395 of the Penal Code, 1860. Secondly, the evidence of the complainant PW 4 clearly shows that the dacoits had no doubt concealed their identity but they did it in such a way that their faces were visible. Indeed, if the appellant had participated in the dacoity and taken the precaution of concealing his identity, then he would have seen to it that his face was fully covered so that identification by the complainant or the witnesses would become impossible. If he was a dare-devil, then he would not have concealed his identity at all. Thirdly, FIR having been lodged the same evening the police visited the house of the appellant next morning and found him there. If the appellant had really participated in the dacoity, he would have at least made himself scarce. The house of the accused was also searched

and nothing incriminating was at all found. Finally, there was the important circumstance that in view of a dispute between complainant Baijnath Prasad and the appellant, there was a clear possibility of the appellant having been falsely implicated due to enmity. The complainant himself admits that there is a boundary wall around the house of the appellant and there is a road which runs to the east of his house and the mill of the complainant is situated to the west of the house. There is evidence of DW 2 that there has been some dispute between Baijnath Prasad and accused Lakshman Prasad two or three years before the occurrence of dacoity in respect of a passage near the house of accused Lakshman Prasad through which he used to go to his mill. The evidence of DW 2 does support what the complainant has himself admitted. The gravest provocation which the complainant must have felt was the fact that Lakshman Prasad bought a piece of land near his house from Kishori Lall, the nephew of Baijnath Prasad. This is proved by Ex. Kha and the evidence of DW 4. The High Court also observed that the sale deed executed by the nephew of the complainant in favour of the appellant was executed only a month before this occurrence. This therefore furnishes an immediate motive for the false implication of the appellant. Another important circumstance which seems to have been overlooked by the courts below is that PW 4 has clearly admitted in his evidence at p. 44 of the paper-book that immediately after the occurrence, a number of people near the mosque assembled, of whom he recognised Suba Raut and Moti Raut, but they never came to his help. The witness also says that when he came from the west, he saw 40 to 50 persons at a little distance, including Ganesh Raut, Achhelal, Mathura Ram and Rameshwar. Obviously,

if an occurrence of dacoity had taken place in the early hours of the evening, the near neighbours must have assembled and yet none of these neighbours have been examined to support the complainant's version that the appellant had participated in the occurrence. It seems to us that the reason why these persons did not choose to support the complainant was that perhaps the appellant had been falsely implicated and hence the persons who had assembled may not have relished the idea of supporting the complainant if he had gone to the extent of falsely implicating the appellant in the dacoity. These intrinsic circumstances speak volumes against the prosecution case and raise considerable amount of suspicion in our minds regarding the complicity of the appellant in the dacoity. It is well-settled that while witnesses may lie, circumstances do not.

Still further learned counsel for the appellants relied **upon Prem and others vs. State of U.P** reported in **2022 (6) ADJ 529 (DB)**. Since the learned counsel for the appellants has read out paragraphs no. 25 and 26 of the judgement, they are being reproduced here as under:-

"25. Before we proceed to analyse the submissions, it would be useful to notice a decision of the Supreme Court in somewhat similar situation where the accused had allegedly participated in the commission of dacoity at his neighbour's house and the factum of dacoity was duly proved and the eye-witnesses, apparently, were congruous and consistent in their deposition yet, upon finding the possibility of false implication very high, the apex court allowed the appeal of the convicted accused and acquitted him of the charge upon finding that intrinsic circumstances of the prosecution case raised considerable

amount of suspicion regarding the complicity of the appellant in the dacoity. The relevant observations of the Supreme Court in that case i.e. Lakshman Prasad v. State of Bihar : 1981 (Supp) SCC 22, contained in paragraph 3 of the judgment, are extracted below:-

"3. The central evidence against the appellant consisted of the testimony of PWs 1 and 2 who were the servants of complainant PW 4 Baijnath Prasad. It appears from the evidence that Baijnath Prasad was a rich business man of the locality and the accused-appellant Lakshman Prasad was his next door neighbour having a double storey house. Both the courts below have accepted the prosecution case that a dacoity took place in the house of Baijnath Prasad in the course of which cash and other articles were stolen away. In the instant case, counsel for the appellant has not challenged this finding of the courts below. We are also satisfied that a dacoity undoubtedly took place in the house of Baijnath Prasad. The only question that falls for consideration is whether or not the appellant participated in the crime. PWs 1, 2 and 4 have supported the prosecution case that the appellant clearly participated in the dacoity and was, in fact, the leader of the dacoits. After going through their evidence, we do find that there is some amount of consistency in their evidence but mere congruity or consistency are not the sole test of truth. Sometimes even falsehood is given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface. This appears to be one of these cases. There are many inherent improbabilities in the prosecution case so far as the participation of appellant is concerned. In the first place, admittedly the appellant was a respectable man in the sense that he was possessed of sufficient

means and was a well-known homeopath doctor and also the neighbour of the complainant. In this view of the matter, it is difficult to believe that he would commit dacoity in the house of his own neighbour and that too in the early hours of the evening, so that he may be caught any moment and take the risk of a conviction under Section 395 Indian Penal Code. Secondly, the evidence of the complainant PW 4 clearly shows that the dacoits had no doubt concealed their identity but they did it in such a way that their faces were visible. Indeed, if the appellant had participated in the dacoity and took the precaution of concealing his identity, then he would have seen to it that his face was fully covered so that identification by the complainant or the witnesses would become impossible. If he was a dare-devil, then he would not have concealed his identity at all. Thirdly, FIR having been lodged the same evening the police visited the house of the appellant next morning and found him there. If the appellant had really participated in the dacoity, he would have at least made himself scarce. The house of the accused was also searched and nothing incriminating was at all found. Finally, there was the important circumstance that in view of a dispute between complainant Baijnath Prasad and the appellant, there was a clear possibility of the appellant having been falsely implicated due to enmity. The complainant himself admits that there is a boundary wall around the house of the appellant and there is a road which runs to the east of his house and the mill of the complainant is situated to the west of the house. There is evidence of DW 2 that there has been some dispute between Baijnath Prasad and accused Lakshman Prasad two or three years before the occurrence of dacoity in respect of a passage near the house of

accused Lakshman Prasad through which he used to go to his mill. The evidence of DW 2 does support what the complainant has himself admitted. The gravest provocation which the complainant must have felt was the fact that Lakshman Prasad bought a piece of land near his house from Kishori Lall, the nephew of Baijnath Prasad. This is proved by Ex. Kha and the evidence of DW 4. The High Court also observed that the sale-deed executed by the nephew of the complainant in favour of the appellant was executed only a month before this occurrence. This therefore furnishes an immediate motive for the false implication of the appellant. Another important circumstance which seems to have been overlooked by the courts below is that PW 4 has clearly admitted in his evidence at page 44 of the paper-book that immediately after the occurrence, a number of people near the mosque assembled, of whom he recognized Suba Raut and Moti Raut, but they never came to his help. The witness also says that when he came from the west, he saw 40 to 50 persons at a little distance, including Ganesh Raut, Achhelal, Mathura Ram and Rameshwar. Obviously, if an occurrence of dacoity had taken place in the early hours of the evening, the near neighbours must have assembled and yet none of these neighbour have been examined to support the complainant's version that the appellant has participated in the occurrence. It seems to us that the reason why these persons did not choose to support the complainant was that perhaps the appellant had been falsely implicated and hence the persons who had assembled may not have relished the idea of supporting the complainant if he had gone to the extent of falsely implicating the appellant in the dacoity. These intrinsic circumstances speak volumes against the prosecution case and raise considerable

amount of suspicion in our minds regarding the complicity of the appellant in the dacoity. It is well settled that while witnesses may lie, circumstances do not.

(Emphasis supplied)".

26. From the observations of the apex court, extracted above, what becomes clear is that mere consistency or congruity in the testimony of the prosecution witnesses is not the sole test of truth as even falsehood can be given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface. Therefore, what the court has to look at, and assess, is whether the prosecution evidence coupled with the surrounding circumstances has a ring of truth about it or there arises a strong suspicion and high probability of false implication of the accused put on trial. Bearing this in mind, when we embark upon the exercise to assess the prosecution evidence, we find that, no doubt, on record, the prosecution case is instituted on a prompt first information report and is supported by testimony of a person injured but, interestingly, no one disputes the factum of dacoity in the village on that fateful night. What is disputed is the accused-appellants being part of the gang of dacoits. When we see the evidence in this light, we find that the prosecution evidence is completely silent as to what the accused-appellants did at the time of dacoity. Except in the statement of one witness (i.e. PW-1) that Bhagwan Singh was carrying a gun and he fired a shot, there is no disclosure about the role of any of the accused appellants save that, that they were noticed. In fact, PW-1 who deposed about that, in the FIR, which was lodged by him and with which he was confronted, made no such disclosure. Even in respect of gunshot alleged to have been fired by Bhagwan Singh, it is not disclosed as to

whom it was aimed at and who sustained what injury from it. Importantly, two persons were reported to have been examined for their injuries, one is PW-4 and the other is Champa Devi. Champa Devi has not been examined as a witness and PW-4 has sustained incised wounds, the author of which has not been disclosed by him. Interestingly, the only witness (i.e. PW-3) with whom the accused-appellants had no enmity and whose house was also looted, does not support the prosecution case either with respect to the number of dacoits who participated in the dacoity or in respect of their identity. Further, we find that there is no recovery of any incriminating material from any of the accused-appellants to lend credence to the accusation against them. Another important feature that we notice from the testimony of the prosecution witnesses is that various houses in the village were looted and after the dacoits had left, the villagers had collected at one place. This suggests that there were independent witnesses also who were affected by the dacoity but the prosecution deliberately chose not to examine them. When we see all of this, coupled with the fact that the accused-appellants are residents of the same village where the dacoity had been committed yet, they chose not to cover their faces and nothing incriminating has been recovered from them, as also that all the accused do not appear to be of the same family or of the same village, it gives us a feeling that the dacoity in the village has been taken as an opportunity to falsely implicate the accused with whom the informant and the prosecution witnesses of fact except PW-3, who was declared hostile, had strong enmity.

IV. Learned counsel for the appellants further state that, in fact, the first

information report was an ante-timed first information report. They submit that the first information report, to begin with, was registered as a first information report under Section 396 IPC. He states that when, however, the names of the accused persons were known and that the first informant wanted to implicate them for the crime of murder also then definitely the first information report had been got lodged under Section 302/34 IPC also. Learned counsel further relying upon the statements of P.W. - 24 had stated that the first information report had not accompanied the post mortem report. He submits that from the testimony of the various witnesses it became clear that since the chik FIR was not prepared and had not accompanied the Panchayatnama when the dead bodies were sent for post mortem, it clearly showed that though the case crime number of the case was allotted there was no first information report in existence for a very long time.

V. Learned counsel for the appellants further submits that when the prosecution witnesses had stated in so many words that the accused persons were known to the first informant and the other prosecution witnesses and as per them the accused had come to commit dacoity in the house of an acquaintance then it was but natural that they should have covered their faces. In the instant case, he submits that when the faces were not covered then the only logical conclusion would be that in fact they had not gone at the place of incident and only because the informant had been an enmity with the accused persons they had been implicated in the case after a simple case of dacoity had taken place on the date of incident by unknown persons.

VI. Learned counsel for the appellants states that in the first

information report it was not mentioned that the hands of Ramagya Singh were tied behind him and thereafter he was shot at. However, after he had seen the dead body at the time of the panchayatnama wherein the bodies were tied, he had tried to improve his case by saying so in the court that the hands of the deceased Ramagya Singh were tied behind him.

VII. Learned counsel for the appellants further states that had the persons who were bearing enmity come to the place of incident and had also committed dacoity then they would have not just shot at Ramagya and Deo Nath Singh but would have killed, all the younger lot which were very much present as per the prosecution case and would have finished off all their enemies in one go. In the instant case, he submits that just because Ramagya and Deo Nath had resisted the dacoity, the unknown dacoits had tied the hands of Ramagya and thereafter when he was still resisting the dacoity he was shot at and killed. Learned counsel states that even Deo Nath was done away in the same manner.

VIII. Learned counsel for the appellants states that there was absolutely no recovery of any looted items from the possession of any of the named accused persons.

IX. Learned counsel for the appellants further submitted that 8 accused persons who were not named in the first information report and were acquitted of the charges levelled against them were also, to begin with, charged for the same offences for which the named accused were charged but the court below failed to apply the logic for which the acquittal had taken

place in the cases of the persons who were convicted.

24. Learned counsel for the appellants thereafter submitted that if the entire case is seen it would become evident that the prosecution had come up with a most unnatural case. Human behaviour would not have made the eye-witnesses call out the names of the accused when the incident was happening and that too when there was an acute enmity existing between the two sides. This learned counsel for the appellants states was unnatural as when the names were called out, the accused would have definitely aimed at the place from where the names were being called out and would have tried to shoot down the person who was calling the names. In this regard, learned counsel for the appellants relied upon the judgement in **Ram Lakhan Singh and others** reported in **1977 (3) SCC 268** and had relied upon paragraph no. 27. Since the learned counsel for the appellants had relied upon paragraph no. 27 of the judgement, the same is being reproduced here as under:-

“27. The Sessions Judge wrongly accepted the prosecution case that “the assailants had come to destroy the entire family” and that “in the present case the main intention of the known assailants was to murder Shiv Bahadur Singh and other members of his family”. It is difficult to appreciate how this alone can be the object when we find that Udairaj Singh and Ram Naresh Singh who were all along shouting from the roof and were focusing a torch upon the intruders, who even fired towards them, were spared. If the Sessions Judge is right about the object of the attack, it will only be consistent with the absence of Udairaj Singh and Ram Naresh Singh in which case the evidence of Ram Naresh

Singh will be open to grave suspicion. Even Udairaj Singh has not been examined by the prosecution as a witness although the Sessions Judge has referred in his judgment “that Udairaj Singh told them (people who gathered) that Rameshwar Singh and others had killed his father and son...” In the absence of Udairaj Singh this statement is of course inadmissible, but this is pointed out only to show that the culprits named, at that stage, were “Rameshwar Singh and others” and not all the accused and that withholding of his evidence was deliberate. If the killing of the persons is the main intention, it is difficult to appreciate why it was necessary for the accused Shitla Baksh Singh and another unknown person to have caught Ram Jas Singh while he was running away and brought him back to the courtyard for the purpose of firing at him in order to kill him. He could have been killed while he was running away. The reason why the witnesses have stated that Ram Jas Singh was brought to the courtyard was perhaps to enable Ram Naresh Singh and others to see the killing. The Courts have not taken note of this at all.”

25. Similarly, to prove the point that if the enemies of the first informant side had come on the spot, they would have tried to do away with the entire family, learned counsel relied upon paragraph no. 33 of the above judgement which is being reproduced here as under:-

“33. Again if the object of the accused was to murder and wipe out the entire family, as has been found, by the Sessions Judge, there is no reason why in spite of their noticing Udairaj Singh and Ram Naresh Singh on the roof they would have left them without a scratch in spite of

the fact that Ram Naresh Singh stated that the accused had fired towards them."

26. Still further to bolster his point that no prudent person would conduct himself in the manner which has been reported by the prosecution in the case, learned counsel for the appellants relied upon a judgement of the Supreme Court reported in **2009 (6) SCC 457 : Shrishti Narain vs. Bindeshwar Jha and Ors.** and he specifically relied upon paragraphs no. 13 to 20 of the judgement which is being reproduced here as under:..

"13. The evidence of investigating officer that he found a plank of door broken and fallen on the floor which is also against the evidence of PW 1 who has clearly said that the appellants had made a hole in the plank of the door of her room by tengari and by inserting hand to that hole, opened the latch of the door. This also does not support the case of prosecution regarding the manner in which door of her room was opened. The investigating officer (PW 12) in his evidence has stated that he recorded the statements of PWs 1 and 2 on 7-7-1981 because on 6-7-1981 when he met them, they were not in a position to give their statements because they were engaged in weeping.

14. PW 2 has admitted that the police came on the next day of dacoity but on that day, her statement was not recorded because she was weeping on that day and on the next day her statement and statement of her mother-in-law were recorded. This has also created a very strong doubt to accept the evidence of PWs 1 and 2 that they are eyewitnesses to the occurrence. When PW 1 was in a position to give the details of the occurrence to her son who is the informant immediately after the occurrence, there was no reason for her

not to give her statement on the next day of occurrence when police had come to her house. PWs 1 and 2, said to be eyewitnesses to the occurrence, in their evidence, have stated that they were also assaulted by dacoits and had received injuries but there is nothing on record that like other injured persons, they were also examined by any doctor.

15. The investigating officer (PW 12) does not say that on the next day in the morning when he visited the place of occurrence, he found any injury on PWs 1 and 2. Although he has said that he prepared injury certificate but has not made it clear for whom such certificates were prepared by him. He, in his cross-examination, has said that by the time, he reached the place of occurrence, injured Gopal Narain Jha (PW 4) and Naresh Narain Jha (PW 6) had already been sent to the hospital and he, after going to the hospital, saw injuries on their persons. The injuries certificates, prepared by him, may be for these two injured persons and no definite opinion about the injury certificate, said to be prepared by him, can be given in the absence of naming the injured by him or in absence of bringing these injury certificates on record.

16. Amod Devi (PW 1) has said that later one Bahuran Devi gave her a sum of Rs 320 saying that she found the money thrown on the bank of a river and on the next day, one Ram Master informed that some boxes were lying in katai area which were brought by Budhan Sahni and others. None of the persons, named above, were examined.

17. The prosecution witnesses have claimed that they identified the appellants in the light of lantern but the investigating officer, during investigation, did not find any lantern or sign of lighting the lantern which usually appear in the

surrounding areas. Accused Bharat Lal Jha was not identified by PWs 1 and 2, accused Binod Jha by PW 2 and accused Umesh Jha by PW 6. Besides this, PWs 4 and 6 have added names of Ashok Jha, Somendra Jha and Ram Ballabh Jha who are not among the accused persons.

18. The medical evidence showing that the death of deceased was homicidal and the evidence of the investigating officer who found bloodstains at the place of occurrence and some marks of violence on a wooden box kept at the place of occurrence may suggest the factum of dacoity in the house of informant but so far as the manner of dacoity and participation of the accused in that dacoity is concerned, that appears quite doubtful. The evidence of prosecution witnesses is that besides the accused, there were some other dacoits also with them who could not be identified. The possibility of false implication of the appellants in this case on account of long-standing enmity utilising the incident of dacoity cannot be ruled out.

19. In this case, accused Vijay Jha and Binod Jha were examined under Section 313 of the Code of Criminal Procedure on 31-3-1987 and 20-4-1987 respectively when their ages were estimated by the court below as about nineteen years and twenty-two years respectively. The occurrence is said to have taken place in the night between 5-7-1981 and 6-7-1981. It means that at the time of occurrence the age of accused Vijay Jha was about thirteen years, three months and the age of appellant Binod Jha was about sixteen years two months. They both are brothers and accused Bindeshwar Jha is their another brother. It looks very unnatural that the accused would go to commit dacoity in their neighbourhood taking with them such minor and young boys as Vijay Jha and Binod Jha when they

were sufficient in number and accompanied by some other persons also.

20. Besides this, the age of accused Bhai Lal Jha was estimated by the court on 31-3-1987 when he was examined under Section 313 of the Code of Criminal Procedure as eighty years. The defence has brought on record a voters' list (Exhibit A) showing that in this voters' list which was received in the year 1983 the age of co-accused Dahaur Jha (since dead) is recorded as seventy-two years, since Dahaur Jha is dead now so this document does not help the case of any one now but then accused Bhai Lal Jha, admittedly at the time of occurrence was aged about seventy-four years. So, we find that the accused included an old man aged about seventy-four years as well as a boy aged about thirteen years and, as stated above, the accused were neighbours of the informant with whom the family of the informant had long-standing dispute."

27. Learned AGA Sri Amit Sinha opposed the appeal tooth and nail and submitted that when there were any number of eye-witnesses then it would matter little that there was enmity existing between the accused persons and the first informant and, therefore, the accused were implicated in the case. He submits that enmity itself could not have been a reason for the commission of the crime. Learned AGA also submitted that the evidence of injured witnesses and eye-witnesses could not be brushed aside casually.

28. Having heard the learned counsel for the appellants Sri Apul Mishra and Sri Rajarshi Gupta and the learned AGA Sri Amit Sinha, we are of the view that definitely when the case was taken by the prosecution that the accused persons had reached the place without any dhata(cover),

specially when they were known to the first informant's side then the case of the prosecution becomes weak and unbelievable. Also, we are of the view that the eye-witnesses from the side of the prosecution were, in fact, coming up with a cooked up story and that they were in fact not there on the spot at all. Had they been there then they would have at least known that before Ramagya was killed his hands were tied behind him. We are also of the view that even if the eye-witnesses were there they had definitely not recognized the dacoits and only to implicate certain known inimical persons, the first information report was got lodged. We are further of the view that the first information report was also ante-timed. In the first information report, there was no mention of the fact that the hands of the Ramagya were tied before he was killed. Also, the P.W.-2 had very categorically stated that under the statement recorded under Section 161 Cr.P.C., he had not mentioned the names of any of the accused but we find from the first information report that the names were mentioned in the first information report and if the P.W.-2 who was so close to the P.W. -1 had known of the names mentioned in the first information report then he would have definitely mentioned the names of the accused persons in the statement made under Section 161 Cr.P.C. Also, we are concluding that the first information report was ante-timed as the documents which were sent for the post mortem along with the panchayatnama did not contain the chik FIR, meaning thereby that the first information report was ante-dated after sometime had passed and the informant's side had made up its mind to implicate all the accused whom they wanted to implicate. We are of the view that the statements of the P.W. -1, P.W.-2, P.W. - 3 and P.W. 4 as had been stated by them before the Court were unrealistic. They had stated that they had called the names of the accused persons from the roof tops. In the case they were aware of the fact that their enemies had

come their would have instead of calling out the names of known enemies who were carrying guns and firearms, would have tried to hide themselves and would not have made them vulnerable to the firearms which they were carrying.

29. In the instant case, we definitely find that all the accused persons were neighbors who were inimical to the prosecution side and, therefore, they were implicated in the case in hand. We, thus conclude that, in fact, the case of the prosecution does not inspire confidence and, in fact, the prosecution had come up with a cooked up story only to implicate known persons who were inimical to him.

30. For all the reasons mentioned above, we are of the view that the judgement and order dated 11.3.1983 passed by Ivth Additional Sessions Judge, Varanasi, in S.T. No. 111 of 1978 (State vs. Jagdish Singh and others) & in S.T. No. 357 of 1979 (State vs. Ramdhani Tiwari @ Dhani and others) cannot be sustained in the eyes of law and, therefore, the same is set aside. Both the appeals are, accordingly, allowed. The appellants are already on bail. They need not surrender. Their bail bonds are cancelled and sureties are discharged.

(2025) 1 ILRA 120
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Criminal Appeal No. 659 of 1984

Iqbal Singh & Ors.	...Appellants
State of U.P.	...Respondent
Versus	

Counsel for the Appellants:

Pt. Mohan Chandra, Om Prakash Rai

Counsel for the Respondent:

D.G.A.

Criminal Law - Criminal Procedure Code, 1973 – Section - 313 - Indian Penal Code, 186 - Sections – 147, 148, 149, 302 & 307-

Appeal – against conviction & sentence – FIR – offence of murder - investigation – PMR – site plant – charge-sheet – plea taken that they were falsely implicated due to enmity – conviction & sentence - court finds that - (i) during pendency of appeal out of 8 accused persons 6 were died therefore against them appeal had abated, (ii) pw-1 who was an injured witness was not there on spot, (iii) there was an enmity between the injured and accused persons, (iv) pw-1 had not informed the first informant about incident himself, (v) pw-1 was such a witness who could not be absolutely relied upon for the purpose of convicting the accused, (vi) surviving both appellants were carrying lathies were not armed in such a manner as would make it evident that they had gone with a premeditated mind to do away with the deceased - court inclined to hold that, Conviction of the accused persons could not be based on the testimony of an eye-witness who was not believable — hence, appeal succeeds and is allowed - conviction and sentence is set aside – direction issued, accordingly. (Para – 11, 13, 14, 15)

Criminal Appeal Allowed. (E-11)**List of Cases cited:**

1. Maniram & ors. Vs St. of UP (1994 Supp (2) SCC 289),
2. Solanki Chimanbhai Ukabhai Vs St. of Guj.(AIR 1983 SC 484),
3. Krishneogwda & ors. Vs St. of Karn. (AIR 2017 SC 1657).

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

1. The present criminal appeal has been preferred against the judgement and order dated 1.3.1984 passed by the Special Judge, Ghaziabad, in Sessions Trial No. 23 of 1982.

2. Upon an incident having taken place on 2nd December, 1981 at around 10:00 A.M., a first information report was lodged on that very date at 1:30 P.M. The first information report had stated that around 6 to 7 years prior in point of time, one Tejpal Singh, father of one of the accused Iqbal Singh was murdered wherein Jagvir Singh and the first informant were made the accused. It has further been stated in the first information report that also around 3 to 4 years prior to the date when the incident had occurred one Vikram Singh was also murdered by Amar Singh etc. It has further been stated in the first information report that these accused persons were out on bail and because of the fact that the injured and the deceased had given statements against accused persons when they were being tried for the murder of Tejpal and Vikram Singh, the accused persons were inimical to them and, therefore, when on the date of incident Ram Saran, the brother of the first informant and nephew of the first informant Jagvir Singh were found by the accused persons, in a lonely place while they were coming back from Shahibad to their village, they were attacked by the accused persons with an intention to kill Ram Saran and Jagvir Singh. It has further been stated in the first information report that Amar Singh, Iqbal Singh were carrying Tabals whereas Omkar Singh, Rukam Singh were having spades/ Favada in their hands. Madan, Sansar and Prakash Singh sons of Khajan, Ishwar son of Harikesh, Krishnapal son of Karan Singh were having Lathies in their hands. They all had met at

the tubewell of Iqbal and on the exhortation of Amar Singh they had chased the two i.e. the deceased and the injured. In the first information report it has been stated that Amar Singh had exhorted the others to do away with the deceased and the injured. It has been stated that the deceased and injured upon realizing that they were being assaulted they had tried to save their lives and had run to the agricultural fields on the northern side. It has further been stated that thereafter Amar Singh had hit Jagvir Singh on the head, whereas the others had started attacking Ram Saran by the spade and tabal in their hands. Still further they had stated that when they had raised a hue and cry then the witnesses Nawab Singh, Pitam Singh, Bijendra Singh, Ganeshi, Kamalvir and Harphool Singh etc. reached on the spot to save the deceased and the injured. It has still further been stated that because of the injury caused by the Spade and Tabal, Ram Saran had died on the spot whereas Jagvir Singh was seriously injured. It has, thereafter, been stated that Nawab Singh had run to the agricultural field of Shiv Charan who had after arranging for a Bagghi which was to be pulled by buffalos, reached the spot and took the injured to the police station and thereafter upon his dictation Ompal Singh had scribed the first information report.

3. Upon the registration of the first information report, investigation ensued. The police had taken into custody the belongings of the deceased Ram Saran and had prepared a memo of it which was exhibited as Exhibit - Ka11. The blood stained bedsheet and cap of the deceased were also kept in the custody of the police and a recovery memo was prepared which was exhibited as Exhibit Ka9. Blood stained soil and normal soil were also taken from the spot when the incident had

occurred and memo of it was prepared and exhibited as Exhibit-ka10. The injured was examined by Dr. S.K. Das and the injury report was exhibited as Exhibit Ka1.

4. Upon the death having taken place of Ram Saran, Dr. K.K. Karoli conducted the post mortem and the report of it was exhibited as Exhibit Ka2. Prior to the conducting of the post mortem and the preparation of the post mortem report, a panchayatnama was also prepared which was exhibited as Exhibit Ka4.

5. Upon investigation having concluded, the police had submitted its report which when was taken cognizance of by the learned Ist Additional Sessions Judge, Ghaziabad, the eight accused, namely, Iqbal Singh, Onkar Singh, Rakam Singh, Madan Singh, Sansar Singh, Prakash Singh, Ishwar Singh and Krishna Pal were charged under Sections 148 read with Section 147 IPC and also under Section 302 read with Section 149 IPC. Since Jagvir Singh was injured, a charge was also framed against the 8 accused persons under Section 307 read with Section 149 IPC. The trial, thereafter, commenced and the eight prosecution witnesses were examined and cross examined. The accused had got their statements recorded under Section 313 Cr.P.C. Thereafter, when the Special Judge, Ghaziabad, held the eight accused persons guilty of the charges levelled against them the instant Criminal Appeal was filed.

6. During the pendency of the appeal, out of 8 accused persons, 6 of them had died and the criminal appeal, therefore, vis-a-vis the appellant no.1 Iqbal Singh, the appellant no. 2 Onkar Singh@Rirku, the appellant no. 3 Rakam Singh, the appellant no. 4 Madan Singh, the appellant no. 6

Prakash and the appellant no.7 Ishwar had abated.

7. The appellant no. 5 Sansar Singh and the appellant no. 8 Krishan Pal were not represented by any lawyer and, therefore, the Court had appointed Sri Saurav Sachan as an Amicus Curiae on their behalf.

8. Learned amicus curiae has essentially argued that if the statements of P.W. 1, P.W. 4, P.W. 5, P.W. 6 and P.W. 7 are perused then it appears that they have very consistently stated that when the deceased and the injured had reached the tubewell of Iqbal then they were chased by the 9 accused persons and they, to save their lives, entered the agricultural fields lying on the northern side where they were attacked by Tabal, spades and lathies and, thereafter, the deceased Ram Saran, because of the injuries, had died. However, Jagvir had survived.

9. Learned amicus curiae has, to substantiate his arguments submitted that in fact, the P.W.-1 who was an injured witness was not there on the spot and had only falsely implicated the appellants.

10. Following were the submissions made:-

I. Learned amicus curiae has submitted that if the post mortem report of the deceased Ram Saran is seen then it would be apparent that the medical evidence was absolutely diametrically opposite to the oral evidence which was recorded during the trial of the case. Learned amicus curiae states that throughout in the first information report and thereafter in the statement of P.W.-1, the injured witness and in the statements of P.W.-4, P.W.-5, P.W.-6 and P.W.-7 who were the

eye witnesses, the case brought forth was that the deceased Ram Saran was assailed by a Tabal. He, however, states that the post mortem report, said that there was an injury on the neck of the deceased which was reported in the post mortem as "Kuchla Hua Zakhma". He stated that "Kuchla Hua Zakhma" would mean a crushed injury. This would not be possible if the deceased was assailed by a sharp edged weapons. He states that even if the sharp side of the spade/tabal was not used and in fact the plain side was used even then a crushed injury was not possible. He, therefore, states that the medical evidence which stated that injury was of a crushed type did not match with the testimony of the eye-witness who was an injured witness, who had stated that, in fact, the deceased was assailed by a spade/tabal (sharped edged weapon).

II. Learned amicus curiae states that the injured witness was definitely not injured to the extent that he could not have spoken out. He had drawn the attention of the Court to page 20 of the paper book wherein it had clearly stated that Nawab had narrated the entire incident to Shiv Charan. How Nawab came to know about what had happened prior in point of time when he had reached the place of incident was not clear. According to the P.W.-1 the injured witness it was not possible for Nawab to have the details of the incident as he had reached the place of incident only after a hue and cry was raised by the injured witness. He, therefore, states that in fact the P.W.-1 was not there on the spot at the time of the incident. It was a possibility that the deceased had died in an accident and the injured had sustained the injuries elsewhere and simply because there was an enmity between the injured and the accused persons, en mass, they had been implicated in the case.

III. Learned amicus curiae for the appellants further states that the testimony

of P.W.-1 further becomes unbelievable because if the testimony is read along with the site plan it becomes evident that the P.W.-1 was stating all types of falsehood. He had stated that there was some Nahar passing by but in the site plan there was no Nahar. He further states that the eye witnesses who had assembled on the spot were staying in the vicinity but pointing out to the site plan learned counsel had argued that all the land surrounding the place of incident belonged to one Virendra and Virendra was nowhere in the picture. He submits that even though he was named in the first information report as an eye witness, he had not been produced in the Court.

IV. Learned amicus curiae for the appellants further states that if the injuries of P.W.-1 and the statement of Dr. S.K. Das, P.W.-2, are perused it would become apparent that the injuries were such that the P.W.-1 could not have narrated the incident to the first informant Shiv Charan Singh.

V. Still further, learned amicus curiae for the appellants has argued that from the testimony of P.W.-1 it was apparent that Shiv Charan Singh was an owner of a tractor but the injured was carried to the Police Station and thereafter to the Hospital by a cart which was pulled by a buffalo.

VI. The surviving appellants i.e. Sansar Singh and Krishnapal Singh were allegedly wielding lathies only. It has nowhere been alleged in the first information report or in the various testimonies of the injured witnesses and the eye-witnesses that all the accused persons had in a premeditated manner decided/resolved to do away with the deceased. From the perusal of their testimony, learned counsel submitted that it becomes only evident that at the spur of the moment Amar Singh had exhorted the others to do away with the deceased. He submits

that if the accused Iqbal Singh and Amar Singh could carry Tabal then in a village it was not difficult for the other accused persons to have also carried Tabal. If they had any intention to actually kill the deceased then they would not have gone to the place of incident with only lathies in their hands. He, therefore, submits that the appellants no. 5 and 8 who were carrying lathies had no role whatsoever in the incident which had occurred. He submits that there were also no lathi injuries on the body of the deceased.

11. Learned amicus curiae, therefore, states that the eye witness account was absolutely unbelievable and the case, therefore, becomes a doubtful one and therefore the conviction of the accused persons could not be based on the testimony of an eye witness who was not believable. He relied upon judgements of the Supreme Court passed in **Maniram and Others vs. State of U.P. reported in 1994 Supp(2) SCC 289, Solanki Chimanbhai Ukabhai vs. State of Gujarat reported in AIR 1983 SC 484 and Krishneogwda and others vs. State of Karnataka reported in AIR 2017 SC 1657.**

12. Learned AGA Sri Chandra Bhushan Dhar Dubey, however, has vehemently argued that the eye-witness account of an injured witness could not be lightly done away with. He has also stated that the eye witness account of P.W. 4, P.W. -5, P.W. - 6 and P.W.-7 had corroborated the eye witness account of P.W.-1 who was an injured eye-witness and, therefore, the testimony of P.W.-1, P.W.-4, P.W.-5, P.W.-6 and P.W. 7 could not be lightly ignored.

13. Having heard learned Amicus Curiae Sri Saurabh Sachan and Sri Chandra Bhushan Dhar Dubey, learned Additional Government Advocate, we are of the view

that the testimony of injured witness P.W.-1, becomes fairly doubtful on account of the fact that he had not been able to give a correct description of the place where the incident had occurred. If the testimony of P.W.-1 is seen, he had definitely not been able to connect the place of incident with the map as had been given in the site plan which was exhibited as Exhibit - ka8 in the paper book. We are also of the view that the P.W.-1 who was an injured witness had not informed the first informant Shiv Charan Singh about the incident himself. We find after having perused the injury report and the statement of P.w.-2, Dr. S.K. Das that the injuries were so grievous that he could not have spoken aloud and narrate the incident to the first informant Shiv Charan Singh. In the instant case, we find that, in fact, another alleged eye witness Nawab Singh had stated that he had narrated the entire incident to Shiv Charan Singh and on the dictation of Shiv Charan Singh, Om Pal Singh had scribed the first information report and we are, thus, of the view that the P.W.-1 was such a witness who could not be absolutely relied upon for the purpose of convicting the accused persons. We further find that the appellants no. 5 and 8 who were carrying lathies were not armed in such a manner as would make it evident that they had gone with a premeditated mind to do away with the deceased.

14. Thus for all the reasons which we have stated, the criminal appeal is **allowed**. The impugned judgement and order dated 1.3.1984 passed by the Special Judge, Ghaziabad, is set aside. Since the appeal against the appellants no. 1 Iqbal Singh, the appellant no. 2 Onkar Singh @ Rirku, the appellant no. 3 Rakam Singh, the appellant no. 4 Madan Singh, the appellant no. 6 Prakash and the appellant

no. 7 Ishwar has already abated, we confine our judgment and order to the appellant no. 5 Sansar Singh and the appellant no. 8 Krishan Pal, who are being acquitted of all the charges under which they were tried.

15. The appellant no. 5 Sansar Singh and the appellant no. 8 Krishan Pal are acquitted of the charges levelled against them. The appellants are already on bail and they need not surrender. The sureties and bail bonds are discharged.

16. For the hard work which has been put in by the learned Amicus Curiae Mr. Saurabh Sachan, we quantify his fee as Rs. 25,000/- which shall be payable to him by the Legal Services Authority forthwith. The payment be got done under the supervision of the Registrar General of this court.

(2025) 1 ILRA 125

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 21.01.2025

BEFORE

THE HON'BLE SIDDHARTH VARMA

**THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.**

Criminal Appeal No. 2696 of 1981

And

Criminal Appeal No. 660 of 1984

Devendra Kumar @ Jhunna & Ors.

...Appellants

Versus

State of U.P.

...Respondent

Counsel for the Appellants:

S.S. Tewari, Ajay Kumar Pandey, K.K. Srivastava, Roshan Khan, Satish Trivedi

Counsel for the Respondent:

Dga, Mayank Bhushan

A. Criminal Law - Juvenile Justice (Care And Protection Of Children) Act, 2000 - Sections 2(k), 2(l), 7-A, 20 & 49 - Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rules 12 & 98 - Applicability of 2000 Act retrospectively - All persons who were below the age of eighteen years on the date of commission of the offence even prior to 1-4-2001 would be treated as juvenile. If the accused claiming plea of juvenility, was less than 18 years of age, on the date of commission of offence, he is entitled to be treated as juvenile and will be given benefit as per 2000 Act, notwithstanding the fact that the accused was not entitled to the benefit of being a juvenile on the date of offence under Juvenile Justice Act, 1986, as Act was passed after commissioning of this offence. In the instant case the Juvenile in conflict of law, dealt with under the provisions of Juvenile Justice (Care And Protection Of Children) Act, 2000 inspite of the fact that occurrence took place in the year 1976 and during trial of the case Juvenile Justice Act, 1986 was enacted and commenced. (Para 83, 84)

B. Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149 & 302 - Common object - Unlawful assembly - Natural witness - Eyewitness credibility - Minor inconsistencies - In the instant case at around 12:00 hours in the day, the deceased, who was the brother of informant was going to his house to take meal from his shop. Accused persons armed with spears (Barchhai) , Tabbals, lathis, all belonging to informant's village waylaid the deceased and attacked him by their weapons. Deceased raised an alarm, the informant and wife of deceased rushed to the spot. Accused persons also gave beating to the informant and wife of the deceased. In the meantime, challenged the accused whereupon they ran away towards east. Deceased died on the spot. Motive was that the deceased was a witness in the murder case and had deposed against the one of accused. *Held* : It was proved beyond reasonable doubt that surviving accused had formed

unlawful assembly together with co-accused on the date and time of the incident and in prosecution of common objection of the assembly they brutally assaulted the deceased in concerted manner by their respective weapons with intention to kill him and caused fatal injuries on his person, which was sufficient to cause death and on account of the injuries sustained in the incident he died instantaneously. Only due to the fact that no punctured wound was found on the person of the deceased, the presence of accused persons who were said to be armed with Barchhai cannot be doubted. Also only due to fact that informant with whom accused persons had strong enmity was spared in the incident by causing simple injuries and was not assaulted by dangerous weapons, his presence cannot be doubted as he stated in his evidence that he and his sister-in-law were rescued by witnesses. PW-5 Jagdish Narain has testified in his evidence that the incident occurred in front of the house and he had seen the incident. This fact is stated in FIR itself that house of Jagdish Narain lies in front of the place of incident and on that reason his presence on the spot is natural as he is supposed to be a witness of the spot and only on account of prior enmity with some accused persons his evidence cannot be brushed aside. From medical evidence, the mode and manner of the incident, and the injuries found on the person of the deceased and injured witnesses, stand proved, and the sworn testimony of the witnesses of fact/eye-witnesses finds corroboration from the medical evidence. Appeal Dismissed (Para 77, 78, 79, 81, 90)

Dismissed. (E-5)

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

1. Criminal Appeal No.2696 of 1981 has been preferred against the judgment and order dated 19.11.1981 passed by VIIth Additional Sessions Judge, (Non-

Metropolitan Area) Kanpur Nagar in S.T. No.75 of 1977 and S.T. No.304 of 1977, and Criminal Appeal No.660 of 1984 arose out of judgment and order dated 18.01.1984 passed in S.T. No.75 of 1977, in both the session trials. All the nine appellants have been convicted for charge under Section 147, 148, 302/149, 325/149 and 323/149 IPC, P.S. Derapur, Kanpur.

2. In S.T. No. 75 of 1977 appellant Devendra Kumar alias Jhunna, Jia Lal alias Dadu, Avdhesh and Smt. Ram Piari and in S.T. No.304/1977 accused Ram Pratap, Bhuneshwar, Bhanu Pratap alias Laluna, Shiv Das and Krishna Kumar alias Chuttan were sentenced to undergo imprisonment for life for charge under Section 302/149 IPC. They were also found guilty for charge under Section 325/149 Cr.P.C., for which they were sentenced to one year's rigorous imprisonment. They were further sentenced to six months rigorous imprisonment under Section 323/149 IPC. Accused Devendra Kumar alias Jhunna, Shiv Das, Krishan Kumar Chuttan were sentenced to one years rigorous imprisonment for charge under Section 147 IPC and accused Ram Pratap, Avdhesh, Bhunesh, Dadu and Lalauna were sentenced to one years rigorous imprisonment under Section 148 IPC.

3. Accused Smt. Ram Piari was sentenced to life imprisonment for charge under Section 302/149 IPC, one year simple imprisonment for charge under Section 325/149 IPC, six months imprisonment for charge under Section 323/149 IPC and one year simple imprisonment for charge under Section 147 IPC. All the sentences were directed to run concurrently.

4. Criminal Appeal No.660 of 1984 arose against the judgment and order dated 18.01.1984 passed by Learned IVth

Additional Sessions Judge, Kanpur Dehat in S.T. No.75A of 1977, whereby appellant Rajmun was convicted of charge under Sections 148, 302/149, 325/149 and 323/149 IPC. Accused Rajmun is sentenced to life imprisonment for charge under Section 302/149 IPC, one year rigorous imprisonment for charge under Section 148 IPC, one year rigorous imprisonment for charge under Section 325/149 IPC and six months rigorous imprisonment for charge under Section 323/149 IPC.

5. Both the criminal appeals have arisen out of conviction of appellants for the same offence having arisen out of Case Crime No.118 of 1976, under Sections 147, 148, 302/149, 323/149 and 325/149 IPC, PS. Derapur, Kanpur. As both the criminal appeals have arisen out of same incident and offence and all the appellants have been implicated as co-accused during the trial, both the appeals have been clubbed together and are being decided by a common judgment. The appellants were released on bail by orders of these Criminal Appeals on direction of this court in their respective criminal appeals.

6. Heard Sri Ajay Kumar Pandey, learned Amicus Curiae on behalf of the appellants, Sri Rahul Asthana, learned A.G.A. for the State and perused the material available on record.

7. The brief facts of the case as culled out from the case of prosecution are that on 29.06.1976 at around 12:00 hours in the day, when the deceased Sheo Narain who was the brother of informant Lalaram was going to his house to take meal from his shop, the accused persons namely Avdhesh, Ram Pratap, Bhuneshwar were armed with spears (*Barchhai*), Dadu, Lalauna, Rajmun were carrying (*Tabbals*), Shiv Das, Jhunna,

Chuttan and Smt. Ram Piari carrying lathis, all belonging to informant's village waylaid the deceased and started attacking him by their respective weapons. The deceased raised an alarm, the informant and Smt. Vimla wife of deceased rushed to the spot to rescue the deceased. The accused persons also gave beating to the informant and Smt. Vimla, wife of the deceased. In the meantime, witnesses Jagdish Narain, Ram Chander, Nanhey, Asharfi Lal, Mahadev challenged the accused whereupon they ran away towards east. The deceased died on the spot. The informant Lala Ram and Smt. Vimla had also sustained injuries. The motive of the offence as stated by the informant in FIR is that he was a witness in the murder case of Ram Gopal of the village who had deposed against accused Ram Pratap and others in an earlier murder case. Ram Pratap and others were convicted by court of sessions and were sentenced to 20 years imprisonment. The convicts were enlarged on bail by orders of High Court in Appeal, by this reason accused persons were harbouring grudge against the informant and his family members.

8. The written report Ext. Ka-3 was filed by Lala Ram PW-2 at the Police Station, Derapur, six miles away from the village Chilauli, where the murder was committed at 2:15 pm. On its basis Chick FIR Ext. Ka-22 was drawn by Head Moharir Ram Raj Singh, PW-9. He also made entry in the general diary at report No.18 dated 29.06.1976 at 02:15 pm, whereof copy is Ext. Ka-23. Injuries found on the person of Lala Ram were also noted in the general diary. The investigation of the case was entrusted to S.I. Sri Ram Singh, PW-8. He left for the scene of the crime immediately. He prepared inquest report Ext. Ka-5 on the dead body of the

deceased. Blood stained Dhoti Ext. 2 Shri Ext.3, Baniyan Ext. Ka-4 found on the dead body of Shiv Narain were taken into custody and placed in a sealed cover and Fard Ext. Ka-11 was prepared. He also took into custody blood stained Lathi Ext-5 and blade of Barchi Ext-6 found near the dead body under fard Ext. Ka-12. The Lathi was cut into three pieces and both the items were placed under sealed covers. The Investigating Officer thereupon searched the houses of the accused Ram Pratap, Bhunesh etc. but the accused were not found. Memos of search Ext. Ka-13 to Ka-17 were prepared. Thereafter, the Investigating Officer, prepared a diagram of the dead body Ext. Ka-18, report for postmortem examination Ext. Ka-19 and Ka-20 respectively, and challan lash Ext. Ka-21. The dead body was sealed in a cloth-sheet and was entrusted to constables Sri Subhan Ali and Ram Pal for being taken to the Head Quarters for post mortem examination. Sub Inspector Sri Mata Prasad P.W.7, who had reached there after the dead body had been sent and he had taken over the investigation. He had also collected in the presence of S.I. Sri Ram Singh, blood stained earth Ext.7 and plain earth Ext.8 from the scene of occurrence and Fard Ext. Ka-8 was prepared in this behalf. S.I. Sri Ram Singh returned to the police station with the sealed bundles. S.I. Sri Mata Prasad recorded the statements of the witnesses and prepared site-plan Ext.Ka-7. He sent the injured Smt. Vimla Devi and Lala Ram for medical examination with letters Ext. Ka-1/1 and Ka-2/1.

9. Head Moharir Sri Ram Raj Singh P.W.9 had made entry in the general diary at report No.34 on 29.6.1976 at 10:15 P.M. when S.I. Sri Ram Singh returned to the Police Station with five sealed bundles.,

Copy of the general diary is Ext.Ka-24. These bundles were sent to Chief Medical Officer's Office through Constable Sri Komal Singh for being forwarded to the Chemical Examiner, Agra, on 22.7. 1976 as per entry in the general diary, a report No. 11, copy of which is Ext.Ka-25. As per affidavit Ext. Ka-28, filed by Sri Komal Singh he had brought these bundles, with seals intact on 22.7.1976. Sri Vikram Singh, Clerk of the Office of Chief Medical Officer, Kanpur, has filed affidavit Ext.Ka-27 to the effect that he had received these five bundles and had despatched the same that very day to Chemical Examiner Agra. According to the report of the Chemical Examiner, Agra, Ext. Ka-29, blood-stained earth, shirt, Dhoti, Baniyan, blade of Barchi and pieces of Lathi were found stained with blood. According to the report of the Serologist Ext .Ka-30, the blood-stained earth and Baniyan had human blood of Group- "O" the blood was dis-integrated on Barchi and Lathi.

10. The injured Smt. Vimla Devi was examined by Dr. Surendra Singh (P.W.-1) on 29.6. 1976 at 8 P.M. when he found the following injuries on her person and prepared injury report Ext. Ka-1.

1. Contusion 8 Cm. x 2 Cm. on back, below right scapula region oblique in direction.

2. Contusion 7 Cm. x 2 Cm. on right hand just below the right elbow joint.

3. Contusion 6 Cm. x 2 Cm. on right hand about 4 Cm. above the right wrist joint on lateral aspect.

4. Three contusions in area of 9 Cm. x 5 Cm. on right fore arm about 8 Cm. above the wrist joint on the medial aspect.

5. Contusion 6 Cm. x 2 Cm. on right thigh about 8 Cm. above the right knee joint.

Injuries Nos. 1,2,3 and 5 were found to be simple and injury No.4 was kept under observation for which Xray was advised. The injuries in the doctor's opinion were about half day old and could have been caused by a blunt weapon Like a Lathi.

11. Dr. R.Prakash P.W.3, Radiologist, had taken X-ray of the right fore-arm of Smt. Vimla Devi on 29.6.76 and he found the lower 1/3rd right radius fractured for which he had issued his report Ext. Ka-4.

12. Dr. Surendra Singh P.W.1 had also examined Lala Ram at 8.30 P.M. and issued injury report Ext. Ka-2, Following injuries were found on his persons :-

1. Contusion 6 Cm. x 2 Cm. on right side of back below right scapular region oblique in direction.

2. Contusion 8 Cm. X 1 ½ cm on right upper hand about 7 Cm. below the shoulder joint on lateral aspect.

3. Contusion 6 Cm. X 1 ½ Cm. on right thigh about 10 Cm. above the knee joint on lateral aspect.

13. These injuries were also about half day old according to his opinion and might have been caused, at 12.00 Noon on 29.6.76. Injuries were simple and caused by blunt object.

14. The dead body of the deceased was sent through Constable Sri Subhan Ali and Constable Ram Pal Singh to the mortuary on 29.6.1976 duly sealed for which Constable Sri Subhan Ali has filed his affidavit Ext. Ka-26. He had also identified the dead body before the Medical Officer at the time of its post mortem examination.

15. Dr. B.K. Jain P.W.-6 had performed the post mortem examination on the dead body of the deceased Shiv Narain on 30.6.1976 at 4.30 P.M. He had found that the deceased was about 40 years of age. Death had taken place about one day earlier. Rigor-mortis had passed off and decomposition had just set in. He found the following ante-mortem injuries on the dead body;

(i) Incised wound 6.5 Cm. x 4 Cm. x 4 Cm, brain cavity deep on the front and middle of head 6 Cm. above the bridge of nose, frontal bone cut under-neath. Brain matter coming out of the wound.

(ii) Incised wound 3 Cm. x 1.5 Cm. x bone cut underneath on the right side front of head 4 Cm. above the right eye-brow.

(iii) Incised wound 2 Cm. x 1 Cm. x muscle deep on the right side face just outer to right eye brow.

(iv) Incised wound 3 Cm. x 1.5 Cm. x bone cut underneath on the right side head 11 Cm. above right ear.

(v) Incised wound 4 Cm. x 1.5 Cm. x bone cut underneath on the right side head 4 Cm. above right ear.

(vi) Incised wound 4 Cm. x 2 Cm. x bone cut underneath on the right side head 3 Cm. behind injury No. (v)

(vii) Incised wound 10 Cm. x 6.5 Cm. x Occipital bone cut underneath on the back of head oblique 3 1/2 Cm. behind right ear.

(viii) Abraised contusion 13 Cm. x 6 Cm. on the back of left Shoulder and outer side left arm.

(ix) Abraised contusion 6 Cm. x 4.5 Cm. on the back of left elbow.

(x) Incised wound 2 Cm. x 1 Cm. x muscle deep on the front of left leg in middle.

(xi) Abraised contusion 9 Cm. x 6 Cm. on the back of right elbow.

(xii) Contusion 19 Cm. x 4 Cm. on the left side back oblique

(xiii) Contusion 21 Cm. x 5 Cm. on the right scapular region and middle of back oblique.

(xiv) Contusion 12 Cm. x 6 Cm. on the left buttock.

16. On internal examination, the Medical Officer had found that the frontal, temporal and right parietal and occipital bones were cut under injuries Nos. 1 to 7. Brain was cut and was coming out. Stomach was empty. Small intestines contained a little digested food and large intestines contained faecal matter. In the opinion of the Doctor, cause of death was shock and hemorrhage as a result of ante-mortem injuries. Dr. Jain had prepared and proved post-mortem report Ext. Ka-6.

17. After completing the investigation, Sub Inspector Sri Mata Prasad P.W.7 submitted the charge-sheet Ext. Ka-9 against the accused Jia Lal alias Dadu, Rajmun, Avdhesh, Devendra and Smt. Ram Piari, on 28.8.1976. They were committed to stand their trial in the Sessions Court by the Chief Judicial Magistrate, Kanpur Dehat, under his order dated 26.3.1977. The police could not apprehend the other accused inspite of issue of proclamation under Section 81 Cr.P.C. and after issuing warrants of attachment as also attachment of the movable properties of Ram Pratap, Bhunesh, Lalauna alias Bhanu Prakash and of Shiv Das, on 5.9.1976 and consequently, charge-sheet Ext. Ka-10 was submitted against the accused Ram Pratap, Bhunesh, Bhanu Prakash alias Lalauna, Krishan Kumar alias Chhuttan, as absconders. They were committed to stand their trial in the Sessions Court by the Chief Judicial

Magistrate under his order dated 28.10.1977.

18. Both the Sessions cases were consolidated and S.T. No.75/1977 was made the leading case. All the accused except Rajmun were charged under Sections 147, 148, 302/149, 325/149 and 323/149 I.P.C. to which they pleaded not guilty. During the trial, the accused Rajmun jumped bail and his case had to be separated from S.T. No.75 of 1977 under order dated 22.7. 1980 vide S.T. No.75 A of 1977. The accused were tried for charge under Sections 147, 325/149, 302/149, 323/149, 148 IPC.

19. In support of its case, the prosecution has examined nine witnesses in all. Of these, Dr. Surendra Singh P.W. 1, Dr. R. Prakash, Radiologist, P.W.3 and Dr.B.K.Jain P.W.6 are the medical Officers and their evidence has already been referred to above, while stating the prosecution case. Sub-Inspector Sri Mata Prasad P.W.7 and Sub-Inspector Sri Ram Singh PW-8 are the Investigating Officers and P.W.-9 Head Moharrir Sri Ram Raj Singh is a formal witness who had prepared check F.I.R. and made entries in the general diary P.W-2 Sri Lala Ram, brother of the deceased, PW-4 Smt. Vimla Devi wife of the deceased and P.W.-5 Jagdish Prasad are the eye-witnesses. The accused persons also examined five witnesses in their defence, including the accused Ram Pratap who has been examined on his request.

20. We may now refer to the evidence of the eye-witnesses examined by the prosecution.

21. Supporting the prosecution case, Sri Lala Ram P.W.-2 brother of the

deceased, Sheo Narain, has deposed that Ram Gopal of his village was murdered and the accused Ram Pratap, Bhunesh, Avdhesh, Dadu, Rajmun and others were tried for that murder, for which he had given evidence and these accused were convicted and sentenced to 20 years' rigorous imprisonment by the Sessions Court. At the time of the murder of his brother, these accused had been released on bail by the Hon'ble High Court during the pendency of their appeal. They bore enmity against him and members of his family.

22. The witness further deposed that about a year and eight months' back, at about 12 noon, his brother Sheo Narain was returning from his shop. He was also following him. When his brother reached in front of the house of Jagdish Narain on the passage, the accused Ram Pratap, Bhunesh, Avdhesh, carrying Barchi (spears), and the accused Dadu, Rajmun Lalauna carrying Tabbals and the accused Sheo Das, Jhunna, Chhuttan and Smt. Ram Piari carrying Lathies, came there. He could not notice from which side they had come. The accused started attacking his brother with Barchi, Tabbals and Lathies. His brother raised an alarm. The witnesses came running to rescue him. The wife of his brother, Smt. Vimla Devi also came there. Jagdish Narain, Nanhey, Asharfi Lal, Mahadeo, Ram Chander had also come. The accused attacked the witness and also Smt. Vimla Devi with Lathies. On the intervention of the witness, the accused ran away towards the east. His brother died on the spot. Smt. Vimla had also suffered injuries. The witness further deposed that he had prepared the report Ext. Ka-3 and had gone to the police Station Derapur, where it was filed. He identified the shirt, Dhoti and Baniyan Exts. 1 to 3 as the clothes worn by the deceased at the time of

the incident. He further deposed that at the time of the incident, blood had fallen on the ground where his brother had fallen down after fatally hurt. He further deposed that a Lathi and blade of Barchhi were found near the dead body, which were stained with blood. The witness also stated that the accused Lalauna was a real brother of the accused Ram Pratap, and Sheo Das accused was the cousin of the accused Ram Pratap. Jhunna and Chhuttan were also related to Ram Pratap. All the other accused belongs to the party of Ram Pratap and were his supporters. Smt. Ram Piari was the mother of the accused Dadu.

23. In his cross-examination, the witness has stated that Jagdish Narain, who was a prosecution witness in this case, was informant of the earlier murder trial against the accused Ram Pratap etc. and the deceased Ram Gopal of the said murder trial was the brother of Jagdish Narain. The accused Ram Pratap was the Pradhan of the village but he did not know if he was a Principal in a School at Ladpur Pad. He also stated that even before the murder of his brother, the accused had tried to Gherao them. He also claimed to have sent an information to the Superintendent of Police Kanpur, but the matter was not pursued further. He admitted that Sri Kalika had filed a complaint against him, his brother u/s 307 I.P.C. Rajjan and the witness Jagdish Narain, who claimed that it was a false complaint and had been dismissed. He admitted that in a case under Section 324 I.P.C. against Hirdaya Narain he had appeared as a witness and the accused was sentenced.

24. He further submitted that his shop was about one furlong away from the scene of occurrence on the road side. On coming towards the village, in some portions

agricultural fields were lying on both sides, there are khaliyans. The shop was, however, in the abadi. He denied that there were any bushes along the passage from the shop to his house. The witnesses further deposed that his brother was not an eye witness in the murder of Ram Gopal, brother of Jagdish Narain, but his brother used to do pairvi in the case. He further stated that his brother used to press him for giving evidence and to state the truth. He admitted that this fact was not mentioned by him in the FIR, but he claimed that he had told about it to the investigating officer. However, his statement under Section 161 Cr.P.C. did not find any mention about it. The witness could not give the date or month of making the application to the Superintendent of Police regarding the attempts of the accused to Gherao them nor to give the names of the witnesses of those incidents. He admitted that no mention about it was made by them in the FIR. He did not remember if he had told about it to the Investigating Officer, but he did not give copy of the application to him. He also testified that he and his brother had only one house in village Chilauli and they live jointly. The land was in the name of their father at the time of incident. Although their father died 3-4 years back, it was only during the consolidation that their chaks were separated after the murder of his brother. He also admitted that he had constructed a separate house in Rura and the deceased had purchased land from Babbu Shukla in his own name, but he denied that he and his brother were living separately since before the incident of this case. He admitted that he had a ration card in Rura also, while his brother had a ration card in village Chilauli. They had a small shop of betel and Cigarettes etc. He admitted that he and his brother were prosecuted by Sheo Datt

Bajapi. It was a false case and they had been acquitted. He further stated that he had not noticed the Lathi and the blade of Barchhai before writing the report, but he noticed it when he came out of his house after writing the report. He did not think it necessary to add it in the report before filing it. He claimed that he had sustained injuries on his back and on his waist. Although the hospital was only 40 mts. away from the police Station, yet he had not been sent for medical examination immediately after the filing of the report. He came with the investigating officer and was medically examined latter in the evening.

25. PW-1 further stated that at the time of incident, Jagdish Baba was 12-14 paces away from the scene of occurrence. He and Nanhey who was also at the same distance had asked the accused to refrain from beating the deceased. The accused had not tried to attack Jagdish. The marpeet took place only for half a minute. The Tabbal was about 4 finger wide and was of the shape of *Axe (Kulhari)*. All the *Tabbals* were of the same shape. All the accused had attacked from all the sides. The *ballam* was of the size of 4-5 fingers. Smt. Vimla Devi had wept after the incident, but she had not taken the head of her husband in her lap, neither she had embraced the dead body. The clothes of Smt. Vimla Devi or of the witness were not stained with the blood of the deceased. Apart from the enmity on account of his giving the evidence, the accused bore enmity against them for other reasons also. Ram Pratap had also filed a case under Section 379 IPC in which they were acquitted. They had three houses in the Chulauli. One of the houses had been sold. They have a house adjoining the house of accused Dadu, and in the third house had therein shop. At the time of

murder of Ram Gopal, his parents used to live in Phatak Wala house and as they were not keeping good-health, he used to stay with them in that house. But ordinarily, he lived in the house adjoining the the house of the accused Dadu. In his cross examination on behalf of accused Dadu the witness has admitted that in the house of Dadu, there were only two members namely the accused Dadu and his mother Smt. Ram Piari. Dadu had no enmity against them, except his giving evidence against him in the murder case of Ram Gopal. He denied the suggestion that Dadu and his brother had been implicated with a view to get them punished and their houses may have been usurped by the witnessed.

26. PW-4 Vimla Devi, who is wife of the deceased Sheo Narain. She stated in her evidence that the incident occurred four years and four months back, at about noon, she was present in her house and she was trying to get her infant baby female child aged about two and a half year sleep. When she heard shrieks of her husband Sheo Narain who was crying that he was being killed come fast, she rushed out of the house. She also heard shouts of accused persons. When the witness and other reached at the door of the house of Dadu, accused Smt. Ram Piari and Jhunna who were present in the court at the time of evidence, started beating them. She saw the accused Dadu alias Jiya Lal, Lalauna, Sheo Das, Bhunesh, Aavdhesh, Ram Pratap, Chhuttan, Jhunna and Smt. Ram Piari alongwith Rajmon were attacking her husband. Lalauna, Dadu and Rajmon had Tabbals, while Bhunesh, Avdhesh and Ram Pratap had Barchhai, the remaining accused Lathies. She also deposed that her brother-in-law Lala Ram had come from the western side. The accused Sheo Das and Chhuttan had attacked Lala Ram. Her

husband was attacked in front of the door of Jagdish Narain and Jagdish Narain and Nanhey were present in front of the house of Jagdish. 4-5 other accused persons who did not belong to her village had also come. All of them had raised hue and cry when the accused ran towards the east. Her husband had fallen down on the spot and had died instantaneously. She had sustained injury on her hand, on her upper leg, and on her back and at some other places, which were caused by Smt. Ram Piari and Jhunna. Her brother-in-law, Lala Ram had gone to file report at the police station Derapur. The police accompanied him from police station, her brother-in-law had written report and took it to police station. The Sub Inspector had carried out inquest of the body and transmitted the body from the spot. Thereafter another Sub Inspector reached there who recorded her statements of witness and her brother-in-law. Her medico legal examination was conducted at hospital and a temporary posture was drawn on her right hand, it was 09:00 hours in the night, therefore she was sent back to her house with a police personnel. The police took her at Rousla Hospital next day in the morning; but due to power cut X-ray of her hand could not be carried out. She went thereafter at the place where postmortem was being done. She was sent to her parental place at Shastri Nagar by her brother-in-law (*Jeth*) in the company of a person. X-ray of her hand was conducted thereafter on some date. Accused bore enmity with her husband as it was witness in the murder of his elder brother Ram Gopal.

27. The witness stated in her cross-examination that in her knowledge the accused had no other enmity except that her husband's brother had given evidence against the accused Ram Pratap etc. in the

murder case of Ram Gopal. She also stated that her husband used to look after his cultivation and had set up a shop on the road side. Her husband and Lala Ram live jointly in the same house and would jointly cultivate the land. The shop on the road side also belonged to both the brothers. Her parents-in-law were living in Phatak Wala House, but food was cooked only in their house situated near the scene of occurrence. Sometime, her husband also slept at the shop.

28. PW-4 further stated that she and Lala Ram were not beaten in front of the house of Jagdish. She could not remember if she had told the Investigating Officer about their beaten in front of the house of Jagdish Narain, though her version before the Investigating Officer is that witness Lala Ram and she herself were beaten in front of the house of Jagdish Narain. When Lala Ram came to rescue the deceased, four or five persons came from the western side and Lal Ram went back four or five paces. He again advanced, thereupon the accused ran away. When Lala Ram had turned back, his face was towards west and he had gone upto the house of Bane and Chhotey which adjoined each other.

29. PW-4 further stated that Barchhi was not pointed, but was flat (*chapti*) and was 4-5 fingers long and one or two fingers in width. The *Tabbal* was 4-5 fingers wide and 2-3 fingers deep. The *marpeet* took place for half a minute after he reached the scene of occurrence. She had not embraced her husband's dead body but had wept sitting by its side. Her clothes were not stained with his blood.

30. She next stated that that her husband had gone to the shop after

answering the call of nature in the morning at 07:30 am alongwith Lala Ram. The shop was being filled with earth. She had stated on her own that her husband had gone to the shop without eating anything. She had sent her daughters aged about 10 and 8 years at the shop to convey that food was ready at 11:30 am. Lala Ram's wife had gone to her parents' house those days. Shiv Das and Chhuttan had beaten Lala Ram, when he was coming from the side of the shop. She did not remember if she had told it to the Investigating Officer, but it does not appear in her statement under Section 161 Cr.P.C. that Lala Ram was beaten by Shiv Das and Chhuttan.

31. The witness denied defence suggestion that her husband was attacked while he was going to answer the call of nature or was returning after easing himself in the darkness. She also denied defence suggestion that she deposed falsely on being tutored by her brother-in-law. She clarified that she had herself witnessed the incident. She is blessed of 5 children and she cannot tell a lie, her children are in front of her. Smt. Ram Piari was healthy at that time, but now she has become old. She also denied the suggestion that she got her injuries manufactured falsely. There was bright sunlight in days of incident. The relationship between the witness and her brother-in-law and husband were cordial. Lathi and Pola were lying near the dead body of her husband which was lying towards north. He was lying on a site of culvert, his legs were eastwards and head was westwards.

32. PW-5 Jagdish Narain, the last eyewitness had deposed that he was sitting in front of his house. Nanhey Tewari was sitting with him. He deposed that at about mid-day, the deceased was coming from

west and was proceeding towards his house and had reached in front of the house of witness, when the accused persons came out of the house of accused Dadu, alongwith Rajmun and attacked the deceased with their arms. The witness attributed the same weapons to the accused persons which are shown in the statements of other eye-witnesses. PW2 Lala Ram and PW4 -Vimla Devi.

33. According to the witness when the deceased had raised alarm, his wife Smt. Vimla Devi came out of the house when she reached near the house of accused Dadu she was attacked by Smt. Ram Piari. Lala Ram was coming behind the deceased. He challenged the accused whereupon, he was attacked by Shiv Das and Chhuttan near the door of Chhotey. Mahadeo, Asharfi, Ram Chander had also come from the west side. These persons as well as the witness Nanhey asked the accused persons to refrain from killing. Shiv Narain alias Rajjan pleaded to leave him, whereupon the accused persons ran away towards east. Shiv Narain had died on the spot. He had also stated that Nanhey, Mahadev, Asharfi and Ram Chander have colluded with the accused and they intend that the accused be acquitted. The informant Lala Ram came back at around 03:30 pm alongwith police, the witness acknowledged his signature on inquest report, which is marked as Ext. Ka-5. He also stated that the Sub Inspector visited the spot after inquest who recorded his statements. In cross-examination the witness has stated that he was an eye-witness and informant in the murder of his brother Ram Gopal. Raj Narain is not an eye-witness in that case and Nanhey a witness in the present case is real brother of Raj Narayan. Ram Swaroop was a witness in murder case of Ram Gopal, he had given eye-witness account in the murder case of

his brother Ram Gopal. He was also informant in the case Ram Pratap, Bhunesh, Avdhesh, Jia Lal alias Dadu, beside Rajmon, Rameshwar and Jagannath (in all seven persons) were tried for murder of his brother. Five were sentenced to life imprisonment and two were sentenced to two year's rigorous imprisonment. He admitted that he and his brother Ram Gopal were tried for having caused hurt to one Chunnu in which Prem Narain father of Ram Pratap accused had given evidence and they were sentenced to six months' rigorous imprisonment. The witnesses admitted that the litigation had taken place 20 years back, over the house presently occupied by Dadu between Dadu's father Munni Lal and Har Prasad, cousin of witness in which Har Prasad had lost. The witness denied that he wanted to usurp Dadu's house and added that there was no one in his family except the witness himself.

34. He further stated that he was sitting in the *Dehri* of his house and Nanhey was sitting 4-5 steps away on the Chabutra since about an hour before the incident. Many people were passing on the way. He claimed that 1 and 1/2 or 2 hours before the murder, the accused had gone into Dadu's house in separate manner and were carrying their arms. He had inquired from the accused as to why they were going with the arms. He had not suspected anything wrong. He further stated that although he had become afraid of the accused but had not told any other villager or Nanhey about the assembly of the accused. He had seen Shiv Narain coming at a distance 10-15 paces but he did not call and warn him. He remained in his *Dehri* thinking that he will go inside the house if there was any danger to him. When the accused started attacking Shiv Narain, he

only asked the accused to refrain from doing so and made no other attempt to save his life. Smt. Vimla Devi was beaten, 7-8 steps away from her husband in front of the door of Dadu. The blade of Barchhi was about 4 fingers' long and 3 fingers wide. The Tabbal was of five fingers, circular like an Axe.

35. He further deposed that deceased was a Mahajan while the witness is a Brahmin. The deceased had some land and did its cultivation himself. The deceased had no mango tree to keep watch over the crop during the night. His fields were situated on two or three sides of the village, some where 6 to 8 furlongs away.

36. The witness also stated that Lala Ram's brother Chunni had died in his childhood and one Savitri had filed objection before the Consolidation Authorities which were dismissed, he added that right since the murder of Ram Gopal the accused Ram Pratap was creating trouble. He admitted that he was a witness of the sale deed in respect of Phatak Wala House executed by Lala Ram, and he had given evidence in the proceedings under Section 145 Cr.P.C., in which the accused Ram Pratap was arrayed as opposite parties. He also admitted that he had opposed accused Ram Pratap in the election.

37. PW-6 Dr. B.K. Jain has stated that injuries Nos. 2,4,5,6 and 7 could be caused by a heavy sharp cutting weapon which includes a *Tabbal* and injury Nos. 3 and 10 could be caused by a sharp edged weapon whose sharp edge was of about 2 cm. Ballam and Barchhi are included in such instruments. In his opinion, the injuries Nos. 8, 9, and 14 could be caused by a blunt weapon like a *Lathi*. Instantaneous

death was possible from these injuries and the injuries could have been caused on 29.06.1976 at about 12:00 noon.

38. Dr. B.K. Jain PW-6 has stated in his cross-examination that the time of death given by him, on the basis of rigor-mortis and de-composition. He stated that rigor-mortis passed off in upper limbs between 18 to 36 hours de-composition sets in after the rigor-mortis passes off. He has estimated the time having regard to the fact that it was the month of June and to the climate of Kanpur. He had not mentioned in the report as to in which part of the body, decomposition had started. He admitted that he had not found any punctured or penetrating wound and that Barchhi and *Ballam* were weapons of piercing. He ruled out that the death could have taken place 36 hours earlier. Injuries Nos. 1, 2, 4, 5, 6, and 7 had been caused. He agreed with the observation of Modi that shape and size of a wound generally corresponds to the weapon used in inflicting the injuries. He also stated the injuries Nos. 11, 12, 13 and 14 and 8 were on the back side of the body and could be caused by a fall on rough and hard surface.

39. Sub-Inspector Sri Mata Prasad PW-7 has stated that he has not shown in the site-plan or in the case diary the place from where the witnesses saw the occurrence. He had also not shown separately the places where Lala Ram and Smt. Vimla Devi were attacked. He admitted that an application dated 02.07.1976 moved by Sri Rajeshwar Prasad Dixit, uncle of Ram Pratap, accused had been sent to him for inquiry and affidavits were also filed by Ram Adhar and Sheetal Prasad. He had learnt in the course of investigation that Sheo Das accused was a dealer of Sugar and the statement of supply

Inspector was also recorded by him. The witness also proved in his examination by the Court in the course of his cross-examination, the proclamation issued by the Chief Judicial Magistrate under Section 82 Cr.P.C. against the accused Ram Pratap, Bhunesh and Lalauna on 09.07.1976, marked Ext. C-1/1 to C-1/3. He also deposed that he had made attachment of the property of these accused under Fard Ext. C-2 on 05.09.1981. Warrants issued against the accused Ram Pratap, Bhunesh, Lalauna Sheo Das, and Ext. 3 to 7 and the reports made by him have also been proved by him. He has also proved the Fard of attachment of the property of accused, Sheo Das, marked Ext. C-10 and their compliance reports marked C-9/1 and C-9/2 have also been proved by the witness. The property of the accused Chhuttan was also attached on 05.09.1976 under Fard C-11. In his cross-examination by the counsel of the accused, he stated that he had not made any report of the sale of the attached property. He denied that the houses of the accused were not searched or the accused Ram Pratap was not absconding.

40. In his further cross-examination, the witness has stated that Lala Ram had not told him that the deceased Sheo Narain used to do Pairvi in the Ram Gopal's murder case, or he used to ask Lala Ram to give evidence. Lala Ram had also not told him that he had made any application to the Superintendent of Police prior to this murder. Lala Ram had also not said in his statement that Lathi and blade of Barcchi were left by the accused on the spot. He had also not told him that the deceased was walking ahead, while he was following him. Smt. Vimla Devi had told him that she and Lala Ram were also attacked in front of the house of Jagdish Narain. She had not told him that Smt. Rama Piari and Chhunna

had beaten her, nor had she told him that Lala Ram was beaten by Chuttan and Sheo Das. Smt. Vimla Devi had also not said before him that the accused had said that the deceased should be put to death otherwise, he will also make a statement like Ram Gopal.

41. The prosecution has also filed a certified copy of the judgment passed by the Additional Sessions Judge, Kanpur. Sri M. Wahajuddin, on 21.12.1972, convicting the accused Ram Pratap, Bhunesh, Jiya Lal, Avdhesh and three others including Rajmun whose case has been separated, under Section 302/149 IPC and sentenced them to imprisonment for life, besides passing a sentence under Sections 147/148 IPC for the murder of Ram Gopal.

42. On conclusion of prosecution evidence the accused persons were examined under Section 313 Cr.P.C. , wherein they admitted that accused Ram Pratap, Avdhesh, Bhunesh and Dadu (as well as Rajmun whose case was separated) from S.T. No.76/76 were tried for committing the murder of Ram Gopal and was sentenced to life imprisonment by court of Session, but they claimed that in appeal their sentence was reduced to six years. The accused also admitted that Lala Ram, brother of the deceased had given evidence in that case, but they denied that the deceased had done pairvi in that case. They also admitted that accused Ram Pratap, Avdhesh, Bhunesh and Lalauna are real brothers and Shiv Das was their cousin. Smt. Ram Piari stated that accused Chhuttan and Jhunna were related to Ram Pratap etc. She claimed that she and her son Dadu had no connection with the other accused. They denied that they bore enmity with the deceased since the time of murder of Ram Gopal. They admitted that on 29.06.1976, the

accused who had been sentenced for the murder of Ram Gopal were on bail pending their appeal. They denied having committed murder of Shiv Narain on 29.06.1976 at about noon in front of the house of Jagdish Narain or having caused hurt to Smt. Vimla Devi or Lala Ram when they tried to rescue the deceased.

43. Accused Avdhesh, Ram Pratap and Bhunesh are real brothers. The informant Lala Ram had lodged a false report at Police Station with regard to murder of Shiv Narain alias Rajjan. This case was instituted due to enmity with the family of his maternal grandfather. He was on bail in Appeal after being convicted in murder case of Ram Gopal. He is not aware of the outcome of Forensic Science Laboratory (FSL) report. The witnesses have deposed falsely against him. The accused did not adduce any evidence in defence, his defence of denial.

44. Accused Jhunna alias Devendra Kumar claimed in his statement under Section 113 Cr.P.C. that he and his father Chhunna alias Krishna Kumar had gone to village Aureri riding motorcycle, as his cousin sister had died and they returned a day after this incident. Accused Krishan Kumar alias Chhuttan has supported the version of Jhunna alias Devendra Kumar.

45. Accused Bhanu Prakash alias Lalauna has stated that his brother Ram Pratap was village Pradhan, he was innocent. The police wanted to file final report, but has been won over by the informant Raja Ram. Therefore, he had surrendered on 28.02.1977. He claimed that police had shown the attachment of his property fictitiously.

46. Accused Shiv Das has claimed that he was a retailer in Sugar and had gone to

Derapur on the date of incident, and he was not present in the village at the time of the incident. He surrendered on 28.02.1977 when the police colluded with Raja Ram. Accused Dadu stated that he was a poor man and had been wrongly implicated due to enmity with Jagdish with whom his father had litigation. Bhunesh stated that he was a brother of Ram Pratap who was the village Pradhan and there was a party-faction in the village. On the fateful day, he claimed that he had gone with Budhi, son-in-law of Jhau Lal for doing pairvi in the case at 06:30 am before the Consolidation Court and remained there the whole day and returned in the evening.

47. The accused Ram Pratap had claimed that he was falsely implicated. He was Principal of a private School in Ladpur Panth and in connection with the report of the school building, he used to go there between 27.06.1976 and 30.06.1976 every day at 07:30 am in the morning and used to return back at 06:00 pm, he was present on the school on the date and time of the incident.

48. Accused Avdhesh has also stated that he had been implicated on account of enmity.

49. The accused persons produced five witnesses in their defence and have filed some documents as well. The accused Ram Pratap has also examined himself after moving an application under Section 315 Cr.P.C.. Accused Ram Pratap had deposed that he was M.A. B.Ed. And Principal of Janata Vidyalaya, Ladpur Panth. He had an old enmity with the informant Lala Ram as well as the eye witness Jagdish Narain. He denied that he was amongst the persons, who committed the murder of Sheo Nasrain alias Rajjan. He also stated that it was

wrong to say that Shiv Narain was murdered at 12:00 noon in front of the house of Jagdish Narain. He further stated that between 29.06.1976 and 28.10.1977, he had stayed in the village and had been teaching the children in the school at Ladpur Panth at village Chilauli and had been looking after the work of Gram Pradhan. He remained Gram Pradhan of village Chilauli since May 1972 to till date. He also stated that he handed over the copies of cashmemo etc. in connection with the repair of the school building to the investigation officer.

50. He stated in the cross-examination that in the murder case of Ram Gopal, he was also convicted and sentenced for life imprisonment alongwith accused Ram Gopal, Avdhesh, Ramesh, Dadu and Rajmun, but the sentence was reduced in appeal by High Court to six years rigorous imprisonment. At the time of murder of Sheo Narain, they were on bail during the pendency of appeal before Hon'ble High Court. He also admitted that Lala Ram had given evidence in the murder case of Ram Gopal and Jagdish Narain was the informant in that case. He, however denied that Shiv Narain had done pairvi in the earlier murder trial. The school of which he was a Principal was 14 Kms. Away and in the month of June, it was closed. He used to go there in connection with the repair work, where Phoos Bangla (thatched bangalow) was being raised. His attendance was not marked in any register.

51. In support of plea of alibi, the accused Ram Pratap had examined DW3 Sheetal Prasad who claimed that he was a Manager of Janta Vidyalaya, in the village Laluapur. The school building was being repaired and the repair-work was being looked after the Ram Pratap, who was then

Head Master of the School. The repair work began on 27.06.1976. He also deposed that Ext. Kha-1 bearing dated 22.07.1976 . The account of repairs was maintained by Ram Pratap and the school was situated in his residential house.

52. DW-2 Sidh Nath, who deposed that he was Pradhan of the village Aurandi, Police Station Sikandra, District Kanpur Dehat. He further deposed that Chhuttan and Jhunna accused of this case had come to his village early in the morning till day evening between 27th June to 30th June 1976. Chuttan and Jhunne are falsely implicated in this case.

53. DW-4 Rajeshdhar Dwivedi, a Supply Inspector, who had deposed that accused Shiv Shankar was not present on the spot on the date and time of incident. Shiv Das was retailer of Sugar and grain in village Chilauli and on 29.06.1976 he had gone to village Chilauli for verification of the stock of Shiv Lal and had made an endorsement on register, marked as Ext. Ka-9. He has also proved his endorsement as Ext. Kha-2 thereon. He reached the spot at 08:30 am in the morning after the verification. Shiv Das had accompanied him to Derapur. He got down from the bus at 11:00 am at Derapur and then they got separated on that date. Shiv Das kept on contacting him through out the day till 04:00 pm from time to time.

54. DW-1 Rameshwar had deposed that early in the morning when he awoke at around 4:30 – 5:00 am he heard a lot of hue and cry in front of his door. He slept in the night in the courtyard of the house, he came out and saw that Jagdish and Lala Ram were laying down Sheo Narain @ Rajjan. The house of Rajjan situates towards east of his house. He reached on the spot and

saw that Rajjan had died. On hearing the hue and cry, wife of Rajjan and many villagers reached there. He inquired from Lala Ram about the incident and that he tried to speak something but Jagdish took him away. The police reached after 2-3 hours later and he told the police whatever he had seen. He got up on that day around 05:00 am. The Sub Inspector had interrogated him, but he is not sure as to whether he had recorded his statement. On noticing the dead body it appeared that he died around one hours earlier. Ram Gopal was killed in the village in the year 1971 and the witness was also convicted and sentenced in that case.

55. The VIIth Additional Sessions Judge, (Non- Metropolitan Area) Kanpur Nagar after considering the submissions of learned counsel for the prosecution and defence and on appreciation of evidence on record recorded verdict of guilt against accused Devendra Kumar alias Jhunna, Jia Lal alias Dadu, Avdhesh, Smt. Ram Piari in S.T. No.75 of 1977 and consolidated S.T. No. 304 of 1977 against Ram Pratap, Bhuneshwar, Bhanu Prakash alias Laluna, Shiv Das and Krishan Kumar alias Chuttan for charges under Sections 147, 148, 302/149, 323/149 and 325/149 IPC and they were sentenced as stated above. All the sentences were directed to run concurrently.

56. Accused Rajmun had absconded during proceedings in S.T. No.75/1977 by order dated 22.07.1980 Learned trial court separated his case from co-accused persons. The accused Rajmun was later on apprehended and he was tried separately in S.T. No.75A of 1977. He was charged by learned trial judge on 01.07.1983 under Sections 148, 302/149, 323/149, 323/149 IPC and charges were read over and

explained to him in hindi who pleaded not guilty and claimed to be tried.

57. In support of his case, the prosecution examined Lala Ram, the informant of the case, PW-2 Smt. Vimla Devi the wife of the deceased, PW-3 Jagdish Narain as witnesses. After recording of statements of PW-1, PW-2 and PW-3, learned counsel for the accused Sri K.G. Pradhan dispensed with the proof of the documents relied by prosecution which were placed on record. He stated that the factum of death of deceased Sheo Narain has been admitted. He also admitted that a postmortem was done on the dead body of the deceased. He did not agitate or dispute the genuineness of any of the documents on record. He admitted that genuineness of all the documents without any reservation and did not like to cross examine any of the formal witnesses.

58. At this juncture learned State Counsel submitted that the prosecution case has been proved because there was no need or necessity of examination of any of the formal witnesses. Learned counsel for the accused had not opposed the prayer of the prosecution and accordingly prosecution evidence was closed.

59. Learned Trial Judge after, hearing the submissions of prosecution and defence and appreciating the evidence on record, recorded a verdict of conviction of accused appellant Rajmun in S.T. No.75A of 1977 for charge under Sections 302/149, 323/149, 325/149 and 148 of IPC and sentenced to life imprisonment for charge under Section 302/149 IPC, one year rigorous imprisonment for charge under Section 148 IPC, one year rigorous imprisonment for charge under Section 325/149 IPC and six months rigorous

imprisonment for charge under Section 323/149 IPC.

60. The accused Rajmun in his statement under Section 313 Cr.P.C. stated that he was convicted alongwith co-accused persons in murder trial of Ram Gopal and he was sentenced to 20 years rigorous imprisonment, but the sentence was commuted to six years imprisonment by High Court. Deceased Sheo Narain was not a pairokar of earlier murder trial.

61. It is noteworthy that during the pendency of instant Criminal Appeal appellant No.2 Jia Lal alias Dadu, appellant No.4 Smt. Ram Piari, appellant No.5 Ram Pratap, appellant No.6 Bhunesh, appellant No.7 Bhanu Prakashs alias Laluna and appellant No.8 Shiv Das died in during pendency of Criminal Appeal No.2696 of 1981, therefore appeal was got dismissed against them as abated by orders of this Court.

62. This appeal survives only in respect of appellant No.1 Devendra Kumar alias Jhunna, appellant No.4 Avdhesh and appellant No.9 Krishan Kumar alias Chuttan in Criminal Appeal No.2696 of 1981 and in Criminal Appeal No.660 of 1984 in respect of sole appellant Rajmun.

63. Thus in nutshell, out of ten convicts/appellants six appellants have died during the pendency of their respective appeals and four appellants are surviving.

64. The plea of juvenility was taken by appellants Avdhesh and Devendra Kumar alias Jhunna. This Court vide order dated 14.07.2023 that the juvenility of the accused- appellant no.1 (Devendra Kumar @ Jhunna son of Kishan Kumar) and accused-appellant no.3 (Avdhesh Chandra son of Prem Narain) be determined by the

competent Court/Authority under the Juvenile Justice (Care and Protection of Children) Act, 2015 within one month from today. The District Judge, Kanpur Dehat and the Superintendent of Police, Kanpur Dehat shall provide copies of all relevant papers to the Juvenile Justice Board within a week of the communication of this order to them. The Registrar General shall ensure that a copy of this order is sent to the District Judge, Kanpur Dehat within four days for compliance.

65. In compliance of Court's order dated 14.07.2023 the Juvenile Justice Board, Ramabai Nagar, Kanpur Dehat had submitted a report dated 25.08.2023, wherein it is stated that at the time of incident appellant No.3 Avdhesh was juvenile. Similarly vide communication dated 25.09.2023 the Principal Judge, Juvenile Justice Board, Kanpur Dehat has submitted his report, wherein he has stated that at the time of incident dated 29.06.1976 the appellant No.1 Devendra Kumar alias Jhunna was juvenile. On these set of facts, this is obvious that out of four surviving appellant No.1 Devendra Kumar Jhunna and appellant No.3 Avdhesh in Criminal Appeal No.2696 of 1981 are held to be juvenile at the time of incident.

66. Learned counsel for the appellants submitted that according to FIR version it is informant Lala Ram with whom the accused persons were having grudge and harboring animosity, as he had deposed against some of the accused persons in the present case in murder trial of Ram Gopal, the brother of PW-5 Jagdish Narain.

67. PW-3 Lala Ram has assumed role of eye-witness in the case and if he was present on the spot when deceased Sheo Narain was killed, there was no occasion

for the accused appellants to spare him. The injuries detected on the person of PW-3 Lala Ram are of simple in nature and can be manufactured. This fact has emerged in the evidence of so called eye-witnesses that three persons had attacked the deceased by Barchhi (spare) which is a pointed weapon, but no punctured wound was found in the postmortem report of the deceased. The approximate time of death shown in postmortem report suggests that incident occurred in wee hours on the date.

68. He also contended that learned trial courts have not considered the evidence of defence witnesses and brushed aside their evidence in cursory manner, whereas this is settled law that evidence of defence witnesses deserves equal regard as that of prosecution witnesses.

69. He next submitted that PW5 Jagdish Narain is a highly interested witness. He has been a witness in murder trial of Ram Gopal as well as in murder trial of Sheo Narain alias Rajjan. He is real brother of Ram Gopal, the deceased in earlier murder trial and some of the appellants in present appeal were accused and convict in the earlier murder trial. Although their sentence was later on commuted by the High Court. Therefore, PW-5 has every reason to seek conviction of present appellants in murder trial of Sheo Narain, due to strong enmity with them due to murder of his brother. Some accused persons have adduced clinching evidence of alibi and their presence elsewhere at the time of incident, but same has been overlooked by learned trial court while recording conviction against all the accused persons. The conduct of PW-4 Smt. Vimla Devi who is wife of the deceased is highly unnatural as PW-1 and PW-4 both have admitted that she did not

try to embrace or touch the deceased even when he was left on the spot after being brutally assaulted by accused persons as she supposed him to be dead. No blood stain of the deceased were found on her clothes.

70. DW-5 deceased Ram Pratap has categorically stated in his evidence that the incident occurred at wee hours on the date of incident and is is wrongly shown to have occurred at 12:00 noon. He has stated that he saw deceased Sheo Narain lying dead, when he reached the spot after hearing hue and cry at around 05:00 am and he was told by the witnesses that he was killed around one hour earlier. There is old enmity between him and informant Lala Ram and witness Jagdish Narain. He has been falsely implicated in this case due to village partybandi. He has been Gram Pradhan since 29.06.1997 to 28.10.1977. On meticulous analysis of the depositions in cross-examination of witnesses of fact namely Lala Ram, Smt. Vimla Devi and Jagdish Narain, they have claimed that they had seen the incident, becomes highly doubtful. In fact, the deceased was killed in the darkness at early hours of the day on 29.06.1976 and none of the eyewitnesses had seen the occurrence, and subsequently on due deliberations with police the accused persons were named in the FIR due to previous enmity. The informant side had strong motive to falsely implicate the accused persons and for that reason PW-5 Jagdish Narain, the brother of the deceased Ram Gopal who was deceased in earlier murder case has been projected as an eye witness in the present case. This is trite law that evidence of partisan witnesses needs meticulous and close scrutiny. None of the witnesses are independent. According to prosecution version itself there appeared a number of persons at the time of incident,

but no independent witness has been produced in support of prosecution case. The medical evidence adduced by PW-6 Dr. B.K. Jain, the author of postmortem report of the deceased is not in conformity with the eyewitness account and in case of medical inconsistency with eye-witness account the benefit of doubt is liable to be extended to appellants.

71. Per contra, learned A.G.A. submitted that this is a broad day light murder case and FIR has been lodged just after two hours of the incident by real brother of the deceased. The distance of police station from place of occurrence is 6 mile as per Chick FIR. Therefore, the FIR has been lodged with utmost promptness which fortifies the authenticity of prosecution version. The accused persons have strong motive to commit the offence. PW-2 and 4 who are brother and wife of deceased had themselves received injuries due to assault caused by accused persons when they tried to rescue the deceased. Therefore, the injuries are proved by evidence of doctor who conducted medico legal examination, therefore, their presence on the spot cannot be disbelieved. The deceased had suffered as many as 14 external injuries and serious injuries were found in internal examination of the deceased also, which corroborates the facts that a number of persons were involved in causing fatal assault on deceased. Blood stained Blade and Barchhi were found on the spot by investigating officer.

72. He further contended that even in cross-examination of eye-witnesses no such fact emerged which would cause a reasonable doubt on authenticity of prosecution case. Learned trial judge have recorded the convictions of the accused appellants and sentenced them in

accordance with law. The impugned judgments are based on proper appreciation of evidence on record. No significant infirmity in the impugned judgments could be shown in contention raised on behalf of the appellants. The impugned judgments need no interference and the same deserve to be affirmed by this Hon'ble Court.

73. We have re-appreciated the evidence on record in the light of submissions made by learned counsel appearing for the parties.

74. In the instant case date and time of incident is stated to be 29.06.1976 at 12:00 hours in the day and FIR was lodged at the instance of informant Lala Ram on the same day at 02:15 pm at P.S. Derapur Kanpur. On the basis of written report in Chik FIR Ext. Ka-22, the distance between police station and place of occurrence is shown as six miles. The informant is real brother of the deceased and also an eyewitness alongwith other eye-witnesses Vimla Devi the injured and wife of deceased, Shiv Narayan, Jagdish, Nanahey, Asharfi Lal and Ram Chand. Vimla Devi also received simple and grievous injuries in the incident who has been examined as PW-4 during trial. Keeping in view the facts and circumstances of the case and the fact that FIR was lodged just after two hours of the incident, it may be held that FIR in the case has been lodged with utmost promptitude without any unreasonable delay which increases the reliability in FIR and it rules out any embellishment, after thought or embroidery in prosecution version. There is nothing on record to suggest that FIR is ante timed. Informant Lala Ram and Vimla Devi the wife of Sheo Narain were also examined by government doctor, PW-1 Dr. Surendra Singh at P.S. Derapur on 29.06.1976 at

around 08:00 pm to 08:30 pm, their medico legal examination was conducted as police case and no doubt can be raised about authenticity of their injury report which reveals that Smt. Vimla Devi has received five injuries on her person at the time of her medico legal examination, out of which one injury was found grievous which was on her wrist joint. Informant Lala Ram also sustained three injuries which were found simple in his medico legal examination report. The evidence of injured witness is held on high-pedestal in comparison to evidence of other witnesses, as persons of an injured witness on the place of incident appears more probable than other witnesses. In prosecution version every accused has been assigned specific weapon and this fact has been proved in evidence of witnesses of facts.

75. According to FIR version and evidence of witnesses of facts namely PW-1 Surendra Singh, PW-2 Lala Ram, PW-4 Vimla Devi and PW-5 Jagdish Narayan, this fact is proved that at the time of incident accused, Devendra Kumar alias Jhunna, Shiv Das, Krishna Kumar alias Chuttan and Ram Piari were armed with lathi, Ram Pratap, Avdhesh and Bhunesh were armed with Barchhai (a pointed sharp edged weapon), Dadu, Lalauna and Rajmun were armed with Tabbal (a heavy sharp edged weapon) attacked the deceased Shiv Narain alias Rajjan by surrounding him on public way in the village in front of the house of Jagdish Narain PW-5. The accused persons were prompted by motive to commit the offence, as prior to this incident dated 29.06.1976 one Ram Gopal of the village was killed in which accused Ram Pratap and other were also accused and the informant Lala Ram had testified in that murder case against Ram Pratap and others, in which Ram Pratap and others

were convicted and sentenced to twenty years imprisonment, subsequently they were enlarged on bail. This fact is stated in FIR itself that accused persons Ram Pratap and others were hand in gloves with the informant and his family members due to bad enmity. The deceased was going to take meal at his home at the time of incident when he was waylaid by the accused assailants and due to fatal injuries caused by accused persons in concerted manner, he died on the spot.

76. In postmortem report of deceased Shiv Narayan, he appears to have received as many as fourteen injuries on his person, out of which there are eight incised wounds are found on different parts of head and face. The deceased received six incised wounds on his head and one incised wound on the frond of left leg, other injuries are abrasion and contusion. In internal examination, frontal, right temporal and right parietal and occipital bones cut found, the doctor has also opined that the cause of death was shock and hemorrhage due to ante-mortem injuries. Thus, the medical evidence proves that the injuries of deceased Shiv Narain were sufficient to cause death and all the accused persons armed by their respective weapons on the date time and incident in concerted manner with intention to kill.

77. PW-6 Dr. V.K. Jain had proved postmortem report of the deceased Shiv Narain as Ext. Ka-6 by his evidence. He has stated in his evidence that he performed postmortem examination on the deceased Shiv Narain on 30.06.1976 at 04:40 pm, who had received fourteen injuries on his person, his stomach was empty, semi-digested food was found in small intestine and faecal matter was present in large intestine. He stated in his examination in

chief that injury No.1,2,3,4,5,6 and 7 found on the person of the deceased were caused by some heavy sharp edged weapon, in which Tabbal is also included. Injuries No.3 and 10 could also be caused by some sharp edged weapon, which edge is around 2 cm in width in which Ballam and Barchhai may also be included. Injury Nos. 8,9,11 and 14 might have been caused by Lathi. The injuries found on the person of the deceased were sufficient to cause death in the ordinary course of nature. Instantaneous death was probable by such injuries found on the persons of the deceased. In cross-examination he stated that Tabbal is heavy sharp edged weapon and he had not found any punctured or penetrating wound by Tabbal, Barchhai and Ballam are penetrating weapons. Injury Nos.1,2,3,13, 14 and 8 can be caused by fall on hard surface. Therefore, from medical evidence also the mode and manner of the incident, and injuries found on the person of the deceased and injured witnesses Lala Ram and Vimla Devi are proved and the sworn testimony of witnesses of fact/eye witnesses finds corroboration from medical evidence in this case. The doctor has opined in his evidence that the injuries found on person of the deceased were mostly caused by some heavy sharp edged weapon like Tabbal and some injuries would have been caused by a weapon like Barchhai/Ballam. This statement of PW-4 Vimla Devi in cross examination on behalf of the accused persons that Barchhai taken by three accused persons namely Avdhesh, Prem Narain and Munesh were flat and not pointed, cannot be disbelieved. Thus on the basis of arguments of learned counsel for the appellant, it cannot be assumed that only due to the fact that no punctured wound was found on the person of the deceased, the presence of accused persons

who were said to be armed with Barchhai cannot be doubted or in other words only on that count their presence on the place of occurrence will be ruled out.

78. PW-5 Jagdish Narain has testified in his evidence that the incident occurred in front of the house and he had seen the incident. This fact is stated in FIR itself that house of Jagdish Narain lies in front of the place of incident and on that reason his presence on the spot is natural as he is supposed to be a witness of the spot and only on account of prior enmity with some accused persons his evidence cannot be brushed aside.

79. Learned trial court has rightly discarded the defence evidence which has been adduced on the point that occurrence took place in wee hours of the day in the darkness and none of the witnesses had seen the incident and accused persons are named in the FIR due to partybandi and earlier an enmity on account of murder of Ram Gopal which took place some years earlier to this incident. Informant Lala Ram has stated in his evidence that accused persons were planning to kill him and his family members, as he had deposed against them in murder case of Ram Gopal. Accused persons are related together and they are associated with Gram Pradhan, Ram Pratap. Deceased was stated to be on way to home to take his meal in the noon from his shop and the witness was behind him. He could not see that from which direction the accused persons arrived, they attacked his brother by their respective weapons and on hearing his scream he ran towards him, in the meanwhile wife of deceased Vimla Devi and witnesses had also arrived there. Accused persons assaulted him and Vimla Devi by lathis and on interference of witnesses they ran

towards east. Only due to fact that informant with whom accused persons had strong enmity was spared in the incident by causing simple injuries and was not assaulted by dangerous weapons, his presence cannot be doubted as he stated in his evidence that he and his sister-in-law Vimla Devi were rescued by witnesses. PW4 Vimla Devi and PW5 Jagdish Narain have also given eye-witness account of the incident and supported the prosecution version. PW-5 Jagdish Narain has been examined as eye witness and in his evidence this fact has also emerged that some of the accused persons in the present trial were convicted and sentenced by the court in the murder case of Ram Gopal, his brother. A defence suggestion has been given to this witness that he had opposed the accused Ram Pratap in Gram Pradhan election and for that reason he was in opposition to him after he was elected in the election.

80. So far as motive is concerned motive is specifically attributed to accused persons against the informant PW-1 Lala Ram who is real brother of the deceased. Hon'ble Supreme Court in a catena of judgments including a recent judgment in **Chandan Vs. The State (Delhi Admin) 2024 Live Law (SC) 288** held that lack or absence of motive on the part of the accused is in consequential when direct evidence establishes the crime.

81. On re-appreciation of evidence adduced during trial and giving a meticulous perusal of judgment under appeal, we are of the considered opinion that prosecution has been successful to prove its case where reasonable doubt against surviving accused Devendra Kumar alias Jhunna, Krishna Kumar alias Chuttan, Rajmun and Avdresh. This fact is proved

beyond reasonable doubt that surviving accused had formed unlawful assembly together with co-accused on the date and time of the incident and in prosecution of common objection of the assembly. They brutally assaulted the deceased in concerted manner by their respective weapons with intention to kill him and caused fatal injuries on his person, which was sufficient to cause death and on account of the injuries sustained in the incident he died instantaneously. This fact is also proved beyond doubt that in prosecution of common object surviving accused and co-accused persons assaulted the informant Lala Ram and wife of deceased namely Smt. Vimla Devi and caused them simple and grievous injuries. Therefore, the charge under Sections 302/149, 325/149 and 323/149, 147 IPC is proved against surviving accused persons and charge under Section 148 IPC is also proved against accused Avdhesh. Therefore, we find no legal or factual error in the impugned order passed by learned trial court, whereby surviving accused and co-accused persons were convicted of the aforesaid charges. The prosecution has successfully proved charges framed against appellants beyond reasonable doubt.

82. Accused/appellants Devendra Kumar alias Jhunna and Avdhesh were found juvenile on the date of incident in an inquiry carried out by Juvenile Justice Board, Kanpur Dehat, and on the basis of report of Juvenile Justice Board they are held to be juvenile on the date of incident.

83. Hon'ble Supreme Court in **Satya Deo Alias Bhoorey Vs. State of U.P. AIR 2020 (SC) 4526** considered the claim of juvenility made by an accused taken at the stage of first appeal before High Court where incident had occurred on 11.12.1981.

Hon'ble Supreme Court considered the various provisions of Juvenile Justice (Care And Protection Of Children) Act, 2000 and after giving a thoughtful consideration to statutory provisions held in paragraph 15 that it is, thus, manifest from a conjoint reading of Sections 2(k), 2(l), 7-A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1-4-2001 would be treated as juvenile, if the accused claiming plea of juvenility was less than 18 years of age on the date of commission of offence, he is entitled to be treated as juvenile and will be given benefit as per 2000 Act, notwithstanding the fact that the accused was not entitled to the benefit of being a juvenile on the date of offence, under Juvenile Justice Act, 1986 as Act was passed after commissioning of this offence.

84. Accordingly the juvenile in conflict of law in the present case namely Devendra Kumar alias Jhunna and Avdhesh will be dealt with under the provisions of Juvenile Justice (Care And Protection Of Children) Act, 2000 in spite of the fact that occurrence took place in the year 1976 and during trial of the case Juvenile Justice Act, 1986 was enacted and commenced.

85. Consequently conviction of surviving Appellants for above stated charged recorded by the trial court is affirmed, so sentence awarded to Juvenile accused Devendra @ Jhunna and Avdhesh is quashed. Sentence awarded to appellants Krishna Kumar @ Chuttan and Rajmun is affirmed.

86. However, on the basis of foregoing reasons the accused Devendra Kumar alias Jhunna and Avdhesh having being held as

juvenile in conflict of law on the date of incident by Juvenile Justice Board concerned, their conviction is upheld for said charges, but their sentence is set-aside.

87. In the light of aforesaid judgment the appellants Devendra Kumar alias Jhunna and Avdhesh are liable to be dealt with under Section 15 of Juvenile Justice (Care and Protection of Children) Act, 2000 which is reproduced as under:-

15. Order that may be passed regarding juvenile

(1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit,

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;

(b) direct the juvenile to participate in group counselling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on probation of good conduct and

placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(g) make an order directing the juvenile to be sent to a special home for a period of three years: [Substituted by Act 33 of 2006, Section 12, for Clause (g) (w.e.f. 22-8-2006).

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

(2) The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognised voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.

(3) Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law: Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after

making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.

(4)The Board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer.

Prior to its substitution, Clause (g) read as under:-(g) make an order directing the juvenile to be sent to a special home,-(i) in the case of juvenile, over seventeen years but less than eighteen years of age for a period of not less than two years;(ii) in case of any other juvenile for the period until he ceases to be a juvenile:Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit."

88. As the appellants Devendra Kumar alias Jhunna and Avdhesh have attained the age of majority many decades ago, no purpose of law will be served to keep them in special and juvenile home.

89. Apart from that the appellants Devendra Kumar alias Jhunna and Avdhesh are directed to deposit Rs.50,000/- fine before the court concerned, which will be payable as compensation to Vimla Devi-PW-4 the wife of the deceased Shiv Narain and in case of her death, the said amount will be paid to her legal heirs to the satisfaction of trial court.

90. Appeal stands **partly allowed** in respect of appellants Devendra Kumar @ Jhunna and Avdhesh, as the sentence awarded

to them by trial court is quashed and they have been dealt with under Section 15 of Juvenile Justice (Care and Protection of Children) Act, 2000. Appeal is dismissed in respect of convict Krishna Kumar @ Chuttan and Rajmun.

91. As conviction and sentence passed by learned court below in respect of accused Krishan Kumar alias Chuttan and Rajmun is affirmed in present appeal by this judgment and they have been enlarged on bail during the pendency of appeal, they are directed to surrender before the trial court to serve the sentence awarded by court below in impugned judgment within two weeks and in case of their non-appearance the trial court shall ensure their arrest by issuing appropriate process against them, and on their appearance they will be sent to jail custody for undergoing the sentence as awarded by trial court and affirmed by this Court.

92. Let a copy of this judgment be sent to court below/ Session Judge, as the case may be for necessary compliance.

93. This court appreciates the valuable assistance and hard work which has been put in by Sri Ajay Kumar Pandey, learned Amicus Curiae, we quantify his fee as Rs.25,000/- which shall be paid to him by the High Court Legal Services Authority, Allahabad High Court. Learned Registrar General of the High Court will oversee the payment.

(2025) 1 ILRA 149

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 03.01.2025

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Criminal Revision No. 1237 of 2024

Shamima & Ors.

...Revisionists

Versus

State of U.P. & Anr.

...Opposite Parties

Counsel for the Revisionists:

Kali Charan Yadav

Counsel for the Opposite Parties:

G.A.

A. Criminal Law – Criminal Procedure Code, 1973 – Section 227 – Discharge – Abuse of process of law – Co-accused of the same Case crime number have been acquitted – Effect – Discharge application of other co-accused was rejected – Validity challenged – Held, once for identical charges and on the basis of the identical evidence based on the testimonies of the identical witnesses, co-accused of the same case crime number have been acquitted from the charges, then if other co-accused are permitted to be tried by the trial court without there being any new evidence on record, there would be one and the only one conclusion i.e. their acquittal from the charges, as such allowing to proceed the second trial would amount to abuse of the process of the Court. (Para 22)

Criminal Revision allowed. (E-1)

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

1. Heard Sri Pratish Upadhyay, Advocate holding brief of Sri Kali Charan Yadav, learned counsel for the revisionists and learned A.G.A. appearing for the State.

2. The instant Criminal Revision arises out of an order dated 03.02.2024 passed by the learned Additional Sessions Judge/Special Judge (P.O.C.S.O. Act), Basti in Special Sessions Trial No. 2800039 of 2016 (State Vs. Mohit and Others) whereby, the revisionists' application filed under Section 227 Cr.P.C. for discharge had been rejected. □

3. Facts of the case, in brief, are that an F.I.R. was lodged under Sections 363,

366 I.P.C. and Section 7/8 of P.O.C.S.O. Act in Police Station, Parasrampur, District Basti which was registered as Case Crime No. 554 of 2015. In the F.I.R., wife of Hamid Ali i.e. Safia alias Shafiqun Nisha, Mohid, Gyasuddin, Shariffuddin @ Babbu, Irshad, Mehsar, Samima, Taudeen, Bauhar and Gasili were named and it was alleged that they enticed Razia Khatoon and kidnapped her. The alleged victim, Razia Khatoon and others filed a Criminal Misc. Writ Petition No. 19293 of 2015 (Rajiya Khatoon and Others Vs. State of U.P. and Others), wherein Rajiya Khatoon claimed that she is major and is living with the main accused Taudeen and a Division Bench of this Court passed an order on 10.08.2015 whereby it was provided that the accused/petitioners shall not be arrested till submission of the police report under Section 173(2) Cr.P.C. The police filed charge-sheet under Section 173 (2) Cr.P.C. and arrested the main accused Taudeen, Gyasuddin and Safia alias Shafiqun Nisha.

4. The police filed charge-sheet against the main accused, Taudeen under Sections 363, 366, 376, 120-B, 506 I.P.C. and under Section 3/4 of the P.O.C.S.O. Act and charge-sheet against the other accused including the present revisionists was filed under Sections 363, 366, 120-B, 506 I.P.C. and Section 16/7 of the P.O.C.S.O. Act.

5. The present revisionists, after filing of the aforesaid charge-sheet against them, filed a petition under Section 482 Cr.P.C bearing CrI. Misc. Application No. 22868 of 2016 (Shamima and Others Vs. State and Another) and this Court was pleased to pass an interim order on 01.08.2016 whereby it was provided that no coercive steps shall be taken against the applicants in Case Crime No. 554 of 2015.

6. Since Taudeen, Gyasuddin and Safia alias Shafiqun Nisha were already arrested, therefore sessions trial in respect of the said accused was separated and was numbered as Special Sessions Trial No. 1000066 of 2015 (State of U.P. Vs. Taudeen and two others) and in respect of other accused of Case Crime No. 554 of 2015, Special Sessions Trial was numbered as 2800039 of 2016 (State Vs. Mohid and Others). It is worth to note it down at this stage that the evidence collected by the police and the witnesses relied on are identical in both the aforesaid criminal trials.

7. The Special Sessions Trial No. 1000066 of 2015 (State of U.P. Vs. Taudeen and two Others) had been concluded and vide judgement and order dated 22.08.2023 passed by the learned Additional Sessions Judge/Special Judge (P.O.C.S.O. Act), Basti, the main accused of the Case Crime No. 554 of 2015 i.e. Taudeen and other two co-accused, who are identically placed to that of the present revisionists, have been acquitted from the charges levelled against them.

8. The trial court in its judgement and order dated 22.08.2023 had considered the testimonies of the alleged victim, her mother and other witnesses and found that none of the witnesses have supported the prosecution story and on that basis, had exonerated the main accused and other two accused (identically placed to that of the revisionists) from all the charges.

9. The revisionists after the conclusion of the aforesaid trial vide judgement and order dated 22.08.2023, pressed their petition filed under Section 482 Cr.P.C. which was pending before this Court and this Court disposed of the Criminal Misc.

Application No. 22868 of 2016 vide order dated 07.11.2023 whereby applicants were directed to move an appropriate application for discharge before the trial court with a direction that the trial court shall decide the said application within two months. Pursuant to the aforesaid order dated 07.11.2023, the revisionists filed application for discharge under Section 227 Cr.P.C. wherein they categorically stated that on the basis of the identical evidence on which they are to be tried, the trial of the main accused Taudeen and other two co-accused (identically placed to that of the revisionists) had already been concluded vide judgement and order dated 22.08.2023 wherein accused have been acquitted, therefore now there is no occasion for the trial court to proceed with the trial against the revisionists and as such they are liable to be discharged from the charges levelled against them. The revisionists in their application for discharge categorically stated that the charge-sheet has been filed against the present revisionists on the identical charges, identical evidence has been relied on and same witnesses are sought to be produced who were produced in the trial of the main accused and two other accused i.e. Special Trial No. 1000066 of 2015, therefore once the main accused and other two co-accused have been exonerated from the charges vide judgement and order dated 22.08.2023, the revisionists are also liable to be discharged from the charges levelled against them.

10. The learned Additional Sessions Judge/Special Judge (P.O.C.S.O. Act), Basti had rejected the application filed by the revisionists under Section 227 Cr.P.C. on the ground that at the time of considering the case for discharge, the trial court can only consider the evidence collected by the police and charge-sheet

filed before the court. The trial court had further opined that since the police had filed charge-sheet against the revisionists in Case Crime No. 554 of 2015 under Sections 363, 366, 120-B, 506 I.P.C. and under Section 16/7 of P.O.C.S.O. Act on the basis of evidence, therefore the application filed by the revisionists for discharge is liable to be rejected. □

11. Learned counsel appearing for the revisionists has argued that once it is admitted on record that the main accused of Case Crime No. 554 of 2015 i.e. Taudeen and two other co-accused i.e. Gyasuddin and Safia alias Shafiqun Nisha (identically placed to that of the revisionists) have already been tried and acquitted for the identical charges and on the basis of the identical evidence, there is no occasion for the trial court to reject the application filed by the revisionists (other co-accused) for discharge, as that would amount to abuse of the process of the court. Learned counsel appearing for the revisionists has further argued that the alleged victim had already married to the main accused i.e. Taudeen and out of the wedlock, they have one son who, as on date, is aged about seven years, therefore there is no justifiable reason for not discharging the other co-accused of the Case Crime No. 554 of 2015.

12. It has been vehemently argued that the judgement and order dated 22.08.2023 passed in Special Sessions Trial No. 1000066 of 2015 though has been referred by the trial court in the impugned order dated 03.02.2024 but has not been considered at all. It has also been argued that once there is no denial to the fact that the charges and evidence against the revisionists are identical and witnesses named in the charge-sheet are also same, on the basis of which main accused and

other co-accused facing the same charges have been acquitted, there cannot be any justifiable reason for the trial court to not consider the judgement and order dated 22.08.2023 passed in Special Sessions Trial No. 1000066 of 2015 while deciding the application for discharge filed by the revisionists.

13. Learned counsel appearing for the revisionists has lastly argued that this revision is liable to be allowed and proceedings of the Special Sessions Trial No. 2800039 of 2016 (State Vs. Mohid and Others) are liable to be quashed otherwise if for the same charges, on same evidence and on the testimony of the same witnesses, the trial against the revisionists is allowed to be proceeded, that would amount to abuse of the process of the court as ultimately the revisionists are bound to be exonerated from the charges levelled against them.

14. Learned A.G.A., while arguing for the State, has not disputed the fact that the Special Sessions Trial No. 1000066 of 2015 in respect of the main accused of the Case Crime No. 554 of 2015 i.e. Taudeen and two other co-accused i.e. Gyasuddin and Safia alias Shafiqun Nisha (identically placed to that of the present revisionists) had been decided by the trial court vide judgement and order dated 22.08.2023 wherein the charges, evidence and witnesses relied on by the prosecution are identical to that of the Special Sessions Trial No. 2800039 of 2016 and those accused have been exonerated from all the charges.

15. Learned A.G.A. appearing for the State has argued that while deciding the application for discharge, filed under Sections 227 Cr.P.C., only the charge-sheet

and evidence collected by the police can be taken into account and therefore the trial court while not considering the impact of the judgement and order dated 22.08.2023 passed in Special Sessions Trial No. 1000066 of 2015 (State of U.P. Vs. Taudeen and two others) while deciding the application for discharge, had acted in absolutely legal manner. It has further been argued that there is neither any illegality nor any infirmity in the impugned order dated 03.02.2024 passed in Special Sessions Trial No. 2800039 of 2016.

16. I have considered the arguments advanced by the learned counsel appearing for the revisionists and learned A.G.A. appearing for the State. I have also perused the contents of the impugned order dated 03.02.2024 passed in Special Sessions Trial No. 2800039 of 2016 and the judgement and order dated 22.08.2023 passed in Special Sessions Trial No. 1000066 of 2015.

17. This Court takes note of the fact, in categorical terms, that the State has not disputed that one Taudeen (main accused) and two other co-accused i.e. Gyasuddin and Safia alias Shafiqun Nisha (identically placed to that of the present revisionists) have already been tried for identical charges, on the basis of identical evidence and on the testimonies of the identical witnesses related to Case Crime No. 554 of 2015 and the trial had been concluded vide judgement and order dated 22.08.2023 passed in Special Sessions Trial No. 1000066 of 2015 whereby accused have been exonerated from the charge.

18. Now this Court proceeds to consider the provisions of the Sections 227, 228 and 229 Cr.P.C. which are extracted 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.

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

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

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

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

229. Conviction on plea of guilty.-If the accused pleads guilty, the Judge shall record the plea and may, in his discretion, convict him thereon."

19. This Court finds that Section 227 Cr.P.C. provides that if, upon consideration of the record of the case and the documents

trial court without there being any new evidence on record, there would be one and the only one conclusion i.e. their acquittal from the charges, as such allowing to proceed the second trial would amount to abuse of the process of the Court.

23. Once it is admitted by the State that the charges levelled against the accused in Special Sessions Trial No. 1000066 of 2015 are identical and the evidence relied on and the witnesses are also identical to that of the charges levelled against the accused and evidence relied on and witnesses in Special Sessions Trial No 2800039 of 2016, there was no occasion for the trial court to reject the application filed by the revisionists for their discharge and to further proceed with the trial.

24. In view of the aforesaid reasons, this revision is allowed. The impugned order dated 03.02.2024 passed by the learned Additional Sessions Judge/Special Judge (P.O.C.S.O. Act) Basti in Special Sessions Trial No. 2800039 of 2016 is set-aside. The present revisionists who are accused in Special Sessions Trial No 2800039 of 2016 are hereby discharged and the entire proceedings of the Special Sessions Trial No. 2800039 of 2016 are hereby quashed.

(2025) 1 ILRA 154
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2025
BEFORE

Criminal Revision No. 5217 of 2023

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

Counsel for the Revisionists:

Shubham Srivastava, Sunil Kumar
Srivastava

Counsel for the Opposite Parties:

G.A., Shivam Tiwari

Criminal law-Code of Criminal Procedure, 1973 — Sections 161, 164, 173, 190(1)(b), 200, 202 & 397-Final Report — Protest Petition — Rejection — Powers of Magistrate — Contradictory St.ments of prosecutrix — St.ment under Section 161 Cr.P.C. implicating accused and later exculpatory St.ment under Section 164 Cr.P.C. — Final report submitted by police concluding no offence made out — Magistrate accepted final report and rejected protest petition — Held, Magistrate not bound by police conclusions and may independently assess material on record — St.ment under Section 164 Cr.P.C., being judicial in nature, carries greater probative value than one under Section 161 Cr.P.C. — Protest petition based on retracted version rightly dismissed — No illegality or perversity in Magistrate's order — Revision dismissed. (Paras 14, 15, 17 to 20)

HELD:

In light of aforesaid dictum of this Hon'ble Court in Pakhandu (supra) undoubtedly the Magistrate is at liberty to adopt all the four courses enumerated in the said judgment on production of a closure report by police after investigation into a FIR to the effect that complicity of the accused is not found in the alleged offence or no alleged offence has not been found to be committed. (Para 14)

In the present case, learned Magistrate after placing reliance on closure report filed by the police after conclusion of an investigation, adopted Ist course as St.d in Pakhandu (supra) and accepted closure report submitted by police in favour of the accused persons whose name has been surfaced during investigation, placing reliance on St.ment of prosecutrix under Section 164 Cr.P.C. and affidavits of the father and uncle (phupha) of the prosecutrix during the course of

investigation which was made part of investigation. (Para 15)

The St.ment made by the prosecutrix/victim under Section 164 Cr.P.C. before the Magistrate stands on a high pedestal and a sanctity is attached on such St.ment recorded during the course of investigation, than that of her St.ment recorded under Section 161 of the Code by the Investigating Officer. (Para 18)

With foregoing discussion this court does not find any illegality, irregularity or perversity in the impugned order passed by learned Magistrate, whereby the final report filed by the police after investigation in the case in favour of accused persons placing reliance on St.ment of the prosecutrix recorded under Section 164 Cr.P.C. as well as affidavits filed by father and uncle of the victim, has been accepted and protest petition filed by the prosecutrix has been dismissed. (para 19)

Revision Application dismissed. (E-14)

List of Cases cited:

1. Pakhandu Vs St. of U.P., 2001 Cri LJ 3560
2. H.S. Bains Vs St., (1980) 4 SCC 631
3. India Carat Pvt. Ltd. Vs St. of Karn., (1989) 2 SCC 132
4. Raju Vs St. of U.P., 2012 (78) ACC 111

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

1. Instant Criminal Revision has been preferred against the order dated 04.08.2023 passed by learned Judicial Magistrate IIIrd Saharanpur on Misc. Application No.02 of 2022 Abbas Vs. Taushif, whereby the protest petition filed by the revisionist against final (closure) report submitted by the police after investigation in Case Crime No.17 of 2021, under Section 366 and 376 IPC has been

dismissed and final report has been accepted.

2. Heard Sri S.K. Srivastava, learned counsel for the revisionists, Sri Shivam Tiwari, learned counsel for the respondent No.2 and learned A.G.A. for the State-respondent and perused the material available on record.

3. The factual matrix of the case in brief are that the informant Abbas lodged an FIR at P.S. Gagalhedi, District Saharanpur on 14.01.2021 under Section 363 IPC against one Taushif with averments that on 09.01.2021 his minor daughter aged around 14 years was enticed away by accused Taushif son of Hazi Julfan, his daughter is student of class IXth. He has been searching for his daughter for three days and now he came to know that Taushif had kidnapped his minor daughter by enticing and taking her away. The informant came to the place of Hazi Julfan, the father of Taushif, where his father and family members misbehaved and threatened him that his daughter will not be handed over to him. In the transfer certificate of class IXth of the victim issued by Siyaram Intermediate College, Gagalhedi, Saharanpur, her date of birth is recorded as 30.06.2006 and accordingly she was of fourteen and half years of age on the date of incident and minor, the victim was recovered by police on 15.01.2021 at 10:30 am. As per G.D. Report No.17 dated 10.10.2021 time 10:30 hours, P.S. Gagalhedi Saharanpur, at the time of her recovery, effected on secret information she was found in the company of a boy on Rana Steel Trisection. However, her companion could not be caught and he fled away from the spot on noticing the police team. The statement of the victim was recorded on the same day under Section

161 Cr.P.C., wherein she stated that she studied in Class IXth at Siyaram Intermediate College. Vasim and Taushif called her and took her near the shop, they got her sniffed some substance, whereupon she got unconscious and when she regain her consciousness, she found her in Dehradun in a room where Farman, Danish, Wasim, Taushif and their sister Tasmini met her in the room. Farman, Wasim, Taushif and Danish committed rape on her and when she requested them to arrange a call from her family members, they threatened her with life. They took her at Sikandarpur and they stayed at the house Kuban, they took her from there to Sansarpur where she was confined for four days. She requested the police to inform her family members so that they could visit her in the police station. She was present before lady doctor Dr. Deepika for her medico legal examination, but she refused to get herself examined and stated that there was no pressure on her. The informant Abbas reiterated his FIR version in his first statement under Section 161 Cr.P.C., but after recording of the statement of victim under Section 161 Cr.P.C. he filed affidavit before SSP Meerut together with Abdul Rahman his brother in-law in the light of the statement of victim under Section 164 Cr.P.C.

4. The statement of the victim was recorded by Magistrate under Section 164 Cr.P.C. which has been copied in case diary Parcha No.7 dated 01.02.2021, wherein she did volte face and deviated from her version under Section 161 Cr.P.C. and stated that on 09.01.2021 at 12:00 hours she went to the place of her aunt (Bua) Gulshan at village Paragpur near Meerut on her own by traveling in a bus. No wrong act is done with her, she stayed there for three days, her father lodged a

false case against Gram Pradhan Farman and Ramesh due to enmity. Informant Abbas and Abdul Rahman the uncle (Phufa) of the victim had filed an affidavit which is addressed to the S.S.P. Saharanpur on 21.01.2021 and same was forwarded to SHO concerned for necessary action through circle officer. In this affidavit they supported the version of the victim recorded under Section 164 Cr.P.C., wherein she has given a clean chit to the named accused as well as other accused persons whose name surfaced during investigation, on the basis of statement of victim recorded under Section 161 Cr.P.C.

5. The police placed reliance on the statement of the victim under Section 164 Cr.P.C. and affidavits of Abbas and Abdul Rahman, the father and Phufa of the victim submitted final report in favour of the accused persons with finding that their complicity in the disappearance of the victim was not established, and she had left her home on her own as she became disturbed on being rebuked by her parent and went to the place of her bua alone and went back to her home on her own volition.

6. However, on the turn of events, the victim herself filed a protest petition before the court of Magistrate against the final report submitted by police in favour of accused persons namely Taushif, Wasim, Farman, Danish and Tasleem wherein she acknowledged and placed reliance on her statement under Section 161 Cr.P.C. recorded by Investigating Officer and has deviated from her statement recorded by Magistrate under Section 164 Cr.P.C. She stated that her father reconciled the matter after fifteen days of the incident with the accused persons, in view of some inducement or pressure and he exerted pressure on her to depose infavour of the

accused persons before the Magistrate and for that reason she had given her statement before the Magistrate under Section 164 Cr.P.C. in favour of accused persons. She also refused to get herself medically examined on instructions of her father. She clarified that her statement under Section 164 Cr.P.C. on the basis of which the police has filed final report in favour of accused persons is not a free statement. Infact, her statement under Section 161 Cr.P.C. is a real and true statement and on that basis police should have submitted chargesheet against the accused persons. Now the accused persons are threatening her and she apprehends some unforeseen incident may have occurred with her. In protest petition she has prayed for setting-aside the final report dated 02.12.2021 and summoning the accused persons under Sections 366 and 376-D IPC and Section 3/4 of POCSO Act, after taking cognizance under Section 190 (1)(b) Cr.P.C.

7. Learned Magistrate in the impugned order dismissed the protest petition filed by the victim and accepted the final report filed by the police after investigation in the case on the ground that the victim has exonerated the accused persons in her statement under Section 164 Cr.P.C. recorded by Magistrate. She has controverted her statement under section 161 Cr.P.C recorded by Investigating Officer in her statement before the Magistrate under Section 164 Cr.P.C. her father has also supported her stand under Section 164 Cr.P.C. by filing an affidavit which is part of case diary, no presumption can be raised against genuineness of the statement of the victim recorded by Magistrate under Section 164 Cr.P.C.

8. Feeling aggrieved by the impugned order dated 04.08.2023 the informant has

filed present criminal revision. The informant and victim has jointly filed present criminal revision with prayer to set-aside the impugned order passed by learned Magistrate and the matter be remitted to learned Magistrate to decide the protest petition a fresh and summon the respondent No.2 for facing trial.

9. Learned counsel for the revisionists submitted that the learned trial court has wrongly placed reliance on statement of the victim recorded under Section 164 Cr.P.C. and ignored her statement under Section 161 Cr.P.C., in which she has given an entire gamut of the sequence of events which occurred with her from the date of her disappearance to the date of her recovery. He also submitted that the learned trial court has given a wrong finding that no prima facie case is made out to summon the accused persons to face trial after rejecting the final report. The learned Magistrate has even not considered the averments in respect of protest petition filed by the victim. Accused Vasim and Taushif mislead the victim and called her near their shop on 09.01.2021; they got her sniffed some intoxicating substance and thereafter they committed rape on her, and they threatened his father to pressurize her to give the statement before the Magistrate in their favour and also to refuse her medico legal examination. He next submitted that age of the victim was fourteen and half years at the time of incident and she was minor at the time of incident and therefore in view of commission of rape on her by accused persons a case under Section 3/4 of POSCO Act is also made out together with sections 363, 366, 376 IPC. Learned Magistrate did not record statement of the victim in proper manner.

10. Per contra, learned counsel for the respondent No.2 submitted that there is no

consistency in prosecution version, the father of the victim lodged an FIR naming accused Taushif only under Section 366 IPC, the victim in her statement under Section 161 Cr.P.C. implicated the accused persons including sister of the accused Taushif, however she has not implicated any of the accused persons in her statement under Section 164 Cr.P.C. and stated that she was rebuked by her parent and having been angry for that reason, she left her home on the date of incident and travelled to the place of her bua (aunt) in a bus and stayed there for three days and came to her home on her own. Even father and phupha (uncle of the victim) has supported her stand taken under Section 164 Cr.P.C. by filing their affidavit during investigation which is included in the case diary. However, the victim did a volte face after filing of closure report by the police in the case and filed a protest petition with prayer to take cognizance against proposed accused and summon them as accused to face trial for alleged offence and when the court dismissed the protest petition and accepted closure report, her father and victim had filed present criminal revision placing reliance on statement under Section 161 Cr.P.C. made by the victim before Investigation Officer. There is no illegality, irregularity or perversity in the impugned order passed by the learned trial court. The victim has changed her stand at every stage and therefore, no reliance can be placed on her averment. She even denied to undergo medicolegal examination when offered by the doctor.

11. This High Court in **Pakhandu v. State of U.P.** decided on 13.09.2001 was called upon for consideration of earlier judgment in **Moahabbat Ali v. State of U.P reported in 1985 UP Cri R 264**. The brief facts of the case were that on an

application moved by Smt. Vimala Devi, the Magistrate in exercise of powers under **Section 156(3), Cr. P.C** directed the police to register the case and investigate the same. Consequently an F.I.R under **Sections 467/468/419/420/364 and 392, I.P.C** was registered and investigated. On completion of investigation, police forwarded a final report to the Court of the concerned Magistrate. Feeling aggrieved, the complainant Smt. Vimala Devi filed objections in the form of 'Protest Petition' against the acceptance of final report. Along with the said petition, she also filed her own affidavit and affidavits of witnesses Ram Charan and Mata Prasad. It further appears that the learned Magistrate, on the basis of material on record came to the conclusion that there was sufficient ground to proceed against the applicants and issued process against them under **Section 204 of the Code of Criminal Procedure**. Thereafter, an application on behalf of the applicants was moved before the Magistrate for recalling the summoning order dated 7-7-1997. This application was however rejected by the learned Magistrate by the order dated 21-10-1999 holding that the applicants had no right of hearing before passing of the summoning order and as cognizance has been taken under Section 190(1)(b). Cr. P.C the order of summoning was amenable to revision. The applicants then preferred revision before the Session Judge against the aforesaid order dated 29-10-1999. The revision has also been dismissed by the learned Session Judge by the impugned order dated 15-5-2000. The applicants have now approached this Court for invoking inherent powers of the Court under **Section 482, Cr. P.C** seeking quashing of the summoning order dated 7-7-1997.

12. When this application was taken up for admission on 25-5-2001 by this

Court, it was urged on behalf of the applicants that they have been summoned under **Section 364, I.P.C** also which offence is triable exclusively by the Court of Session, yet before issuing process the learned Magistrate did not record statements of all the witnesses as required by the proviso to **Section 202(2), Cr. P.C**. This Court observed as under:-

6. Chapter XTV of the Code of Criminal Procedure deals with the conditions requisite for initiation of proceedings. For the purpose of this case, we are concerned with Section 190(1) alone which is reproduced below:

"190. Cognizance of offences by Magistrate:— (1) Subject to the provisions of this Chapter, and Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under subsection (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."

7. There are four more methods of taking cognizance of offences by the Court competent to try the same. The Court called upon to take cognizance of the offence must apply its mind to the facts placed before it either upon a police report or upon a complaint or in some other manner the Court came to know about it and in the case of Court of Session upon commitment of the case by the Magistrate. [vide A.R Antulay v. R.S Nayak, (1984) 2 SCC 500 : (AIR 1984 SC 718)].

*8. When a Magistrate receives a complaint or an application under **Section***

156(3), Cr. P.C which otherwise tantamounts to complaint **under Clause (d) of Section 2** of the Code, there are two courses open to him. He may take cognizance under Section 190(1)(a) by applying his mind to the facts of the case. In that event he has to proceed in the manner provided in **Sections 200 and 202, Cr. P.C** By virtue of Section 200 he is required to examine the complainant and the witnesses present, if any. If the Magistrate finds that there is sufficient ground for proceeding, he may issue process under Section 204. However, if the Magistrate is not satisfied, he may either dismiss the complaint under Section 203, Cr. P.C or post pone the issue of process and take recourse to Section 202 which provides that he may inquire into the case himself or may direct an investigation to be made by a police officer or such other person as he thinks fit for the purpose of deciding whether or not there are sufficient grounds to proceed. But if the offence is triable exclusively by a Court of Session, the Magistrate cannot make a direction for investigation. It is only where the Magistrate decides to hold the inquiry himself that the proviso to **sub-section (2) of Section 202**, which we extract below, would come into operation:

“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.”

9. The other course open to the Magistrate is that instead of taking cognizance, he may send the complaint/application under **Section 156(3), Cr. P.C** for police investigation. If the course is adopted, the police will have to investigate the matter as per the procedure laid down in Section 157

onwards. If upon investigation the police came to the conclusion that there was no sufficient evidence or any reasonable ground of suspicion to justify the forwarding of accused for trial and submitted final report for dropping the proceedings, following courses are open to the Magistrate and he may adopt any one of them as the facts and circumstances of the case may require:

(I) He may agree with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant;

(II) He may take cognizance under **Section 190(1)(b)** and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed;

(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under **Sections 200 and 202, Cr. P.C** and thereafter decide whether complaint should be dismissed or process should be issued.

10. The Apex Court in **Abhinandan Jha v. Dinesh Misra**, AIR 1968 SC 117 held that on receiving final report it was not within the powers of the Magistrate to direct the police to submit a charge sheet but it is open to him to agree or disagree with the police report. If he agrees that there is no case made out for issuing process, he may accept the report

and drop the proceedings. He may come to the conclusion that further investigation is necessary in that event he may pass an order to that effect. If ultimately the Magistrate is of the opinion that the facts set out in the police report constitute an offence, he can take cognizance of the offence, notwithstanding the contrary opinion, expressed in the police report. It was observed there in that the Magistrate in that event could take cognizance under **Section 190(1)(c)** of the Code. The reference to **Section 190(1)(c)** was a mistake for **Section 190(1)(b)** and this has been pointed out in a later decision of **H.S Bains v. State, (1980) 4 SCC 631 : AIR 1980 SC 1883**.

11. In **H.S Bains, ((1980) 4 SCC 631 : AIR 1980 SC 1883)** (supra) it was held by the Supreme Court that the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses expressed in the police report submitted to the Magistrate under **Section 173(2)**, Cr. P.C. The Magistrate may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police. In that case it was observed : "If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under **Section 307**, Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclose an offence under **Section 324**, Indian Penal Code only and he may take cognizance of an offence under **Section 324** in stead of **Section 307**. Similarly, if a

police report mentions that half a dozen persons examined by them claim to be eye-witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does go, it would be on the basis of the statement of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police."

12. In another decision in India **Carat Pvt. Ltd. v. State of Karnataka, (1989) 2 SCC 132 : AIR 1989 SC 885 (890)**, it was held as under:

The position is, therefore, now well settled that upon receipt of a police report under **Section 173(2)** a Magistrate is entitled to take cognizance of an offence under **Section 190(1)(b)** of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. **Section 190(1)(b)** does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusions arrived at by the investigation officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under **Section 190(1)(b)** and direct the issue of process to the accused. 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. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him."

13. In the case of **Tularam v. Kishore Singh**, (1977) 4 SCC 459 : AIR 1977 SC 2401, it was held that if the police, after making an investigation, sent a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of the case under **Section 190(1)(b)** on the basis of material collected during investigation and issue process or in the alternative he could take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he was of opinion that the case should be proceeded with.

14. From the aforesaid decisions, it is thus clear that where the Magistrate receives final report the following four courses are open to him and he may adopt any one of them as the facts and circumstances of the case may require:—

(I) He may agree 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

(II) He may take cognizance under **Section 190(1)(b)** and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied

that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(III) *he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner, or.*

(IV) *he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under **Sections 200 and 202, Cr. P.C** and thereafter decide whether complaint should be dismissed or process should be issued.*

14. In light of aforesaid dictum of this Hon'ble Court in Pakhandu (supra) undoubtedly the Magistrate is at liberty to adopt all the four courses enumerated in the said judgment on production of a closure report by police after investigation into a FIR to the effect that complicity of the accused is not found in the alleged offence or no alleged offence has not been found to be committed.

15. In the present case, learned Magistrate after placing reliance on closure report filed by the police after conclusion of an investigation, adopted Ist course as stated in Pakhandu (supra) and accepted closure report submitted by police in favour of the accused persons whose name has been surfaced during investigation, placing reliance on statement of prosecutrix under Section 164 Cr.P.C. and affidavits of the father and uncle (phupha) of the prosecutrix during the course of investigation which was made part of investigation.

16. In the instant case for the prosecutrix though inculpated the named

accused Taushif and three other accused persons whose name surfaced during investigation in her statement under Section 161 Cr.P.C. recorded by Investigating Officer at the early stage of investigation when she was recovered by police, but she exculpated all the accused persons in her statement under Section 164 Cr.P.C. recorded by Judicial Magistrate during the course of investigation and stated that she had left her home on being rebuked by her parent, and visited the place of her bua (father's sister) where she stayed for three days and he came back to her home subsequently. This statement was supported by father of the prosecutrix and her Phupha Abdul Rahman by filing an affidavit during investigation. Abdul Rahman stated in his affidavit that victim visited his place alone and remained there for three days during the period of her disappearance. However, when closure report was filed by the police, the prosecutrix who was minor at the time of incident filed a protest petition before the court, wherein she placed reliance on her statement under Section 161 Cr.P.C. recorded by police and stated that her statement under Section 164 Cr.P.C. was tutoring an external pressure.

17. Section 164 of the Code also gives power to the investigating agency to forward any person for recording of his confession and the statements before a Magistrate. In the case of **Raju Vs. State of U.P. and others : 2012 (78) ACC 111**, a Division Bench of this Court in paragraph 9 has observed as follows:

"9. We are of the opinion that the statement of an accused or victim or a witness which is to be recorded under Section 164 Cr.P.C., might be a statement recorded during the course of investigation of a case but that is quite different from the

statement of witnesses recorded under Section 161 Cr.P.C. The reason is that there is a full fledged provision under Section 164 Cr.P.C. authorizing the recording of such a statement by a judicial Magistrate. The practise and the procedure which is followed in recording such a statement is that the police has to file an application before the head of Magistracy, who is presently the Chief Judicial Magistrate, requesting for the statement of such a person to be recorded. On receipt of such an application, the Chief Judicial Magistrate gets the relevant record before him and thereafter passes an order in token of receipt of such an application and further passes an order upon the same and thereafter direct by the same order for deputation of a Magistrate to record the statement. He may also record the statement himself. In case of other judicial Magistrate being deputed for recording the statement under Section 164 Cr.P.C., the witness along with the judicial record is transmitted to the deputed judicial Magistrate, who records the receipt of the record for the purpose and proceeds to record the statement and as soon as it is recorded, he again records the recording of such a statement in the order-sheet of the same record and transmits the record along with the recorded statement under Section 164 Cr.P.C. to the Chief Judicial Magistrate. Thus, the whole exercise appears judicial in nature. Not only that, it further indicates that the orders drawn in the above behalf as also the statement recorded are the records of the judicial acts performed by him in discharge of official and judicial functions by a Judge. The recording of the statements is enjoined by the law of the country and the record in the form the recorded statement under Section 164 Cr.P.C. is the record of the act of a public servant discharging his official

and judicial functions. In addition to that the statement recorded under Section 164 Cr.P.C. is never taken out of the judicial record nor it is handed over to the Investigating Officer or any other police officer. The copy of the statement is allowed to be copied in the relevant part of the case dairy. Thus, the recorded statement under Section 164 Cr.P.C. assumes the part of the judicial record of that particular case and, as such, it is the part of the case. This is the reason that we have pointed out that in spite of being a statement of a witness or any other interested person during the course of investigation, the recorded statement under Section 164 Cr.P.C. could not, strictu sensu, be said to be a mere statement during investigation which could be treated as part of the case dairy. It could never be put at par with a statement under Section 161 Cr.P.C. and as such it could never be said to be a part of case dairy."

18. The statement made by the prosecutrix/victim under Section 164 Cr.P.C. before the Magistrate stands on a high pedestal and a sanctity is attached on such statement recorded during the course of investigation, than that of her statement recorded under Section 161 of the Code by the Investigating Officer.

19. With foregoing discussion this court does not find any illegality, irregularity or perversity in the impugned order passed by learned Magistrate, whereby the final report filed by the police after investigation in the case infavour of accused persons placing reliance on statement of the prosecutrix recorded under Section 164 Cr.P.C. as well as affidavits filed by father and uncle of the victim, has been accepted and protest petition filed by the prosecutrix has been dismissed.

20. The learned court below has made an observation that when she was presented for medico legal examination. She refused to undergo medico legal examination. She has been changing her stand at different stages. No presumption can be drawn that statement of prosecutrix recorded by Magistrate before the court suffers from falsehood or external pressure.

21. The impugned order is within bounds of law and no illegality, irregularity or perversity is found therein. The revision is devoid of merit and deserves to be dismissed.

22. However, it is pertinent to observe that even after acceptance of final report and dismissal of protest petition filed by the defacto complainant or prosecutrix are at liberty to file criminal complaint under Chapter 15 of Code of Criminal Procedure before the competent court, if they think fit and if such complaint is made before the court below, the same will be dealtwith in accordance with law, as no embargo is created under law on filing of criminal complaint only due to fact that revision preferred against impugned order passed by learned Magistrate has been dismissed by this Court.

23. The revision is **dismissed** with above observations.

(2025) 1 ILRA 164

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 30.01.2025

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 23 of 2025

Girja Shankar & Ors.

...Appellants

Versus

Ram Sajeevan & Ors.

...Respondents

Counsel for the Appellants:

Ved Prakash Shukla, Tarun Kumar Pandey

Counsel for the Respondents:

A. Civil Law – Civil Procedure Code, 1908 – Section 96 - Order XX R. 6 & 7 - Order XLI - Rule 1 – First Appeal – Maintainability – Only Judgment was filed, decree could not be filed – Filing and hearing of the appeal – Permissibility – Held, the appeal can be filed accompanying with a copy of the judgment passed by the trial court and in view of Order 41 Rule 1(1) CPC, the judgment shall be treated as the decree for the purpose of Rule 1 of Order 41 for filing an appeal, but as soon as the decree is drawn, the judgment shall cease to have effect of a decree for the purposes of execution or for any other purpose. (Para 11)

Second Appeal dismissed. (E-1)

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

1. Heard, Shri Tarun Kumar Pandey, learned counsel for the appellants.

2. Learned counsel for the appellants, while assailing the judgment and decrees passed by the courts below, submits that in the suit for permanent injunction filed by the appellants, an order of interim injunction was passed restraining the respondents from interfering in the peaceful possession of the appellants. However during pendency of the suit a sale deed was executed by respondents of the property in dispute, therefore, by way of amendment the same was challenged in the suit, but neither any issue was framed in regard to the same nor finding was recorded. Being aggrieved, an appeal was filed. He further submits that the decree passed by the trial court was not before the appellate court, whereas an appeal can be filed against the decree under Section 96 of the Civil

Procedure Code (here-in-after referred as CPC), therefore, the appeal could not have been decided in its absence, but without considering it and the grounds raised by the appellants in the appeal, the appeal has been dismissed and the judgment and decree passed by the trial court has been affirmed, therefore the same are not sustainable in the eyes of law.

3. Having considered the submissions of learned counsel for the appellants, I have perused the material placed on records of this appeal and the judgment and decrees passed by the courts below.

4. The suit for permanent injunction was filed by the appellants, in which the interim injunction was granted on 30.04.1988 restraining the respondents from interfering in peaceful possession of the appellants. Therefore it is apparent that there was no restraint in regard to the sale or otherwise of the land in dispute or maintaining status quo of the property in dispute. During pendency of the suit the land in dispute was sold by the respondents, therefore, by way of amendment the sale deed was challenged raising certain grounds. The trial court initially framed seven issues and subsequently three additional issues were framed, out of which the issue no.8 was "Whether the sale deed in dispute shown in list 'B' is liable to be cancelled on the basis of sub-paragraphs of paragraph 4 of plaint?" The trial court after considering the pleadings, material and evidence on record decided the issue no.1 i.e. "Whether the plaintiffs are owner and in possession of the land in dispute" and the aforesaid issue no.8 in regard to cancellation of sale deed recording a categorical finding that the appellants have not been found owner and

in possession of the land in dispute and in all the revenue record-of-rights, the name of defendant Ram Suman Pandey is recorded alongwith other co-tenure holders, who have not been impleaded by the appellants as defendants in their plaint.

5. The trial court further considering the issue of cancellation of sale deed on the grounds raised in the suit found that the sale deed in question has been executed in accordance with law and it cannot be cancelled on the grounds raised in the suit. Therefore the contention of learned counsel for the appellants that neither any issue was framed in regard to cancellation of sale deed nor any finding was recorded is misconceived and not tenable. Being aggrieved, the appellants filed the appeal before the lower appellate court.

6. The lower appellate court, after framing two points for determination to the effect, "As to whether the appellants are entitled for the reliefs claimed in the plaint in regard to land in dispute on the basis of facts stated in the plaint." and "As to whether the impugned judgment and order passed by the trial court is liable to be interfered with" and after considering the pleadings, evidence and material on record found that the appellants have failed to prove their possession and ownership on the land in dispute Gata No.565Ga and the judgment and decree passed by the trial court has been passed in accordance with law, which is not liable to be interfered with and dismissed the appeal confirming the judgment and decree passed by the trial court in the suit. This court does not find any illegality or error in the findings recorded by the courts below.

7. A ground has been raised that the first appellate court could not have decided

the appeal as the 'decree' passed by the court below was not prepared and before it on the ground that the appeal can be filed only against the decree under Section 96 CPC, which provides the appeal from original decree, therefore, unless the decree was prepared and before the appellate court, the appeal could not have been decided.

8. The decree is framed under Order 20 Rule 6 and 7 of CPC. Rules 6 and 7 provides the contents of decree etc. and date of decree, which are extracted here-in-below:-

"6. Contents of decree.-(1) The decree shall agree with the judgment; it shall contain the number of the suit, the [names and description of the parties, their registered addresses,] and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

[6A. Preparation of decree.-(1) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible and, in any case, within fifteen days from the date on which the judgment is pronounced.

(2) An appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the court shall for the purposes of Rule 1 of Order XLI be treated as the decree. But as soon as the decree is drawn, the judgment shall

cease to have the effect of a decree for the purposes of execution or for any other purpose.]

6-B. Copies of judgments when to be made available.-Where the judgment is pronounced, copies of the judgment shall be made available to the parties immediately after the pronouncement of the judgment for preferring an appeal on payment of such charges as may be specified in the rule made by the High Court.]

7. Date of decree.-The decree shall bear the day on which the judgment was pronounced, and, when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree."

8. Rule 6 provides that the decree shall agree with the judgment and it shall contain the number of the suit, description of the parties, their registered addresses, particulars of the claim and relief granted or other determination of the suit including the amount of costs incurred in the suit and in what proportions such costs are to be paid etc. Rule 6-A provides the preparation of decree. **Rule 6-A (2) provides that the appeal may be preferred against the decree without filing a copy of the decree and in such a case copy made available to the party by the court shall for the purposes of Rule 1 of Order 41 be treated as the decree. But as soon as the decree is drawn the judgment shall cease to have the effect of a decree for the purposes of execution or for any other purpose.** Rule 6-B provides that the copies of the judgment shall be made available immediately after pronouncement of judgment for preferring an appeal. Rule 7 provides that the decree shall bear date the day on which the judgment was pronounced, and, when the Judge has

satisfied himself that the decree has been drawn upon in accordance with the judgment, he shall sign the decree.

9. Order 41 Rule 1 CPC provides the form of appeal and what to accompany memorandum and contents of memorandum. By the High Court amendments of Allahabad Rule 1 has been amended inserting explanation after the proviso to Sub-rule (1) of Rule 1 and proviso to sub-rule (2) of Rule 1. Thus Rule 1 Order 41 as amended by the High Court amendment Allahabad is extracted here-in-below:-

"1. Form of appeal What to accompany memorandum.-(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the 1 [Judgment].

[Provided that where two or more suits have been tried together and a common judgment has been delivered therefor and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the Appellate Court may dispense with the filing of more than one copy of the judgment.]

(2) Contents of memorandum.-The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively. 1

[(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such

security in respect thereof as the Court may think fit.]"

"ALLAHABAD. (1) In sub-rule (1) of Rule 1, after the proviso the following Explanation shall be inserted, namely:

"Explanation.- The copy of the decree referred to in sub-rule (1) of Rule 1 above shall include a deemed decree as provided in Order XX in clause (b) in sub-rule (2) of Rule 6-A" (Noti. No.345-VII-d-134, dt.8-8.1994, w.e.f.22.10.1994)

(2) Add the following proviso to sub-rule (2) of Rule 1:

"Provided that the Court may, for sufficient reasons, accept a memorandum of appeal without a copy of the decree appealed from if the counsel for the appellant certifies that the copy has been applied for and has not yet been issued, subject to the copy being filed subsequently within the time granted by the Court." (13-12-1969). [Note.- This amendment shall come into force with effect from the date of its publication in the Uttar Pradesh Gazettee.]"

10. The aforesaid Rule 1 of Order 41 provides that the memorandum shall be accompanied by a copy of the judgment. Explanation added to sub-rule(1) of Rule 1 by the High Court Amendment, Allahabad provides that the copy of the decree referred to in sub-rule (1) of Rule 1 shall include a deemed decree as provided in Order 20 in clause (b) in sub-rule (2) of Rule 6-A. The proviso added to sub-rule (2) of Rule 1 of Order 41 by the High Court amendment, Allahabad provides that the court may, for sufficient reasons, accept a memorandum of appeal without a copy of the decree appealed from if the counsel for the appellant certifies that the copy has been applied for and has not yet been issued, subject to the copy being filed

subsequently within the time granted by the Court.

11. In view of above, the appeal can be filed accompanying with a copy of the judgment passed by the trial court and in view of Order 41 Rule 1(1) CPC, the judgment shall be treated as the decree for the purpose of Rule 1 of Order 41 for filing an appeal, but as soon as the decree is drawn, the judgment shall cease to have effect of a decree for the purposes of execution or for any other purpose. As per the proviso added to sub-rule (2) of Order 41 CPC, which is in regard to the contents of memorandum, the court may, for sufficient reasons, accept a memorandum of appeal without a copy of the decree appealed from if the counsel for the appellant certifies that the copy has been applied for and has not yet been issued, which would be subject to the copy filed subsequently on being issued. Therefore an appeal can be filed with the copy of the judgment, if the decree has not been issued and it shall be deemed to be a decree for the purposes of appeal, till the decree is issued as it contains only the contents of the judgment by the concerned court. However once a decree is drawn it shall cease to have effect of a decree for the purposes of execution or for any other purpose. Therefore even after the decree is drawn, it can not be said that if it is not filed, the appellate court will have no jurisdiction to decide the appeal. Even otherwise, admittedly the decree was not drawn during pendency of appeal and even if the decree is drawn subsequently, it cannot affect the merit of appeal or of the case as it shall have the effect of the decree for the purpose of execution or any other purpose. Even otherwise the appellants, who had filed the appeal before the lower appellate court can not take benefit of their

laxity or wrong of not filing the decree. Thus on this technical ground the decree passed by the court's below cannot be reversed, modified or the case remanded as it does not affect the merits of case in view of Section 99 of Civil Procedure Code.

12. There is one more reason for non availability of the aforesaid technical ground of decree to the appellant is that if such ground is permitted to be taken then the appellants may get the appeal filed annexing a copy of the judgment and get the record of the trial court summoned immediately after receipt of the copy of the judgment, which is to be issued immediately after pronouncement of the judgment for preferring an appeal so that the decree may not be prepared and in case of adverse decision, the ground may be set up in this regard. Thus this ground is misconceived and not tenable.

13. In view of above, this court does not find any illegality or error in the impugned judgment and decrees passed by the courts below. No substantial question of law arises in this appeal. The Second Appeal has been filed on misconceived and baseless grounds.

14. The Second Appeal is, accordingly, **dismissed**.

(2025) 1 ILRA 169

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 24.01.2025

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 151 of 2016

Surya Kumar Tripathi Deceased & Ors.

...Appellants

Versus

Ram Pal

...Respondent

Counsel for the Appellants:

Madhav Chaturvedi

Counsel for the Respondent:

Mayank Pandey, Ashok Shukla, Brijesh Kumar, Nirmal Singh Yadav, Prince Kumar, Raj Kumar Singh, Raj Kumar Yadav, Shailendra Kumar Singh, Shyam Kishor

Civil Law – Civil Procedure Code, 1908 – Section 100 - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 229-B & 331- Second Appeal – against judgments and decrees passed by the lower courts, - on the ground that suit was barred by Section 331 of the Act, 1950 – plaintiff-respondent alleged that on the basis of a forged unregistered Power of Attorney – a Sale deed was executed – FIR - Suit - for cancellation of Sale deed - Defendant-appellant objected that Suit was barred by Section 331 of Act, 1950, as the name of the defendant-respondents was recorded in the revenue records – Suit was allowed & decreed – Civil Appeal – allowed & decreed – Second Appeal – Court finds that, - the plaintiff-respondent filed the suit for cancellation of the sale deed on the grounds of fraud, alleging that the Power of Attorney was void and the sale deed was executed based on this fraudulent document - The execution of the alleged unregistered Power of Attorney also has been denied by the plaintiff-respondent – Hon'ble Supreme court held that no right, title or interest can be transferred with respect to immovable properties on the basis of an unregistered agreement to sell or on the basis of an unregistered Power of Attorney, which has been found fraudulent, so it cannot be said that suit was not maintainable - held, Plaintiff-respondent as bhumidhar of the land in dispute can file a suit for cancellation of sale deed before the Civil Court on the ground of Fraud and misrepresentation as revenue court does not have jurisdiction for granting such relief of cancellation of sale deed and in such circumstances no declaration of title is required – hence, there is no illegality or error in the impugned judgments and decrees – accordingly, second appeal is dismissed. (Para – 15, 17, 18)

Special Appeal Dismissed. (E-11)**List of Cases cited:**

1. Rajni Tandon Vs Dulal Ranjan Ghosh Dastidar & anr.; (2009) 14 SCC 782,
2. Shri Ram & anr. Vs 1st A.D.J. & ors.; (2001) 3 SCC 24,
3. Kamla Prasad & ors. Vs Kishna Kant Pathak & ors.; (2007) 4 SCC 213,
4. Narendra Kumar Mittal & ors. Vs Nupur Housing Development Pvt. Ltd. & anr.; 2019 Legal Eagle (SC) 797/ 2019 (7) JT 553,
5. Kundan Singh Vs Addl. District Judge, Bijnore & ors.; 2008 SCC OnLine All 2050,
6. Shakeel Ahmed Vs Syed Akhlaq Hussain; 2023 SCC OnLine SC 1526,
7. Chhanga & ors. Vs 1st A.D.J., Jaunpur; 1998 Legal Eagle (ALD) 541/1998 (3) AWC 2094,
8. Ram Padarath Vs Second A.D.J.; 1989 RD 21 (All) (FB).

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

1. Heard, Shri Sudeep Seth, learned Senior Advocate, assisted by Shri Madhav Chaturvedi, learned counsel for the appellants and Shri Ashok Shukla, learned counsel for the respondent.

2. This Second Appeal under Section 100 of the Civil Procedure Code 1908 has been filed with a prayer to call for the records and after its perusal, this instant second appeal may be allowed and further be pleased to set aside the judgment and decree dated 27.01.2016 passed in Regular Civil Appeal No.310 of 2003 by the Additional District Judge, Court No.17, Lucknow and the judgment and decree dated 12.11.2003 passed in Regular Suit No.156 of 1995 by the VIth Additional

Civil Judge (Jr.Div.), Court No.38, Lucknow or pass any other suitable decree which this Hon'ble Court deems just and proper in the interest of justice.

3. Learned counsel for the defendants-appellants submitted that the suit filed by the plaintiff-respondent was barred by Section 331 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (here-in-after referred as Act of 1950) as the name of defendant-respondents was recorded in the revenue records, therefore, the suit could have been filed only before the Revenue Court with a prayer for declaration of his rights. He further submitted that the plaintiff-respondent was not in possession of the land in dispute, therefore, also no relief could have been granted by the Civil Court.

4. On the basis of above, learned counsel for the defendant-appellants submitted that the judgment and decrees passed by the courts below are not tenable in the eyes of law and are liable to be set aside. He relied on **Rajni Tandon Versus Dulal Ranjan Ghosh Dastidar and another; (2009) 14 SCC 782, Shri Ram and another Versus Ist Addl. Distt. Judge and others; (2001) 3 SCC 24, Kamla Prasad and others Versus Kishna Kant Pathak and others; (2007) 4 SCC 213, Narendra Kumar Mittal and others Versus Nupur Housing Development Pvt.Ltd. And Another; 2019 Legal Eagle (SC) 797/ 2019 (7) JT 553 and Kundan Singh Versus Addl.District Judge, Bijnore and others; 2008 SCC OnLine All 2050.**

5. Per contra, learned counsel for the respondent submitted that the suit was filed only for cancellation of sale deed and no prayer for injunction was made, therefore,

the plea of learned counsel for the defendants-appellants that possession was required to be pleaded is misconceived and not tenable as it was not in issue. He further submitted that the suit for cancellation of sale deed was rightly filed before the Civil Court as no declaration of title was required because admittedly the plaintiff-respondent was bhumidhar of the land in dispute and therefore the suit was filed on the ground of fraud. He further submitted that the Power of Attorney was a void document as it was not executed by the plaintiff-respondent and sale deed was got executed on the basis of the said void document, therefore, the sale deed was required to be cancelled considering its veracity. Even otherwise the Power of Attorney does not give any title.

6. On the basis of above learned counsel for the plaintiff-respondent submitted that the courts below have passed the judgment and decrees in accordance with law, which does not require any interference by this court. The appeal has been filed on misconceived and baseless grounds. No substantial question of law arises in this appeal, therefore, it does not require even admission. Thus the appeal is liable to be dismissed. He relied on **Shakeel Ahmed Versus Syed Akhlaq Hussain; 2023 SCC OnLine SC 1526, Narendra Kumar Mittal and others Versus Nupur Housing Development Pvt.Ltd. And Another; 2019 Legal Eagle (SC) 797/ 2019 (7) JT 553 and Chhanga and others Versus Ist Additional District Judge, Jaunpur; 1998 Legal Eagle (ALD) 541/1998 (3) AWC 2094.**

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

8. The plaintiff-respondent filed a suit for cancellation of sale deed on the ground

that by preparing forged Power of Attorney dated 30.03.1992 in favour of defendant no.1 on behalf of plaintiff-respondent the sale deed has been executed on 23.05.1992 in favour of defendants no.2 to 6. On coming to know about the same First Information Report was lodged against the defendants. No sale consideration has been paid to the plaintiff-respondent. It was also alleged that no agreement of sale dated 11.10.1991 was executed by the plaintiff-respondent in favour of the defendant-appellants nor the defendant no.1 was authorized to execute the sale deed. The suit was contested by the defendant-appellants by filing written statement and alleging that the agreement to sale was executed by the plaintiff-respondent on 11.10.1991. Thereafter he executed the Power of Attorney in favour of the defendant no.1 for execution of sale deed. On the basis of the said Power of Attorney, the sale deed was executed, the sale consideration of which was paid to the plaintiff-respondent. The names of defendants no.2 to 6 have been recorded in revenue records. The plaintiff-respondent after receiving the sale consideration, gave notice and filed the suit to blackmail the defendants, which is barred by Section 331 of the Act of 1950. On the basis of the pleadings of the parties five issues were framed by the trial court. Thereafter oral as well as documentary evidence was adduced by the parties. Considering the pleadings, evidence and material on record the suit was decreed vide judgment and order dated 12.11.2003 and sale deed dated 23.05.1992 was cancelled. Being aggrieved Civil Appeal bearing Civil Appeal No.310 of 2003 was filed by the defendant-appellants, which has been dismissed by means of the judgment and decree dated 27.01.2016 confirming the order passed by the trial court. Hence this second appeal has been filed.

9. Section 331 of the Act of 1950 provides the cognizance of suits etc. under

the Act. According to the Section 331 of the Act of 1950 except as provided by or under the Act no court other than a court mentioned in Column 4 of Schedule II shall, take cognizance of any suit, application, or proceedings mentioned in Column 3 in respect of which any relief could be obtained by means of any such suit or application. On perusal of Schedule II of the Act 1950 it is apparent that no proceedings have been shown under Column 3 which could have been instituted for cancellation of sale deed. However it was argued that since the declaration of rights was required, therefore, the suit should have been instituted under Section 229-B of the Act of 1950. Section 229-B provides declaratory suit by person claiming to be an asami of a holding or part thereof. The provisions would also apply mutatis mutandis to a suit by a person claiming to be a bhumidhar. The suit under Section 229-B can be filed for declaration of rights against the State. However the other person, if any, claiming such rights is also required to be impleaded.

10. The trial court, while considering the issue of bar of Section 331 of the Act of 1950, after considering a Full bench Decision of this Court in the case of **Ram Padarath Versus Second ADJ; 1989 RD 21 (All) (FB)** relied by defendant-appellants, has held that since indisputably the plaintiff-respondent was bhumidhar of the land in dispute and he is denying the sale of the land in dispute through the impugned sale deed and he wants to get the sale deed cancelled to protect his interest, therefore, he could have filed the suit before the civil court because if the sale deed in question exit it may be adverse to the interest and rights of the plaintiff-respondent. The learned lower appellate court has upheld the findings recorded by the trial court.

11. The Hon'ble Supreme court, in the case of **Shri Ram and another Versus Ist Addl.Distt.Judge and others (Supra)**, after considering the Full Bench decision of this court in the case of **Ram Padarath Versus Second ADJ; 1989 RD 21 (All) (FB)** has held that where a recorded tenure holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having been obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the Revenue Court, the reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. The relevant paragraphs 4 and 7 are extracted here-in-below:-

“4. In the present case what we find is that the vendor Smt Vidyawati Devi admitted that she had executed a registered sale deed in favour of the appellants on 12-7-1984. She also admitted that she delivered the possession of the said land to the appellants and the appellants are in possession over the said plot of land. It is also on record that the names of the appellants have been ordered to be recorded as a tenure-holder in the revenue record. The aforesaid facts show that the appellants are the recorded tenure-holders in possession of the plot in dispute in pursuance of the sale deed dated 12-7-1984. The question that now arises for consideration is whether a recorded tenure-holder having prima facie title in his favour and in possession is required to file a suit in the Revenue Court or the civil court has jurisdiction to entertain and decide the suit seeking relief of cancellation of a void document. In *Ram Padarath v. Second ADJ* [1989 RD 21 (All) (FB)] a Full Bench of the Allahabad High Court considered this aspect of the matter and held thus:

“We are of the view that the case of *Indra Dev v. Ram Piari* [(1982) 8 ALR 517] has been correctly decided and the said decision requires no consideration, while the Division Bench case, *Ayodhya Prasad (Dr) v. Gangotri Prasad* [1981 AWC 469] is regarding the jurisdiction of consolidation authorities, but so far as it holds that suit in respect of void document will lie in the Revenue Court it does not lay down a good law. Suit or action for cancellation of void document will generally lie in the civil court and a party cannot be deprived of his right getting this relief permissible under law except when a declaration of right or status and a tenure-holder is necessarily needed in which event relief for cancellation will be surplusage and redundant. *A recorded tenure-holder having prima facie title* in his favour can hardly be directed to approach the Revenue Court in respect of seeking relief for cancellation of a void document which made him approach the court of law and in such case he can also claim ancillary relief even though the same can be granted by the Revenue Court.”

7. On analysis of the decisions cited above, we are of the opinion that where a recorded tenure-holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having been obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the Revenue Court, the reason being that in such a case, prima facie, the title of the recorded tenure-holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure-holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of

his title and, therefore, he may be directed to approach the Revenue Court, as the sale deed being void has to be ignored for giving him relief for declaration and possession.”

12. The Hon’ble Supreme Court, in the case of **Kamla Prasad and others Versus Kishna Kant Pathak and others (Supra)**, considered the issue in regard to a suit in which the case of the plaintiff in the plaint was that over and above the plaintiff, defendants 10 to 12 had also right in the agricultural land and after considering the pleadings and evidence and the judgment of the Hon’ble Supreme Court in the case of **Shri Ram Versus Ist ADJ (Supra)** and the fact that in the mutation proceedings the plaintiff himself appeared as a witness before the mutation court and admitted execution of the sale deed, receipt of sale consideration and the factum of putting vendees into possession of the properties purchased by them, on the basis of which the name of the contesting defendants had been mutated in the records of rights and name of plaintiff was deleted. In the said facts and circumstances, the Hon’ble Supreme Court held that the courts below were wholly right in reaching the conclusions that such a suit can be entertained only by a Revenue Court and civil court had no jurisdiction and in such circumstances declaration of rights was also required. Similar view was taken by a Co-ordinate Bench of this court in the case of **Kundan Singh Versus Addl. District Judge, Bijnore and others (Supra)**, relying on the judgment of the Hon’ble Supreme Court in the case of **Kamla Prasad and others Versus Kishna Kant Pathak and others and Shri Ram and another versus Ist Addl. Distt. Judge and others (Supra)**.

13. The Hon’ble Supreme Court, in the case of **Narendra Kumar Mittal and**

others Versus Nupur Housing Development Pvt.Ltd. and Another (Supra), after considering the aforesaid judgments and the judgment in the Full Bench decision of this court in the case of **Ram Padarath Versus Second ADJ, Sultanpur and others (Supra)** dismissed the appeal holding that Section 331 of the Act of 1950 does not deprive a party to approach the competent court of law for getting a document cancelled, especially when, prima facie, the title of the recorded tenure holder is not under cloud and revenue court does not have jurisdiction of granting relief of cancellation of a deed on the ground of fraud and misrepresentation. The relevant paragraph 7 is extracted here-in-below:-

7. In the instant case, the plaintiff has pleaded that it had purchased the disputed property under five sale deeds all dated 17.10.1998 from the first defendant. The suit was filed for cancellation of the sale deed dated 15.06.2006 on the ground of fraud and misrepresentation. The plaintiff had not sought any relief with respect to its own right and title as a tenure holder or declaration of its title or status. As stated above, the only relief sought in the suit filed was for cancellation of the alleged sale deed dated 15.06.2006. We are of the view that Section 331 of the Act does not deprive a party of his right to approach competent court of law for getting a document cancelled, especially when, prima facie, the title of the recorded tenure holder is not under cloud. Revenue Court does not have jurisdiction of granting relief of cancellation of a deed on the ground of fraud and misrepresentation.”

14. In view of above in case a suit for cancellation of sale deed by a person having prima facie title and no cloud on his title can

file a suit for cancellation of sale deed before the Civil Court on the ground of fraud and misrepresentation as revenue court does not have jurisdiction for granting relief of cancellation of sale deed on these grounds and in such circumstances no declaration of title is required.

15. In the present case the title of the plaintiff-respondent as bhumidhar of the land in dispute or any cloud on his title could not be raised by the defendants-appellants and it could also not have been raised because the alleged forged sale deed was executed on his behalf. Thus the plea of bar of Section 331 of the Act of 1950 has rightly been considered and decided by the courts below holding that it is not barred by Section 331. This court does not find any illegality or error in the findings so recorded by the courts below.

16. This court, in the case of Chhanga and others Versus Ist **Additional District Judge, Jaunpur (Supra)**, has held that from Section 331 of the Act of 1950, it is explicitly clear that those reliefs which can be had in Column 3 of Schedule II before the authority mentioned in Column 4 cannot be entertained by a civil court. Relevant paragraph 7 is extracted here-in-below:-

“7. Thus the section is explicitly clear that those cause of action in respect of which any proceedings or suit can be specified by the relief provided under the said Act cannot be taken cognizance of by a civil court. It further makes it clear that those reliefs which can be had in Column 3 of Schedule II before the authority mentioned in Column 4 cannot be entertained by a civil court.”

17. Now the question arises whether non challenge to unregistered Power of Attorney, on the basis of which the sale

deed was executed by the defendant no.1 in favour of the defendants no.2 to 6, could have been a ground to hold that the suit is not maintainable. The execution of the alleged unregistered Power of Attorney has been denied by the plaintiff-respondent and it has been found forged by the courts below, on the basis of which the registered sale deed has been executed by the defendant no.1 in favour of defendant no.2 to 6, whereas no title or power could have been transferred and conferred on the basis of said unregistered Power of Attorney.

18. The Hon'ble Supreme Court, in the case of **Rajni Tandon Versus Dulal Ranjan Ghosh Dastidar and another (Supra)**, has held that in cases where the person signing the document cannot present the document before the registration officer and gives a power of attorney to another to present the document, the provisions of Section 33 get attracted and it is only in such a case that the said Power of Attorney has to be necessarily executed and authenticated in the manner provided under Section 33(1)(a) of the Act. However this case is not of any assistance to the appellants because the case of plaintiff-respondent is not attracted by Section 33(1)(a) of the Act. The sale deed was challenged on the ground that the sale deed has been executed on the basis of fraudulent unregistered Power of Attorney, which has not been executed by the defendant-respondent and it has been proved. In view of latest judgment of the Hon'ble Supreme Court in the case of **Shakeel Ahmed Versus Syed Akhlaq Hussain (Supra)**, in which the suit was filed for possession and mesne profits on the basis of Power of Attorney and decree for possession alongwith mesne profits was granted. On being challenged the findings were confirmed by the High Court.

However the Hon'ble Supreme Court held that no right, title or interest can be transferred with respect to immovable properties on the basis of an unregistered agreement to sell or on the basis of an unregistered Power of Attorney. Thus even if he who signs the deed could have presented the same, he could not have transferred the title with respect to immovable properties on the basis of unregistered Power of Attorney, which has been found fraudulent, so it cannot be said that the suit was not maintainable and non challenge to same would not vitiate the impugned judgment and decrees as in view of the grounds raised it has been considered. There is no illegality or error in it.

19. In view of above, the courts below have passed the impugned judgment and decrees in accordance with law, which does not call for any interference by this court as no substantial question of law arises in this appeal. The appeal has been filed on baseless and misconceived grounds.

20. The Second Appeal is, accordingly, **dismissed** at the admission stage. No order as to costs.

(2025) 1 ILRA 175

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 31.01.2025

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

First Appeal From Order No. 1780 of 2024
With other connected cases

ICICI Lombard General Insurance Co. Ltd.
...Appellant

Versus
Smt. Arti Devi & Ors. ...Respondents

Counsel for the Appellant:

Rahul Sahai

Counsel for the Respondents:

Abhinav Trivedi, Adarsh Kumar, Shreesh Srivastava

A. Civil Law - Motor Vehicles Act, 1988-Sections 147, 149 & 150 (as amended by the Motor Vehicles (Amendment) Act, 2019)-Right of Insurer to Recover Compensation-"Pay and Recover" Principle-Omission of Proviso to Section 149(4)-Effect on Insurer's Liability-Held-The insurer is liable to pay compensation to accident victims first and can recover the amount from the vehicle owner if there is a breach of policy conditions-The Motor Vehicles (Amendment) Act, 2019 does not abolish the principle of "pay and recover".(Para 1 to 39)

B. Statutory obligation of insurer u/s 147(6)-the presence of section 147(6) which mandates that insurers indemnify the insured, reinforces the insurer's duty to compensate victims before seeking reimbursement from the vehicle owner. the amendment does not relieve the insurer from its initial liability. (Para 18)

C. Indemnification Obligation unaffected-the replacement of section 149 with section 150 does not alter the insurer's obligation to indemnify third party risks. the omission of the proviso does not negate the well-established principle of "pay and recover" which continues to protect the rights of accident victims. (Para 21)

The appeal dismissed. (E-6)

List of Cases cited:

1. NICL Vs Swaran Singh & ors.(2004) JT 1 SC 109
2. Satheedevi Vs Prasanna (2010) 5 SCC 622
3. UOI Vs Deoki Nandan Aggarwal (1991) AIR SCW 2754

4. M/s Unique Butyle Tube Industries Pvt. Ltd. Vs UP Financial Corp. & ors.(2003) AIR SC 2103

5. New India Assr. Co., Shimla Vs Kamla & ors.(2001) 4 SCC 342

6. S. Iyyapan Vs UII Co. Ltd. & anr.(2013) 7 SCC 62

7. ICICI Lombard Gen. Ins. Co. Ltd. Vs Suresh & ors. (2024) 2 ADJ 576

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

**EFFECT OF MOTOR VEHICLES
(AMENDMENT) ACT, 2019 (32 of 2019)
ON INSURER'S RIGHT TO RECOVER
COMPENSATION FROM OWNER**

1. Heard Shri Aditya Singh Parihar, learned counsel for the appellant-Insurance Company, Shri S.D. Ojha, and Shri Shreesh Srivastava, learned counsel for the claimant-respondents and Shri Abhinav Trivedi as well as Shri Adarsh Kumar, learned counsel for vehicle owner and driver in all the connected appeals.

2. All these appeals involve common questions of fact and law and, hence, are being decided by a common judgment. For the sake of convenience, First Appeal From Order No. 1780 of 2024 shall be treated as leading case.

3. The present appeal at the instance of Insurance Company challenges the award dated 01.06.2024, whereby the Presiding Officer, Motor Accident Claims Tribunal, Kanpur Dehat has allowed M.A.C. No. 186 of 2022 (Smt. Aarti Devi and others vs. Manager I.C.I.C.I. Lombard General Insurance Company Limited and others) in part awarding a sum of Rs.20,11,800/- towards compensation against the owner

and driver of the offending vehicle with an observation that vehicle being insured with the appellant-Company, the appellant shall have right to recover the amount of compensation from the owner and the driver. Initial liability to pay compensation has been fastened upon the appellant-Insurance Company.

4. Brief facts giving rise to the instant appeal are that a road accident took place on 29.05.2022 in which one Pradeep Kumar, who was sitting in Eco Car No. U.P. 90 U-9831, suffered injuries and succumbed to the same on the spot. The accident was caused by Bus No. U.P. 77 T-5052, which was insured with the appellant-Insurance Company. A claim petition was filed by the legal representatives of the deceased claiming compensation. The Tribunal, after framing issues as regards rash and negligent driving of the bus driver and the car driver and as to whether the drivers were having valid driving license on the date of accident, factum of insurance and liability to pay compensation by which party and to what extent, decided the claim petition by the impugned judgment and order.

5. When the appeal came up for consideration on the first date, this Court, after noting down submissions advanced by the appellant including a legal plea raised in the light of omission of proviso to sub-section (4) of Section 149 of the Motor Vehicles Act, 1988 (herein after referred to as Act, 1988) by way of **Motor Vehicles (Amendment) Act, 2019 (32 of 2019)**, admitted the appeal on 27.09.2024 and issued notices to the unrepresented respondents. After the parties were represented, the Court, by an order dated 08.11.2024, summoned the record of the Tribunal. The appeal was heard at length on 09.01.2025 and judgment was reserved.

THE LEGAL ISSUE INVOLVED

6. The decision in these appeals raises a very significant question of law in the light of **Motor Vehicles (Amendment) Act, 2019 (32 of 2019)** and not yet decided in India, as informed to the Court. Vide notification dated 25.02.2022 issued in exercise of powers under Section 1(2) of the Amending Act, 2019, various sections including Section 51 of the Amending Act came into force w.e.f. 01.04.2022. It is Section 51 that replaces Chapter XI of the Act of 1988 by a new Chapter XI that is relevant for the instant case. When read with Section 166 (3) of the Act where limitation to present a claim petition within 6 months from the occurrence of accident has been prescribed, it infers that the provisions of newly substituted Chapter XI would deal with cases arising from accidents taking place after 01.04.2022. The question is as to whether mere omission of proviso attached to sub-section (4) of Section 149 of Act, 1988 after its replacement by Section 150 by Amendment Act, 2019 would mean that the liability of the insurer to pay and its right to recover the amount from the owner has been taken away and does not survive in relation to accidents occurring after 01.04.2022.

ARGUMENTS ON BEHALF OF INSURER

7. Learned counsel for the appellant has vehemently argued that since the accident took place after coming into force of the Amendment Act, the Tribunal was not justified in issuing a direction to the appellant to pay compensation to the claimants with a right to recover. Elaborating his submissions, it is urged that Insurance Company's right to recover compensation from the owner of the

offending vehicle flows from the proviso attached to sub-section (4) of Section 149 of Motor Vehicles Act, 1988, however, the said proviso has been omitted by Act of 2019 and, therefore, in case of a breach of policy, it is only the owner against whom award can be directly made and Insurer is liable to be relieved from any liability to indemnify the owner. It is further submitted that language used in the statute being plain and simple, nothing can be read which the statute does not contain and, hence, earlier judgments laying down proposition to first pay compensation to the claimants and then have right to recover the same from the owner, would have no application as in none of the authorities so far, the effect of amendments made by the Act of 2019 has been examined. Entire Chapter XI of the Act of 1988 has been replaced by new Chapter XI and in place of Section 149 of the Act of 1988, Section 150 has been substituted, which does not contain any provision/proviso as was earlier attached to sub-section (4) giving right to the Insurer to recover the amount in case of breach of policy. Placing reliance upon Statement of Objects and Reasons behind enactment of Act of 2019, it is urged that after considering numerous representations and recommendations in the form of grievances and suggestions from various stake-holders, legislature has, in its wisdom, brought into existence the Amendment Act to minimize road accidents and disregard traffic rules and regulations and to improve road safety and transport system. There is flood of cases where either fake claims are raised or the claimants collude with the owners of the offending vehicle and proceed in such a manner so that ultimately, though breach of insurance policy is found, liability to pay compensation at the first instance is enforced against the Insurance Company, knowing well that owner's role would

come into picture when the recovery is issued against him by which time the claimants would have been compensated and a situation would arise where for years together, owners would remain absolved of liability.

8. Elaborating his submissions, it is urged by Shri Parihar as under:-

(a) Section 149 (4) and amended provision section 150 (4) reflect that the unamended section 149 (2) provided two defences to the Insurance Co.:

- i. Case of breach of policy mentioned section 149 (2)(a) of the Act and
- ii. policy being void as per section 149 (2) (b) of the Act.

(b) The unamended provision laid down that except under the situation provided by section 149 (2)(b), the insurer would not be in a position to avoid the liability because it has got right against the owner under the above provision. So, in a situation of breach of policy as provided u/s 149 (2)(a), the Insurance Co. would be held liable and it can recover the same in light of the proviso to Section 149(4).

(c) The amended Section 150 (2) provides three defences to the Insurance Co.:

- i. Case of breach of policy-mentioned u/s 150 (2)(a) of the Act,
- ii. Policy being void as per sec. 150 (2)(b) of the Act, and
- iii. Non-receipt of premium.

(d) The amended provision, i.e. Section 150(4) provides that except under the situations provided by S.150(2), the insurer would not be in a position to avoid the liability. Meaning thereby that if the case falls under any of the defences reflected in Section 150(2) of the Act, the Insurer can avoid the liability.

(e) All the earlier precedents lose their precedential value as they relate to earlier unamended provision and, hence, do not contemplate the new amended provision and its implication. If the arguments of claimants are accepted that even after deletion of proviso by way of amendment Act, Insurance Company would be liable to pay compensation, permitting it to raise grounds of challenge would be a redundant provision and in no case, defence of Insurance Company would be entertainable.

(f) The power under Article 142 of the Constitution of India is in the exclusive domain of the Apex Court and can be exercised by the Apex Court alone to serve the ends of justice in the peculiar facts and circumstances of a case. Hence all the judgements of the Hon'ble Supreme Court invoking its power under Article 142 of the Constitution of India cannot be relied upon.

(g) The leading judgment in relation to Insurance Company's right to recover from the owner, i.e., **National Insurance Company Limited vs. Swaran Singh and others, JT 2004 (1) SC 109**, was pronounced when the proviso to sub-section (4) of Section 149 existed in the Statute Book and the matter before the Supreme Court had arisen out of interpretation of Section 149 vis-a-vis the proviso and once the proviso does not find place after amendment, any law laid down by the Supreme Court or this Court would not be read in relation to those cases where accident took place after the Amendment Act has come into operation.

(h) The doctrine of "Stare decisis" directs courts to follow prior decisions of higher courts when resolving cases involving similar facts and law. The argument of the respondents and the judgments relied upon by them presented

as examples of stare decisis suggesting that insurers cannot avoid liability and that 'Pay and Recover' still remains where liability is disputed, hold no ground as they are based on the now-deleted provisions of the Act, 1988.

(i) The amendments in Act are prospective in nature and, hence, the mandate of **Swaran Singh's** case would hold ground for all cases wherein the occurrence of accident predates the coming into force of the amendment, i.e. 1.4.2022, but not otherwise.

(j) It is a trite law that primary rule of interpretation/ construction is that the intention of the legislature must be found in the words used by the legislature itself. The Hon'ble Apex Court, in the case of **Satheedevi vs Prasanna, (2010) 5 SCC 622**, has held that if the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise.

(k) In the case of **Union of India vs. Deoki Nandan Aggarwal, 1991 AIR SCW 2754**, the Hon'ble Apex Court has held that court cannot rewrite recast or reframe the legislation. A court cannot add words to a statute or read words which are not there in it. Even if there is a defect or an omission in the statute, the court cannot correct the defect or supply the omission.

(l) The Supreme Court has upheld the *Causus Omissus maxim* in several judgments, explicitly stating that such omissions cannot be addressed by judicial

interpretation. In **M/s Unique Butyle Tube Industries Pvt. Ltd. vs. UP Financial Corporation and Others**, AIR 2003 SC 2103, it was held that the legislature's omissions (if any) cannot be filled by judicial interpretation. If a statute leaves out a particular situation, the courts cannot insert words to address that omission. In such a circumstance, reading something into a provision when the legislature in its wisdom has specifically omitted, deleted or repealed a provision or its part, would amount to doing violence to the statute and the same should not be done to the clear and plain language of the statute.

(m) Even laws that are beneficial must follow the constraints of statutory language ensuring a balance between legislative intent and literal interpretation. The principle that "*the law is what the text says*" underlines court judgments. While beneficial legislation plays an important role, it cannot override the clear and specific language of statutes as drafted by the legislature. The court cannot go beyond the framework established by the legislature.

9. In support of his submissions, learned counsel for the appellant has placed reliance upon the following authorities:-

(1) **New India Assurance Co., Shimla vs. Kamla and others**, 2001(4) SCC 342

(2) **National Insurance Co. Ltd. vs. Swaran Singh and others**, JT 2004 (1) SC 109

(3) **S. Iyyapan vs. United India Insurance Co. Ltd. And another**, 2013 (7) SCC 62

(4) **M/s Unique Butyle Tube Industries Pvt. Ltd. vs. U.P. Financial Corporation and others**, AIR 2003 SC 2103

(5) **Satheedevi vs. Prasanna and another**, 2010 (5) SCC 622

(6) **Union of India vs. Deoki Nandan Aggarwal**, 1991 AIR SCW 2754

(7) **ICICI Lombard General Insurance Co. Ltd. vs. Suresh and 2 others**, 2024 (2) ADJ 576.

ARGUMENTS ON BEHALF OF CLAIMANTS AND OWNER

10. Per contra, learned counsel for the claimants-respondents as well as owner and driver of offending vehicle submit as under:-

(a) Amendments incorporated by the Act of 2019 would not absolve the liability of the Insurer to first pay compensation and irrespective of deletion of proviso to sub-section (4) of Section 149 by virtue of newly substituted Section 150, the Insurer shall have to pay compensation and right to recover compensation so paid from the owner would still remain intact.

(b) Requirements of issuance of insurance policy and limiting liability as per section 147 of Act of 1988 has to be read in the light of various sub-sections especially sub-section (1) (a), (b) and (5) thereof and a conjoint reading of the said provision with the previous sub-section (4) in Section 149 and newly substituted sub-section (4) of Section 150 would reveal that there is no change as far as indemnifying the owner of the vehicle by the Insurance Company is concerned.

(c) Even as on today, the Supreme Court has passed certain judgments whereby right to recover has been given to the Insurance Company and considering the fact that the Act is a beneficial legislation having benevolent object, the argument of Insurance Company

that the award has to be made against the owner and the Insurance Company has to be completely freed from indemnifying the owner cannot be accepted.

(d) Claimants being dependents of the deceased or themselves injured would not be in a position to recover the amount from the owner of the vehicle and, therefore, keeping in view the object of the Act, immediate compensation has to be paid to the claimants by the Insurance Company.

(e) If the Insurance Company keeps on issuing insurance policy and renew it without examining the requirements such as existence of a valid driving license or permit or other such components, in case breach of policy comes into light during the course of proceedings before Tribunal, the Company being at fault, it cannot absolve itself from liability to pay compensation and then recover from the owner.

(f) Despite replacement of Section 149 by substituted Section 150, liability of Insurance Company to indemnify the risk as provided under Section 147(5) of the Act of 1988 prior to amendment has not been taken away, rather the said sub-section has now been reintroduced as sub-section (6) of the Act after amendment and, therefore, liability of Insurance Company to first pay the amount to the claimants does not vanish.

(g) Insurance policy is a contract between insurer and the owner and third party being alien to the contract, in case of breach of policy, claimants cannot suffer and beneficial legislation and object behind it containing provision of indemnifying the risk would stand frustrated if mere non-inclusion of proviso in sub-section (4) of Section 150 is interpreted to absolve the Insurance Company to first pay the amount to the claimants.

11. In support of their submissions, reliance has been placed upon the following authorities:-

(1) **Praveenbhai S. Khambhayata vs. United India Insurance Company Ltd. & others** 2015 (11) SCC 417

(2) **National Insurance Co. Ltd. vs. Santro Devi and others**, 1997 (9) Supreme 458

(3) **Amrit Paul Singh and another vs. Tata AIG General Insurance Company Limited and others**, 2018 (7) SCC 558

(4) **National Insurance Co. Ltd. vs. Swaran Singh and others**, 2004 (3) SCC 297

(5) **S. Iyyapan vs M/s United India Insurance Company Ltd. and another**, 2013 (7) SCC 62

(6) **Shivawwa and another vs. The Branch Manager, National India Insurance Co. Ltd. And another**, 2018 (5) SCC 762

(7) **Balu Krishna Chavan vs. The Reliance General Insurance Company Ltd. And others**, 2023 ACJ 1546.

(8) **Pappu and others vs. Vinod Kumar Lamba and another**, 2018 (3) SCC 208

(9) **Dhondubai vs. Hanmantappa Bandappa Gandigude (since deceased) through his LRs and others**, 2023 ACJ 1979.

(10) **Oriental Insurance Company Ltd. Allahabad vs. Smt. Chandra Devi and another**, 2010 (5) AWC 4607

(11) **Oriental Insurance Co. Ltd. vs. Sunita Rathi and others**, AIR 1998 SC 257

(12) **V. Ravi vs. M/s New India Assurance Company Ltd.** 1998 ACJ 598

(13) **Uttar Pradesh State Road Transport Corporation vs. Kulsum and others**, 2011 (8) SCC 142.

(14) **Manuara Khatun and others vs. Rajesh Kumar Singh and others**, 2017 (4) SCC 796.

(15) **Shamanna and another vs. The Divisional Manager, The Oriental Insurance Co. Ltd. and others**, 2018 (9) SCC 650.

(16) **Rishi Pal Singh vs. New India Assurance Co. Ltd. And others**, 2022 (3) ACC 556.

ANALYSIS OF RIVAL CONTENTIONS

12. Having heard learned counsel for the parties, this Court proceeds to deal with some relevant provisions of Act of 1988, both before and after amendments made in the year 2019.

Motor Vehicles Act, 1988

“147. Requirements of policies and limits of liability.—

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required—

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen’s Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee—

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation.—For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:—

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

.....
“149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.—

(1) If, after a certificate of insurance has been issued under sub-

section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) or under the provisions of section 163A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled **to be made a party thereto and to defend the action on any of the following grounds, namely:—**

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—

(i) a condition excluding the use of the vehicle—

(a) for hire or reward, where the vehicle is on the date of the contract of

insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3)

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

Motor Vehicles Act, 1988 [As amended by Motor Vehicles (Amendment) Act, 2019]

“150. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) or under the provisions of section 164 is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the award any sum not exceeding the sum assured payable thereunder, as if that person were the decree holder, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as its execution is stayed pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto, and **to defend the action on any of the following grounds, namely:—**

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:—

(i) a condition excluding the use of the vehicle—

(A) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward; or

(B) for organised racing and speed testing; or

(C) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle; or

(D) without side-car being attached where the vehicle is a two-wheeled vehicle; or

(ii) a condition excluding driving by a named person or by any person who is not duly licenced or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification or driving under the influence of alcohol or drugs as laid down in section 185; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by nondisclosure of any material fact or by representation of any fact which was false in some material particular; or

(c) that there is non-receipt of premium as required under section 64VB of the Insurance Act, 1938.

(3)

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby, by reference to any condition

other than those in sub- section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect.

FEW AUTHORITIES ON COMPULSORY INSURANCE

13. The Supreme Court, in *United India Insurance Company Limited v. Santro Devi and Ors.*, (2009) 1 SCC 558 observed that the provisions of compulsory insurance have been framed to advance a social object. It is in a way part of the social justice doctrine. When a certificate of insurance is issued, in law, the insurance company is bound to reimburse the owner. There cannot be any doubt whatsoever that a contract of insurance must fulfill the statutory requirements of formation of a valid contract but in case of a third- party risk, the question has to be considered from a different angle. It was further held that section 146 of the Act gives complete protection to Third Party in respect of death or bodily injury or damage to the property while using the vehicle in public place. For that purpose, insurance of the vehicle has been made compulsory to the vehicles or to the owners. This would further reflect that compulsory insurance is obviously for the benefit of Third Parties. The judgment in *Santro Devi (supra)* was followed by Supreme Court in *Uttar Pradesh State Road Transport Corporation vs. Kulsum and other*, 2011 (8) SCC 142.

14. In *G. Govindan vs. New India Assurance Co. Ltd. and others*, 1999 (3) SCC 754, the Supreme Court, dealing with mandatory requirement of statute governing insurance qua third party risks, observed in paragraph Nos. 12, 13 and 15 as under:-

“12. The heading of Chapter VIII of the old Act reads as "Insurance of Motor Vehicles against Third Party Risks". A perusal of the provisions under Chapter VIII makes it clear that the Legislature made insurance of motor vehicles compulsory against third-party (victims) risks. This Court in *New Asiatic Insurance Co. Ltd. v. Pessumal Dhanamal Aswani & Ors.*, AIR (1964) SC 1736 **after noticing the compulsory nature of insurance against third- party observed that once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy.**

13. In our opinion that both under the old act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.

15. As between the two conflicting views of the full bench judgments noticed above, **we prefer to approve the ratio laid down by the Andhra Pradesh High Court in *Kondaiah's case (Madineni Kondaiah v. Yaseen Fatima: AIR 1986 AP 62)* as it advances the object of the Legislature to protect the third party interest.** We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well- settled rule of interpretation of statutes **we are inclined to hold that the view taken by the Andhra Pradesh High Court in *Kondaiah's case* is preferable to the contrary views taken by the Karnataka (*National Insurance Co. Ltd.***

***v. Mallikarjun: AIR 1990 Kant 166*) and Delhi (*Anand Sarup Sharma v. P.P. Khurana: 1989 ACJ 577 (Del) (FB)* High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest.** The ratio laid down in the judgment of Karnataka & Delhi High Courts (supra) differing from Andhra Pradesh High Court is not the correct one.”

LEADING AUTHORITIES ON ‘PAY AND RECOVER’

15. In *Kamla* (supra), the Supreme Court dealt with the then existing Chapter XI of the Act of 1988 and held as under:-

“21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. **This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.**

22. To repeat, the effect of the above provisions is this: When a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or violation of the

policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.”

16. Indisputably, the Supreme Court in *Kamla* (supra), *Swaran Singh* (supra) and other judgments cited on that line was dealing with unamended provisions which, had not come into light by that time as the amending Act was enacted in 2019. First paragraph of Swaran Singh (supra) reads as under:-

“Interpretation of Section 149(2)(a)(ii) vis-a-vis the proviso appended to sub-sections (4) and (5) of the Motor Vehicles Act, 1988 is involved in this batch of special leave petitions filed by the National Insurance Company Limited (hereinafter referred to as Insurer) assailing various awards of the Motor Vehicle Claims Tribunal and judgments of the High Courts.”

The relevant ratio of Swaran Singh (supra) in the form of summary of findings is as under:-

“108. The summary of our findings to the various issues as raised in these petitions are as follows:

(i) **Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.**

(ii)

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v)

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii)

(viii)

(ix)

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi)

17. The Court, in the light of judicial precedents referred above, now proceeds to deal with the object of the Act, spirit of relevant provisions, both before and after amendments and to answer the core question involved.

18. Section 147 of the Act, after amendment, remains unchanged except renumbering of one or the other sub-section. According to it, a policy of insurance insures the person or classes of persons specified in the policy to the extent

specified in sub-section (2) against any liability which may be incurred by him in respect of the death of or bodily injury to any person including owner of the goods or his authorised representative carried in the motor vehicle or damage to any property of a third party caused by or arising out of the use of the motor vehicle in a public place; against the death of or bodily injury to any passenger of a transport vehicle, except gratuitous passengers of a goods vehicle, caused by or arising out of the use of the motor vehicle in a public place. It is, therefore, apparent that insurance policy covers third party risks in case of death of or of bodily injury.

19. Sub-section (2) of Section 149, before amendment, contemplates grounds on which an Insurance Company can defend its liability to pay compensation and one of the grounds is that there has been a breach of specified condition of the policy. The conditions have also been specifically enumerated. The question is as to whether in a case of breach of policy, the Insurance Company would be liable to pay compensation or to indemnify the owner at the first instance and as to whether right to recover is still available available to the insurer.

20. It is clear that when conditions other than those mentioned in clause (b) of sub-section (2) of Section 149 exist, the policy shall be of no effect. In such event, though the sum is initially payable by the insurer towards discharge of liability covered by the policy, the same shall be recoverable by the insurer from the person, who is actually liable to pay compensation, i.e. owner of the offending vehicle. The substituted Section 150 does not contain any such provision giving right of recovery. As a matter of fact the proviso has been

omitted and sub-section (2) of Section 150 clearly lays down that Insurance Company can defend the action on any of the grounds mentioned therein which include breach of a specified condition of the policy, specifying the conditions of breach also.

21. When the language used in sub-Section (4) of Section 149 prior to amendment as replaced by sub-Section (4) of Section 150 by the Amendment Act of 2019, is carefully examined, the words **“shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect”** would only mean that under the circumstances covered by sub-Section (4), either of Section 149 or Section 150, the insurer would be well within its rights to avoid liability flowing from the insurance policy. Meaning thereby that the insurer would be absolved of bearing liability to pay compensation to the claimants. It does not mean that the insurer would also be absolved from its liability to indemnify the owner's risk. Such indemnification will still continue to remain alive and the insurer shall have to first pay the compensation through indemnification and, then, it shall have a right to recover from the owner the amount paid as the ultimate liability shall have to be borne by the owner and not by insurer. In such an event, there would be no financial loss to the insurer as it would be compensated through recovery from the owner. **The aforesaid provisions are expressly to give defence to the insurer and have to be read to that extent only and not to interpret as if the liability to indemnify stands washed away.** It therefore follows that even if the proviso to sub-Section (4) would not have been there before the amendment, the indemnification concept would have still remained alive

and operative and, hence, mere omission of the proviso by the Amendment Act of 2019 would be of no avail.

22. Therefore, when Shri Parihar urges that if, in every case, liability to pay compensation has to be borne by the Insurance Company, there would be no effect of providing grounds for defence either under sub-section (2) of the Act prior to amendment or under sub-section (2) of the Act after amendment, this Court finds no force in the submission. The reason is that providing grounds of defence under the said provisions would be read so as to give an opportunity to the Insurance Company to avoid passing of award against it, i.e., holding it liable to bear the award. The said liability to have an award against the Insurance Company is distinct from the situation where award is against the owner and insurer is made liable to pay compensation to the claimants and then recover the same from the owner. Non-receipt of premium as required under Section 64(V)B of the Insurance Act, 1938 has now been added in Section 150(2). It reflects that even in a case where premium is not received by the Insurance Company, it can raise a ground of challenge so as to avoid passing of award against it and, in that event also, award would be drawn against the owner. When payment or non-payment of premium is significant after amendment and has been made a ground of defence, the Court observes that a third party risk is covered under the policy which is a contract and premium qua third party risk is received by the insurer in relation to the contract. Therefore, policy continues to subsist to cover third party risk so long the premium is received and non-payment thereof would absolve the Insurance Company from its liability of an award being passed against it.

CONCEPT OF 'PAY AND RECOVER'

23. To better understand as to whether 'PAY AND RECOVER' aspect is still left after amendment, words **“any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy”** used in proviso attached to section 149(4) need to be read and understood with great caution. The words used are **“paid by the insurer”** and not **“payable by the insurer”**. There is a distinction between **“paid”** and **“payable”** as per the scheme of the Act. The sum shall become payable by the insurer when the award is passed against it holding it liable to bear the award on its shoulders for all time to come without any further shift in such liability. The proviso existed earlier gives the insurer a right to recover the amount from the owner which **has been paid by it and not payable by it.**

24. Award is made under Section 168 of the Act. Sub section (3) of Section 168 reads as under:-

“168 – Award of the Claims Tribunal-

(3) When an award is made under this section, **the person who is required to pay any amount in terms of such award shall,** within thirty days of the date of announcing the award by the Claims Tribunal, **deposit** the entire amount awarded in such manner as the Claims Tribunal may direct.”

Words **“a person who is required to pay any amount in terms of such award”** mentioned in sub-section (3) of Section 168 not only mean a person who has to finally satisfy the award but also include a person, who has been directed to pay any amount **in terms of the award.** The

said person may also be insurer and that is why whenever the insurer is directed to pay any amount in terms of award and the right of recovery is also given to it, the insurer has to deposit the amount before the Tribunal within thirty days. In such situation, it does not mean that if the insurer deposits the amount, its right to recover stands vanished, rather such right is specifically conferred upon the insurer under the award itself. **The said provision does not mean that it is the liability of the Insurance Company to bear the award for all time to come but it only means that it has to pay the amount only for transitional period and the chapter is not closed forever as the right to recover is very much there. The award has to be read as a whole and not in piece-meal.**

25. The Court cannot overlook an aspect that Section 147(5) of the Act, prior to amendment has been replaced by Section 147(6) of the Act after amendment but there are no qualifying words referable to section 150. Sub-section (6) of section 147 reads as under:-

“(6) Notwithstanding anything contained in any other law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.”

From renumbering of the sub-section, as above, it follows that once the liability to indemnify the person specified in the policy, as per sub-section (6) of Section 147, even after amendment, continues to exist in the Statute book and it excludes applicability of any other law for

the time being in force, indemnification by the insurer does not vanish even after amendments incorporated by the Act of 2019. The right to recover the amount paid to the claimants as per conditions mentioned in section 150 would still be available to the insurer as indemnification has not been taken away by the legislature nor has it been explained by adding words to section 147 or anywhere else.

26. This Court also finds that since the contract of insurance is between insurer and the owner and has no concern with the claimants who are in fact victims of the accident, language used in Section 149 (prior to amendment) and Section 150 (after amendment) would show that notwithstanding the fact that the insurer may be entitled to avoid or cancel the policy on account of breach of terms thereof, it shall pay to the person entitled to the benefit of the award. Therefore, whether Insurance Company cancels or does not cancel an insurance policy, the same has nothing to do with the claimants and they are entitled to get the amount from insurer. It means that claimants' right to receive compensation from the insurer at the first instance is unaffected by the inter-se rights and liabilities arising out of contract between the insurer and the owner.

27. Words “**no sum shall be payable by the insurer under sub-section (1)**” used either in Section 149 of the Act of 1988 (prior to amendment) in Section 150 (after amendment) would mean that if the grounds of defence set-forth in sub-section (2) of Section 149 or Section 150, as the case may be, exist, no sum shall be payable by the insurer. **It does not mean that the sum shall not be paid by the insurer if the award contains a direction to the insurer to pay and recover.** Liability to

pay the amount has to be segregated from actual payment made by the insurer in case of survival and existence of insurance policy issued under Section 147 of the Act. Word “**liability**” has to be understood as the “**final liability to bear the award for all time to come**” separate from concept of indemnification by the insurer by making immediate payment.

28. Whenever a claim petition is decided by the Tribunal, thirty days' time is granted under section 168(3) by the Tribunal for depositing the amount, failing which recovery proceedings in terms of Section 174 of the Act would be initiated. Section 174 is quoted for a ready reference:-

“174. Recovery of money from insurer as arrear of land revenue.—

Where any amount is due from any person under an award, the Claims Tribunal may, on an application made to it by the person entitled to the amount, issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrear of land revenue.”

Certainly, recovery as arrears of land revenue in the State of U.P. would then be ensured as per Chapter X of the **Uttar Pradesh Zamindari Abolition & Land Reforms Rules, 1952**. Now suppose Tribunal issues a recovery certificate on account of non-deposit of amount by the insurer in terms of the award towards indemnification and if, during the period of limitation for filing the appeal under Section 173 of the Act, the insurer approaches the High Court where on one or the other ground, an interim order is passed, the insurer, in almost all cases, barring few exceptions, is put to financial terms in such a way that the claimants get

some financial relief even during the pendency of appeal. This is done as per the legislative mandate contained under sub-Rule (5) of Rule 5 of Order XLI of the Code of Civil Procedure (as applicable in the State of U.P.), which reads as under:-

“(5) Notwithstanding anything contained in the foregoing sub-rules where the appeal is against the decree for payment of money, the Appellate Court shall not make an order staying the execution of the decree, unless the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Appellate Court may think fit.”

29. Therefore, when the provisions of the Act of 1988 are read with C.P.C., it becomes clear that as soon as an award is passed, the claimants become entitled to get the amount of compensation and they get financial relief even during the pendency of the appeal filed by the insurer.

30. At this juncture, this Court also thinks it appropriate to make a reference of the Statement of Objects and Reasons behind introducing the Amendment Act, 2019. The relevant clauses of the same are quoted hereunder:-

Statement of Objects and Reasons

“The Motor Vehicles Act, 1988 (the Act), was enacted with a view to consolidate and amend the laws relating to motor vehicles. The Act was enacted to give effect to the suggestions made by the Supreme Court in M.K. Kunhimohammed Vs P. A. Ahmedkutty (1987) 4 SCC 284.

2. The Act was amended several times to adapt to the technological up gradation emerging in road transport, passenger and freight movement and in

motor vehicle management. With rapidly increasing motorisation, India is facing an increasing burden of road traffic injuries and fatalities. **The emotional and social trauma caused to the family which loses its bread winner, cannot be quantified.**

India is signatory to the Brasilia Declaration and is committed to reduce the number of road accident fatality by fifty per cent. by the year 2020. The road transport sector also plays a major role in the economy of the country.

3. Numerous representations and recommendations in the form of grievances and suggestions from various stakeholders have been received in the Ministry, citing cases of increase in road accidents, delay in issue of driving licences, the disregard of traffic rules and regulations, etc. Therefore, in order to improve road safety and transport system, certain amendments are required to be made in the Motor Vehicles Act, 1988 to address safety and efficiency issues in the transport sector.

4. In view of the above, it has become necessary to amend certain provisions of the said Act. The proposed Motor Vehicles (Amendment) Bill, 2019 seeks to address the issues relating to road safety, citizen facilitation, strengthening public transport, automation and computerisation.

5. The Motor Vehicles (Amendment) Bill, 2019, inter alia, provides for the following, namely:—

(a) to facilitate grant of online learning licence;

(b) to replace the existing provisions of insurance with simplified provisions in order to provide expeditious help to accident victims and their families;

(c) to increase the time limit for renewal of driving licence from one month to one year before and after the expiry date;

(d) to increase the period for renewal of transport licence from three years to five years;

(e) to enable the licensing authority to grant licence even to the differently abled persons;

(f) to enable the States to promote public transport, rural transport and last mile connectivity by relaxing any of the provisions of the Act pertaining to permits;

(g) to increase the fines and penalties for violation of provisions of the Act; and

(h) to make a provision for protection of Good Samaritans.

6. The Notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives.”

.....
“Clause 51 seeks to substitute Chapter XI of the Act with a new Chapter XI. **This Chapter aims to simplify the third party insurance for motor vehicles.** It empowers the Central Government to

prescribe the minimum premium and the corresponding liability of the insurer for such a policy. **It also provides for compensation on the basis of no-fault liability, scheme for the treatment of accident victims during the golden hour and provides for increase in the compensation to accident victims to five lakh rupees in the case of death and two and a half lakh rupees in the case of grievous hurt. It also provides a scheme for interim relief to be given to claimants.**”

31. A bare perusal of clause 2 read with clause 5 (b) and clause 51 reflects that the intention of the legislature was never to withdraw protection and reliefs as regards compensation ensured by the previous

existing provisions. Rather, the Bill strives more towards ensuring expeditious help to the accident victims and their families. **The emotional and social trauma caused to the family which loses its bread winner, is still one of the special considerations as set forth in the Statement above, The Bill was brought with an object to replace the existing provisions of insurance with simplified provisions in order to provide expeditious help to accident victims and their families.** There is nothing in the Statement of Objects and Reasons which may, either directly or indirectly, infer withdrawal of insurer’s liability to pay compensation as soon as the award is declared, even in case of occurrence of breach of policy or other existence of similar grounds of defence available to the insurer. Therefore, the purpose behind bringing amendments in the Act of 1988 was clearly to provide immediate financial help to the accident victims and their dependents and not to create a situation where they are made to run from pillar to post even after an award is declared in their favour.

PURPOSIVE INTERPRETATION OF STATUTE

32. Jurisprudence of statutory interpretation has moved from literal interpretation to purposive interpretation, which advances the purpose and object of a legislation. The Supreme Court in catena of judgments has dealt with the issue of literal interpretation vis-a-vis purposive interpretation. The Apex Court, in **Central India Spinning and Weaving Manufacturing Comp. versus Municipal Committee, Wardha, AIR 1958 SC 341** has held that it is a recognized principle of construction that general words and phrases however wide and comprehensive they may

be in their literal sense must usually be construed as being limited to the actual objects of the Act.

33. In **Girdhari Lal & Sons versus Balbir Nath Mathur**; 1986 (2) SCC 237, it was held that the primary and foremost task of a Court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment. For this purpose, where necessary the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing the written word if necessary. Ascertainment of legislative intent is a basic rule of statutory construction and that a rule of construction should be preferred which advances the purpose and object of a legislation and that though a construction, according to plain language, should ordinarily be adopted, such a construction should not be adopted where it leads to anomalies, injustices, or absurdities, vide **K.P. Varghese v. ITO**, (1981) 4 SCC 173, **State Bank of Travancore v. Mohd. M. Khan**, (1981) 4 SCC 82, **Som Prakash Rekhi v. Union of India** (1981) 1 SCC 449, **Ravula Subba Rao v. CIT**, AIR 1956 SC 604, **Govindlal V Agricultural Produce Market Committee**, (1975) 2 SCC 482 and **Babaji Kondaji v. Nasik Merchants Co-op Bank Ltd.** (1984) 2 SCC 50.

34. **Utkal Contractors & Joinery Pvt. Ltd. versus State of Orissa**; 1987 (3) SCC 279 is an authority holding that a statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the Preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. [See- **Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Anr** 2017(15) SCC 133].

35. The Apex Court, in **Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. & Ors.** (1987) 1 SCC 424, held that Interpretation must

depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

36. Same view has been reiterated in **S. Gopal Reddy Vs. State of Andhra Pradesh**, (1996) 4 SCC 596, **Prakash Kumar Alias Prakash Bhutto Vs. State of Gujarat**, (2005) 2 SCC 409, **Anwar Hasan Khan Vs. Mohd. Shafi & Ors.** (2001) 8 SCC 540, **Union of India & Ors. Vs. Filip Tiago De Gama of Vedem Vasco De Gama**, (1990) 1 SCC 277, **Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.**, (1987) 1 SCC 424: (AIR 1987 SC 1023) and **N. K. Jain v. C. K. Shah** (1991) 2 SCC 495: (AIR 1991 SC1289).

37. From the over all discussion made above, it is crystal clear that the object of

the Motor Vehicles Act, 1988, either before the amendment or thereafter, particularly covered by Chapter XI thereof, is to compensate victims of accidents in case of an insurance policy being in existence. In view of the interpretation made, holding that omission of the proviso would exonerate the insurer of its liability to indemnify at the first instance would be too wild a proposition and would result in creating a situation where the insurer would be out of scene despite an insurance policy being there and the claimants would have to again fight for getting the amount of compensation through execution proceedings in one way or the other, searching the owner through the process of Court. In such an event, the claimants would face further harassment and nobody knows that despite a money decree in the nature of an award being there in their favour, as to whether the claimants would ever be able to get the compensation realized through recovery proceedings directly from the owner. Accordingly, the legislative intent becomes clear and there is nothing to support the insurer's arguments flowing from interpretation of Statute or *Causus Omissus*. The contention advanced on behalf of insurer stands discarded.

CONCLUSION

38. The Court, therefore, holds that mere omission of proviso attached to sub-section (4) of Section 149 of Motor Vehicles Act, 1988 after its replacement by Section 150 of Motor Vehicles (Amendment) Act, 2019 (32 of 2019), neither takes away the liability of the insurer to pay the claimants nor its right to recover the said amount from the owner. The law to this effect remains intact and unaffected by Amendment Act, 2019 and, hence, insurer shall continue to indemnify

the owner's risk in relation to accidents taking place after 01.04.2022 and "PAY & RECOVER" principle will still continue to govern the field advancing social object of the Statute protecting third party interest. Principle of law laid down by the Supreme Court in **National Insurance Company Limited vs. Swaran Singh and others, JT 2004 (1) SC 109** has not lost its significance and binding effect despite omission of proviso. Held accordingly.

39. Consequently, all the appeals fail and are dismissed.

(2025) 1 ILRA 196
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2025

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Government Appeal No. 1178 of 2024

State of U.P. ...Appellant
Versus
Kallan & Ors. ...Respondents

Counsel for the Appellant:
A.K. Sand, Mohd. Danish, Saif Ali Khan

Counsel for the Respondents:

Criminal Law — Acquittal — Appeal against — Scope of interference — Sessions Trial for murder under Sections 302/34 and 506 IPC — Trial court acquitted all accused after disbelieving prosecution witnesses and rejecting motive —Held, appellate court must not interfere with acquittal unless view of trial court is perverse, illegal or unsupported by evidence — Testimony of prosecution witnesses found contradictory; key eyewitness turned hostile — Motive

appeared remote and speculative — Trial court's acquittal based on plausible view supported by evidence — No interference warranted. (Paras 21 to 24, 27, 28, and 29)

HELD:

While going through the testimony of said witness, we find that she being the wife of the deceased, was the most natural witness, whose presence in the wee hours of the night cannot be doubted and she, in her St.ment, has categorically St.d that accused-opposite parties were not real assailants and some unknown persons had in fact murdered her husband, who had concealed their identity and could not be identified by her. She further categorically St.d that earlier testimony given by her was under the fear and pressure of the P.W.-1- Iqbal and P.W.-9- Salman (Para 21)

Thus, the said witness, in our opinion, cannot be said to be a wholly reliable witness but an inconsistent witness, thus relying on her testimony, the said accused-opposite parties cannot be convicted by reversing the acquittal. Even when we go through the testimony of P.W-1 and P.W.-2, who are the real brother of the deceased and the first informant and sister in-law of the deceased, we find that there are material contradictions in their testimonies as noted by the trial court and, therefore, they too cannot be said to be reliable witnesses as held by the trial court. The motive suggested for the commission of the said offence also do not inspire confidence at all. Even if, aggrieved by the act and conduct of Salman, who forcibly enticed away her daughter and married him against his wishes then he would have caused the death of Salman and there is no reason for him to cause the death of Gulfam brother of the deceased, which circumstance further creates a serious doubt about the prosecution story and, therefore, the appellants, in our opinion, are entitled to the benefit of doubt. (Para 22)

Assessing the aforementioned analysis and evaluation of the evidence with the aforesaid guidelines given by the Hon'ble Apex Court in the judgement of Mallappa(supra), we are of the considered opinion that the learned trial court has taken legally plausible view, which favours the accused and thus it does not

deserves any interference by this court in exercise of powers under Section 378 (3) Cr.P.C. (Para 24)

In the light of above settled proposition of law more so in view of the fact that the criminal appeal under Section 372 Cr.P.C. filed by the first informant, has already been rejected by coordinate bench of this Court vide Judgment and order dated 5.4.2024, which has not further been challenged before higher court and has become final and going through the impugned Judgment, we find that the trial court had given cogent and convincing reasons for recording the finding of acquittal against the accused opposite parties and that the acquittal of the accused opposite parties is plausible and justifiable view emanating from the discussion of the evidence available on record and does not suffer from any infirmity or perversity. Therefore, we are of the opinion that the impugned judgement and order passed by the trial court is just, proper and legal and do not call for any interference by this Court. (Para 29)

Revision application dismissed. (E-14)

List of Cases cited:

1. Mallappa Vs St. of Karn., 2024 SCC OnLine SC 130
2. Rajesh Prasad Vs St. of Bihar & anr., (2023) 6 SCC 115
3. H.D. Sundara Vs St. of Karn., (2023) 8 SCC 544

(Delivered by Hon'ble Mohd. Azhar
Husain Idrisi, J.)

1. Heard Sri Jitendra Kumar Jaiswal, learned AGA for the appellant/State, Sri Mohd. Danish, learned counsel for the accused-opposite parties and perused the trial court record.

2. The instant Government Appeal alongwith an application for grant of leave to appeal has been filed by the State of U.P.

against the impugned judgment and order dated 13.3.2024 passed by Addl. Sessions Judge, Court No. 9, Moradabad in Sessions Trial No. 952 of 2018 (State Vs. Kallan and others) arising out of Case Crime No. 39 of 2018, under Sections 302 read with section 34 IPC and Section 506 IPC, P.S.- Hazratnagar Garhi, District-Moradabad, by which, all the accused-opposite parties Kallan, Haneef, Shahid and Waheed have been acquitted of all the charges framed against them under Sections 302/34, 506 IPC.

3. As per the prosecution case, based on the written report an FIR has been lodged at the instance of one Iqbal son of Wazeer on 12.6.2018, stating therein that he is permanent resident of Sonakpur, P.S. Hazratnagar Garhi, Moradabad. On 12.6.2018 in the night, he was sleeping on the roof top of his house alongwith his children. His younger brother Gulfam was also sleeping alongwith his wife and children in the nearby roof and at about 1.30 a.m. in the night, accused-opposite parties, namely Kallan, Haneef, Shahid and Waheed in furtherance of common intention reached on the roof top of his brother Gulfam and sliced his neck causing his death.

4. It is further alleged that while committing the said murder, they were saying that your brother had forcibly taken away his daughter and the said incident is outcome of the same. After hearing the screaming of Gulfam, he had seen the assailants, in the torch light, running away towards jungle.

5. On the basis of said written report, a first information report was lodged at Police Station-Hazratnagar Garhi vide Case Crime No. 13 of 2018, under Section 302,

506 IPC on 12.6.2018 at 4.14 a.m. After registration of the said first information report by P.W.-6 Head Constable Parvez Ali, the investigation of the case was entrusted to P.W.-13 S.I. Neeraj Kumar Sharma, who reached the place of incident and prepared the site-plan and recorded the statement of relevant witnesses and had taken in his possession the torch and prepared its fard recovery memo. Thereafter, P.W.-10 SSI Jitendra Kumar Baliyan conducted the inquest on the person of the deceased and prepared the inquest report and the other documents, namely photo-lash, challan-lash, letter C.M.O., letter R.I. and also took in possession the blood stained earth and plain earth from the place of incident and kept it in a container and prepared its fard recovery memo and thereafter sealed the dead body in a cloth and handed it over to P.W.-8 Constable Manoj Kumar for carrying it to the mortuary for post-mortem.

6. An autopsy was conducted on the person of the deceased on 12.6.2018 by P.W.-7 Dr. Shashi Kumar, who had noted the injuries found on the person of the deceased and prepared the post-mortem report, wherein the cause of death has been noted to be ante mortem injury as a result of shock and haemorrhage.

7. Thereafter, the Investigating Officer after recording the statement of relevant witnesses and collecting the relevant material, concluded the investigation and submitted the charge- sheet against all the four accused- opposite parties.

8. On the basis of said charge sheet, learned Magistrate had taken cognizance, however, since the case was exclusively triable by the court of Sessions, it was committed to the court of Sessions for trial,

where it was registered as Sessions Trial No. 952 of 2018 (State Vs. Kallan and others). The trial court thereafter on 13.3.2019 framed the charges against the accused-opposite parties under Section 302 read with section 34 and 506 IPC, which was read over and explained to them, who abjured the charges, pleaded not guilty and claimed to be tried.

9. The prosecution, in order to prove the guilt against the accused-opposite parties, has examined P.W.-1 Iqbal, the first informant, P.W.-2 Smt. Asma, wife of Iqbal, eye witness, P.W.-3 Smt. Shabnam wife of deceased, P.W.-4 Jane Alam witness of fard recovery of torch and hair strands, P.W.-5 Irfan witness of inquest and witness of recovery of crime weapon, P.W.-6 Head Constable Parvez Ali, who had drawn the first information report and the chik FIR alongwith its corresponding G.D., P.W.-7 Dr. Shashi Kumar, Medical Officer, who conducted the post-mortem and noted the injuries, P.W.-8 Constable Manoj Kumar, who had taken the dead body to the mortuary for post-mortem, P.W.-9 Salman another brother of the deceased, P.W.-10 S.S.I. Jitendra Baliyan, who had conducted the inquest on the person of the deceased and prepared the recovery memos, P.W.-11 Smt. Sanno wife of Salman daughter of Kallan accused-opposite party No. 1, P.W.-12 Tasleem witness of inquest and P.W.-13 S.I. Neeraj Kumar Sharma the Investigating Officer.

10. After recording the testimonies of the prosecution witnesses, the statement of the accused opposite parties were recorded under Section 313 Cr.P.C., wherein they have denied the prosecution story and stated that they have been falsely implicated in the present case on account of village enmity and infact were not present

at the time of incident and the incident has been caused by some unknown person. Zaqir son of Nasruddin, Nanhu son of Ismail, Akbar son of Roshan, Julfiquar Ali son Anees and Yameen son of Jumma were produced as defence witnesses to support the defence.

11. After recording the entire testimonies of the witnesses and hearing the accused-opposite parties, the trial court acquitted the accused- opposites parties of all the charges framed against them vide judgment and order dated 13.3.2024.

12. Being aggrieved and dissatisfied by the said order, the present Govt. Appeal has been preferred by the State alongwith an application for grant of leave to appeal with the prayer to reverse the finding of acquittal recorded in favour of the accused-opposite parties and to convict them for the offence charged with.

13. Learned AGA for the State/appellant has submitted that the trial court has not appreciated the evidence and material on record in right perspective and has illegally recorded the finding of acquittal in favour of the accused-opposite parties. He has further submitted that the impugned judgment and order passed by the trial court is based on surmises and conjectures and, therefore, liable to be set aside by allowing the instant govt. appeal.

14. Per contra, learned counsel for the accused-opposite parties has submitted that the trial court has appreciated the evidence and material on record in right perspective and has recorded the finding of acquittal in favour of the accused-opposite parties in the light of testimony adduced during the course of trial and has reached the just conclusion that no offence charged with, is

made out against the accused-opposite parties, however, they have been falsely implicated in the instant case. He has further submitted that against the impugned judgment and order dated 13.3.2024 passed by the trial court, an appeal u/s 372 Cr.P.C. No. 169 of 2024 was preferred by the first informant Iqbal. The said appeal was heard by co-ordinate bench of this Court and this Court vide judgment and order dated 5.4.2024 by a well reasoned and detailed order rejected the said appeal.

15. Against the said order dated 5.4.2024 dismissing the Criminal Appeal u/s 372 Cr.P.C. No. 169 of 2024, no further appeal has been filed before the higher court and the said order has become final and thus, the present Govt. Appeal is also liable to be dismissed.

16. Having considered the rival submissions made by the learned counsel for the parties and recapitulating the facts of the case and the testimony made therein, we find that incident in question is said to have taken place on 12.6.2018 at around 1.30 in the night when the accused-opposite parties are said to have assaulted Gulfam brother of Salman. Even according to the prosecution own case, Sanno daughter of Kallan accused-opposite party No. 1 was forcibly taken away by the Salman brother of the deceased Gulfam, who married her and was living peacefully with her. The said marriage was against the wishes of accused-opposite party No. 1 Kallan and thus, he committed the instant offence.

17. When we go through the motive of the present incident and analysing the same, we find that in the backdrop of the motive as suggested by the prosecution, the accused-opposite party No. 1 Kallan was aggrieved with the act and conduct of

Salman, who forcibly had taken away his daughter and married her four years back and was living peacefully with him, however, after four years there was no reason for the accused-opposite party No. 1 Kallan to join hands with other accused-persons to kill Gulfam brother of Salman.

18. The trial court has vividly discussed the said factum of motive and held that in the backdrop of the circumstance, the said motive appears to be far-fetched and difficult to believe. During the course of trial, Salman and Smt. Sanno daughter of Kallan have also been examined as P.W.-9 and P.W.-11. Salman and they in their testimony, stated that after marriage with Sanno, he alongwith his wife has been residing at Delhi and the accused-opposite party No. 1 Kallan never contacted them after the incident nor extended any threats to them and the last four years were event free and no untoward incident had taken place during this period, however, suddenly killing of Gulfam by Kallan and his accomplices for the aforesaid motive, raises a big question mark and grave doubt about the veracity and authenticity of the prosecution case, that too in the darkness of night when all were sleeping.

19. Furthermore, when we go through the testimony of P.W-3 Shabnam wife of deceased Gulfam, who claims herself to be an eye witness, we find that though in her examination in-chief, she has supported the prosecution story but in her cross examination, she has categorically stated that the incident has taken place in the dark night, where there was no source of light either of torch or any electric bulb and at the relevant time, she was not present at the roof top, where the deceased was sleeping but had come down. She has further

categorically stated that no other person of the village nor any of his family members nor Iqbal had witnessed the incident, he was not even present at the place of incident and it was she, who had first reached the place of incident and raised alarm.

20. She has further categorically stated that accused-opposite parties Kallan, Haneef, Shahid and Waheed though involved in the present incident and belongs to her village with whom she is well acquainted but they were not seen at the time of incident. She has further stated that her husband was done to death by the assailants, who had covered their identity and could not be identified by her. She has further stated that assailants, who actually committed the incident and were running away, were not of the same physical structure as that of the accused. She further denied to have given any statement to the police nor she was interrogated by the police. She further testified that Iqbal used to live in a separate house and the earlier statement given by her was made under the fear and pressure of Iqbal and Salman, who had extended death threats to her if she refuses to depose as per their wishes, nominating accused-opposite parties as accused. She even denied the presence of P.W.-2- Asma at the time of incident, as such, she was declared hostile by the prosecution and cross examined by the public prosecutor.

21. While going through the testimony of said witness, we find that she being the wife of the deceased, was the most natural witness, whose presence in the wee hours of the night cannot be doubted and she, in her statement, has categorically stated that accused-opposite parties were not real assailants and some unknown persons had

infact murdered her husband, who had concealed their identity and could not be identified by her. She further categorically stated that earlier testimony given by her was under the fear and pressure of the P.W.-1- Iqbal and P.W.-9- Salman.

22. Thus, the said witness, in our opinion, cannot be said to be a wholly reliable witness but an inconsistent witness, thus relying on her testimony, the said accused-opposite parties cannot be convicted by reversing the acquittal. Even when we go through the testimony of P.W-1 and P.W.-2, who are the real brother of the deceased and the first informant and sister in-law of the deceased, we find that there are material contradictions in their testimonies as noted by the trial court and, therefore, they too cannot be said to be reliable witnesses as held by the trial court. The motive suggested for the commission of the said offence also do not inspire confidence at all. Even if, aggrieved by the act and conduct of Salman, who forcibly enticed away her daughter and married him against his wishes then he would have caused the death of Salman and there is no reason for him to cause the death of Gulfam brother of the deceased, which circumstance further creates a serious doubt about the prosecution story and, therefore, the appellants, in our opinion, are entitled to the benefit of doubt.

23. Now coming to the scope of reversal of acquittal in Govt. Appeal, it will be relevant to note the principles of law laid down by the Apex Court with regard to the appreciation of evidence in the appeal against the acquittal. Recently in **Mallappa v. State of Karnataka, 2024 SCC OnLine SC 130**, the Apex Court has held as under:-

37. Our criminal jurisprudence is essentially based on the promise that no

innocent shall be condemned as guilty. All the safeguards and the jurisprudential values of criminal law, are intended to prevent any failure of justice. The principles which come into play while deciding an appeal from acquittal could be summarized as:

(i) Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive - inclusive of all evidence, oral or documentary;

(ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;

(iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;

(iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;

(v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;

(vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court.

24. Assessing the aforementioned analysis and evaluation of the evidence with the aforesaid guidelines given by the Hon'ble Apex Court in the judgement of Mallappa(supra), we are of the considered opinion that the learned trial court has taken legally plausible view, which favours the accused and thus it does not deserves any interference by this court in exercise of powers under Section 378 (3) Cr.P.C.

25. Further this Court in the case of **Rajesh Prasad v. State of Bihar and**

Another encapsulated the legal position covering the field after considering various earlier judgments and held as below: -

“29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415]

“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, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may 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.”

26. Further, in the case of **H.D. Sundara & Ors. v. State of Karnataka** this Court summarized the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 of CrPC as follows: -

“8.1. The acquittal of the accused further strengthens the presumption of innocence;

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to reappraise the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after re-appreciating the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the

basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible."

27. 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 reikasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.*

28. 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.

29. In the light of above settled proposition of law moreso in view of the fact that the criminal appeal under Section 372 Cr.P.C. filed by the first informant, has already been rejected by coordinate bench of this Court vide Judgment and order dated 5.4.2024, which has not further been challenged before higher court and has become final and going through the impugned Judgment, we find that the trial court had given cogent and convincing reasons for recording the finding of acquittal against the accused-opposite parties and that the acquittal of the accused-

opposite parties is plausible and justifiable view emanating from the discussion of the evidence available on record and does not suffer from any infirmity or perversity. Therefore, we are of the opinion that the impugned judgement and order passed by the trial court is just, proper and legal and do not call for any interference by this Court.

30. Accordingly, the prayer to grant leave to appeal is refused. The Govt. Appeal is also accordingly dismissed.

31. Let a certified copy of this judgment and order be forwarded to the court concerned for information and necessary compliance alongwith the trial court record.

(2025) 1 ILRA 203
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.01.2025

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application U/S 482 No. 363 of 2025

Kalavati Devi @ Kalavati ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
 Sharad Pathak, Gaurav Shukla

Counsel for the Opposite Parties:
 G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 239 - Discharge , Indian Penal Code, 1860 - Section 420 - Application seeking discharge under Section 239 Cr.P.C. in a case under Section 420 IPC - Mere act of certifying an

affidavit does not constitute an offence of cheating unless dishonest intention is established.(Para -17,18)

(B) Criminal Law - Principle of Natural Justice - Recording of reasons is mandatory - Reasons are the heartbeat of every conclusion - Not only administrative but also judicial order must be supported by reasons, recorded in it - Non recording of reasons, non consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable - Failure to give reasons amounts to denial of justice - If the decision reveals the *'inscrutable face of the sphinx'*, it can be 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.**(Para - 20,29,32,33)**

Application under Section 239 Cr.P.C. - seeking discharge - ground - no fraudulent intent - Magistrate rejected discharge application - holding - prima facie evidence to frame charges - criminal revision - dismissed - Magistrate and Revisional Court failed to consider case facts and law properly - didn't provide reasons for concluding that applicant is not liable - courts overlooked essential ingredients of Section 420 IPC (cheating) and relevant Supreme Court judgments - hence application.(Para - 2 to 18)

HELD:- Impugned orders of the Magistrate and the Revisional Court set aside.Matter remanded back to the Magistrate to reconsider the applicant's request for discharge. (Para - 34,35)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

1. Anil Kumar Bose Vs St. of Bihar, (1974) 4 SCC 616
2. Mohd. Ibrahim Vs St. of Bihar, (2009) 8 SCC 751
3. Samir Sahay Vs St. of U.P., (2018) 14 SCC 233
4. R.K. Vijayasathay Vs Sudha Seetharam, (2019) 16 SCC 739

5. Deepak Gaba Vs St. of U.P., (2023) 3 SCC 423
6. Vipin Sahni Vs CBI, 2024 SCC OnLine SC 511
7. Ramandeep Singh Vs St. of U.P., 2024 SCC OnLine All7500
8. Jit Vinayak Arolkar Vs St. of Goa, 2025 SCC OnLine SC 31
9. Breen Vs Amalgamated Engg. Union, 1971(1) AIER 1148
10. Alexander Machinery (Dudley) Ltd. Vs Crabtree, 1974(4) IRC 120 (NIRC)
11. U.O.I. Vs Mohan Lal Kapoor, (1973) 2 SCC 836
12. Uma Charan Vs St. of M.P. & anr., AIR 1981 SC 1915 S.N.
13. Mukherjee Vs U.O.I., AIR 1990 SC 1984
14. Raj Kishore Jha Vs St. of Bihar & ors., (2003) 11 SCC 519
15. St. of Orissa Vs Dhaniram Luhar (2004) 5 SCC 568
16. Mc Dermott International Inc. Vs Burn Standard Co. Ltd. & ors. (2006) 11 SCC 181
17. St. of Raj. Vs Rajendra Prasad Jain, (2008)15 SSC 711
18. Kranti Associates Pvt. Ltd. & anr. Vs Masood Ahmed Khan & ors. (2010) 9 SCC 496
19. C.C.I. Vs S.A.I.L. & anr. JT 2010 (10) SC 26
20. The Secretary & Curator, Victoria Memorial Vs Howrah Ganatantrik Nagrik Samity and ors., JT 2010(2)SC 566
21. Chandana Impex Pvt. Ltd. Vs Commissioner of Customs, New Delhi , 2011(269)E.L.T. 433 (S.C.)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Sharad Pathak and Sri Gaurav Shukla, learned counsel for the applicant and Sri Alok Kumar Tiwari, learned A.G.A. for the State and perused the record.

2. The present application has been filed seeking following main relief(s):-

I. Impugned order dated 23.11.2024, passed by Additional District and Sessions Judge, Barabanki (Court No.5), in Criminal Revision No.94/2023, contained in Annexure No. 1 to this petition;

II. Impugned order 15.03.2023, passed by Additional Chief Judicial Magistrate, Barabanki (Room No.25), on Case Crime No.186/2020, under Section 420 Indian Penal Code, Police Station Dariyabad, District Barabanki, contained in Annexure No.2 to this petition. The application for discharge filed by the Petitioner under Section 239 Cr.P.C. may be allowed and the Petitioner may be discharged in proceedings at Case Crime No.186/2020, under Section 420 Indian Penal Code, at Police Station Dariyabad, District Barabanki.

3. Vide impugned order dated 15.03.2023 passed in the case registered as CNR No. UPBB 040149722021 (State Versus Kalawati and Others), arising out of Crime No. 186 of 2020 under Sections 420 IPC, Police Station Dariabad, District Barabanki, the Additional Chief Judicial Magistrate, Room No.4, Barabanki (in short 'Magistrate'), rejected the application of the applicant seeking discharge preferred under Section 239 Cr.P.C. The order dated 15.03.2023 is extracted hereinunder:-

"पत्रावली पेश हुई। पुकार करायी गयी।

विद्वान सहायक अभियोजन अधिकारी व अभियुक्ता के विद्वान अधिवक्ता उपस्थित है।

पत्रावली वास्ते निस्तारण प्रार्थना-पत्र अन्तर्गत धारा-239 दं०प्र०सं० हेतु नियत है।

अभियुक्ता कलावती की ओर से इस आशय का प्रार्थनापत्र दिया गया है कि उपरोक्त मुकदमा वादिनी व 6 अन्य

लोगों के विरुद्ध वादी ने अन्तर्गत धारा 409 भा०दं०सं० का दर्ज कराया था जिसमें विवेचक ने अन्य पांच नामजद अभियुक्तों के नाम निकालते हुए वादिनी व अन्य गैर नामजद अभियुक्त चन्द्र प्रकाश विश्वकर्मा के विरुद्ध आरोप पत्र धारा 409 भा०दं०सं० को निकालते हुए धारा 420 भा०दं०सं० प्रस्तुत किया। उक्त मामले में प्रार्थिनी के विरुद्ध यह आरोप लगाये गये हैं कि प्रार्थिनी के ग्राम प्रधान रहते हुए अन्य सह अभियुक्त चन्द्र प्रकाश विश्वकर्मा के नाम प्रधानमंत्री आवास योजना के अन्तर्गत आवंटित करा दिया गया जब कि लाभार्थी चन्द्र प्रकाश विश्वकर्मा के पास किसी अन्य गांव में पक्का मकान है जो प्रधानमंत्री आवास योजना हेतु पात्र नहीं था। जानकारी होने पर संबंधित अधिकारियों द्वारा जांच करने पर लाभार्थी को अपात्र पाये जाने पर उसको भुगतान की गयी प्रधानमंत्री योजना की समस्त धनराशि सरकार के खाते में फिर से वापस कर ली गयी। प्रार्थिनी केवल ग्राम प्रधान थी। प्रधानमंत्री आवास योजना के तहत सारी लिखा पढ़ी व जांच कार्यवाही तथा अभिलेखों के रख रखाव आदि की सम्पूर्ण जिम्मेदारी ग्राम विकास अधिकारी, सहायक विकास अधिकारी आदि अधिकारियों की होती है। प्रार्थिनी द्वारा उक्त मामले में केवल लाभार्थी का शपथ पत्र प्रमाणित कर देने के अलावा अन्य कोई भूमिका नहीं है। प्रार्थिनी द्वारा बहैसियत ग्राम प्रधान लाभार्थी का प्रमाण पत्र प्रमाणित कर देने से प्रार्थिनी के विरुद्ध अपराध नहीं बनता है। उक्त मामले में प्रार्थिनी की प्रतिष्ठा धूमिल करने के लिए प्रार्थिनी के विरुद्ध विवेचक से मिलकर गलत आरोप पत्र दाखिल कराया गया है जब कि प्रार्थिनी के विरुद्ध धारा 420 भा०दं०सं० का कोई अपराध नहीं बनता है। क्योंकि प्रार्थिनी ने किसी के साथ कोई धोखा धड़ी नहीं की है।

विद्वान सहायक अभियोजन अधिकारी के द्वारा प्रार्थना पत्र का विरोध करते हुए कथन किया गया है कि थाना दरियाबाद के मु०अ०सं० 186/2020 धारा 420 भा०दं०सं० के अन्तर्गत कलावती के विरुद्ध आरोप पत्र मा० न्यायालय में प्रेषित किया जा चुका है। दिनांक 16-7-2021 को मा० न्यायालय द्वारा कलावती के विरुद्ध प्रसंज्ञान लिया जा चुका है। अभियुक्ता के विरुद्ध अपराध के प्रपत्ति साक्ष्य पत्रावली पर मौजूद है।

सुना एवं पत्रावली का अवलोकन किया। अवलोकन से स्पष्ट है कि प्रस्तुत प्रकरण में संज्ञान लिया जा चुका है एवं संज्ञान लिये जाने के बाद कोई अतिरिक्त साक्ष्य पत्रावली पर आया नहीं है। अभियुक्त द्वारा अपने डिस्चार्ज प्रार्थनापत्र के माध्यम से जो भी कथन किया या है यह मेरिट का विषय है, जिसे चार्ज के स्तर पर नहीं देखा जा सकता है। चार्ज के स्तर पर सिर्फ अभियोजन दस्तावेज (Prosecution paper) को देखने हैं, जिससे प्रथम दृष्टया मामला अभियुक्ता के विरुद्ध बनता प्रतीत हो रहा है जिसके कारण संज्ञान लिया गया है। चार्ज बनाने के लिए प्रथम दृष्टया साक्ष्य पत्रावली पर मौजूद है। इस संबंध में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्थाओं का अवलोकन करना समीचीन होगा।

माननीय उच्चतम न्यायालय द्वारा भारत पारिक बनाम सी०बी०आई 2008 सी०आर०एल०जे० 3540, एस० सी० रुक्मणि नखेकर बनाम विजय सतरदेकर ए०आई० आर 02009 एस०सी० 1013 एवं माननीय उच्च न्यायालय इलाहाबाद द्वारा सचिन सक्सेना उर्फ लकी बनाम स्टेट आफ उ०प्र० 2008 (62) ए०सी०सी० 454 में यह अभिनिर्धारित किया गया है कि विचारण न्यायालय आरोप के समय केवल पुलिस रिपोर्ट एवं दस्तावेजों का अवलोकन करेंगी। अभियुक्त का एकमात्र अधिकार उसको सुने जाने का है।

माननीय उच्चतम न्यायालय द्वारा तमिलनाडू राज्य बनाम एन० सुरेश राजन 2014 (84) ए०सी०सी० 656 में अभिनिर्धारित किया गया है कि आरोप विरचन/उन्मोचन के समय वह अवधारणा की जानी चाहिये कि अभियोजन द्वारा प्रस्तुत तथ्य सत्य है।

उपरोक्त तथ्यों एवं परिस्थितियों व माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्थाओं के दृष्टिगत प्रार्थिनी/अभियुक्ता का प्रार्थना पत्र अन्तर्गत धारा 239 द०प्र०सं० निरस्त किये जाने योग्य है।

आदेश

अभियुक्ता कलावती के द्वारा प्रार्थना पत्र अन्तर्गत धारा 239 द०प्र०सं० निरस्त किया जाता है। पत्रावली आरोप विरचन हेतु दिनांक 15/4/23 को पेश हो।"

4. Being aggrieved by the order dated 15.03.2023 passed by the Magistrate, the applicant filed the revision registered as CNR No. UPBB010046682023.

5. The Additional District and Sessions Judge, Court No.5, Barabanki (in short 'Revisional Court') vide impugned order dated 23.11.2024 dismissed the revision and affirmed the order of Magistrate dated 15.03.2023. The relevant portion of order dated 23.11.2024 reads as under:-

"6- उभय पक्ष को सुनने तथा मूल एवं निगरानी पत्रावली का सम्यक परिशीलन करने से स्पष्ट होता है कि वादी मुकदमा बलदेव सिंह द्वारा निगरानीकर्ती कलावती एवं पांच अन्य व्यक्तियों के विरुद्ध थाना दरियाबाद, जिला बाराबंकी पर प्रथम सूचना रिपोर्ट संख्या 186/2020 अन्तर्गत धारा 409 भा०द०सं०

दर्ज करायी गयी, जिसमें विवेचना के पश्चात विवेचक द्वारा निगरानीकर्ती कलावती पत्नी रामदेव वर्मा एवं चन्द्रप्रकाश विश्वकर्मा के विरुद्ध आरोप पत्र दिनांकित 01.03.2021 अन्तर्गत धारा 420 भा०द०सं० न्यायालय में प्रस्तुत किया गया। उपरोक्त आरोप पत्र पर विद्वान अवर न्यायालय द्वारा दिनांक 16.07.2021 को प्रसंज्ञान लिया गया तत्पश्चात अभियुक्ता कलावती की ओर से प्रार्थना पत्र अन्तर्गत धारा 239 द०प्र०सं० न्यायालय के समक्ष इस आशय का प्रस्तुत किया गया कि उपरोक्त मुकदमा अभियुक्ता व अन्य लोगों के विरुद्ध वादी द्वारा अन्तर्गत धारा 409 भा०द०सं० दर्ज कराया गया था, जिसमें विवेचक ने अन्य पांच नामजद अभियुक्तों का नाम निकालते हुए अभियुक्ता कलावती व अन्य गैर नामजद अभियुक्त चन्द्र प्रकाश विश्व कर्मा के विरुद्ध आरोप पत्र अन्तर्गत धारा 420 भा०द०सं० प्रस्तुत किया गया। उक्त मामले में प्रार्थिनी के विरुद्ध यह आरोप लगाया गया है कि उसने ग्राम प्रधान रहते हुए सहअभियुक्त चन्द्र प्रकाश विश्वकर्मा के नाम प्रधानमंत्री आवास योजना के अन्तर्गत गलत तौर पर आवास आवंटित करा दिया। जबकि लाभार्थी चन्द्रप्रकाश विश्वकर्मा के पास किसी अन्य गांव में पक्का मकान है तथा वह प्रधानमंत्री आवास योजना हेतु पात्र व्यक्ति नहीं था, इस तथ्य की जानकारी होने पर संबंधित अधिकारियों द्वारा जांच करने पर लाभार्थी को अपात्र पाये जाने पर उसको भुगतान की गयी प्रधानमंत्री आवास योजना की समस्त धनराशि सरकार के खाते में फिर से वापस कर ली गयी। प्रार्थिनी केवल ग्राम प्रधान थी, प्रधानमंत्री आवास योजना के तहत सारी लिखा पढ़ी, जांच, कार्यवाही तथा अभिलेखों के रख-रखाव की सम्पूर्ण जिम्मेदारी ग्राम विकास अधिकारी, सहायक विकास अधिकारी आदि की होती है, प्रार्थिनी की भूमिका उपरोक्त मामले में मात्र लाभार्थी का शपथ पत्र प्रमाणित कर देने की है, अतः प्रार्थिनी के विरुद्ध धारा 420 भा०द०सं० के अन्तर्गत कोई अपराध नहीं बनता है। उक्त मामले में मात्र प्रार्थिनी की प्रतिष्ठा धूमिल करने के लिए वादी ने विवेचक से मिलकर गलत आरोप पत्र दाखिल कराया है। प्रार्थिनी ने किसी के साथ कोई धोखाधड़ी नहीं की है। विद्वान अवर न्यायालय द्वारा उभय पक्ष को सुनने के पश्चात इस आधार पर अभियुक्ता का उन्मोचन प्रार्थना पत्र आदेश दिनांकित 15.03.2023 के द्वारा निरस्त कर दिया कि प्रकरण में संज्ञान लिया जा चुका है तथा संज्ञान लिये जाने के बाद कोई अतिरिक्त साक्ष्य पत्रावली पर नहीं आया है। अभियुक्त द्वारा अपने उन्मोचन प्रार्थना पत्र में जो भी कथन किया गया है, वह मेरिट का विषय है, जिसे चार्ज के स्तर पर नहीं देखा जा सकता चार्ज के स्तर पर सिर्फ अभियोजन दस्तावेज देखा जाना है, जिनसे प्रथम दृष्टया मामला अभियुक्ता के विरुद्ध बनता प्रतीत हो रहा है। चार्ज बनाने के लिए प्रथम दृष्टया साक्ष्य पत्रावली पर मौजूद हैं। विद्वान अवर न्यायालय द्वारा अपने आदेश में माननीय उच्चतम न्यायालय की विधि व्यवस्था भारत पारिख बनाम सी०बी०आई० 2008

सी०आर० एल० जे० 3540 सुप्रीम कोर्ट एवं माननीय उच्च न्यायालय इलाहाबाद की विधि व्यवस्था सचिन सक्सेना उर्फ लकी बनाम उत्तर प्रदेश राज्य 2008 (62) ए०सी०सी० 454 का उल्लेख किया गया है, जिसमें यह अभिनिर्धारित किया गया है कि विचारण न्यायालय आरोप के समय केवल पुलिस रिपोर्ट एवं दस्तावेजों का अवलोकन करेगी, अभियुक्त का एकमात्र अधिकार उसको सुने जाने का है। अवर न्यायालय के उपरोक्त आदेश से क्षुब्ध होकर यह आपराधिक निगरानी, निगरानीकर्ता कलावती द्वारा प्रस्तुत की गयी है।

7- निगरानी में निगरानीकर्ता द्वारा मुख्य रूप से यह आधार लिया गया है कि विद्वान अवर न्यायालय द्वारा इस तथ्य पर विचार नहीं किया गया है कि निगरानीकर्ता द्वारा बतौर प्रधान लाभार्थी चन्द्रप्रकाश द्वारा लिये गए इस आशय का शपथ पत्र कि उसके पास कोई पक्का मकान नहीं है, को लाभार्थी पर विश्वास करके केवल प्रमाणित किया गया था। निगरानीकर्ता के गांव में लाभार्थी का कोई मकान नहीं था तथा अन्य गांव में उसका आवास होने की जानकारी निगरानीकर्ता को नहीं थी, इसलिए लाभार्थी के शपथ पत्र को प्रमाणित करते हुए अग्रसारित किया गया था। निगरानीकर्ता ने केवल लाभार्थी के शपथ पत्र पर लगे उसके फोटो व हस्ताक्षर को प्रमाणित किया था। प्रधानमंत्री आवास योजना के अन्तर्गत सारी लिखा-पढ़ी आदि ग्राम विकास अधिकारी व सहायक विकास अधिकारी की होती है, ग्राम प्रधान की कोई भूमिका नहीं होती है। उपरोक्त प्रकरण में सम्पूर्ण धनराशि लाभार्थी द्वारा सरकारी खजाने में वापस कर दी गयी है, इस प्रकार निगरानीकर्ता द्वारा धारा 420 भा०दं०सं० के अन्तर्गत कोई अपराध कारित नहीं किया गया है तथा अवर न्यायालय द्वारा विधि विरुद्ध तरीके से निगरानीकर्ता का उन्मोचन प्रार्थना पत्र निरस्त किया गया है। अपने तर्कों के समर्थन में निगरानीकर्ता के विद्वान अधिवक्ता की ओर से माननीय उच्चतम न्यायालय की विधि व्यवस्था दीपक गाबा एवं अन्य बनाम उत्तर प्रदेश राज्य एवं अन्य 2023 ए०आई०आर० सुप्रीम कोर्ट 2028 प्रस्तुत की गयी है, जिसमें माननीय न्यायालय द्वारा यह धारित किया गया है कि धारा 415 भा०दं०सं० के अन्तर्गत धोखा धड़ी का अपराध बनने के लिए किसी व्यक्ति को प्रेरित किया जाना चाहिए, चाहे छल पूर्वक या बेईमानी से ताकि वह किसी व्यक्ति को कोई व्यक्ति को सम्पत्ति परिदत्त करे या उस व्यक्ति को सम्पत्ति अपने पास रखने के लिए सहमति दे। इसी प्रकार एक अन्य विधि व्यवस्था मरियम फसीहउद्दीन एवं अन्य बनाम राज्य एवं अन्य 2024 ए०आई०आर० सुप्रीम कोर्ट 801 प्रस्तुत किया गया है, जिसमें माननीय न्यायालय द्वारा यह धारित किया गया है कि धारा 420 भा०दं०सं० के प्रावधानों को आकृष्ट करने के क्रम में अभियोजन को न केवल यह साबित करना होगा कि अभियुक्त ने किसी व्यक्ति के साथ छल किया बल्कि यह भी साबित करना होगा कि ऐसा करके

उसने बेईमानी पूर्वक किसी व्यक्ति को ऐसे प्रेरित किया कि वह ऐसे छल के कारण सम्पत्ति का परिदान कर दे। विद्वान अधिवक्ता द्वारा यह तर्क दिया गया कि निगरानीकर्ता द्वारा ऐसा कोई कार्य नहीं किया गया है, अतः उसके द्वारा धारा 420 भा०दं०सं० का अपराध कारित किया जाना नहीं पाया जाता है।

8- निगरानीकर्ता के विद्वान अधिवक्ता द्वारा प्रस्तुत तर्कों के प्रकाश में आलोच्य आदेश दिनांकित-15.03.2023 एवं मूल पत्रावली का परिशीलन करने से यह स्पष्ट होता है कि अभियुक्ता का नाम प्रथम सूचना रिपोर्ट में दर्शित है। विवेचक द्वारा विवेचना के दौरान समस्त अभिलेखों का परिशीलन करने एवं अन्य गवाहों के बयान लेने के पश्चात सी०डी० पर्वा नम्बर-18 में आरोपी सालिक राम वर्मा ग्राम विकास अधिकारी का बयान लिया गया है, जिसमें उसने कहा कि मुझे विभाग की तरफ से परिनिंदा प्रविष्टि का दण्ड दिया जा है, चूंकि ग्राम प्रधान का हस्ताक्षर शपथ पत्र पर होने के कारण हमने पात्र समझ लिया था, क्योंकि यह कार्य हमारे तथा ग्राम प्रधान के द्वारा होता है। इसी प्रकार आरोपी कलावती देवी द्वारा अपने बयान में कहा गया कि चन्द्रप्रकाश द्वारा पूरे यकीन के साथ मुझे बताया गया तथा इस बात का शपथ पत्र दिया गया कि मेरे पास कोई पक्का मकान नहीं है, इसलिए इनकी बात पर विश्वास करके हस्ताक्षर बना दिया था। चन्द्र प्रकाश ने मुझे धोखे में रखकर हस्ताक्षर बनवाया। लाभार्थी/अभियुक्त चन्द्र प्रकाश द्वारा अपने बयान में कहा गया है कि मैंने ग्राम प्रधान के कहने पर आवास न होने का शपथ पत्र दे दिया था, साहब मुझे गलती हो गयी। उपरोक्त विवेचना के पश्चात विवेचक द्वारा धारा 409 भा०दं०सं० के स्थान पर विवेचना धारा 420 भा०दं०सं० के अन्तर्गत की गयी तथा बाद विवेचना अन्तर्गत धारा 420 भा०दं०सं० अभियुक्ता कलावती एवं चन्द्र प्रकाश के विरुद्ध आरोप पत्र प्रेषित किया गया। माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्था मध्य प्रदेश राज्य बनाम एस०बी०जौहरी एवं अन्य ए० आई०आर० 2000 सुप्रीम कोर्ट 665 में यह अवधारित किया गया है कि "यह सुस्थापित विधि है कि आरोप विरचन के स्तर पर न्यायालय यह देखेगी कि क्या अभियुक्त के विरुद्ध कार्यवाही किये जाने का पर्याप्त आधार है। न्यायालय से यह अपेक्षा नहीं की जाती कि वह साक्ष्यों की समीक्षा करे और इस निष्कर्ष पर पहुंचे कि प्रस्तुत किये गए साक्ष्य अभियुक्त की दोषसिद्धि के लिए पर्याप्त है अथवा नहीं, यदि न्यायालय संतुष्ट है कि अग्रिम कार्यवाही किये जाने हेतु प्रथम दृष्टया मामला बन रहा है, तब आरोप विरचित किया जायेगा।" अतः विद्वान अवर न्यायालय द्वारा पुनरीक्षणकर्ता के विरुद्ध अग्रिम कार्यवाही किये जाने का प्रथम दृष्टया पर्याप्त आधार पाते हुए उन्मोचन प्रार्थना पत्र निरस्त किया गया है, इस स्तर पर यह नहीं कहा जा सकता कि पुनरीक्षणकर्ता के विरुद्ध आरोप विरचित किये जाने हेतु प्रथम दृष्टया साक्ष्य पत्रावली पर उपलब्ध नहीं है।

9- अतः उपरोक्त विवेचना के पश्चात न्यायालय की राय में विद्वान अवर न्यायालय द्वारा पत्रावली पर उपलब्ध साक्ष्यों का सही मूल्यांकन करते हुए आलोच्य आदेश पारित किया गया है, जिसमें किसी प्रकार के हस्तक्षेप की आवश्यकता प्रतीत नहीं होती है। तदनुसार यह आपराधिक निगरानी सं० 94/2023 निरस्त किये जाने योग्य है तथा आलोच्य आदेश दिनांकित 15.03.2023 पुष्ट किये जाने योग्य है।

आदेश

आपराधिक पुनरीक्षण संख्या-94/2023, कलावती बनाम राज्य निरस्त की जाती है। आलोच्य आदेश दिनांकित 15.03.2023 पुष्ट किया जाता है। इस आदेश की एक प्रति मूल पत्रावली के साथ अवर न्यायालय को अविलम्ब प्रेषित हो। पक्षकार अवर न्यायालय के समक्ष दिनांक-10.12.2024 को अग्रिम कार्यवाही हेतु उपस्थित हों।"

6. Impeaching the impugned order(s) it is stated that the case of prosecution against the applicant, in nutshell, is to the effect that the applicant being Gram Pradhan of Village Jethauti Kurmiyan, District Barabanki verified the contents of affidavit of one Chandra Prakash Vishwakarma r/o Ranepur hamlet of Village-Jethauti, Kurmiyan, Police Station-Dariyabad, District- Barabanki, which he filed to get the benefit of the scheme known as "Pradhanmantri Awas Yojna", indicating therein that he has no 'idDk edku/Pakka Makan' i.e. 'Brick House' in the Village, which in fact was correct as in enquiry/investigation, it was found that Chandra Prakash Vishwakarma is having a house in Village Mathura Nagar and considering these facts of the case the applicant ought to have been discharged as offence under Section 420 IPC against the applicant is not made but without recording reasons after considering the facts of the case in the light of the law settled, the Magistrate as also the Revisional Court passed the impugned order(s) and being so the same are liable to be interfered by this Court.

7. In support of his submissions reliance has been placed on the judgments indicated hereinafter.

8. Referred paragraphs of judgment passed in the case of **Anil Kumar Bose v. State of Bihar, (1974) 4 SCC 616**, are as under:-

"11. For the purpose of holding them guilty, the evidence adduced must establish beyond reasonable doubt, mens rea on their part. We will, therefore, consider the case of each appellant from that aspect. With regard to the Accountant, Raghunath Prasad, the evidence relied upon by the High Court for its conclusion of guilt of this appellant may be Ext. 1 is the Duty Chart of the Accountant. The first item of this chart is 'sole in charge of accounts and to exercise general supervision on all staff working under him for the efficient working of the Accounts Section'. The third item of this Chart is To complete the Bill Book and get it checked and signed by the Dy. Superintendent'. I must point out that this duty has not been performed by the Accountant in the case of these disputed bills. The fifth item of his duty is To put up all salary bills prepared by the dealing assistant dally before the Superintendent. The Superintendent, PW 9 Dr Safdar Ali Khan has stated that the Accountant is responsible for keeping the Acquittance Roll in order It is stated in para 21 that the Accountant should check the bill and then place for signature of higher officers. Of course, it is in evidence that the Superintendent had asked the office to place all bills for his signature in the office on his table and no clerk should stand there when he would sign on those bills. This direction is clearly against item No. 5 of the Duty Chart of the Accountant. I do not know for what purpose he made this

innovation in the procedure. But this procedure would not absolve the Accountant of his duty to check the pay bills and other bills before sending them to the Superintendent....

It is further interesting to note that the disputed pay bills do not bear the initial or signature of the Accountant below the signature of the Superintendent As the evidence shows, the Accountant did not purposely sign on these forged bills with a view to get himself absolved of the responsibility As a matter of course, the work of this Accountant was to get pay bills prepared, check them and then put up before the Superintendent for his signature so that after obtaining his signature the bills may be sent to the treasury for encashment."12. *On the above evidence at the highest it was a failure on the part of the Accountant to perform his duties or to observe the rules of procedure laid down in the Duty Chart in a proper manner and may, therefore, be an administrative lapse on his part about which we are not required to pronounce any opinion in this case. Without, however, anything more we do not think it will be correct to impute to this appellant a guilty intention which is one of the essential ingredients of the offence of cheating under Section 420IPC. Apart from this, the High Court is not correct and indeed had no material to hold that "the Accountant did not purposely sign on these forged bills with a view to get himself absolved of the responsibility". The evidence of the Superintendent, which is extracted above, runs counter to that conclusion.*

12. *On the above evidence at the highest it was a failure on the part of the Accountant to perform his duties or to observe the rules of procedure laid down in the Duty Chart in a proper manner and may, therefore, be an administrative lapse*

on his part about which we are not required to pronounce any opinion in this case. Without, however, anything more we do not think it will be correct to impute to this appellant a guilty intention which is one of the essential ingredients of the offence of cheating under Section 420IPC. Apart from this, the High Court is not correct and indeed had no material to hold that "the Accountant did not purposely sign on these forged bills with a view to get himself absolved of the responsibility". The evidence of the Superintendent, which is extracted above, runs counter to that conclusion.

13. *With regard to the other appellant, the Cashier Anil Kumar Bose we may read what the High Court has relied upon for its finding:*

"Coming to the case of the Cashier, I find that his Duty Chart is Ext. 1/1. His first duty is 'Daily receipt and disbursement of cash. A note in this Duty Chart shows To be solely responsible for the performance of above duties.... The Deputy Superintendent (PW 6) has stated in para 8 of his deposition that it was the duty of the Cashier to see that the payment was made to the correct or right person. Of course, in the Duty Chart it is not written in so many words. But as his duty was to disburse the money, this disbursement was to be made in a bona fide manner, that is, after due enquiry about the payee, if the latter is not known to the Cashier. In case of PW 5 one payment was made on the 5th April for the month of March and the next payment to a person of that name was made on 10th April, that is, only after five days. The Cashier ought to have detected this if his case of bona fides is to be accepted.

The argument advanced on his behalf is that it was not possible for him to know all the Housemen. It may be so, but

he cannot be allowed to take shelter that he paid the money without ascertaining who was the real recipient. It was also the practice to make the payment in presence of the Deputy Superintendent and then to take his initial below the seal, that is, rubber stamp. In these disputed cases no such signature was obtained of the Deputy Superintendent, and there is no explanation as to why this was not done. The Deputy Superintendent has clearly stated that against these disputed entries his signature was not obtained and no rubber stamp concerning the payment was affixed.... In my opinion, therefore, the Cashier also cannot claim to be absolved of the charge against him. It was his duty to have seen that the payment was made to the correct person. It is not clear in evidence that these payments were made in presence of the Deputy Superintendent of the said Hospital. The witnesses have spoken only about the usual practice."

14. The learned Judge of the High Court made a significant observation in the following terms:

"I am constrained to remark that both, the Superintendent and the Deputy Superintendent have shown carelessness in their duties and these things came to happen because of the latitude which they had given to these employees. Had the Superintendent been careful to see whether the signature of the Accountant was given in the pay bills, he must have detected that in the disputed pay bills there was no signature of the Accountant, and that should have aroused his suspicion about the correctness of the pay bills."

15. Even on the finding of the High Court, there was nothing in the Duty Chart that the duty of the Cashier was to see that the payment was made to the correct or right person. There is further no evidence that these three Doctors were

known to the Cashier. On the other hand, the High Court has not absolutely repelled the argument advanced on his behalf that it was not possible for him to know all the Housemen. The High Court has come to an adverse conclusion against him on account of his not properly "ascertaining who was the real recipient" of the money before he disbursed the same. The material before the High Court together with the significant observation against the Superintendent and the Deputy Superintendent do make out a case for giving benefit of reasonable doubt to the Cashier as well. On the evidence which the High Court has relied upon against him, it is not possible to hold that the requisite mens rea has been established against this accused. As observed in the case of the Accountant, it may be at the highest a case of an error of judgment or breach of performance of duty which, per se, cannot be equated with dishonest intention to establish the charge under Section 420IPC. In the result, the appeals are allowed. The judgment of the High Court so far as these two appellants are concerned is set aside. The two appellants herein are acquitted of the charge and shall be discharged from their bail bonds."

9. Referred paragraphs of judgment passed in the case of **Mohd. Ibrahim v. State of Bihar, (2009) 8 SCC 751**, are 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).

20. When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused.

21. It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to

be the complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner.

22. As the ingredients of cheating as stated in Section 415 are not found, it cannot be said that there was an offence punishable under Sections 417, 418, 419 or 420 of the Code."

10. Referred paragraphs of judgment passed in the case of *Samir Sahay v. State of U.P.*, (2018) 14 SCC 233, are as under:-

"8. The learned Senior Counsel for the State submits that both in the first information report as well as in the statement made by the complainant under Section 161 CrPC, it was alleged that false assurance was given to the complainant to deposit money. He submits that it is not necessary that accused should be an employee of Aneja Consultancy. There the loss was caused to the complainant due to the false assurance given by Major P.C. Sahay (Retd.) and the appellant, who was his son.

9. We have considered the submissions made by the learned counsel for the parties and perused the records.

10. The copy of the first information report lodged by Respondent 2 against the appellant and his father is at Annexure P-6 to the paper book. It will be useful to reproduce the entire first information report lodged by Respondent 2 which is as follows(as translated into English):

'To,

*The S.H.O. Kotwali Fatehpur,
Janpat, Fatehpur*

Sir,

It is requested that the applicant Colonel R.K. Singh (Retired) is a r/o Mohalla Nasirpur Lal Bahadur Shashtri Marg, City Fatehpur, P.S. Kotwali Fatehpur, Janpat Fatehpur. In City Fatehpur in Mohalla Civil Lines of the applicant an office was opened at I.T.I. Road in the name of Aneja Group Consultancy. Their people came to the applicant and made him understand and assured him if I or any person will deposit money with their company, their company will return the double amount after three years but the applicant did not assure on them.

(3) But in the month of June 1997 retired Major P.C. Sahay, r/o Lavrol House, 145 Civil Lines, Fatehpur who was known to the applicant being an army personnel and a resident of the same locality contacted the applicant and assured him that he is the Regional Manager of the said Company and whatever amount the applicant will deposit he will give the receipt of the same with his signature. It was also assured that the money of the applicant will not be lost this and all responsibility will be on him. Along with him his son Samir Sahay, Advocate who was already acquainted with the applicant also accompanied his father. Major P.C. Sahay gave the abovesaid assurance, and the applicant and his wife Smt Uma Devi deposited rupees one lakh with Major P.C. Sahay in this regard and he gave the receipt of the same to the applicant of which the applicant is enclosing the photocopy. Like this Major P.C. Sahay(Retired) has got deposited total amount of Rs 86,000 from me and my wife.

(4) But after some days it came to be known that the said company has run

away along with the lakhs of rupees of the depositors after closing its office. I personally went and found the office closed.

(5) I met with Major P.C. Sahay (retired) and his son Samir Sahay they denied their responsibility and said that due to loss the company has been closed.

(6) In this way the owner of company Aneja Group Major P.C. Sahay(Retired) Regional Manager and his son Samir Sahay have committed forgery by giving false assurance to the depositors and caused loss to them on their deposited amount earned profit illegally and have committed the offence of conspiracy and forgery.

(7) It is therefore prayed that after registering the FIR appropriate legal action may be taken against the abovesaid persons. It has also come to knowledge that goods worth about one lakh are kept in the office of the company which have been taken into his possession by the owner of the shop (office). In this regard a list of the property and goods given by flight lieutenant Nagendra Vikram, Senior Branch Manager Aneja Group is enclosed. Which may be attached so that some money of the depositors be returned.

(8) Details of the receipts and deposited amount."

11. After lodging the first information report, Respondent 2 and his wife had also filed Petition No. 318 of 1998 before the District Consumer Forum, Fatehpur against Inderjeet Aneja, Proprietor of Aneja Consultancy, President and Managing Director of Aneja Financial Services Ltd. and Aneja Group of Companies. In the complaint filed before the District Consumer Forum neither the appellant nor his father was arrayed and no allegation was made against the appellant and his father in the complaint. It

is also relevant to note that the said complaint filed by Respondent 2 and his wife ultimately was allowed by the District Consumer Forum on 27-12-2006. The District Consumer Forum directed the amount as claimed to be paid within 15 days after receiving the copy of the order.

12. It is also relevant to note that the appellant had also filed a complaint being No. 111 of 1999 along with his wife, son, father and other family members alleging that the applicants had deposited an amount of Rs 3,49,415 in the Company which has not been returned back. The District Consumer Forum allowed the complaint filed by the appellant vide order dated 16-8-2001 directing payment with interest @ 9% per annum.

13. In the statement made before the police under Section 161 CrPC both Respondent 2 and his wife have repeated the same allegations which were made in the first information report. In the statement which has been brought on record under Section 161 CrPC, Respondent 2 and his wife had alleged that Major P.C. Sahay (Retd.) who was known to Respondent 2 contacted Respondent 2 and assured him that if any amount was deposited with the Company, he would take the entire responsibility. It was further stated that the appellant accompanied his father Major P.C. Sahay (Retd.) who was known to Respondent 2.

14. The application was filed by the appellant seeking discharge on the ground that there is no evidence to frame charge under Section 420 IPC. The learned Chief Judicial Magistrate while rejecting the application filed by the appellant for discharge has observed that on the assurance of both Major P.C. Sahay (Retd.) and the appellant, the complainant and his wife deposited Rs 86,000. The learned Chief Judicial Magistrate has given the

following reasons for rejecting the application:

“It has been clearly mentioned in the FIR that after the assurance of deceased P.C. Sahay and his son Samir Sahay the money was invested in the Company. As well as it has also been mentioned that accused Samir Sahay was receiving commission from the Company after perusing all the evidence in the file as per law there is proof to frame allegation against accused Samir Sahay.”

15. The order passed by the Chief Judicial Magistrate was challenged. The High Court by brief order has dismissed the revision observing that the counsel for the revisionist could not point out any manifest error or otherwise illegality so as to warrant interference.

16. Before we proceed further to examine the contentions of the learned counsel for the parties, it is necessary to notice the ingredients for establishing a charge under Section 420 IPC. Section 415 IPC defines “cheating” which is to the following effect:

“415.Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.”

17. Section 420 IPC is with regard to the cheating and dishonestly inducing delivery of property which is to the following effect:

“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."

18. According to Section 415 IPC, the inducement must be fraudulent and dishonest which depends upon the intention of the accused at the time of inducement. This Court had occasion to consider Sections 415 and 420 IPC in *Hridaya Ranjan Prasad Vermav.State of Bihar*[*Hridaya Ranjan Prasad Vermav.State of Bihar*, (2000) 4 SCC 168 : 2000 SCC (Cri) 786] . This Court after noticing the provisions of Sections 415 and 420 IPC stated the following in paras 14 and 15: (SCC pp. 176-77)

"14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent

conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

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22. The Chief Judicial Magistrate while rejecting the application of the appellant for seeking discharge has not even referred to any allegation or evidence on the basis of which it can be said that ingredients of Section 420 IPC were made out in the facts of the present case.

23. We are, thus, of the considered opinion that in the present case ingredients of Section 420 IPC were not made out so as to frame any charge under Section 420 IPC against the appellant.

24. In the result, the appeal is allowed, the order of the Chief Judicial Magistrate dated 28-2-2007 and the judgment of the High Court dated 21-10-2016 [*Sameer Sahayv.State of U.P.*, 2016 SCC OnLine All 2373] are set aside. The appellant shall stand discharged from the charges under Section 420 IPC in Case No. 545 of 2002."

11. Referred paragraphs of judgment passed in the case of **R.K. Vijayasarathy v. Sudha Seetharam**, (2019) 16 SCC 739, are as under:-.

"8. The primary question before this Court is whether the High Court has

erred in rejecting the plea of the appellants for quashing the criminal proceedings against them. The question at the heart of the present dispute is whether the averments in the complaint disclose the ingredients necessary to constitute an offence under the Penal Code.

9. Section 482 of the Code of Criminal Procedure saves the inherent power of the High Court to make orders necessary to secure the ends of justice. In *Indian Oil Corpn.v. NEPC (India) Ltd.* [Indian Oil Corpn.v.NEPC (India) Ltd., (2006) 6 SCC 736 : (2006) 3 SCC (Cri) 188] , a two-Judge Bench of this Court reviewed the precedents on the exercise of jurisdiction under Section 482 of the Code of Criminal Procedure 1973 and formulated guiding principles in the following terms : (SCC p. 748, para 12)

“12.***

(i) *A complaint can be quashed where the allegations made in 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 the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*

(ii) *A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*

(iii) *The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.*

(iv) *The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.”*

10. *The High Court, in the exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure, is required to examine whether the averments in the complaint constitute the ingredients necessary for an offence alleged under the Penal Code. If the averments taken on their face do not constitute the ingredients necessary for the offence, the criminal proceedings may be quashed under Section 482. A criminal proceeding can be quashed where the allegations made in the complaint do not disclose the commission of an offence under the Penal Code. The complaint must be examined as a whole, without evaluating the merits of the allegations. Though the law does not require that the complaint reproduce the legal ingredients of the offence verbatim, the complaint must contain the basic facts necessary for making out an offence under the Penal Code.*

11. *The first respondent has alleged in the complaint that the appellants have committed offences under Sections 405, 406, 415 and 420 read with Section 34 of the Penal Code. It would thus be necessary to examine the ingredients of the above offences and whether the allegations*

made in the complaint, read on their face, attract those offences under the Penal Code.

12. Section 405 of the Penal Code reads thus:

“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”.”

13. A careful reading of Section 405 shows that the ingredients of a criminal breach of trust are as follows:

13.1. A person should have been entrusted with property, or entrusted with dominion over property;

13.2. That person should dishonestly misappropriate or convert to their own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so; and

13.3. That 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.

14. Entrustment is an essential ingredient of the offence. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code. [406.Punishment for criminal breach of trust.—Whoever commits criminal breach

of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

15. Section 415 of the Penal Code reads thus:

“415.Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.”

16. The ingredients to constitute an offence of cheating are as follows:

16.1. There should be fraudulent or dishonest inducement of a person by deceiving him:

16.1.1. The person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or

16.1.2. The person so induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived; and

16.2. In cases covered by 16.1.2. above, the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

17. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

18. Section 420 of the Penal Code reads thus:

“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.”

19. The ingredients to constitute an offence under Section 420 are as follows:

19.1. A person must commit the offence of cheating under Section 415; and

19.2. The person cheated must be dishonestly induced to

(a) deliver property to any person; or

(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security.

20. Cheating is an essential ingredient for an act to constitute an offence under Section 420.

21. A court exercising its inherent jurisdiction must examine if on their face, the averments made in the complaint constitute the ingredients necessary for the offence. The relevant extract of the complaint filed by the first respondent is extracted below:

“The accused person's son Mr Rajiv Vijayasaraty Ratnam started to transfer all his monies to different accounts and also transferred some monies belonging to him in the US to his parents, accounts in Bangalore, India and he also pleaded his wife i.e. complainant's daughter that he also wanted to divert some funds unto complainant's account in Bangalore... That Rajiv Vijayasaraty

Ratnam diverted some of his monies to Accused 1 and 2 and the complainant...

It is further pertinent to mention that the accident occurred on 5-2-2010 and money was transferred on 17-2-2010; the transfer was due to the insecurity at the behest of Mr Rajiv Vijayasaraty Rathnam; the money was not sought or required by the complainant.

The complainant's daughter Ms Savitha Seetharam convinced the complainant to accept transfer of monies which was for the benefit of the accused person's son Mr Rajiv Vijayasaraty Ratnam and to hold it in trust for him and accordingly the son of the accused transferred monies on 17-2-2010 to the complainant's account Rs 20,00,000 (Rupees twenty lakhs only) ... It is pertinent to mention that the accused person's son Mr Rajiv Vijayasaraty Ratnam insisted the complainant's and her husband to pay the said monies by way of cash to the accused persons including the interest ...Mr Rajiv Vijayasaraty Ratnam sought for the return of the aforesaid monies i.e. of Rs 20,00,000.

... The said monies were paid in cash as per the dicta of the accused person's son Mr Rajiv Vijayasaraty Ratnam has filed a false and frivolous suit ...”

(emphasis supplied)

22. The condition necessary for an act to constitute an offence under Section 405 of the Penal Code is that the accused was entrusted with some property or has dominion over property. The first respondent has stated that the disputed sum was transferred by the son of the appellants of his own volition to her. The complaint clearly states that the amount was transferred for the benefit of the son of the appellants and that the first respondent was to hold the amount “in trust” for him. The

complaint alleges that the money was transferred to the appellants "as per the dicta" of the son of the appellants. There is on the face of the complaint, no entrustment of the appellants with any property.

23. The condition necessary for an act to constitute an offence under Section 415 of the Penal Code is that there was dishonest inducement by the accused. The first respondent admitted that the disputed sum was transferred by the son of the appellants to her bank account on 17-2-2010. She alleges that she transferred the money belonging to the son of the appellants at his behest. No act on part of the appellants has been alleged that discloses an intention to induce the delivery of any property to the appellants by the first respondent. There is thus nothing on the face of the complaint to indicate that the appellants dishonestly induced the first respondent to deliver any property to them. Cheating is an essential ingredient to an offence under Section 420 of the Penal Code. The ingredient necessary to constitute the offence of cheating is not made out from the face of the complaint and consequently, no offence under Section 420 is made out.

24. In *Binod Kumar v. State of Bihar* [Binod Kumar v. State of Bihar, (2014) 10 SCC 663 : (2015) 1 SCC (Cri) 203] certain amounts were due and payable to a contract worker. When the amount due was not paid due to a termination of the contract, the worker filed a criminal case against the appellant for criminal breach of trust. The appellants' petition under Section 482 of the Code of Criminal Procedure for quashing was dismissed [Binod Kumar v. State of Bihar, 2011 SCC OnLine Pat 595] by the High Court. A two-Judge Bench of this Court examined the ingredients of the offence and

whether the complaint on its face disclosed the commission of any offence. This Court quashed the criminal proceedings holding thus : (SCC pp. 671-72, paras 14 & 18-19)

"14. At this stage, we are only concerned with the question whether the averments in the complaint taken at their face value make out the ingredients of criminal offence or not. ...

18. In the present case, looking at the allegations in the complaint on the face of it, we find that no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the appellants in retaining the money in order to have wrongful gain to themselves or causing wrongful loss to the complainant. Excepting the bald allegations that the appellants did not make payment to the second respondent and that the appellants utilised the amounts either by themselves or for some other work, there is no iota of allegation as to the dishonest intention in misappropriating the property. ...

19. Even if all the allegations in the complaint taken at the face value are true, in our view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a shortcut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the appellants under Sections 406/120-B IPC, is liable to be quashed."

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30. For the above reasons, the appeal is allowed. The judgment [R.K. Vijayasathy v. Sudha Seetharam, 2016 SCC OnLine Kar 8478] of the High Court is set aside and the criminal proceedings

arising from PCR 2116 of 2016 instituted by the first respondent against the appellants are quashed. We however clarify, that no opinion has been expressed on the merits of the pending civil suit filed by the son of the appellants for the recovery of money. The pending suit shall be disposed of in accordance with the law."

12. Referred paragraphs of judgment passed in the case of **Deepak Gaba v. State of U.P., (2023) 3 SCC 423**, are as under:-

"11. The private complaint filed by Respondent 2 complainant had invoked Sections 405, 420, 471 and 120-BIPC. However, by the order dated 19-7-2018, summons were directed to be issued only under Section 406IPC, and not under Sections 420, 471 or 120-BIPC. We have quoted the operative and reasoning portion of the summoning order, that records in brief the assertions in the complaint, to hold that Respondent 2 complainant had shown that "a forged demand of Rs 6,37,252.16p had been raised by JIPL, which demand is not due in terms of the statements made by Shubhankar P. Tomar and Sakshi Tilak Chand". The order states that Respondent 2 complainant had filed photocopy of "one" email as per Documents 1 to 34, but the narration and the contents of the email is not adverted to and elucidated.

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18. In order to apply Section 420IPC, namely, cheating and dishonestly inducing delivery of property, the ingredients of Section 415IPC have to be satisfied. To constitute an offence of cheating under Section 415IPC, a person should be induced, either fraudulently or dishonestly, to deliver any property to any person, or consent that any person shall

retain any property. The second class of acts set forth in the section is the intentional inducement of doing or omitting to do anything which the person deceived would not do or omit to do, if she were not so deceived. Thus, the sine qua non of Section 415IPC is "fraudulence", "dishonesty", or "intentional inducement", and the absence of these elements would debase the offence of cheating. [Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74 : (2010) 3 SCC (Cri) 1201]

19. Explaining the contours, this Court in Mohd. Ibrahim v. State of Bihar [Mohd. Ibrahim v. State of Bihar, (2009) 8 SCC 751 : (2009) 3 SCC (Cri) 929. This Court, in this case, has cautioned that the ratio should not be misunderstood, to record the clarification, which in the present case, in our opinion, is not of any avail and help to Respondent 2 complainant. We respectfully concur with the clarification as well as the ratio explaining Sections 415, 464, etc. IPC.] , observed that for the offence of cheating, there should not only be cheating, but as a consequence of such cheating, the accused should also have dishonestly adduced the person deceived to deliver any property to a person; or to make, alter, or destroy, wholly or in part, a valuable security, or anything signed or sealed and which is capable of being converted into a valuable security.

20. In the present case, the ingredients to constitute an offence under Section 420 read with Section 415IPC are absent. The pre-summoning evidence does not disclose and establish the essential ingredients of Section 415IPC. There is no assertion, much less legal evidence, to submit that JIPL had engaged in dishonesty, fraud, or intentional inducement to deliver a property. It is not the case of Respondent 2 complainant that

JiPL had tried to deceive them, either by making a false or misleading representation, or by any other action or omission; nor is it their case that JiPL had offered any fraudulent or dishonest inducement to deliver a property. As such, given that the ingredients of Section 415 IPC are not satisfied, the offence under Section 420 IPC is not made out."

13. Referred paragraphs of judgment passed in the case of **Vipin Sahni v. CBI, 2024 SCC OnLine SC 511**, are as under:-

"9. Before we proceed to examine the case on merits, we may first take note of relevant legal provisions. Section 415 IPC defines 'Cheating' and it reads thus:—

'415. Cheating.-

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.- A dishonest concealment of facts is a deception within the meaning of this section.'

Section 420 IPC, the provision we are concerned with presently, reads as under:—

'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.'

Sections 120A IPC and 120B IPC read thus:—

'120A. Definition of criminal conspiracy.-

When two or more persons agree to do, or cause to be done,

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.'

'120B. Punishment of criminal conspiracy.-

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [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.[']

10. The sine qua non to make out an offence under Section 420 IPC, insofar as the present case is concerned, is an act on the part of the appellants to 'cheat and thereby dishonestly induce the person so deceived, viz., the AICTE, to deliver any

property'. Therefore, the appellants, while applying for and on behalf of the Society, should have either suppressed material information or projected incorrect information so as to induce the AICTE, by such dishonest means, to grant approval for its educational institutions. Further, as no official of the AICTE has been implicated in the offence, as per the charge sheet, the alleged 'criminal conspiracy' under Section 120BIPC would also be attributable to the appellants only.

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19. In *Ram Jas v. State of U.P.* (1970) 2 SCC 740, the ingredients required to constitute an offence of cheating were succinctly summed up thus:—

(i) there should be fraudulent or dishonest inducement of a person by deceiving him;

(ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by (ii) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.'

20. In *V.P. Shrivastava v. Indian Explosives Limited* (2010) 10 SCC 361, this Court observed that in order to constitute an offence of cheating, it must be shown that the accused had a fraudulent or dishonest intention at the time of making the representation or promise and such a culpable intention should be there at the time of entering into the agreement. On facts, it was found that the party alleged to have been cheated was fully conscious of the situation at the time it decided to enter

into the contract and there was no dishonest inducement.

21. In the case on hand, there was disclosure of the fact that the subject land was mortgaged to secure the bank loan but despite the same, the AICTE granted approval for the 'Business School of Delhi' and it never complained that it was under any misinformation in that regard. Thus, the essential requisite to make out an offence of cheating is lacking. Mere carelessness on the part of the appellants in filling up the second and third applications and a part of the first application also cannot be taken to be motivated by deliberate deception, on the admitted factual position, so as to invite criminal charges.

22. Further, there is no evidence of the appellants consciously agreeing or conspiring to deliberately furnish false information to the AICTE so as to garner its approval for their colleges. As already noted, appellant No. 1 filed the first application, divulging the relevant details of the bank loan and the mortgage over the leased land, but he failed to do so in the third application filed by him. Appellant No. 2 filed the second application with the same non-disclosure but there is no evidence whatsoever of the appellants resorting to deception in that regard willfully and in connivance with each other. Therefore, the charge under Section 120B IPC also does not withstand judicial scrutiny.

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26. On the above analysis we are of the opinion that the learned Magistrate was fully justified in exercising power under Section 239 Cr.P.C. and discharging the appellants from criminal proceedings in relation to Case No. 456 of 2012. The High Court adopted a rather technical approach and practically concluded that the

appellants were guilty of deliberately withholding relevant information so as to secure the approvals by deceitful means. This finding of the High Court is not supported by the admitted facts, which indicate disclosure of the mortgage at the outset when the first application was made and, therefore, there is no possibility of inferring that the appellants conspired in terms of Section 120A IPC to commit an illegal act of suppression so as to secure the approvals. Further, the AICTE itself never claimed that it was dishonestly induced to grant such approvals and that essential link is altogether missing, whereby any such criminal charge of cheating can be sustained against the appellants. The impugned order dated 20.01.2023 passed by the Allahabad High Court in Application u/s 482 Cr.P.C. No. 11426 of 2021 is, therefore, set aside and the order of discharge passed by the learned Special Judicial Magistrate, CBI Court, Ghaziabad, in Case No. 456 of 2012 is restored. In consequence, the appellants shall stand discharged of the alleged offence under Sections 420 and 120B IPC in Case Crime No. 219 of 2011 (E) 0016."

14. Referred paragraphs of judgment passed in the case of **Ramandeep Singh v. State of U.P., 2024 SCC OnLine All 7500**, are as under:-

"22. In support of his submissions, learned counsel for the applicants has relied upon the following judgments of the Supreme Court:

(i) the Supreme Court in *Inder Mohan Goswami v. State of Uttaranchal* (2007) 12 SCC 1 : (2008) 1 SCC (Cri) 259, has elaborated upon the ingredients of cheating under Section 420 IPC. Paras 40 to 42 of the aforesaid judgment read as under : (SCC p. 15, para 40-42)

"40. Firstly, we shall deal with the Section 420 IPC. Cheating is defined in Section 415 IPC and is punishable under Section 420 IPC. Section 415 is set out below:

'415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat.

Explanation.— A dishonest concealment of facts is a deception within the meaning of this section.'

41. Section 415 IPC thus requires—1. Deception of any person.

2. (a) fraudulently or dishonestly inducing that person-

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body mind, reputation or property.

42. On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts is the doing or omitting to do anything which the person deceived would

not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but need not be fraudulent or dishonest. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning."

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27. Moreover, as laid down in Inder Mohan Goswami case (2007) 12 SCC 1:(2008) 1 SCC (Cri) 259, to constitute the offence of cheating, the intention to deceive should remain present from the very beginning of the transaction. In the present case, M/s S.K. Associates purchased the property in the year 2003, and sold it in 2021/2022, after nearly 18 years. When it purchased the property, the name of the successors/legal heirs of the erstwhile tenure-holders was duly recorded in the Revenue records; M/s S.K. Associates had no reason to suspect that it was purchasing land in which its vendors did not have title. It was after M/s S.K. Associates had entered into the sale transaction in 2021/2022 that for the first time, it was accused of conveying land that belonged to the Bareilly Development Authority.

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95. The Supreme Court in R.K. Vijayasathay v. Sudha Seetharam (2019) 16 SCC 739:(2020) 2 SCC (Cri) 454: 2019 INSC 216 has culled out the ingredients to constitute the offence under Sections 415 IPC are as follows : (SCC pp. 745-746, paras 16-17 and 19-20)

"16.The ingredients to constitute an offence of cheating are as follows:

16.1. There should be fraudulent or dishonest inducement of a person by deceiving him:

16.1.1. The person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property. or

16.1.2. The person so induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived. and

16.2. In cases covered by 16.1.2. above, the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

*15. Referred paragraphs of judgment passed in the case of **Jit Vinayak Arolkar v. State of Goa, 2025 SCC OnLine SC 31**, are as under:-*

"3. On 16th October 2018, the 4th respondent filed twelve separate civil suits in the civil court in Goa, claiming a declaration of his ownership in respect of the subject property. In the suits filed by the 4th respondent, it was contended that the subject property is a common and undivided property in which the 4th respondent has an undivided share, which he inherited from his father. The appellant filed a written statement in the suit on 1st September 2020 and claimed that the property was originally owned by one Sacarama Sadassiva Natecar. On 23rd October 2020, the 4th respondent, through his constituted attorney, filed a complaint with the Superintendent of Police, North Goa District, alleging that the appellant had sold a portion of the subject property without the consent of all the legal heirs of

both co-owners. Based on the said complaint, the impugned FIR was registered by the police. The appellant was granted anticipatory bail by the sessions court vide order dated 10th February 2021 in connection with the impugned FIR. On 23rd October 2021, the appellant filed a writ petition before the High Court for quashing the FIR. By the impugned judgment dated 1st March 2023, the High Court dismissed the petition.

SUBMISSIONS

4. The learned senior counsel appearing on behalf of the appellant stated that the appellant is the constituted attorney of Vidhya Natekar and Sanjay Natekar, the vendors under the sale deeds subject matter of the impugned FIR. He submitted that the 4th respondent in his complaint had accepted co-ownership of the vendors in respect of the subject property under the sale deeds. Learned senior counsel submitted that a complaint was filed by the 4th respondent more than two years after the date of institution of the civil suit. Learned senior counsel pointed out how Sacarama Sadassiva Natekar became the owner of the subject property based on documents executed in the years 1928 and 1929. He submitted that Vidhya Natekar and Sanjay Natekar are the legal representatives of Sacarama Sadassiva Natekar. He submitted that both claimed a half share in the subject property in view of the regime of the communion of assets applicable in the State of Goa. He pointed out that, on 10th May 2013, the appellant had published a public notice calling for objections from any interested party concerning the subject property.

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CONSIDERATION OF SUBMISSIONS

8. We have carefully perused one of the sale deeds, which is the subject

matter of the impugned FIR. The sale deeds are similar. The appellant signed the sale deed as the constituted attorney of Vidhya Natekar and Sanjay Natekar and also in his capacity as a confirming party. The said power of attorney executed by Vidhya Natekar and Sanjay Natekar in favour of the appellant contains a recital that the executants, i.e., Vidhya Natekar and Sanjay Natekar, are the co-owners of the subject property. The legal effect of the sale deeds which are the subject matters of the impugned FIR is that the ownership rights of Vidhya Natekar and Sanjay Natekar were transferred to the purchasers.

9. It is pertinent to note that civil suits were filed by the 4th respondent in October 2018. In the suits, he claims to be a co-owner or person with an undivided share in the subject property. Two years after the institution of the said suits, the constituted attorney of the 4th respondent filed a complaint with the Superintendent of Police on 23rd October 2020. In the complaint, she stated that the subject property was originally owned by the predecessor of the 4th respondent and Sadashiv Natekar. In paragraph 5 of the complaint, the constituted attorney of the 4th respondent stated thus:

“5. This vicious and malafide exercise of deceit, forgery and land-grabbing has been systematically and high-handedly perpetrated by one Mr. Jit Vinayak Arolkar who claims to be the Power of Attorney holder of legal heirs of Sadashiv Sakharam Natekar. The said Sadashiv Natekar was the co-owner of the said property along with vaikunth Rawloo Khalap. Thus, it is clear that, the said property can in no way be arbitrarily sold without the express consent of all the legal heirs of both the Co-owners of the said property.”

(emphasis added)

It is pertinent to note that the constituted attorney of the 4th respondent has omitted to mention in the complaint that two years before the filing of the complaint, declaratory suits were filed by the 4th respondent, which were pending. Interestingly, two years after the registration of the FIR, on 13th October 2022, the 4th respondent filed a supplementary complaint with the police alleging that even the said Vidhya Natekar and Sanjay Natekar had also committed an offence.

10. Thus, in short, the grievance of the 4th respondent is that the vendors under the sale deeds had only an undivided share in the subject property, and they could not have sold the entire subject property under the sale deeds. The contention of the appellant is that what is sold is the right, title and interest of Vidhya Natekar and Sanjay Natekar. Thus, the dispute between the parties is predominantly a civil dispute.

11. Section 415, which defines cheating, reads thus:

“415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.”

12. It is pertinent to note that the purchasers under the sale deeds have not made any grievance about the sale deeds.

In the case of Mohd. Ibrahim v. State of Bihar, in paragraphs 20 to 23, this Court held thus:

“20. When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused.

21. It is not the case of the complainant that any of the accused tried to deceive him either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner.

22. As the ingredients of cheating as stated in Section 415 are not found, it cannot be said that there was an offence punishable under Sections 417, 418, 419 or 420 of the Code.

A clarification

23. When we say that execution of a sale deed by a person, purporting to

convey a property which is not his, as his property, is not making a false document and therefore not forgery, we should not be understood as holding that such an act can never be a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is, the purchaser, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint."

(emphasis added)

12. In this case, it is impossible to understand how the appellant deceived the 4th respondent and how the act of execution of sale deeds by the appellant caused or was likely to cause damage or harm to the 4th respondent in body, mind, reputation or property. The appellant has not purported to execute the sale deeds on behalf of the 4th respondent. He has not purported to transfer the rights of the 4th respondent. There is no allegation that the appellant deceived the 4th respondent to transfer or deliver the subject property.

13. Taking the complaint as correct, the offence of cheating under Section 415 of IPC was not made out against the appellant. Moreover, the complaint was filed by the 4th respondent for the first time after a time gap of two years from the date of institution of the civil suits. In the complaint, he suppressed the fact that civil suits were already filed in which applications for temporary injunction were made. When there was a dispute over the title, the act of the 4th respondent of setting in motion criminal law two years after the date of filing of the suits amounts to nothing but abuse of the process of law.

14. Considering the above, the appeal succeeds. The impugned judgment and order dated 1st March 2023 is set aside, and FIR No. 177 of 2020 initially registered with Pernem Police Station, Pernem in the State of Goa, and now transferred to the Special Investigation Team of the Economic Offences Cell, and proceedings based thereon are hereby quashed and set aside only as against the appellant. Accordingly, the appeal is allowed on the above terms. We clarify that we have made no adjudication on the merits of the pending civil dispute between the parties."

16. Considered the aforesaid and perused the record.

17. From the documents available on record including the case diary, this Court finds that allegations, in nutshell, against the applicant are to the effect that being Gram Pradhan the applicant verified the contents of the affidavit of co-accused Chandra Prakash Vishwakarma whose intention was to get benefit of scheme known as 'Pradhanmantri Gramin Awas Yojana', which was provided to him and subsequently he returned the same. In this regard relevant portion(s) of the case diary is extracted hereinunder:-

"बयान लाभार्थी व प्रकाश मे आये अभियुक्त चन्द्रप्रकाश पुत्र श्री रामदास नि० ग्राम रानेपुर मजरे जैठोती कुमियान थाना दरियाबाद बाराबंकी, उम्र करीब 52 वर्ष ने पूछने पर बताया कि साहब गांव में मेरा एक कच्चा मकान है, जिसमे हम लोग रहते थे, तथा मेरे खेत मे ट्यूबवेल है तथा मैंने 1994 मे मथुरानगर में एक प्लाट लेकर बनवाया है, 2011 की सर्वे मे मेरे कच्चा मकान को देखकर मुझे आवास आवंटित हुआ था, मैं ग्राम प्रधान के कहने पर आवास न होने का शपथ पत्र दे दिया था, साहब मुझसे गलती हो गई, मुझे क्षमा कर दिया जाये मैंने प्राप्त किया हुआ रुपया 120000/- वापस कर दिया है। साहब यही मेरा बयान है।"

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जिसके सम्बन्ध में आवेदक द्वारा तथ्यों को छिपाते हुए लाभ प्राप्त करने के लिये पक्का मकान न होने का शपथ पत्र दिया है तथा ग्राम प्रधान श्रीमती कलावती द्वारा शपथ पत्र पर चन्द्रप्रकाश को लाभ देने हेतु झूठी गवाही दी गयी जिस पर ग्राम प्रधान के हस्ताक्षर बने हुए हैं।

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नामित आरोपी कलावती देवी पत्नी रामदेव निवासी ग्राम जेठौती कुर्मियान थाना दरियाबाद जनपद बाराबंकी तथा प्रकाश में आये अभियुक्त चन्द्र प्रकाश विश्वकर्मा पुत्र रामदास निवासी ग्राम रानेपुर मजरे जेठौती कुर्मियान थाना दरियाबाद जनपद बाराबंकी द्वारा अपने पक्के मकान व ट्युबवेल पर बना दो मंजिला पक्के मकान को छिपाते हुए फर्जी तरीके से शपथ पत्र प्रस्तुत किया गया है जिसे ग्राम प्रधान द्वारा प्रमाणित किये जाने के कारण धारा 420 भादवि बाखूबी साबित है। अतः अभियुक्त गण 1. कलावती पत्नी रामदेव वर्मा निवासी ग्राम जेठौती कुर्मियान थाना दरियाबाद जनपद बाराबंकी 2. चन्द्रप्रकाश विश्वकर्मा पुत्र रामदास निवासी ग्राम रानेपुर मजरे जेठौती कुर्मियान थाना दरियाबाद जनपद बाराबंकी के विरुद्ध अपराध धारा 420 भा०द०वि० का जुर्म बाखूबी साबित होता है।"

18. Taking note of the aforesaid as also the essential ingredients to attract the offence under Section 420 IPC and observations made by the Hon'ble Apex Court in this regard in the various pronouncements, indicated above, as also the impugned order(s) this Court finds that neither the Magistrate nor the Revisional Court has taken note of the aforesaid facts of the case in its true spirit and further these courts for coming to the conclusion that applicant is not liable to discharge have not recorded reasons after considering the facts of the case and law on the subject despite the settled principle of law that reasons being heart beat of an order are required to be recorded.

19. The recording of reasons are necessary. It is well known that "conclusions" and "reasons" are two different things and reasons must show mental exercise of authorities in arriving at a particular conclusion.

20. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx', it can be 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 later 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.

21. In **Breen Vs. Amalgamated Engg. Union, reported in 1971(1) AIER 1148**, it was held that the giving of reasons is one of the fundamentals of good administration.

22. In **Alexander Machinery (Dudley) Ltd. Vs. Crabtree, reported in 1974(4) IRC 120 (NIRC)** it was observed that "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.

23. In **Union of India Vs. Mohan Lal Kapoor (1973) 2 SCC 836**, as under:

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial.

They should reveal a rational nexus between the facts considered and the conclusions reached."

24. The Apex Court in the case of ***Uma Charan Vs. State of Madhya Pradesh & Anr.*** AIR 1981 SC 1915 said:

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable"

25. The Hon'ble Supreme Court of India in the case of ***S.N. Mukherjee v. Union of India***, AIR 1990 SC 1984, has explained that reasons are necessary links between the facts and the findings recorded in the administrative orders, which visit a party with evil civil consequences. In absence of reasons such an order cannot be permitted to stand.

26. The Hon'ble Supreme Court of India in the case of ***Raj Kishore Jha v. State of Bihar and others***, (2003) 11 SCC 519, has held that reasons are the heartbeat of every conclusion and without the same, it becomes lifeless.

27. The ***Supreme Court in State of Orissa v. Dhaniram Luhar*** (2004) 5 SCC 568 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

"8. Even in respect of administrative orders Lord Denning, M.R. In *Breen v. Amalgamated Engg. Union*, (1971)2 QB 175, observed: (QB p.191 C) *"The giving of reasons is one of the fundamentals of good administration."* In *Alexander Machinery (Dudley) Ltd. v. Crabtree* 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."

28. In ***Mc Dermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.*** (2006) 11 SCC 181 Apex Court referring to Bachawat's Law of Arbitration and Conciliation, 4th Edn., pp. 855-56 in para 56 said:

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions..."

29. In ***State of Rajasthan v. Rajendra Prasad Jain, (2008)15 SSC 711*** stated that 'reason is the heartbeat of every conclusion, and without the same it becomes lifeless.'

30. The Apex Court in ***Kranti Associates Private Limited & Anr. Vs. Masood Ahmed Khan & Ors. (2010) 9 SCC 496*** referring to the judgment in Mohan Lal Capoor (supra) in para(s) 23 and 47 said:

"Such reasons must disclose how mind was applied to the subject-matter for a decision regardless of the fact whether such a decision is purely administrative or quasi-judicial. This Court held that the reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons must reveal a rational nexus between the two.

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47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by

disregarding extraneous considerations.(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or rubber-stamp reasons? is process. not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency In decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject

to broader scrutiny. (See David Shapiro in *Defence of Judicial Candor* ((1987) 100 *Harvard Law Review* 731-37].)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See *Ruiz Torija v. Spain* ((1994) 19 EHRR 553) EHRR, at 562 para 29 and *Anya v. University of Oxford* [2001 EWCA Civ 405 (CA)], wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

31. The Apex Court also in ***Competition Commission of India Vs. Steel Authority of India Ltd. & Anr.*** JT 2010 (10) SC 26 in para 68 referring to the judgment in the case of *Gurdial Singh Fijji* (supra) said:

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. By practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and therefore, proper reasoning is foundation of a just and fair decision."

32. It is well settled that an order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. Highlighting this rule, Hon'ble Supreme Court held in the case of ***The Secretary & Curator, Victoria Memorial v. Howrah Ganatantrik Nagrik Samity and ors.***, JT 2010(2)SC 566 para 31 to 33 as under :

"31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice - delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. " [Vide *State of Orissa Vs. Dhaniram Luhar* (JT 2004(2) SC 172 and *State of Rajasthan Vs. Sohan Lal & Ors.* JT 2004 (5) SCC 338:2004 (5) SCC 573].

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/ unsustainable

particularly when the order is subject to further challenge before a higher forum. [Vide Raj Kishore Jha Vs. State of Bihar & Ors. AIR 2003 SC 4664; Vishnu Dev Sharma Vs. State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. Vs. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. Vs. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal Vs. State of Haryana & Ors. (2009) 3 SCC 258; Mohammed Yusuf Vs. Faij Mohammad & Ors. (2009) 3 SCC 513; and State of Himachal Pradesh Vs. Sada Ram & Anr. (2009) 4 SCC 422].

33. Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected.”

33. Non recording of reasons, non consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable. Hon'ble Supreme Court in the case of **Chandana Impex Pvt. Ltd. Vs. Commissioner of Customs, New Delhi , 2011(269)E.L.T. 433 (S.C.)**, held as under :

"8. It needs to be emphasised that every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums. In State of Orissa Vs. Dhaniram Luhar² this Court, while reiterating that reason is the heart

beat of every conclusion and without the same, it becomes lifeless, observed thus :

"8.....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;....."

34. Considering the facts and the reasons indicated in paragraph(s) 17 and 18 , respectively, of this judgment as also the law related to Section 420 IPC and principle settled on the issue of recording of reasons in the order, this Court is of the view that the present application is liable to be allowed. Accordingly, **allowed**. The order dated 15.03.2023 passed by the Magistrate and the order dated 23.11.2024 passed by the Revisional Court, are hereby set aside.

35. The matter is remanded back to the Magistrate, who shall consider and decide the application of the applicant seeking discharge a fresh.

(2025) 1 ILRA 231

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 28.01.2025

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Application U/S 482 No. 743 of 2025

**Bhartendu Pratap Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties**

Counsel for the Applicant:

Shivendra S. Singh Rathore, Krishna Kumar Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Criminal Procedure Code, 1973 — Sections 195(1)(b) & 340 — Scope and threshold for initiating perjury proceedings — Application for prosecution of senior government officers for alleged falsehood in questionnaires under General Rules (Criminal), 1977 — Held, mere assertion that document was false and might be used before disciplinary/vigilance authorities not sufficient — No evidence of actual production or use in judicial proceedings — Principles reiterated from *Iqbal Singh Marwah* and *James Kunjwal* — Proceedings under Section 340 CrPC must be exceptional and based on deliberate falsehood affecting administration of justice — Application dismissed. (Paras 7, 10, 11, 12 and 13)

HELD:

In the aforesaid context, it may be mentioned herein that Section 190 CrPC provides that a Magistrate 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, and (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. Section 195 CrPC is a sort of exception to this general provision and creates an embargo upon the power of the Court to take cognizance of certain types of offences enumerated therein. (Para 10)

. It is clear from the language used in Section 340 CrPC that the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b) Cr.P.C., as the section is conditioned by the words "when such offence is alleged to have been committed in, or in relation to, any proceedings in any Court". Further, Section 195(1)(b) Cr.P.C. deals with two distinct categories of offence, which are described in clauses (b)(i) and (b)(ii) respectively. Clause (b)(i) refers to offences in

Chapter XI of IPC which is headed as 'Of False Evidence And Offences Against Public Justice'. The offences mentioned in this clause relates to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a Court of justice or before a public servant who is bound or authorized by law to receive such declaration, and also to some other offences which have a direct co-relation with the proceedings in a Court of justice (Sections 205 and 211 IPC). The scheme of both these two provisions or clauses of Section 195 Cr.P.C. is that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a public servant or has a direct correlation with the proceedings in a Court of justice. Further, the expression "when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in a Court" occurring in clause (b)(ii) should normally mean commission of such an offence after the document has actually been produced or given in evidence in the Court. Thus, clause (b)(ii) contemplates a situation where the offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any Court. (Para 11)

However, it is relevant to mention herein that Section 195(1)(b)(i) Cr.P.C., is conditioned by the words "when such offence is alleged to have been committed in, or in relation to, any proceedings in any Court", which indicates that such a course will be adopted only if the offence of Sections 193 to 196, 199, 200, 205 to 211 and 228 IPC have been committed in (a) any proceedings in Court or (b) in relation to the said proceedings in Court. learned Counsel for the applicant has failed to satisfy this Court as to how the asking of the alleged questionnaire is an offence under any of these sections and as to how the said questionnaire has been used in the proceedings before the learned CJM or in relation to the said proceedings before the learned CJM, Lucknow. Although, the centrifugal argument of the learned counsel for the applicant is that these questionnaire have a legal significance and can be used as an evidence before any Court or authority, however as can be seen from the order passed by the learned CJM, Lucknow as well as the learned

Sessions Judge, Lucknow, there is not a single document on record to show as to when and in what manner these questionnaires' were produced before any Court or any authority, so as to trigger the penal provisions of Section 340 of the Criminal Procedure Code.. (Para 12)

No doubt, before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interest of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b) Cr.P.C.. However, the said stage would come only when the Court finds that the nature of complaint meets the minimum threshold, which would normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such false or forged document, but having regard to the effect or impact of such commission of offence, which it may have upon the administration of justice. It is possible that such false document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. It has to understand that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a Court of law or has a direct correlation with the proceedings in a Court of justice. This Court fails to appreciate as to how the alleged falsity of the said questionnaire could in any manner affect the functioning or discharge of lawful duties of the Court or in administration of justice or the other party has perjured themselves to beneficial orders from the Court. Further, no case has been made out as to how the same would be expedient in the interest of justice as contemplated under the provisions of Section 340 of the Criminal Procedure Code. (Para 13)

Application dismissed. (E-14)

List of Cases cited:

1. Iqbal Singh Marwah Vs Meenakshi Marwah, (2005) 4 SCC 370
2. James Kunjwal Vs St. of Uttarakhand, (2024) 8 SCR 332
3. Pritish Vs St. of Mah., (2002) 1 SCC 253
4. Godrej & Boyce Mfg. Co. Vs U.O.I., 1992 CRLJ 3752 (Bom.)
5. M.S. Jaggi Vs Registrar, High Court of Orissa, 1983 CRLJ 1527

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

1. Heard Shri Shivendra S Singh Rathore, learned Counsel for the applicant, learned A.G.A. for the for the State-respondents and perused the material placed on record.

2. The present application has been filed praying for setting-aside the final judgment/order dated 03.10.2024 passed by the learned Addl. District & Sessions Judge, Lucknow in Criminal Appeal No. 66/2023 (Bhartendu Pratap Singh V/s Rajeev Krishna & 2 others) filed under section 341 of the Cr. P.C by the applicant as well as the order dated 16.03.2023 passed by the learned CJM, Lucknow in Crl. Misc. Case No.1041/2023 (Bhartendu Pratap Singh V/s Rajeev Krishna & 2 others) filed under section 340 of the Cr. P.C by the applicant.

3. Learned counsel for the applicant has submitted that the opposite party Nos.2 and 3 prepared questionnaires under General Rules (Criminal), 1977 for declaration of a fact was false and they knew that the said questionnaires were false on the date when the same was obtained under the seal and signature of the concerned Court. According to him, the learned CJM, Lucknow, while exercising

jurisdiction under section 340 Cr.P.C has committed material irregularity in forming opinion contrary to the admissible documentary proof of the offence under section 191 and section 192 of the Indian Penal Code, which paves foundation for the offence under section 196 and 199 of the IPC. According to the learned counsel for the applicant, the gravity of the offence is such that new *modus operandi* has been invented by the opposite party Nos.2 and 3 to misuse a legal instrument to cater to their quests for personal gains which evidently has become so intense that the opposite parties, who are involved in litigation and are senior Government servants, did not hesitate to take shelter of falsehood.

4. Learned Counsel for the applicant further submits that such an act is not only a prescribed offence but a serious fraud has been played upon the Court and the learned trial Court despite having the documentary evidence has not only committed grave irregularity in not proceeding any further but has also in improper exercise of its jurisdiction has not conducted the preliminary enquiry as envisaged under section 2(g) of the Cr.P.C. He further submits that the opposite parties committed such offence with the intention and design to misuse the questionnaires in the proceedings under law/before public servants particularly their competent Disciplinary/Vigilance Authorities of the Government and as such the questionnaires were receivable as evidence, whereas the same were totally false. In the written submission filed after the completion of arguments, the learned Counsel for the applicant has also relied on the judgment of (i) *Godrej & Boyce Manufacturing Co. v/s The UOI*, 1992 CRLJ 3752(Bom.), (ii) *M.S Jaggi V/s Registrar, High Court of Orissa &Anr.* (1983) CRLJ 1527 and (iii)

Prithish V/s State of Maharashtra &Ors. 2002(1) SCC 253.

5. Per contra, the learned AGA for the State-opposite party No.1 has vehemently opposed the petition and have submitted that the facts of the case do not trigger the minimum threshold required for maintaining an application under section 340 Cr. P.C and both the learned CJM and the learned Sessions Court have rightly dismissed the application & appeal of the applicant by giving a valid and cogent reasoning. Learned A.G.A has stated that the impugned orders does not call for any interference by this Court and the present application may be dismissed. The learned A.G.A. also relied on the Constitutional Bench Judgment of the Hon'ble Supreme Court in the case of *Iqbal Singh Marwah V/s Meenakshi Marwah* (2005) 4 SCC 370.

6. Having regard to the submissions advanced by learned Counsel for the parties and going through record, this Court before embarking on the path of deciding the present application may mention that the learned counsel for the applicant has tried to distinguish the Constitutional Bench Judgment of *Iqbal Singh Marwah* (supra) case by submitting in his written submission that the same is applicable only for section 195(1)(b)(ii) for the crimes under Sections 463, 471, 475 or 476 of IPC, whereas the present case allegedly relates to offences u/s 193, 196,199 and 200 of IPC, which were covered under section 195(1)(b)(i) of Cr.P.C.

7. Recently, a larger bench of the Hon'ble Apex Court in the case of *James Kunjwal Vs State of Uttrakhand & Anr.*, (2024)8 SCR 332, after tracing the various precedents relevant to the context,

contemplated a guideline for the Courts for initiation of an action of perjury under section 340 Cr.P.C in the following words:-

"16. What we may conclude from a perusal of the above-noticed judicial pronouncements is that:-

(i) The Court should be of the prima facie opinion that there exists sufficient and reasonable ground to initiate proceedings against the person who has allegedly made a false statement(s);

(ii) Such proceedings should be initiated when doing the same is "expedient in the interests of justice to punish the delinquent" and not merely because of inaccuracy in statements that may be innocent/immateral;

(iii) There should be "deliberate falsehood on a matter of substance";

(iv) The Court should be satisfied that there is a reasonable foundation for the charge, with distinct evidence and not mere suspicion;

(v) Proceedings should be initiated in exceptional circumstances, for instance, when a party has perjured themselves to beneficial orders from the Court."

8. Keeping in mind the aforesaid judgment of the Hon'ble Supreme Court and giving a thoughtful consideration to the contention of the learned counsel for the applicant and learned A.G.A. and the documents on records, this Court finds that the background of the present case lie in a narrow compass. It is available from records of the present case that the applicant had on an earlier occasion, filed a Complaint Case No. 135/2016 before the learned CJM, Lucknow, which came to be dismissed vide order dated 02.12.2016 under Section 203 of the Criminal Procedure Code. The said order came to be

challenged by the applicant before the Sessions Court by means of Criminal Revision No. 105/2017, which came to be allowed on 25.06.2019 and the order dated 02.12.2016 of the learned CJM, Lucknow came to be set-aside, in the presence of the opposite party Nos.2 and 3, as they were also a party in the said Revision petition.

9. It is the case of the applicant that the opposite party Nos.2 and 3 procured three questionnaires dated 01.04.2022 in which dominant being "Whether aforesaid Complaint Case No. 135/2016 has been dismissed under section 203 Cr.P.C on dated 2.12.2016." under Rule 141 of the General Rules (Criminal) 1977 of the Allahabad High Court Rules, which according to them, could not had been procured, as the opposite party Nos.2 and 3 very well aware on that date that the Complaint Case No. 135/2016 had been restored by the learned Sessions Court order and, as such, according to him, the said conduct of the opposite party Nos.2 and 3 amount to commission of an offence in relation to pending proceedings before a Court of law and, therefore, an enquiry under Section 340 Cr.P.C read with section 195(1)(b) Cr.P.C was to be initiated against the opposite party Nos.2 and 3.

10. In the aforesaid context, it may be mentioned herein that Section 190 CrPC provides that a Magistrate 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, and (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. Section 195 CrPC is a sort of exception to this general provision and creates an embargo upon the power of the

Court to take cognizance of certain types of offences enumerated therein. The procedure for filing a complaint by the Court as contemplated by Section 195(1) CrPC is given in Section 340 CrPC, which reads as hereinunder:-

"340. Procedure in cases mentioned in Section 195.

(1) When upon an application made to it in this behalf or otherwise any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, (a)record a finding to that effect; (b)make a complaint thereof in writing; (c)send it to a Magistrate of the first class having jurisdiction; (d)take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such magistrate; and (e)bind over any person to appear and give evidence before such Magistrate

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.

(3) A complaint made under this section shall be signed, -(a)where the Court making the complaint is a High Court, by

such officer of the Court as the Court may appoint, (b)in any other case, by the presiding officer of the Court[or by such officer of the Court as the Court may authorise in writing in this behalf.]

(4) In this section, "Court" has the same meaning as in Section 195."

11. It is clear from the language used in Section 340 CrPC that the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b) Cr.P.C., as the section is conditioned by the words "*when such offence is alleged to have been committed in, or in relation to, any proceedings in any Court*". Further, Section 195(1)(b) Cr.P.C. deals with two distinct categories of offence, which are described in clauses (b)(i) and (b)(ii) respectively. Clause (b)(i) refers to offences in Chapter XI of IPC which is headed as 'Of False Evidence And Offences Against Public Justice'. The offences mentioned in this clause relates to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a Court of justice or before a public servant who is bound or authorized by law to receive such declaration, and also to some other offences which have a direct co-relation with the proceedings in a Court of justice (Sections 205 and 211 IPC). The scheme of both these two provisions or clauses of Section 195 Cr.P.C. is that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a public servant or has a direct correlation with the proceedings in a Court of justice. Further, the expression "*when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in a Court*" occurring in clause (b)(ii) should normally mean commission of such an offence after

the document has actually been produced or given in evidence in the Court. Thus, clause (b)(ii) contemplates a situation where the offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any Court (see **Iqbal Singh Marwah V/s Meenakshi Marwah (2005) 4 SCC 370**).

12. However, it is relevant to mention herein that Section 195(1)(b)(i) Cr.P.C., is conditioned by the words "*when such offence is alleged to have been committed in, or in relation to, any proceedings in any Court*", which indicates that such a course will be adopted only if the offence of Sections 193 to 196, 199, 200, 205 to 211 and 228 IPC have been committed in (a) any proceedings in Court or (b) in relation to the said proceedings in Court. learned Counsel for the applicant has failed to satisfy this Court as to how the asking of the alleged questionnaire is an offence under any of these sections and as to how the said questionnaire has been used in the proceedings before the learned CJM or in relation to the said proceedings before the learned CJM, Lucknow. Although, the centrifugal argument of the learned counsel for the applicant is that these questionnaire have a legal significance and can be used as an evidence before any Court or authority, however as can be seen from the order passed by the learned CJM, Lucknow as well as the learned Sessions Judge, Lucknow, there is not a single document on record to show as to when and in what manner these questionnaires' were produced before any Court or any authority, so as to trigger the penal provisions of Section 340 of the Criminal Procedure Code.

13. No doubt, before filing of the complaint, the Court may hold a

preliminary enquiry and record a finding to the effect that it is expedient in the interest of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b) Cr.P.C.. However, the said stage would come only when the Court finds that the nature of complaint meets the minimum threshold, which would normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such false or forged document, but having regard to the effect or impact of such commission of offence, which it may have upon the administration of justice. It is possible that such false document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. It has to understand that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a Court of law or has a direct correlation with the proceedings in a Court of justice. This Court fails to appreciate as to how the alleged falsity of the said questionnaire could in any manner affect the functioning or discharge of lawful duties of the Court or in administration of justice or the other party has perjured themselves to beneficial orders from the Court. Further, no case has been made out as to how the same would be expedient in the interest of justice as contemplated under the provisions of Section 340 of the Criminal Procedure Code.

14. For all the aforesaid reasons, this Court does not find any infirmity in the order dated 03.10.2024 passed by the learned Addl. District & Sessions Judge, Lucknow in Criminal Appeal No. 66/2023 (Bhartendu Pratap Singh V/s Rajeev Krishna & 2 others) and order dated 16.03.2023 passed by the learned CJM, Lucknow in CrI. Misc. Case No.1041/2023 (Bhartendu Pratap Singh V/s Rajeev Krishna & 2 others). Both the trial Courts have considered all the contentions as well as the Judgments referred by the applicant and has on due appreciation of the facts of the present case has rightly rejected the application under Section 340 of the Cr. P.C.

15. As a sequel to above, the application lacks merits and is hereby *dismissed*.

(2025) 1 ILRA 238

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 07.01.2025

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application U/S 482 No. 885 of 2013

**Sanjay Gaur Advocate & Ors. ...Applicants
Versus**

The State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

R.N.S. Chauhan, Bajhul Quamar Siddiqui,
Sushil Kumar Singh, Sushil Pandey

Counsel for the Opposite Parties:

Govt. Advocate, Munni Lal Yadav, Pradeep
Kumar Tripathi

**(A) Criminal Law - Quashing of criminal
proceedings in civil disputes - The Code of**

**criminal procedure, 1973 - Section 482 -
Inherent power - Indian Penal Code, 1860
- Sections 419, 420, 467, 468, 471 - When
a dispute is essentially of a civil nature,
criminal proceedings should not be
permitted to continue, especially where
there is an unexplained delay in filing the
FIR and the allegations lack
substance.(Para - 9,12)**

Controversy between parties revolves around transfer of title of land - complainant alleged that accused fraudulently executed a sale deed by forging signatures - civil suit was already pending regarding the same property - an ex parte decree was initially passed but later set aside - complainant, instead of pursuing civil remedies, filed a criminal case leading to the filing of a charge sheet. (Para - 7,8)

HELD:- Dispute between the parties was purely of civil nature. No offence as alleged by the complainant was made out. A fit case for exercise of inherent powers under Section 482 Cr.P.C. as the continuation of the criminal proceedings was nothing but an abuse of the process of law.(Para - 9,12)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:

1. Paramjeet Batra Vs St. of Uttarakhand & ors.,
Criminal Appeal No. 2069 of 2012

2. St. of Har. & ors. Vs Ch. Bhajan Lal & ors.,
1991(1) RCR (Criminal) 383 : 1992 Supp (1)
SCC 335

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicants have approached this Court through this application under Section 482 Code of Criminal Procedure for quashing of the impugned charge sheet under Section 173(2) Cr.P.C. dated 24.3.2012, cognizance order dated 30.7.2012 passed by Additional Chief Judicial Magistrate-I, Sitapur and the entire proceedings of Criminal Case No. 2618 of

2011, titled State Vs. Anees Khan and others, arising out of Case Crime No. 156 of 2011, under Sections 419, 420, 467, 468, 471 I.P.C., Police Station Laharpur, District Sitapur.

2. Briefly, the facts leading to the petition are that on the basis of a written complaint given by Rakesh Kumar Gupta, Advocate-opposite party no.2, the above noticed case crime was registered, wherein it is alleged that the land comprised in Gata No. 592 measuring 0.809 hectares, owned by Savitri Devi D/o Awadh Baksh Singh was purchased by complainant through Jamuna Prasad S/o Puttu Lal. In the said sale deed, Jamuna Prasad got entered names of his daughter-in-law Gyanwati and his friend Anees Khan, therefore, a civil suit bearing no. 132 of 2004, titled Rakesh Kumar Vs. Savitri Devi and others was filed to seek a decree of declaration for correction of the said sale deed. The suit was decreed in favour of the complainant-opposite party no.2 and the names of Jamuna Prasad, Gyanwati and Anees Khan were ordered to be removed. Later on, Sanjay Gaur S/o Puttu Lal (applicant no.1) in connivance with his relatives namely, Gyanwati W/o Jay Prakash and Anees Khan S/o Hasan Khan entered into a conspiracy to grab 3/4th share of the complainant's holding, who by forging his signatures got prepared documents and got executed a sale deed in his favour. As per the allegations, the witnesses to the instrument of sale also facilitated the commission of crime. On these broad allegations, the above F.I.R. was registered for the alleged commission of offences punishable under Sections 419, 420, 467, 468, 471 I.P.C., Police Station Laharpur, District Sitapur.

3. After registration of the case, the investigation was carried out and through the impugned final report under Section

173(2) Cr.P.C., the charge sheet against the applicants was filed. Hence, this application.

4. Learned counsel for applicants has argued that the allegations contained in the F.I.R. itself shows that the complainant-opposite party no.2 has already filed a civil suit bearing no. 132 of 2004, and the case of the prosecution is based upon the documentary material, which shows that the dispute, if any, is purely of civil nature, but in order to abuse of the process of law, the complainant has falsely implicated the applicants in the impugned criminal case. Learned counsel submits that the complainant acquired right, title and interest in the suit property by virtue of sale deed dated 11.3.1996 and as per this, vendor Savitri Devi had transferred all her rights in the said property in favour of four purchasers namely, Rakesh Kumar Gupta, Jamuna Prasad, Gyanwati and Anees Khan, and the instrument of sale is a registered instrument, which bears the signatures of all the parties including the witnesses, therefore, there cannot be a doubt about the number of purchasers.

5. Learned counsel for applicants has further submitted that the suit initially filed by the complainant-opposite party no.2 seeking a decree of declaration for correction and removal of the names of other three purchasers was decreed in favour of complainant vide ex parte decree dated 16.10.2006, but the said decree was later on set aside on 26.10.2007, as application under Order IX Rule 13 Code of Civil Procedure filed by aggrieved co-sharers was allowed. Learned counsel states that the suit is still pending for adjudication,□ wherein the applicant no.1 has also been impleaded on the basis of sale deed dated 20.7.2007 executed by his three vendors, who became co-sharer of the

complainant-opposite party no.2, and in this background, it is evident that the registration of F.I.R. on 4.6.2011 is nothing, but an abuse of the process of law to convert a civil dispute into a criminal case. According to learned counsel, the applicant nos. 2 to 4 are the witnesses to the sale deed dated 20.7.2007, whereas the applicant no.5 has been impleaded merely on the ground that he is a clerk with the applicant no.1-Advocate. He prays that the impugned charge sheet as well as impugned cognizance order be set aside.

6. The prayer is opposed by learned counsel for complainant-opposite party no.2, who while referring to the counter affidavit has argued that merely because a civil suit is pending between the parties, it would not mean that the criminal proceedings cannot continue, particularly when the allegations in the F.I.R. *prima facie* show the commission of offences of forgery and cheating. Learned counsel submits that the ex parte decree dated 16.10.2006 conferred absolute title upon the complainant-opposite party no.2 as the names of other three purchasers contained in the sale deed dated 11.3.1996 were directed to be removed, therefore, the sale deed dated 20.7.2007 executed by the three alleged co-purchasers of opposite party no.2 would not pass a valid title in favour of subsequent purchaser-applicant no.1. Learned counsel submits that the alleged title in favour of the vendors of applicant no.1 stood taken away, and the execution of sale deed dated 20.7.2007 by them is apparently a result of fraud, committed to cause wrongful loss to the complainant, therefore, it would not be a case where the facts and circumstances of the case do not constitute the alleged offences. Learned counsel submits that the investigation carried out by the Investigating Officer

prima facie shows the involvement of the accused, who have been rightly sent to face trial, thus, no interference is called for by this Court in exercise of inherent powers under Section 482 Cr.P.C. He prays that the application be dismissed.

7. Learned A.G.A. has also opposed the prayer on the similar lines, who has argued that the execution of sale deed dated 20.7.2007 could not have been executed by the vendors of applicant no.1, therefore, the alleged offences are made out and the charge sheet has been filed on the basis of incriminating evidence showing involvement of the beneficiary Sanjay Gaur and other accused persons. Learned A.G.A. further submits that the prosecution deserves to be afforded an opportunity to discharge the onus against the accused, and otherwise alternatively also the accused can press their claim before the trial court at the stage of consideration of the final report under Section 173(2) Cr.P.C. He prays that the application be dismissed.

8. After hearing the learned counsel for the parties and considering their submissions, this Court finds that the controversy between the parties revolves around the transfer of title of land comprised in Gata No. 592 measuring 0.809 hectares, which was originally owned by Savitri Devi, and she had disposed of the said land by executing a sale deed dated 11.3.1996, whereby the property was sold in favour of complainant Rakesh Kumar Gupta and three others namely, Jamuna Prasad, Gyanwati and Anees Khan. The said document has been placed on record by the applicants as Annexure No.2 of the restoration application, and a perusal of the same would show that it does not contain any overwriting, much less to suggest that the names of other three purchasers were

added later with the complainant. This instrument of sale is a registered document, which is signed by the parties and thumb marked also, but there is nothing on record to show that the complainant ever raised any objection at the stage of execution of the document, who has chosen to file the civil suit on 23.2.2004.

9. No doubt, the ex parte decree was passed in favour of the complainant-opposite party no.2 on 16.10.2006 and the second sale deed dated 20.7.2007 was executed by the vendors of applicant no.1 after the said decree, but the ex parte decree did not survive for long and was set aside on 26.10.2007. Examining the matter conversely, and if, for the sake of arguments, it is assumed that the vendors of applicant no.1 had no title to pass on further to applicant no.1, even then the applicant no.1 cannot be said to have made a wrongful gain. Besides, the vendors of applicant no.1, who had executed the sale deed on 20.7.2007 were not aware that the title of the subject land acquired by them alongwith complainant through sale deed dated 11.3.1996 does not exist with them.

10. Most importantly, the above background clearly shows that the rights of the parties would be determined by the civil court and the parties have already setup their claims against each other, therefore, considering this background, this Court has no hesitation in holding that the dispute between the parties is purely of civil nature, and no offence as alleged by the complainant would be made out. That apart, there is no explanation behind the long delay in lodging the criminal case, which is an after thought and it amounts to abuse of the process of law.

11. At this juncture, reliance can be placed upon the decision of the Hon'ble Apex Court in ***Paramjeet Batra v. State of Uttarakhand and others, passed in Criminal Appeal No. 2069 of 2012***, wherein while examining a similar issue in the context of exercise of inherent powers under Section 482 Cr.P.C., the Hon'ble Apex Court made the following observations :-

"7. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash criminal proceedings to prevent abuse of process of court."

12. Further, the Hon'ble Apex Court in ***State of Haryana and others v. Ch. Bhajan Lal and others, 1991(1) RCR (Criminal) 383 : 1992 Supp(1) Supreme Court Cases 335***, had laid down the principles and guidelines for exercise of inherent powers under Section 482 Cr.P.C. The relevant portion of the judgment is reproduced below :-

"The following categories of cases can be stated by way of illustration wherein the extraordinary power under Article 226 or the inherent powers under Section 482, Cr.P.C., 1973 can be exercised by the High Court 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 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 specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of 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.

We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

13. Thus, in the facts and circumstances of the case, this Court finds it to be a fit case for exercise of inherent powers under Section 482 Cr.P.C. as the continuation of the criminal proceedings is nothing but an abuse of the process of law.

14. Resultantly, present application succeeds and charge sheet dated 24.3.2012, cognizance / summoning order dated 30.7.2012 passed by Additional Chief Judicial Magistrate-Ist, Sitapur in Criminal Case No. 2618 of 2011, titled State Vs.

Anees Khan and others, arising out of Case Crime No. 156 of 2011, under Sections 419, 420, 467, 468, 471 I.P.C., Police Station Laharpur, District Sitapur and the proceedings arising therefrom are ordered to be quashed.

15. The application is allowed.

(2025) 1 ILRA 243
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.01.2025

BEFORE

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

Application U/S 482 No. 1251 of 2019

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

Counsel for the Applicant:
Ram Prasad Yadav, Shesh Narain Mishra

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 321-On the application by public prosecutor to withdraw the criminal case- on the basis of government order without mentioning any reason or his opinion- court should not permit to withdraw the prosecution- no illegality in the impugned order.

Application dismissed. (E-9)

List of Cases cited:

1. Abdul Wahab K. Vs St. of Kerala & ors.(2018) 18 SCC 448
2. St. of Kerala Vs K. Ajith & ors. 2021 (17) SCC 318

3. Ashwini Kumar Upadhyay Vs U.O.I. & ors.
2021 (20) SCC 599

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

1. Heard Sri Ram Prasad Yadav, learned counsel for the applicant and Shri Pankaj Shukla, learned counsel for opposite party no. 2 and Shri Pankaj Srivastava, learned learned A.G.A. for the State and perused the record.

2. The present 482 Cr.P.C. application has been filed to quash the impugned order dated 04.09.2017 passed by learned Additional Chief Judicial Magistrate, Court No. 1, Basti in Case No. 1119 of 2017 (State Vs. Dilip Singh), under Sections 384, 352, 504, 506 IPC arising out of Case Crime No. 419 of 2007, P.S.- Paikoliya, District- Basti as well as quash the order dated 31.08.2018 passed in Criminal Revision No. 122 of 2017 (Dilip Singh Vs. State of U.P. and another) and prayer made to allow the application under Section 321 Cr.P.C.

3. The contention of learned counsel for the applicant is that while rejecting the application of the State under Section 321 Cr.P.C., the court below had not considered the fact that on the basis of material no case is made out against him and this fact was ignored by the revisional court and both the impugned orders are absolutely erroneous.

4. Learned counsel for the opposite party no. 2 has submitted that while filing the application under Section 321 Cr.P.C. State has not mentioned the reason for withdrawing the prosecution. As the prosecution can be withdrawn under Section 321 Cr.P.C. in public interest as there is no public interest involved in this case. Therefore, the application under

Section 321 Cr.P.C. of public prosecutor was rightly rejected by the court below and revision of the applicant was also rightly rejected. It is further submitted that the trial is advanced stage and statement of the the accused -applicant has been recorded under Section 313 Cr.P.C. It is further submitted that the applicant is history sheeter, having 32 cases against him therefore, State has for mala fide reason, moved an application to withdraw the prosecution through the Government Order dated 06.05.2013. Therefore, court below has rightly rejected the withdrawal application.

5. Learned AGA has also supported the argument of counsel for opposite party no. 2.

6. Having heard learned counsel for the parties and the perused the material on record, it appears that FIR was lodged by opposite party no. 2 against the applicant under Sections 384, 506 IPC and subsequently after the investigation, police had submitted charge sheet against the applicant under Sections 384, 352, 504, 506 IPC and during the pendency of the trial, State has filed an application under Section 321 Cr.P.C. seeking permission of court to withdraw the prosecution against the applicant on the ground that the State has decided to withdraw the prosecution against the applicant through Government Order dated 06.05.2013. In that application the public prosecutor has not mentioned any reason or public interest for withdrawal of prosecution against the applicant, though it is the duty of public prosecutor as per the judgment of Apex Court in the case of **Abdul Wahab K. Vs. State of Kerala and other (2018) 18 SCC 448**. Paragraph No. 15 of Abdul Wahab (supra) is being quoted as under:-

"15. From the aforesaid authorities, it is clear as crystal that the Public Prosecutor or an Assistant Public Prosecutor, as the case may be, has an important role under the statutory scheme and is expected to act as an independent person. He/she has to apply his/her own mind and consider the effect of withdrawal on the society in the event such permission is granted."

7. State has power to withdraw the prosecution under Section 321 Cr.P.C. at two stages, one is at before the framing of charge or after the framing of charge.

8. Section 321 Cr.P.C. is quoted hereinunder:-

"The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal;

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences;

Provided that where such offence

—

(I) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

9. The Apex Court in the case of **State of Kerala Vs. K. Ajith and others 2021 (17) SCC 318** had laid down the guidelines in paragraph no. 25 for withdrawal of case under Section 321 Cr.P.C. and observed the permission of withdrawal may be given for the end of public justice. An application by the prosecution must be made in good faith and in the interest of public policy and justice not to thwart or stifle the process of law and also observed in that judgment that public prosecutor should satisfy himself that withdrawal of prosecution is not merely on the ground of possibility of evidence but also end of public justice.

10 Paragraph no. 25 is being quoted hereinunder:-

"25. The principles which emerge from the decisions of this Court on the withdrawal of a prosecution under Section 321 CrPC can now be formulated:

25.1. Section 321 entrusts the decision to withdraw from a prosecution to

the Public Prosecutor but the consent of the court is required for a withdrawal of the prosecution.

25.2. The Public Prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice.

25.3. The Public Prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution.

25.4. While the mere fact that the initiative has come from the Government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the Public Prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons.

25.5. In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:

(a) The function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;

(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;

(c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given;

(d) The grant of consent subserves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law

which the Public Prosecutor is duty-bound to maintain.

25.6. While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinising the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated.

25.7. In a situation where both the trial Judge and the Revisional Court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial Judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent."

11. In the recent judgment, the Apex Court in the case of **Ashwini Kumar Upadhyay Vs. Union of India and others 2021 (20) SCC 599** again has relied upon the judgment of State of Kerala Vs. K. Ajit (supra) and further laid down guidelines for withdrawal of cases against sitting former M.P./M.L.A. Paragraph Nos. 8 and 9 of Ashwini Kumar Upadhyay (supra) is quoted hereinunder:-

"8. In view of the law laid down by this Court, we deem it appropriate to direct that no prosecution against a sitting or former MP/MLA shall be withdrawn without the leave of the High Court in the respective suo motu writ petitions registered in pursuance of our order dated 16-9-2020 [Ashwini Kumar Upadhyay v. Union of India, (2021) 20 SCC 613]. The

High Courts are requested to examine the withdrawals, whether pending or disposed of since 16-9-2020 [Ashwini Kumar Upadhyay v. Union of India, (2021) 20 SCC 613], in light of guidelines laid down by this Court.

9. This Court vide order dated 16-9-2020 [Ashwini Kumar Upadhyay v. Union of India, (2021) 20 SCC 613] had recorded the submissions of the learned Amicus Curiae as under : (Ashwini Kumar Upadhyay case [Ashwini Kumar Upadhyay v. Union of India, (2021) 20 SCC 613], SCC para 10)

?10. ? ?? (c) The High Courts would designate a judicial officer for all such cases, who shall try these cases on priority basis. The judicial officer can be allotted other work depending on the workload, number and nature of criminal cases against MPs/MLAs. The judicial officer so designated shall have continuity of tenure for a minimum period of two years."

12. In view of the above judgment the legal position regarding withdrawal of cases is clear that it cannot be withdrawn merely government has issued a Government Order and public prosecutor should also apply his mind by mentioning in his application filed under Section 321 Cr.P.C. that he is satisfied that the application has been made under good faith and in the interest of public policy and justice. Therefore, on the application by public prosecutor to withdraw the criminal case on the basis of government order without mentioning any reason or his opinion, court should not permit to withdraw the prosecution as the same is not permissible in the eyes of law.

13. Coming back to the present case, it is clear from the perusal of the record that

the present applicant, who is accused in the impugned proceeding is a history sheeter having 32 cases against him and no reason was assigned in the application filed by the public prosecutor under Section 321 Cr.P.C. for withdrawing the prosecution against the applicant. If the prosecution is permitted to withdraw case against such type of person on the basis of unreasoned application then it would definitely be against the public interest as well as against the guidelines laid down by the Apex Court.

14. Therefore, this Court does not find any illegality in the impugned order. Accordingly, the present application is dismissed.

(2025) 1 ILRA 247

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 22.01.2025

BEFORE

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

Application U/S 482 No. 14626 of 2019

**Krishnawati Devi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties**

Counsel for the Applicants:
Om Prakash Shukla

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law – Domestic Violence - Quashing of Complaint – Domestic Relationship – Shared Household - Protection of Women from Domestic Violence Act, 2005 - Section 2(q), 2(f), 2(s), 3 & 12 - Relatives of the husband who do not reside in a shared household

with the complainant do not fall within the definition of "respondents" under Section 2(q) of the Domestic Violence Act - Respondent will be a person who is or has been in a domestic relationship with an aggrieved person - Lower courts must scrutinize complaints before issuing notices to non-resident family members to prevent misuse of legal provisions. (Para - 12,13,14)

Applicant no. 7 (husband) and opposite party no. 2 (wife) were in a matrimonial dispute - wife filed a case under Section 12 of the Domestic Violence Act, implicating the husband, his mother (applicant no. 1), and other relatives (applicants no. 2 to 6) - relatives (applicants no. 2 to 6) claimed they lived separately and were falsely implicated. (Para - 2 to 4)

HELD:- Court found that applicants no. 2 to 6 were not in a shared household and thus did not qualify as "respondents" under Section 2(q). No specific allegations against them in the complaint. **Proceedings against applicants 2 to 6 were deemed malicious, hence quashed.** Mother-in-law (Applicant No. 1) resided in the shared household and was accused of harassing the complainant for dowry. Therefore, the proceedings against her cannot be quashed. Trial court was directed to proceed against applicant nos. 1 and 7 within 60 days. (Para -16 to 20)

Application u/s 482 Cr.P.C. partly allowed.
(E-7)

List of Cases cited:

Hiral P. Harsora & ors. Vs Kusum Narottamdas Harsora & ors., (2016) 10 scc 165

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

1. Heard Sri Om Prakash Shukla, learned counsel for the applicants and Sri Pankaj Srivastava, learned A.G.A. for the State, but no one appeared on behalf of the opposite party no. 2 despite service of notice.

2. The present 482 Cr.P.C. application has been filed to quash the entire proceeding/complaint in Case No. 59 of 2016 (Smrita Srivastava Vs. Rajiv Kumar Srivastava and others) under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Domestic Violence Act'), pending in the court of Additional Chief Judicial Magistrate, Sonbhadra.

3. Facts giving rise to the present controversy is that applicant no. 7 is the husband of opposite party no. 2 and matrimonial discord between them has culminated into this proceeding as well as other proceeding between them.

4. Learned counsel for the applicants has submitted that applicant no. 1 is the mother-in-law of opposite party no. 2 while applicant nos. 2, 3, 4 and 5 are married sisters of applicant no. 7 while applicant no. 6 is the husband of applicant no. 3. Applicant nos. 2, 3, 4, 5 and 6 have been residing separately with their family at different places which is clear from their addresses. Therefore, they are not in a domestic relationship with opposite party no. 2. Therefore, applicant nos. 2 to 6 will not come within the definition of respondents as per Section 2(q) of the Domestic Violence Act and they have been falsely implicated in the impugned proceeding. Therefore, the impugned proceeding is nothing but an abuse of the process of the Court. It is further submitted that this Court has rejected the present application at the instance of applicant no. 7 vide order dated 16.04.2019 but the proceeding against applicant no. 1, mother-in-law of the opposite party no. 2, is also erroneous. It is lastly submitted that the impugned proceeding is absolutely malicious and liable to be quashed.

5. Per contra, learned A.G.A. has submitted that applicant no. 1, mother-in-law of opposite party no. 2 has been in a domestic relationship with opposite party no. 2 at the relevant time. Therefore, applicant no. 1 would come within the definition of the respondent as per Section 2(q) of the Domestic Violence Act.

6. After hearing the submissions of parties and on perusal of record, it appears that the marriage of the applicant no. 7 and opposite party no. 2 has been solemnized in the year 02.06.2011. Subsequently, on the rising of matrimonial discord between them, they have filed cases against each other, including the impugned proceeding.

7. From the perusal of the record, it appears that the applicant nos. 2 to 6 are relatives of applicant no. 7 and they have been residing separately. Therefore, as per Section 2(q) of the Domestic Violence Act, they cannot be termed as respondents as they have not been residing in a shared household with the opposite party no. 2.

8. Section 2(q) of Domestic Violence Act is being quoted as under:-

(q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act;

9. The proceeding under Domestic Violence Act can be initiated when the domestic violence as mentioned in Section 3 of Domestic Violence Act is committed by the respondent who is living in domestic relationship with the aggrieved person. The word "domestic relationship" has been defined in Section 2(f) of Domestic

Violence Act which is being reproduced as follows :

(f) “domestic relationship” means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

10. The above definition of domestic relationship shows that it will be presumed when two persons are related to each other by consanguinity, marriage, or through a relationship in the nature of marriage, adoption, or are family members of a joint family living together in a shared household. The definition of shared household is being provided u/s 2(s) of Domestic Violence Act which is being reproduced as follows :

(s) “shared household” means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;

11. From the above definition of shared household, it is clear that this is a household where aggrieved person lives or

at any stage has lived in a domestic relationship with the respondent.

12. From the definition of respondent given in Section 2(q) of the Domestic Violence Act, it is also clear that the respondent will be a person who is or has been in a domestic relationship with an aggrieved person.

13. From the above analysis, it is clear for holding a person liable u/s 3 of Domestic Violence Act, the following condition must be satisfied :

“The respondent must be related to the aggrieved person in the manner as mentioned in Section 2(f) and he lived or has been living together with aggrieved person in a shared household and then commits domestic violence in the manner mentioned in Section 3 of Domestic Violence Act.”

14. This Court came across number of cases where just to harass the family of husband or the person in domestic relationship, aggrieved party used to implicate the relatives of other side who are not even living or lived with the aggrieved person in shared household and they have been residing at separate places. Therefore, courts below while issuing notice u/s 12 of the Domestic Violence Act must look into this fact from the perusal of the application filed u/s 12 of the Domestic Violence Act along with other available record including the report of the Protection Officer, if available on record. It is further observed that the concerned courts before issuing notices to the persons impleaded as respondents in the application under Domestic Violence Act should satisfy about the fulfilment of the

conditions mentioned in paragraph no. 13 of this judgment.

15. This issue also came into light before the Apex Court in the case of **Hiral P. Harsora and Others Vs. Kusum Narottamdas Harsora and Others, (2016) 10 SCC 165** wherein the Apex Court considered the definition of respondent mentioned in Section 2(q) of Domestic Violence Act and declared that word "adult male" mentioned in Section 2(q) of Domestic Violence Act as well as the proviso to Section 2(q) will stand deleted and observed that respondent for the purpose of domestic violence could be any person who is in domestic relationship with the aggrieved person. Paragraph nos. 20, 21 and 50 of **Hiral P. Harsora (supra)** are being quoted as under :

20. *It will be noticed that the definition of "domestic relationship" contained in Section 2(f) is a very wide one. It is a relationship between persons who live or have lived together in a shared household and are related in any one of the four ways-blood, marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. A reading of these definitions makes it clear that domestic relationships involve persons belonging to both sexes and includes persons related by blood or marriage. This necessarily brings within such domestic relationships male as well as female in-laws, quite apart from male and female members of a family related by blood. Equally, a shared household includes a household which belongs to a joint family of which the respondent is a member. As has been rightly pointed out by Ms Arora, even before the 2005 Act was brought into force on 26-10-2006, the Hindu Succession Act, 1956 was amended,*

by which Section 6 was amended, with effect from 9-9-2005, to make females coparceners of a joint Hindu family and so have a right by birth in the property of such joint family. This being the case, when a member of a joint Hindu family will now include a female coparcener as well, the restricted definition contained in Section 2(q) has necessarily to be given a relook, given that the definition of "shared household" in Section 2(5) of the Act would include a household which may belong to a joint family of which the respondent is a member. The aggrieved person can therefore make, after 2006, her sister, for example, a respondent, if the Hindu Succession Act amendment is to be looked at. But such is not the case under Section 2(q) of the 2005 Act, as the main part of Section 2(q) continues to read "adult male person", while Section 2(s) would include such female coparcener as a respondent, being a member of a joint family. This is one glaring anomaly which we have to address in the course of our judgment.

21. *When Section 3 of the Act defines "domestic violence", it is clear that such violence is gender neutral. It is also clear that physical abuse, verbal abuse, emotional abuse and economic abuse can all be by women against other women. Even sexual abuse may, in a given fact circumstance, be by one woman on another. Section 3, therefore, in tune with the general object of the Act, seeks to outlaw domestic violence of any kind against a woman, and is gender neutral. When one goes to the remedies that the Act provides, things become even clearer. Section 17(2) makes it clear that the aggrieved person cannot be evicted or excluded from a shared household or any part of it by the "respondent" save in accordance with the procedure established*

by law. If "respondent" is to be read as only an adult male person, it is clear that women who evict or exclude the aggrieved person are not within its coverage, and if that is so, the object of the Act can very easily be defeated by an adult male person not standing in the forefront, but putting forward female persons who can therefore evict or exclude the aggrieved person from the shared household. This again is an important indicator that the object of the Act will not be subverted by reading "adult male person" as "respondent".

50. We, therefore, set aside the impugned judgment of the Bombay High Court and declare that the words "adult male" in Section 2(q) of the 2005 Act will stand deleted since these words do not square with Article 14 of the Constitution of India. Consequently, the proviso to Section 2(4), being rendered otiose, also stands deleted. We may only add that the impugned judgment has ultimately held, in para 27. that the two complaints of 2010. in which the three female respondents were discharged finally, were purported to be revived, despite there being no prayer in Writ Petition No. 300 of 2013 for the same. When this was pointed out, Ms Meenakshi Arora very fairly stated that she would not be pursuing those complaints, and would be content to have a declaration from this Court as to the constitutional validity of Section 2(q) of the 2005 Act. We, therefore, record the statement of the learned counsel, in which case it becomes clear that nothing survives in the aforesaid complaints of October 2010. With this additional observation, this appeal stands disposed of.

16. Coming back to the present case, from the perusal of the impugned application filed u/s 12 of the Domestic Violence Act, it is clear that no specific allegation has been made against applicant

nos. 2 to 6 that they have been residing in a shared household with the opposite party no. 2. Therefore, they cannot be said to be in a domestic relationship with opposite party no. 2.

17. From the perusal of the statement of opposite party no.2 recorded u/s 200 Cr.P.C. in Case No. 1594 of 2015 u/s 498-A I.P.C. which has been annexed at page 16 of the supplementary affidavit dated 01.11.2022 filed by the applicants, it is clear that the allegation of domestic violence was made against applicant nos. 1 and 7 and it was also not mentioned that applicant nos. 2 to 6 have been residing with her in a shared household. Therefore, impugned proceeding against applicant nos.2 to 6 is malicious, hence deserves to be quashed.

18. However, considering the fact that applicant no.1 who is the mother-in-law of opposite party no. 2 has been residing in shared household, will fall within the definition of respondent and there is the allegation that opposite party no. 2 has been harassed for demand of dowry and she was also extended threat to evict her from the shared household by the applicant no. 1, therefore, no case for quashing is made out at the instance of applicant no. 1. As the present application has already been rejected at the instance of applicant no. 7, therefore, the present application is also rejected at the instance of applicant no. 1.

19. In view of the above observation, the impugned proceeding/complaint in Case No. 59 of 2016 (Smrita Srivastava Vs. Rajiv Kumar Srivastava and others) under Section 12 of the Domestic Violence Act, against applicant nos. 2 to 6 is hereby quashed.

22. The Registrar (Compliance) is directed to send a copy of this order to the concerned court.

Criminal Law – Criminal Procedure Code, 1973 - Sections 200, 205, 302, 256 & 482 - The Bhartiya Nagarik Suraksha Sanhita, 2023 - Sections – 228, 279 & 339 - Negotiable Instruments Act, 1881 - Sections 138 & 139: - Application – challenging the entire proceeding pending u/s 138 of Act, 1881- offence of Dishonour of cheque – father of opposite party no. 2 filed the complaint against applicant – alleging that to return the payment of booking amount of a flat constructed by the applicant's company, a

1. A.C. Narayanan Vs St. of Mah. & anr.- (2014) 11 SCC 790),
2. Shashibala Agrawal Vs St. of U.P. & anr.- [2024 SCC OnLine All 1216],
3. Kishore Shankar Signapurkar Vs St. of U.P. & anr.- [2024 SCC OnLine All 5279],
4. Ashwin Nanubhai Vyas Vs St. of Mah.- [966 SCC OnLine SC 253],
5. Jimmy Jahangir Madan Vs Bolly Cariyappa Hindley (dead) Irs. - [2004 (12) SCC 509],

6. Kushal Kumar Talukdar Vs Chandra Pd. Goenka - [2004 SCC OnLine Gauhati 130],

7. M/s Sri. Sai Mourya Est.s & Projects Pvt Ltd. & Others Vs St. of A.P. rep by its Public Prosecutor, High Court of A.P., Hyderabad & anr.- [2018 SCC OnLine HYD 43],

8. D. Vinod Shivappa Vs Nanda Belliappa reported in (2006) 6 SCC 456,

9. Lafarge Aggregates And Concrete India Pvt. Ltd. Vs Sukarsh Azad & anr.- 2014 (13) SCC 779,

10. Vijay Kumar Vs St. of U.P. & anr.- in Application u/s 482 No.17464 of 2024 – decided on dated 23.05.2024.

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

1. Heard Sri Rahul Chaudhary, learned counsel for the applicant and Sri Uday Bhan, learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 11.09.2018 passed by learned Presiding Officer, Additional Court No.3, Agra as well as entire proceedings of Complaint Case No.874 of 2018 (Vinod Kumar Agarwal Vs. Ram Avtar Agarwal and another), under Section-138 of Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act, 1881'), Police Station-Chhata, District-Agra, pending in the court of Additional Court No.3, Agra.

3. The facts giving rise to the present case is that father of opposite party no.2, Vinod Kumar Agarwal had filed a complaint against the applicant u/s 138 of the Act, 1881 with the allegation that to return the payment of booking amount of a flat constructed by the applicant, a cheque of Rs.3 lakhs dated 10.05.2018 issued in favour of Vinod Kumar Agarwal, who was

the father of opposite party no.2, was given by the applicant on behalf of the Company-Anupam Omarion Infrastructure India Private Limited and on presenting the same before the bank on 10.05.2018, same was returned by the bank on 11.05.2018 with the endorsement 'account closed'. Thereafter, demand notice was sent to the applicant through registered post on 17.05.2018 but despite receiving the said demand notice on 26.05.2018, cheque amount was not paid by the applicant. Therefore, the impugned complaint was filed. Sri Vinod Kumar Agarwal has also filed his statement u/s 200 Cr.P.C. through affidavit. Thereafter, the court below has summoned the applicant as Director of Omarion Infrastructure India Private Limited vide order dated 11.09.2018. Thereafter, during the pendency of trial, the complainant, Sri Vinod Kumar Agarwal had died on 06.11.2021. After the death of complainant, Sri Vinod Kumar Agarwal, opposite party no.2 being his son moved an application dated 22.08.2023 permitting him to continue the impugned proceeding being legal heir of complainant, Vinod Kumar Agarwal, which was allowed by the court below vide order dated 08.11.2023 and same is under challenge in the present case.

4. Sri Rahul Chaudhary, learned counsel for the applicant, raised following contentions to challenge the impugned proceeding :

(i) The first contention of learned counsel for the applicant is that, admittedly, the cheque in question was issued on behalf of the Company-Anupam Omarion Infrastructure India Private Limited and the court summoned the Director of the Company instead of summoning the company, itself.

(ii) The second contention of learned counsel for the applicant is that after the issuance of the summoning order, the complainant died on 06.11.2021, thereafter, his son moved an application on 22.08.2023, which was erroneously allowed by the court below on 08.11.2023, permitting him to pursue the complaint on behalf of the complainant, which is absolutely illegal as the son of the complainant has no personal knowledge, so he cannot be allowed to pursue the impugned proceeding as well as to depose therein. In support of his contention, learned counsel for the applicant has relied upon the judgement of the Apex Court in the case of **A.C. Narayanan Vs. State of Maharashtra & Another in Criminal Appeal No.73 of 2007** reported in **(2014) 11 SCC 790**.

(iii) The third contention of learned counsel for the applicant is that cheque in question was lost on 08.02.2016 regarding which a police complaint was also given on the same date. Thereafter, news item was also published in newspaper on 10.02.2016 and again on 14.11.2016. Therefore, cheque in question was not issued in discharge of any liability and same was a missing cheque.

(iv) The fourth contention of learned counsel for the applicant is that the notice was sent to the applicant at the incorrect address.

5. *Per contra*, learned AGA has submitted that it is an established law that once the cheque is returned on the ground of the account closed then the court below was well within the jurisdiction to issue summons and the accused can raise all defences during trial to justify the closing account.

6. After hearing learned counsel for the applicant as well as learned AGA, it is clear from the complaint that the complainant had invested Rs.18 lakhs in the project of the applicant who is the builder, but the project could not be completed, then the post dated cheque of Rs.3 lakhs dated 10.05.2018 was issued by the applicant to the complainant. It is not in dispute that the cheque in question was signed by the present applicant on behalf of the company in question. When the cheque was presented before the bank, the same was returned with the endorsement 'account closed' on 11.05.2018 and despite service of notice on 26.05.2018, cheque amount was not paid by the applicant so the impugned complaint was filed.

7. So far as the contention of learned counsel for the applicant that summoning order is itself bad as the company was not summoned, but the applicant was summoned in a personal capacity is incorrect because in the summoning order, it is specifically mentioned that the applicant is being summoned as the Director of the Company in question, and he was also the signatory of the cheque in question. This court, in the case of **Shashibala Agrawal Vs. State of U.P. and Another** reported in **2024 SCC OnLine All 1216**, which was also relied upon by the coordinate Bench of this court in **Kishore Shankar Signapurkar Vs State of U.P. and Another** reported in **2024 SCC OnLine All 5279**, who has observed that if the summon is sent to the signatory Director of the Company by clearly mentioning his status as Director of a particular company, then it will be sufficient service upon the company. Therefore, the contention that the notice was not served upon the company is

misconceived and hence deserves to be rejected.

8. So far as the second contention that the son cannot be permitted to pursue the complaint after the death of the complainant is concerned, from perusal of the record, it is clear that initially complaint was filed by the complainant, Vinod Kumar Agarwal. He himself deposed before the court as a witness and thereafter, the applicant was summoned, and during the pendency of the trial, the complainant had died. Therefore, his son, who is opposite party no.2, herein filed an application to pursue the complaint.

9. Though, it is correct that there is no provision under Cr.P.C. or the Act, 1881 to implead or substitute the legal heirs of the complainant after his death, the question arises whether, after the death of the complainant, his legal heirs can pursue the complaint. Section 256 Cr.P.C. & Section 279 of B.N.S.S. deal with the question of the death of complainant. For reference, Section 256 Cr.P.C. as well as Section 279 of BNSS are being quoted as under:

"256 Cr.P.C. Non-appearance or death of complainant.-(1) *If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:*

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the

personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

"Section 279 BNSS. *Non-appearance or death of complainant.*

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, after giving thirty days' time to the complainant to be present, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by an advocate or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may, dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

10. From the Section 256 Cr.P.C. (corresponding Section 279 of BNSS), it is clear that if the complainant could not appear before the court due to his death or any other reason, then the Magistrate may dismiss the same and acquit the accused. But it is also vests the discretion of the Magistrate to adjourn the case for hearing to some other dates for appropriate reason instead of dismissing the complaint.

Though, there is no time fixed in this section allowing the complainant to be present before the court but Section 279 of BNSS provides giving of 30 days time to the complainant to be present, before dismissing the same for want of prosecution. Complainant may not appear before the court concerned for various reasons which also includes his death, therefore for this purpose, Section-279 of BNSS has provided 30 days time so that the pleader or any legal heir of the complainant could apprise the court of the reason for non-appearance. Though, Section 205 Cr.P.C. (corresponding Section 228 of BNSS) also gives discretion to Magistrate at any stage of proceeding to exempt the personal attendance of the accused in appropriate cases but this provision will not apply where the complainant has died. But as soon as the legal heir of the complainant is permitted to continue the proceeding after the death of the complainant then the Magistrate can grant exemption from personal appearance to the legal heirs so that the proceeding can be continued by the legal heir through a pleader or power of attorney holder. But in case after the death of the complainant, permission is not granted to his legal heir to continue the proceeding then, power of attorney of the deceased complainant or his counsel cannot be permitted to continue the proceeding u/s 205 Cr.P.C. (corresponding Section 228 of BNSS), as after the death of the complainant, his arrangement with his counsel or the power of attorney holder also ends.□

11. Section 302 Cr.P.C. (corresponding Section 339 of BNSS) also gives discretion to Magistrate to permit any person to continue the prosecution in place of complaint. Therefore, after the death of the complainant, the Magistrate can permit

his legal heir to pursue the complaint u/s 302 Cr.P.C. (corresponding Section 339 of BNSS) instead of dismissing the same u/s 256 Cr.P.C. (corresponding Section 279 of BNSS). In case, the legal heir of the deceased complainant is permitted to continue the proceeding u/s 302 Cr.P.C. (corresponding to Section 339 of BNSS) then further discretion is also granted to Magistrate that he can permit the legal heir of the deceased complainant to pursue the proceeding of complaint either personally or by a pleader or through his power of attorney holder. For reference, Section 302 Cr.P.C. (corresponding Section 339 of BNSS) is being quoted as under:

**“Section 302 Cr.P.C..
Permission to conduct prosecution.**

(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.”

12. The Apex Court in **Ashwin Nanubhai Vyas Vs. State of Maharashtra** reported in **1966 SCC OnLine SC 253** observed that Cr.P.C. provides only about the effect of death of any accused or appellant but does not provide expressly for the death of the complainant and further observed that the

Magistrate can permit to continue the prosecution to any person u/s 495 Cr.P.C. applicable in that time (corresponding to Section-302 Cr.P.C., 1973). Paragraph nos.3 and 9 of the **Ashwin Nanubhai Vyas (supra)** is being quoted as under:

"3. The Code of Criminal Procedure provides only for the death of an accused or an appellant but does not expressly provide for the death of a complainant. The Code also does not provide for the abatement of inquiries and trials although it provides for the abatement of appeals on the death of the accused, in respect of appeals under Sections 411-A(2) and 417 and on the death of an appellant in all appeals except an appeal from a sentence of fine. Therefore, what happens on the death of a complainant in a case started on a complaint has to be inferred generally from the provisions of the Code.

9. In support of his contention Mr Keswani has cited some cases of the High Courts in which on the death of the complainant the prosecution was held to have abated. Chief among them are Ishwardas v. Emperor [7 CrLJ 290] , Ramanand v. Crown [40 IC 1008] and Labhu v. Crown [52 IC 797] . The first of these cases was a prosecution for defamation and the second a trial for an offence under Section 323 of the Indian Penal Code. The third followed the second. The first two cases here mentioned were overruled by the Lahore High Court in Hazara Singh v. Crown [ILR 2 Lah 27] wherein it was laid down that such cases do not necessarily abate. Mr Keswani also relied upon several cases which arose under Section 417(3) and 476-B of the Code of Criminal Procedure in which appeals were held to have abated. We need not refer to these cases because they arose

under different circumstances and were certainly not inquiries with a view to committal under Chapter XVIII of the Code. Mr Hathi, who appeared on behalf of the State of Maharashtra, drew our attention to many later cases in which it has been held (dissenting from the cases relied upon by Mr Keswani) that a criminal complaint does not necessarily abate on the death of the complainant even in those cases where the making of the complaint by the person aggrieved is made a condition precedent by the Code. We need not analyse those cases because, in our opinion, unless the Code itself says what is to happen, the power of the court to substitute another prosecution agency (subject to such restrictions as may be found) under Section 495 of the Code of Criminal Procedure is always available. Reference may, however, be made to the following : Emperor v. Nurmohammed [8 CrLJ 190] , Emperor v. Mauj Din [AIR 1924 Lah 72 : 4 Lah 7] , U Tin Maung v. King [AIR 1941 Rang 202] , Mohammed Azam v. Emperor [AIR 1926 Bom 178] and In re Ramasamier [AIR 16 Cr LJ 713] . None of the cases cited either for the one side or the other directly arose under Section 198 first part in a committal proceeding. The later view is distinctly in favour of allowing the prosecution to continue except in those cases where the Code itself says that on the absence of the complainant the accused must be either acquitted or discharged. The present is not one of those cases and in our judgment the Presidency Magistrate was right in proceeding with the inquiry by allowing the mother to carry on the prosecution, and under Section 495 the mother may continue the prosecution herself or through a pleader. We see no reason why we should be astute to find a lacuna in the procedural law by which the trial of such important

cases would be stultified by the death of a complainant when all that the Section 198 requires is the removal of the bar. The appeal fails and it will be dismissed."

13. The Apex Court in the case of **Jimmy Jahangir Madan Vs. Bolly Cariyappa Hindley (dead)** by Irs. reported in **2004 (12) SCC 509**, again considered the issue of continuing the prosecution after the death of complainant and observed that u/s 302 Cr.P.C., Magistrate can permit any person including the legal heirs of deceased complainant to continue the prosecution either himself or through pleader or power of attorney. Paragraph nos.9 and 10 of **Jimmy Jahangir Madan (supra)** is being quoted as under: □

"9. The language of Sections 205 and 302 of the Code is similar. Under Section 302 of the Code, a party can make an application himself to continue the prosecution or the same can be made by a pleader. As provided under Section 2(q) of the Code, the prayer to continue the prosecution can be made either by a legally qualified person, who is authorised to practise in the court under the Advocates Act; or by any other person which would obviously include a power-of-attorney holder in which eventuality such permission can be granted by the court where the prosecution is pending only if it is sought by the person who is entitled to continue the prosecution and not by the power-of-attorney holder. Under Section 205 of the Code, an accused is required to appear in person but his personal appearance can be dispensed with and he can be allowed to be represented by a pleader. Likewise, under Section 302 of the Code, a person, who is entitled to continue the prosecution, is required to make an

application himself but under both the provisions aforesaid, instead of taking steps personally, a party can be represented through a pleader. Power-of-attorney holder can represent the party concerned under both the provisions of the Code, in case permission for such representation is sought from the court by the person concerned and granted by it. But where no such permission is sought by the person concerned, meaning thereby, in the case of Section 205 of the Code ? an accused and in the case of Section 302 of the Code ? a party who has right to continue the prosecution, power-of-attorney holder cannot be allowed to represent the person concerned in the proceeding.

10. In the present case, neither heirs of the complainant filed petition under Section 302 of the Code to continue the prosecution nor was any permission sought by them from the competent court that they should be allowed to continue the prosecution through their power-of-attorney holders, rather the prayer was made by the power-of-attorney holders, which is not permissible under law. This being the position, we are of the view that the trial court was not justified in allowing the petitions under Section 302 of the Code and the High Court has committed an error in confirming the said order which is liable to be set aside and the petitions under Section 302 of the Code are fit to be dismissed giving liberty to the heirs either to make application themselves before the court concerned to continue the prosecution or apply to the court to grant permission to them to authorise the power-of-attorney holders to continue the prosecution on their behalf."

14. The above issue also came into consideration before the High Court of

Gauhati in the case of **Kushal Kumar Talukdar Vs. Chandra Pd. Goenka** reported in 2004 SCC OnLine Gauhati 130 wherein the Gauhati High Court observed that though there is no provision of substitution of a deceased complainant under Cr.P.C. but Magistrate u/s 302 Cr.P.C. can permit any person including the legal heir of deceased complainant. Paragraph nos.53 and 54 of **Kushal Kumar Talukdar (supra)** are being quoted as under:

"53. While dealing with the present, case, it is necessary to bear in mind that there is no provision for substitution of a deceased complainant under the Cr. P.C., but a Magistrate has the power under Section 302 Cr. P.C. to permit any one to conduct prosecution. Hence, when the opposite party herein, as a son of the deceased complainant, came forward to continue to proceed with the complaint, there was no impediment, on the part of the Court, in allowing the son of the deceased complainant to represent the complainant. Though the Magistrate has substituted the accused-opposite party herein in place of the deceased complainant, the impugned order has the effect of allowing the opposite party therein to represent, the deceased complainant in terms of Section 302 Cr. P.C. [See also Ashwin Nanu Bhai (supra)].

54. What crystallises from the above discussion is that in the case at hand, for proving the ingredients of the offence allegedly committed by the accused-petitioner, presence of the complainant was not necessary. In such a situation, when the son of the complainant, i.e., the opposite party herein came forward to conduct the prosecution, there was no impediment under the law, in the light of the provisions of Section 256 Cr. P.C. read with Section

302 Cr. P.C. to permit the opposite party herein, as son of the deceased complainant, to represent the complainant and to allow him to appoint a pleader of his choice to represent him in the case. There was, thus, no legal impediment, on the part of the learned Court below, to allow the proceedings of the complaint case aforementioned to continue. For the conclusions so reached, I find no merit in the present revision and the revision cannot succeed."

15. The issue of permitting the prosecution by the son of the deceased complainant also came into consideration before the High Court of Hyderabad in the case of **M/s Sri. Sai Mourya Estates & Projects Pvt Ltd. & Others Vs. State of A.P. rep by its Public Prosecutor, High Court of A.P., Hyderabad & Another** reported in 2018 SCC OnLine HYD 43 in which the Hyderabad high court observed that after the death of the complainant (payee of cheque), his son is deemed to be holder in due course of the cheque which is subject matter of complaint under the Act, 1881. Therefore, after the death of the father, his son can file complaint u/s 138 of the Act, 1881. Paragraph no.31 of **M/s Sri. Sai Mourya Estates (supra)** is being quoted as under:

"31. From the above provision, it is clear that the 2nd respondent holds the cheque after the death of his father being the payee and as a legal heir he is entitled to possess the same in his own name and in view of Section 53 he is the holder in due course and can get a full discharge. Thus, under Section 53 of the Act, a legal representative/heir of the payee or holder in due course can maintain a complaint under Section 138 of the Act."

16. From the conjoint reading of Section 256 Cr.P.C. (corresponding Section 279 of BNSS) and Section 302 Cr.P.C. (corresponding Section 339 of BNSS) as well as legal position discussed above, it is clear that after the death of the complainant, his legal heir may be permitted to continue the proceeding u/s 138 of the Act, 1881 personally or through pleader or through the power of attorney holder, though, there is no requirement of substitution or impleading the legal heir of the deceased complainant. Therefore, it is not always necessary for the concerned court to dismiss the complaint u/s 256 Cr.P.C. If the complainant failed to appear for any reason, it may postpone the hearing and if the application is filed by the legal heir of the complainant to pursue the complaint proceeding on the ground that the complainant has died, court should normally permit the legal heir of the complainant to pursue the same.

17. Therefore the contention of learned counsel for the applicant that court below has erroneously permitted the son of the complainant after his death to pursue the complaint proceeding is also misconceived.

18. Third contention of learned counsel for the applicant that cheque in question was a missing cheque regarding which applicant has also filed police complaint is also misconceived and there is nothing on record showing that any application was given to bank for stopping the payment of the cheque in question if same had been lost. Even otherwise, this ground being defence would be available to the applicant during trial.

19. So far as the fourth contention that the demand notice was sent at the incorrect address is concerned that can also be raised by the applicant during trial being his defence as the Apex Court in the case of **D. Vinod Shivappa Vs. Nanda Belliappa** reported in (2006) 6 SCC 456 has

observed that issue of service of notice is essentially a question of fact and can be examined during trial.

20. It is also apposite to mention that the cheque in question was returned with the endorsement 'account closed'. The Apex Court in the case of **Lafarge Aggregates And Concrete India Private Ltd. Vs. Sukarsh Azad And Another** reported in 2014 (13) SCC 779 as well as in the case of **Vijay Kumar Vs. State of U.P. & Another** in Application u/s 482 No.17464 of 2024 vide order dated 23.05.2024, has observed that even if the cheque is returned with the endorsement 'account closed', even then the proceeding cannot be quashed, because the defence of closing the account for valid reason can be raised during trial.

21. It also appears from perusal of the record that the impugned proceeding has been pending since 2018 and that applicant has not appeared before the court below to contest the trial and raise all grounds available to him.□

22. In view of the above, this court does not find any illegality in the impugned order.

23. Accordingly, present application is rejected.

(2025) 1 ILRA 260
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.01.2025

BEFORE

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

Application U/S 482 No. 30740 of 2024

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

Counsel for the Applicant:

P.K. Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure 1973 - Section 311-Application u/s 311 Cr.P.C. by the applicant for examination of P.W.-3 rejected-impugned- accused cannot have the witness recalled for re-examination as a matter of right - extraordinary provision cannot be used as an afterthought to fill the gaps- no illegality or infirmity in the order.

Application dismissed. (E-9)

List of Cases cited:

1. Natasa Singh Vs C. B. I., reported in (2013) 5 SCC 741
2. Raja Ram Prasad Yadav Vs St. of Bihar & anr.,(2013)14 SCC 461
3. Mannan SK & ors. Vs St. of W.B. & anr., AIR 2014 SC 2950
4. V.N. Patil Vs K. Niranjan Kumar & ors., reported in (2021) 3 SCC 661
5. Vijay Kumar Vs St. of U.P. & anr., 2011 (8) SCC 136
6. Mannan Shaikh & ors. Vs St. of W.B. & anr., 2014 (13) SCC 59
7. Ratanlal Vs Prahlad Jat & ors., 2017 (9) SCC 340
8. Swapan Kumar Chatterjee Vs C.B.I., 2019 (14) SCC 328
9. St. (NCT of Delhi) Vs Shiv Kumar Yadav (2016) 2 SCC 402
10. Manju Devi Vs St. of Raj., reported in (2019) 6 SCC 203

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

1. Heard Mr. Rajeev Singh, Advocate holding brief of Mr. P.K. Singh, learned counsel for the applicant as well as Mr. Rizwan Ahmad, learned A.G.A. for the State and perused the record.

2. The present application has been filed assailing the order dated 16.06.2023 vide which the application under Section 311 Cr.P.C. as moved by the applicant for examination of P.W.-3 has been rejected.

3. Learned counsel for the applicant submits that the impugned order has been passed without application of judicial mind. During examination of P.W.-3 certain relevant questions which were important for proper adjudication of the matter could not be asked by the lawyer of the applicant, therefore, it would have been appropriate for the Court to allow the application permitting examination of P.W.-3. The order impugned has been passed in an illegal and arbitrary manner, therefore, the same may be set-aside.

4. Learned A.G.A for the State on the other hand submits that there is no illegality in the order dated 16.06.2023 as after detailed discussion and application of judicial mind, the order impugned has been passed. He further submits that the present application requesting for cross-examination of P.W.-3 has been given on 27.04.2023 that too after recording the statements of the witnesses as well as the accused under Section 313 I.P.C. and the matter has been fixed for hearing. From the records, the court concerned found that 15.04.2022 was the date fixed for recording the statements under Section 313 I.P.C. He further submits that the statements of accused Premanshu and Smt. Mithlesh were recorded and they were cross-examined. Three persons from the side of

the accused were also examined. The cross-examination of the said witnesses from the side of the accused took place from the period 23.04.2022 till 27.08.2022. The accused persons stated that they do not want to produce any other witness for proving their case, therefore, the matter was fixed for hearing. On 22.12.2022 an application was given from the side of the accused for summoning P.W.-4 which was allowed and P.W.-4 was re-examined on 16.01.2023.

5. He further contends that nine witnesses have been produced from the side of the prosecution who have been examined and cross-examined by a number of lawyers from the side of the accused namely Om Narayan Dwivedi, Ashok Kumar Trivedi, Dinesh Kumar Pal, Anil Kumar Sachan and Siddharth Verma. Vakalatnama of Sri. Rambahal Vidyarthi was also found in the record of the case. The newly appointed lawyer Sri. Rambahal Vidyarthi moved an application on 27.04.2023 for summoning of P.W.-3 as certain important questions could not be asked from him at the time when he was examined. The court found that the chief examination of P.W.-3 Rambhawan took place on 31.05.2018 and he was cross-examined on the same date. The cross-examination continued on 04.07.2018 and was completed on the said date. The cross-examination is of about three pages. All questions regarding harassment of the deceased, the money as well as gifts which were given as tilak and other questions related to harassment were also asked from P.W.-3. From the aforesaid, it is clear that the applicant is trying to linger on the case by changing the lawyer. Earlier also an application was moved for summoning P.W.-4 which was allowed and he has been re-examined.

6. I have considered the submissions made by the learned counsel for the parties and gone through the records of the present application.

7. Before fathoming correctness of the submissions made by the learned counsel for the parties, it will be worthwhile to refer to Section 311 Cr.P.C., which reads as under:-

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

8. Assiduous scrutiny of aforesaid provision clearly suggests that court enjoys vast power to summon any person as a witness or recall and re-examine a witness, provided, same is essentially required for just decision of the case. Moreover, such exercise of power can be at any stage of inquiry, trial or proceedings under the Code, meaning thereby, applicant can file an application at any time before conclusion of trial. Very object of Section 311 is to bring on record evidence not only from the point of view of accused and prosecution, but also from the point of view of the orderly society.

9. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to

arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 of Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any Court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

10. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interest of the accused, the

victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same.

11. Close scrutiny of aforesaid provision of law further suggests that Section 311 has two parts; first part reserves a right to the parties to move an appropriate application for re-examination of a witness at any stage; but definitely the second part is mandatory that casts a duty upon court to re-examine or recall or summon a witness at any stage if his/her evidence appears to be essential for just decision of case because, definitely the underlying object of aforesaid provision of law is to ensure that there is no failure of justice on account of mistake on the part of either of parties in bringing valuable piece of evidence or leaving an ambiguity in the statements of witnesses examined from either side.

12. In this backdrop, it would be useful to make a reference to certain decisions rendered by the Supreme Court on the interpretation of Section 311 of the Code, wherein the Apex Court highlighted the basic principles which are to be borne in mind while dealing with an application under Section 311 of the Code.

13. In *Natasa Singh v. C. B. I.*, reported in (2013) 5 SCC 741, the Apex Court, after referring the various decisions

of the Supreme Court, has observed that the power conferred under Section 311 Cr.P.C. must therefore, be invoked by the court only in order to meet the ends of justice and such power should be exercised with great caution and circumspection.

14. The scope of Section 311 Cr.P.C. has been dealt in the case of ***Raja Ram Prasad Yadav vs. State of Bihar and another, reported in (2013)14 SCC 461***, wherein the Apex Court has held that power under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage provided the same is required for just decision of the case. It may be relevant to take note of the following paras of the judgment:-

"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section

138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

15. In this context, I also wish to make a reference to the judgment of the Apex Court in ***Mannan SK and others vs. State of West Bengal and another, reported in AIR 2014 SC 2950***, wherein the the Apex Court has held as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code

which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or reexamination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

16. Further in the case of *V.N. Patil vs. K. Niranjana Kumar and Ors.*, reported in (2021) 3 SCC 661, wherein the Apex Court has held that the aim of every Court is to discover the truth. Section 311 Cr.P.C.

is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 Cr.P.C. has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

17. The principles related to the exercise of the power under Section 311 Cr.P.C. have been well settled by this Court in *Vijay Kumar vs. State of Uttar Pradesh and Another*, reported in 2011 (8) SCC 136:-

"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."

18. This principle has been further reiterated in *Mannan Shaikh and Others vs. State of West Bengal and Another*, reported in 2014 (13) SCC 59 and thereafter in the case of *Ratanlal vs. Prahlad Jat and Others*, 2017 (9) SCC 340 and *Swapan Kumar Chatterjee vs. Central Bureau of Investigation*, 2019 (14) SCC

328. The relevant Paras of *Swapan Kumar Chatterjee (supra)* are as under:-

"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely: (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and reexamine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and reexamine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for reexamination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

19. In the case of *State (NCT of Delhi) vs. Shiv Kumar Yadav (2016) 2 SCC 402*, the Apex Court has observed that recall of a witness under Section 311 must be bona fide and genuine. Secondly, applications for recall of a witness under Section 311 should not be allowed as a matter of course and the discretion given to

the Court must be exercised judiciously, not arbitrarily.

20. The Apex Court in the case of *Manju Devi v. State of Rajasthan*, reported in *(2019) 6 SCC 203* has held as under :-

"10. It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the court thereunder have been explained by this Court in several decisions [Vide Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595; Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158 : 2004 SCC (Cri) 999; Mina Lalita Baruwa v. State of Orissa, (2013) 16 SCC 173 : (2014) 6 SCC (Cri) 218; Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461 : (2014) 4 SCC (Cri) 256 and Natasha Singh v. CBI, (2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828] . In *Natasha Singh v. CBI* [*Natasha Singh v. CBI*, (2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828] , though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under:

"8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be

essential to the arrival of a just decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in

order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

21. Aforesaid exposition of law clearly suggests that a fair trial is main object of criminal jurisprudence and it is duty of court to ensure such fairness is not hampered or threatened in any manner. It has been further held in the aforesaid judgments that fair trial entails interests of accused, victim and society and therefore, grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. The Apex Court has categorically held in the aforesaid judgment that adducing evidence in support of the defence is a valuable right and denial of such right would amount to denial of a fair trial.

22. The Apex Court, while culling out certain principles required to be borne in mind by the courts while considering applications under Section 311, has held that exercise of widest discretionary powers under Section 311 should ensure that judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts. Hon'ble Apex Court

has further held that if evidence of any witness appears to be essential for the just decision of the case, it is the duty of the court to summon and examine or recall and re-examine any such person because very object of exercising power under Section 311 is to find out truth and render a just decision. Most importantly, in the judgment referred to herein above, the Apex Court has held that court should bear in mind that no party in trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

23. From perusal of the records of the present application and application filed by the applicant under Section 311 Cr.P.C. as well as from examining the order impugned, this Court finds that during trial, the present application requesting for cross-examination of P.W.-3 has been given on 27.04.2023 that too after recording the statements of the witnesses as well as the accused under Section 313 I.P.C. and the matter has been fixed for hearing. From the records, the court concerned found that 15.04.2022 was the date fixed for recording the statements under Section 313 I.P.C. The statements of accused Premanshu and Smt. Mithlesh were recorded and they were cross-examined. Three persons from the side of the accused were also examined. The cross-examination of the said witnesses from the side of the accused took place from the period 23.04.2022 till 27.08.2022. The accused persons have stated before the court concerned that they do not want to produce any other witness for proving their case, therefore, the matter was fixed for hearing. On 22.12.2022 an application was given from the side of the

accused for summoning P.W.-4 which was allowed and P.W.-4 was re-examined on 16.01.2023. Nine witnesses have been produced from the side of the prosecution who have been examined and cross-examined. Vakalatnama of Sri. Rambahal Vidyarthi was also found in the record of the case. The newly appointed lawyer Sri. Rambahal Vidyarthi moved an application on 27.04.2023 for summoning of P.W.-3 as certain important questions could not be asked from him at the time when he was examined. The court found that the chief examination of P.W.-3 Rambhawan took place on 31.05.2018 and he was cross-examined on the same date. The cross-examination continued on 04.07.2018 and was completed on the said date. From the application made by the applicant under Section 311 Cr.P.C., it is apparently clear that the same has been filed only for lingering on the trial of the case.

24. The fairness of trial has to be seen not only from the point of view of the victim, but also from the point of view of the accused and the society. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of power under Section 311 Cr.P.C. has to be considered from case to case.

25. The accused cannot have the witness recalled for re-examination as a matter of right and extraordinary provision cannot be used as an afterthought to fill the gaps.

26. Considering the materials brought on record and keeping the principles laid down by the Hon'ble Supreme Court for exercise of power under section 311 Cr.P.C., this Court is of the opinion that

observations and findings recorded by the trial Court in rejecting the application under Section 311 Cr.P.C. of the applicant under the facts and circumstances of the case are fully sustainable. The trial Court has committed no illegality or infirmity in the order impugned by rejecting the application of the applicant. There appears no abuse of process of the Court also. There is no evidence on record to satisfy this Court that trial would be seriously prejudiced if the said witnesses is not recalled for re-examination or further examination.

27. In view of the above, the application of the applicant having no merit deserves to be rejected. In the result, the application is **rejected**.

28. The office is directed to communicate this order to the court concerned to proceed with the case in accordance with law.

29. The Court would like to appreciate the hard work put in by Ms. Shreya Shukla, Research Associate, who has drawn attention to detail and the same shows in her work of providing legal assistance in this matter.

(2025) 1 ILRA 269
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.01.2025

BEFORE

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

Application U/S 482 No. 40201 of 2024

Jitendra & Ors. ...Applicants
 Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Aditya Prasad Mishra

Counsel for the Opposite Parties:

G.A.

**Criminal Law - Indian Penal Code,1860 -
Chapter XX - Code of Criminal
Procedure,1973 – Section 198 (1)-No**

cognizance u/s 198(1) Cr.P.C. -for an offence punishable under Chapter-XX of IPC except upon a complaint made by some person aggrieved by the offence- whereupon the Magistrate shall follow the procedure u/s 200 Cr.P.C. onwards -but it does not include the police report i.e. a report under Section 173(2) Cr.P.C.-in the explanation to Section 2(d) of Cr.P.C., a report by a police officer which discloses a non-cognizable offence shall be deemed to be complaint but this explanation is not applicable under Chapter XX of IPC- no complaint in the present case- hence chargesheet itself is not maintainable - cognizance order is vitiated- the procedure as required not followed-impugned order rejected.

Application allowed. (E-9)

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

1. The applicants have preferred instant application under Section 482 Cr.P.C. challenging the charge sheet dated 10.04.2024, cognizance order dated 19.07.2024 passed by Chief Judicial Magistrate, Mathura and proceedings of Criminal Case No. 63822 of 2024¹ arising out of Case Crime No. 402 of 2023, under Section 494 and 120-B IPC, Police Station Jait, District Mathura.

2. Brief facts of the case are that a first information report² was lodged by opposite party no. 2 on 30.09.2023 against 10 named persons including the applicants, under Sections 494 and 120-B IPC, alleging therein that marriage of applicant no. 1 was

solemnized with opposite party no. 2 on 10.11.2016, according to Hindu rites and rituals. Later, without obtaining divorce from opposite party no. 2, applicant no. 1 has again solemnized his second marriage on 27.12.2022 with one Smt. Anju at District Ballabgarh, Haryana. The applicant no. 6 was mediator in the aforesaid second marriage as performed by applicant no. 1 with Anju. After investigation, a charge sheet was submitted on 10.04.2024 and the court concerned has taken cognizance by order dated 19.07.2024, hence the present petition.

3. Learned counsel for the applicants submits that the learned Magistrate has overlooked the mandatory provisions of Section 198 of the Code of Criminal Procedure, 1973, which prohibits the court to take cognizance of an offence punishable under Chapter-XX of the Indian Penal Code⁴ (Offences relating to marriage), except upon the complaint made by some person aggrieved by the offence. He further submits that before proceeding with the investigation, no permission under Section 155(2) Cr.P.C. was obtained by opposite party no. 2 nor by the Investigating Officer, hence, the entire proceedings are void and illegal. In support of his submissions, learned counsel for the applicants has relied upon a judgement of this Court in the case of **Suraj Lal Jaiswal v. State of Uttar Pradesh**⁵.

4. It has further been argued by learned counsel for the applicants that in case the offence in question is non-cognizable, registration of FIR under Section 154 Cr.P.C. is bar. In context of non-cognizable offence, only NCR under Section 151 Cr.P.C. can be registered at the concerned police station, and permission of competent magistrate is mandatory for

carrying out investigation of non-cognizable offences for which NCR is lodged.

5. Relying upon the judgement of the Apex Court in the case of **Keshav Lal Thakur v. State of Bihar**⁶, learned counsel for the applicants submits that the police is entitled to investigate into a non-cognizable offence, pursuant to an order of a competent Magistrate under Section 155(2) Cr.P.C. In the present case, no such order has been passed, therefore, the cognizance order is bad in the eyes of law.

6. Stressing upon the aforesaid ground, learned counsel for the applicants prays that cognizance order and the proceedings of the case instituted against the applicants, may be quashed.

7. Learned A.G.A., on the other hand, could not dispute the legal position as argued by learned counsel for the applicants. However, he submits that a detailed discussion of legal position has been made by the court concerned in the order dated 19.07.2024, vide which the applicants have been summoned, therefore, the procedure as followed by the court concerned should have been in the manner as to be done in a complaint case.

8. I have heard Sri A.P. Mishra, learned counsel for the applicants, Sri Mayank Awasthi, learned Brief Holder for the State and perused the record.

9. Assailing the cognizance order and the proceedings of the case, under challenge, arguments have been advanced by learned counsel for the applicants in two fold: firstly, that charge sheet is not maintainable and cognizance can be taken by the Magistrate in view of Section 198(1)

Cr.P.C. Secondly, for non-cognizable offences NCR can be lodged, in which before proceeding with the investigation, permission under Section 155(2) Cr.P.C. is mandatory.

10. Before carrying out a detailed discussion on the submissions made by learned counsel for the applicants, it would be appropriate to understand the provisions of Sections 2(d) and Section 198(1) Cr.P.C. which are thus:

“2. Definitions:

(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.

198. Prosecution for offences against marriage.---(1). No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that—

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with

the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under (section 494 or 495)7 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister (,or, with the leave of the Court, by any other person related to her by blood, marriage or adoption)8.”

11. From reading of the aforementioned provisions of Section 2(d) and 198(1) Cr.P.C., it is clear that no cognizance can be taken by the Magistrate in view of Section 198(1) Cr.P.C. for an offence punishable under Chapter-XX of IPC except upon a complaint made by some person aggrieved by the offence, thus the complaint should be made by an aggrieved person to the Magistrate by making oral allegations or moving an application, in writing, with a view to his taking action under the Code, that some person, known or unknown has committed an offence, whereupon the Magistrate shall follow the procedure laid down in Section 200 Cr.P.C. onwards but it does not include the police report i.e. a report under Section 173(2) Cr.P.C.

13. Be that as it may, in the explanation to Section 2(d) of Cr.P.C., a report by a police officer which discloses a non-cognizable offence shall be deemed to be complaint but this explanation is not applicable under Chapter XX of IPC, thus, there was no complaint in the present case hence chargesheet itself is not maintainable and the cognizance order, therefore, on the basis of such charge sheet is vitiated.

14. On perusal of the cognizance order, this Court finds that though the court concerned has noted that a complaint

Amir Khan

G.A.

Criminal Law -Indian Penal Code,1860 -
Section 295-A-Applicant made certain post on social media -F.I.R -only those words - spoken or written with deliberate and malicious intention- to hurt the religious feelings of any class of citizen-can be categorized as offence u/s 295-A I.P.C-if it intends to insult a particular political party or a group who are not inextricably associated with any religion or its belief will not attract the ingredients of Section 295-A I.P.C-entire proceedings quashed.

List of Cases cited:

1. Amish Devgan Vs U.O.I., (2021) 1 SCC 1
2. Ramji Lal Modi Vs St. of U.P., AIR 1957 SC 620
3. Mahendra Singh Dhoni Vs Yerraguntla Shyamsundar & anr., (2017) 7 SCC 760

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

1. Compromise affidavit filed on behalf of the applicant is taken on record.

2. Heard Sri Amir Khan, learned counsel for the applicant, Sri Saurabh Kumar, holding brief of Sri Hemant Sharma, learned counsel for the opposite party no. 2 and Sri Pankaj Saxena, learned A.G.A. for the State.

3. The present 482 Cr.P.C. application has been filed to quash the entire proceedings of charge sheet dated 18.02.2019 in Criminal Case No. 620 of 2019 under Section 295-A I.P.C., Police Station- Khurja Nagar, District-Bulandshahr, pending in the court of

16. The parties are at liberty to move recall application before this Court, if they feel aggrieved by this order.

17. The application is accordingly **partly allowed.**

(2025) 1 ILRA 272
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2025

BEFORE

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

Application U/S 482 No. 43911 of 2019

Faraheem Qureshi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

learned Additional Chief Judicial Magistrate, Khurja, Bulandshahr as well as cognizance order dated 05.07.2019 passed by learned Additional Chief Judicial Magistrate, Khurja, Bulandshahr.

4. Contention of learned counsel for the applicant is that applicant made certain post on social media which is the basis for the F.I.R. in question. It is further submitted, even if entire allegation of F.I.R. as well as post of the applicant on social media is taken as true even then offence u/s 295-A I.P.C. is not made out as the basic ingredient u/s 295-A I.P.C. is deliberate and malicious intent to outrage religious feelings but in the post of the applicant, there is nothing which shows that it is directly or indirectly related to any religion or intended to outrage any religious feelings. It is further submitted that now the applicant and opposite party no. 2 have also settled their dispute amicably and a written compromise dated 20.11.2024 has also been entered into between them in which opposite party no. 2 has clearly stated that he does not want to pursue the impugned proceeding.

5. Per contra, learned A.G.A. has submitted that it is a State case which relates to the public at large and merely because opposite party no. 2 was the first informant, impugned proceeding cannot be quashed on the basis of compromise between the applicant and the first informant.

6. Considering the submissions of parties and on perusal of record, it appears that the applicant has posted a message on social media which is being quoted as under :-

पुलवामा अटैक, कहीं 2019 की तैयारी तो नहीं, मुझे तो ऐसा ही लगता है, ये

राजनीति बड़ी कुत्ती चीज़ है। आप लोग क्या सोचते हो।

7. This message was itself basis for lodging of F.I.R. and thereafter, filing impugned charge-sheet as no other material except the statement of opposite party no. 2 as well as the aforesaid message was the ground for filing the charge-sheet.

8. To attract the liability u/s 295-A I.P.C., basic condition is that the intention must be to outrage the religious feelings of any class of citizens, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of the class of citizens. Section 295-A I.P.C. is being quoted as under :-

"295A. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

9. From the perusal of the definition of Section 295-A I.P.C., it is clear that to attract the liability under this section, intention must be to outrage the religious feeling or religious belief of any class of citizen. If from the words, spoken or written or by any other mode, it appears that it was not for outraging the religious feeling but for other purpose like attacking on a political party or a particular group which is not associated in any manner to

any particular religion, then the offence under this section will not be attracted. It is also clear from Section 295-A I.P.C. that the intention to outrage the religious feeling should be deliberate and malicious. Therefore, if a person insults a religion unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feeling, that will also not attract the liability u/s 295-A I.P.C.

10. Vires of Section 295-A I.P.C. was challenged before the Apex Court in the case of **Ramji Lal Modi Vs. State of U.P.**, AIR 1957 SC 620, which was heard by the Constitution Bench and after hearing the matter, the Constitution Bench of the Apex Court upheld the validity of Section 295-A I.P.C. and observed that it does not affect the fundamental right guaranteed under Article 19(1)(a) of the Constitution of India. Paragraph nos. 8 and 9 of **Ramji Lal Modi (supra)** are being quoted as under :

“8. It is pointed out that Section 295-A has been included in Chapter XV of the Penal Code which deals with offence relating to religion and not in Chapter VIII which deals with offences against the public tranquility and from this circumstance it is faintly sought to be urged, therefore, that offences relating to religion have no bearing on the maintenance of public order or tranquillity and consequently, a law creating an offence relating to religion and imposing restrictions on the right to freedom of speech and expression cannot claim the protection of clause (2) of Article 19. A reference to Articles 25 and 26 of the Constitution, which guarantee the right to freedom of religion, will show that the argument is utterly untenable. The right to freedom of religion assured by those articles is expressly made subject to public

order, morality and health. Therefore, it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order. Those two articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order.

9. The learned counsel then shifted his ground and formulated his objection in a slightly different way. *Insults to the religion or the religious beliefs of a class of citizens of India may, says the learned counsel, lead to public disorders in some cases, but in many cases they may not do so and, therefore, a law which imposes restrictions on the citizens' freedom of speech and expression by simply making insult to religion an offence, will cover both varieties of insults i.e. those which may lead to public disorders as well as those which may not. The law insofar as it covers the first variety may be said to have been enacted in the interests of public order within the meaning of clause (2) of Article 19, but insofar as it covers the remaining variety will not fall within that clause. The argument then concludes that so long as the possibility of the law being applied for purposes not sanctioned by the Constitution cannot be ruled out, the entire law should be held to be unconstitutional and void. We are unable, in view of the language used in the impugned section, to accede to this argument. In the first place, clause (2) of Article 19 protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression "in the interest of public order", which is much wider than "for maintenance of public order. If, therefore, certain activities have a tendency to cause public*

disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction "in the interests of public order" although in some cases those activities may not actually lead to a breach of public order. In the next place, Section 295-A does not penalise any and every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. The calculated tendency of this aggravated form of insult is clearly to disrupt the public order and the section, which penalises such activities, is well within the protection of clause (2) of Article 19 as being a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression guaranteed by Article 19(1)(a). Having regard to the ingredients of the offence created by the impugned section, there cannot, in our opinion, be any possibility of this law being applied for purposes not sanctioned by the Constitution. In other words, the language employed in the section is not wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the fundamental right guaranteed by Article 19(1)(a) and consequently, the question of severability

does not arise and the decisions relied upon by the learned counsel for the petitioner have no application to this case."

11. The Apex Court again considered Section 295-A I.P.C. in the case of **Mahendra Singh Dhoni Vs. Yerraguntla Shyamsundar and Another, (2017) 7 SCC 760**. In that case, the Hon'ble Apex Court observed that Section 295-A I.P.C. does not stipulate everything to be penalised and every act would be insult or attempt to insult the religion or religious belief. It was further observed by the Apex Court that Section 295-A I.P.C. penalises only those acts of insult or attempts to insult the religion or religious belief which are deliberate and malicious with the intention to outrage the religious feeling of a class of citizen. Paragraph no. 6 of **Mahendra Singh Dhoni (supra)** is being quoted as under :

6. On a perusal of the aforesaid passages, it is clear as crystal that Section 295-A does not stipulate everything to be penalised and any and every act would tantamount to insult or attempt to insult the religion or the religious beliefs of a class of citizens. It penalises only those acts of insults to or those varieties of attempts to insult the religion or religious belief of a class of citizens which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class of citizens. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. The Constitution Bench has further clarified that the said provision only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the

religious feelings of that class. Emphasis has been laid on the calculated tendency of the said aggravated form of insult and also to disrupt the public order to invite the penalty.

12. The above legal position was again reiterated by the Apex Court in the case of **Amish Devgan Vs. Union of India, (2021) 1 SCC 1**, wherein the Apex Court observed that first part of Section 295-A I.P.C. specially refers to deliberate and malicious intention on the part of maker to outrage religious feeling of any class of citizens and last part referred to harm-based element, that is, insult or attempt to insult religions or religious belief of that class. Paragraph no. 100 of **Amish Devgan (supra)** is being quoted as under :

100. The two provisions have been interpreted earlier in a number of cases including Ramji Lal Modi v. State of U.P., AIR 1957 SC 620, Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955, Bilal Ahmed Kaloo v. State of A.P., (1997) 7 SCC 431. It could be correct to say that Section 295-A of the Penal Code encapsulates of all three elements, namely, it refers to the content-based element when it refers to words either spoken or written, or by signs or visible representation or otherwise. However, it does not on the basis of content alone makes a person guilty of the offence. The first portion refers to deliberate and malicious intent on the part of the maker to outrage religious feeling of any class of citizens of India. The last portion of Section 295-A refers to the harm-based element, that is, insult or attempt to insult religions or religious belief of that class. Similarly, sub-section (2) to Section 505 refers to a person making publishing or circulating any statement or report containing rumour or

alarming news. Thereafter, it refers to the intent of the person which should be to create or promote and then refers to the harm-based element, that is, likely to create or promote on the ground of religion, race, place of birth, residence, language, caste, etc. feeling of enmity. hatred or ill-will between different religions, racial language, religious groups or castes or communities, etc.

13. From the above analysis and legal position, it is clear that only those words which have been spoken or written with deliberate and malicious intention to hurt the religious feelings of any class of citizen, can be categorised as offence u/s 295-A I.P.C. It is further observed that merely because particular word or post on social media intends to insult a particular political party or a group who are not inextricably associated with any religion or its belief will not attract the ingredients of Section 295-A I.P.C. as it does not in any manner affect or outrage the religious feeling or belief of a class of citizen.

14. From the perusal of the post of the applicant made by him on social media which has been quoted as above, it is clear that no offence u/s 295-A I.P.C. is made out and there is no material on record that apart from this post, any other post on social media has been made by the applicant which could attract the ingredients of offence u/s 295-A I.P.C. Therefore, impugned proceedings deserves to be quashed.

15. This Court also observes that the objection of learned A.G.A. is also correct that if any F.I.R. has been lodged by particular person relating to offence against the society then on the basis of compromise between the accused and the first

informant, proceedings cannot be quashed in such cases which are against the public at large.

16. In view of the above, entire proceedings of charge sheet dated 18.02.2019 in Criminal Case No. 620 of 2019 under Section 295-A I.P.C., Police Station- Khurja Nagar, District-Bulandshahr, pending in the court of learned Additional Chief Judicial Magistrate, Khurja, Bulandshahr as well as cognizance order dated 05.07.2019 passed by learned Additional Chief Judicial Magistrate, Khurja, Bulandshahr, are hereby quashed.

17. This application is accordingly disposed of.

(2025) 1 ILRA 277

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 24.01.2025

BEFORE

THE HON'BLE RAJEEV SINGH, J.

Application U/S 483 No. 453 of 2024

Krishna Chandra Singh @ Munna Singh
...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:

Pankaj Kumar Verma, Karam Chand Yadav

Counsel for the Opposite Parties:

G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 145 & 482:- Application U/s 482 – for direction to the trial court – to decide the pending Criminal Revision within stipulated time to be fixed by this court – court finds that, during pendency of application, criminal revision

in question has already been decided, consequently present application is become infructuous and is dismissed accordingly – Court finds that, in the cases of *Imtiyaz Ahmad Vs St. of UP & Another*, *Sonu Agnihotry Vs Chandra Shekhar & ors.* & *All India Judges Association & other Vs UOI & ors.* Hon'ble Apex Court directed that endeavour should be made within five years to increase the judge-to-population ratios in trial judiciary to 50 per million – however, from perusal of personal affidavits filed by the Chief Secretary as well as Principal Secretary Law, Govt. of UP, - ration of 25 per million has not been achieved till the year 2024 – held, - issue is having wider impact on our judiciary system and therefore direction issued to creation of 9149 courts is related to interest of public at large – registry is also directed to registered this application as PIL as a separate case and place it before the Hon'ble Chief justice for appropriate direction. (Para – 10, 11, 12, 14)

Application pending as PIL. (E-11)

List of Cases cited:

1. St. of U.P. & ors. Vs Neeraj Chaubey & ors. – 2010 (10) SCC 320,
2. Sonu Agnihotry Vs Chandra Shekhar & ors. – 2024 SCC online SC 3382,
3. All India Judges Association & ors. Vs U.O.I. & ors. – 2002 (4) SCC 247,
4. Imtiyaz Ahmad Vs St. of UP & anr. – Misc. Application No. 2362-2370/2019 in Criminal Appeal No. 254-262 / 2012.

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

1. Heard learned counsel for the applicant and Shri Kuldeep Pati Tripathi, learned Additional Advocate General assisted by Shri Rao Narendra Singh, learned A.G.A. for the State.

2. The present application has been filed with the prayer to direct respondent no. 2, I Additional Session Judge, Bahraich

to decide Criminal Revision No. 132 of 2010 (Ramendra Singh & Ors. Vs. Jai Raj Singh & Ors.) within stipulated time to be fixed by this Court.

3. Insofar as the prayer sought in the present application is concerned, it is informed that Criminal Revision No. 132 of 2010 (supra) has already been decided by the court below vide order dated 23.07.2024 and, therefore, the application has become infructuous and is dismissed, accordingly.

4. However, looking to the genesis of the present matter, this Court on 08.07.2024 passed the following order :

“Heard Sri Pankaj Kumar Verma, learned counsel for the applicant and Sri Vinod Kumar Sahi, learned Additional Advocate General, who was called upon by this Court, assisted by Sri S.P. Tiwari, learned AGA for the State of U.P. as well as perused the record.

By means of this application, the applicant, who at present is aged about 51 years, has prayed for the following main relief:-

"Direct to the Opposite party no. 2 (Ist Additional Session Judge District Bahraich) to decide the criminal revision bearing no. 132/2010 (Ramendra Singh and others Versus Jai Raj Singh and others) which is pending before Opposite party no. 2 since 2010 within stipulated time as fixed by the Hon'ble Court in the interest of justice. 1."

It appears from the record that in the proceedings initiated under Section 145 Cr.P.C. bearing Case No. 37/57/106, an order was passed in favour of the applicant on 16.03.2010 by the Pargana Adhikari, Kaiserganj, Tehsil- Kaiserganj, District Bahraich and being aggrieved by the order

dated 16.03.2010, the opposite party Nos. 3 to 8 filed a revision i.e. Criminal Revision No. 132 of 2010 (Ramendra Singh and others vs. Jai Raj Singh and others), which has not been disposed of till date.

From the aforesaid, it is apparent that that 14 years have elapsed but the revision has not been decided till date.

While pressing the present application for the main relief sought, it is stated by the learned counsel for the applicant that according to the observations made by the Hon'ble Apex Court in paragraphs 24 and 25 of the judgment passed in the case of All India Judges' Association and others vs. Union of India and others reported in (2002) 4 SCC 247, which are extracted hereunder, the judges are not available in trial courts and for this reason, the trial courts are over burdened and in this view of the matter, the trial courts are unable to decide the cases expeditiously within reasonable time. In the instant case, the revision, which relates to summary proceedings, has not been decided even after lapse of 14 years. As such, the main prayer sought may kindly be acceded.

"24. Mr F.S. Nariman has drawn our attention to yet another important aspect with regard to dispensation of justice, namely, the huge backlog of undecided cases. One of the reasons which has been indicated even in the 120th Law Commission Report was the inadequate strength of Judges compared to the population of the country. Even the Standing Committee of Parliament headed by Shri Pranab Mukherjee in its 85th report, submitted in February 2002, to Parliament, has recommended that there should be an increase in the number of Judges. The said Committee has noted the Judge-population ratio in different countries and has adversely commented on

the Judge-population ratio of 10.5 Judges per 10 lakh people in India. The report recommends the acceptance, in the first instance, of increasing the Judge strength to 50 Judges per 10 lakh people as was recommended by the 120th Law Commission Report.

25. An independent and efficient judicial system is one of the basic structures of our Constitution. If sufficient number of Judges are not appointed, justice would not be available to the people, thereby undermining the basic structure. It is well known that justice delayed is justice denied. Time and again the inadequacy in the number of Judges has adversely been commented upon. Not only have the Law Commission and the Standing Committee of Parliament made observations in this regard, but even the Head of the judiciary, namely, the Chief Justice of India has had more occasion than one to make observations in regard thereto. Under the circumstances, we feel it is our constitutional obligation to ensure that the backlog of the cases is decreased and efforts are made to increase the disposal of cases. Apart from the steps which may be necessary for increasing the efficiency of the judicial officers, we are of the opinion that time has now come for protecting one of the pillars of the Constitution, namely, the judicial system, by directing increase, in the first instance, in the Judge strength from the existing ratio of 10.5 or 13 per 10 lakh people to 50 Judges per 10 lakh people. We are conscious of the fact that overnight these vacancies cannot be filled. In order to have additional Judges, not only will the posts have to be created but infrastructure required in the form of additional courtrooms, buildings, staff etc., would also have to be made available. We are also aware of the fact that a large number of vacancies as of today from

amongst the sanctioned strength remain to be filled. We, therefore, first direct that the existing vacancies in the subordinate courts at all levels should be filled, if possible latest by 31-3-2003, in all the States. The increase in the Judge strength to 50 Judges per 10 lakh people should be effected and implemented with the filling up of the posts in a phased manner to be determined and directed by the Union Ministry of Law, but this process should be completed and the increased vacancies and posts filled within a period of five years from today. Perhaps increasing the Judge strength by 10 per 10 lakh people every year could be one of the methods which may be adopted thereby completing the first stage within five years before embarking on further increase if necessary."

Upon due consideration of the aforesaid particularly the period of pendency of the revision challenging the order passed in the proceedings under Section 145 Cr.P.C. as also the observations made by the Hon'ble Apex Court in the case, referred above, this Court finds it appropriate to direct the concerned officers of the Court to apprise this Court as to what steps have been taken to comply the ratio as indicated in the judgment passed in the case of All India Judges' Association (supra).

Accordingly, Chief Secretary, Government of U.P. and Principal Secretary, Law/Legal Remembrance, Government of U.P. are directed to file personal affidavit within two weeks on the aforesaid.

List/put up this case as fresh on 25.07.2024 within top ten cases."

5. In pursuance of the aforesaid order, personal affidavits have been filed by Mr. Vinod Singh Rawat, Principal Secretary Law, Government of U.P., Civil

Secretariat, Lucknow on 20.08.2024, Mr. Manoj Kumar Singh, Chief Secretary, Government of U.P., Civil Secretariat, Lucknow on 07.09.2024 as well as by Mr. Deepak Kumar, Additional Chief Secretary, Department of Finance, Government of U.P., Civil Secretariat, Lucknow on 19.10.2024.

6. In the affidavit dated 20.08.2024 filed by Mr. Vinod Singh Rawat, it is admitted that in relation to the strength of judges, on the basis of population, Hon'ble Apex Court, in the case of **Imtiyaz Ahmad Vs. State of U.P. & Anr.** (Misc. Application No. 2362-2370 of 2019 in Criminal Appeal No. 254-262/2012), has observed that the report of Chairperson of National Court Management System Committee reveals that judge strength of courts in the district judiciary will have to be assessed by a scientific method to determine the total number of judicial hours required for disposing of the case load of each court. Hon'ble Apex Court also observed that since the Union Government is broadly in agreement with this approach, permission was granted to utilize it for the purpose of determining the required judge strength of the district judiciary.

It is also admitted in the said affidavit that the proposal of creation of courts has already been moved by the High Court, on the basis of requirements, relevant laws as well as directions of Hon'ble Supreme Court issued from time to time. Paragraph 6 of the affidavit, in which the observations made by the Hon'ble Apex Court in the case of **Imtiyaz Ahmad** (supra) have been quoted, is reproduced hereunder :

6. That it is also respectfully submitted that in relation to the number of Judges/Courts in the subordinate courts, the Hon'ble Supreme Court has been pleased to pass an order dated 02-01-2017 in Misc. Application No. 2362-2370 of 2019 in Criminal A No.254-262/2012 "**Imtiyaz Ahmad Vs. State of U.P. & another**" wherein the Hon'ble Supreme Court has been pleased to observe as follows:-

NCMSC has suggested that the clearance of backlog is not the sole or central basis determining judge strength. Several other critical parameters include (i) rate of case clearance: number of cases disposed of as a percentage of institution; (ii) on time disposal rate the percentage of cases resolved within an established time frame; (iii) pre-trial custody periods wherein an under-trial is in custody pending trial of a criminal case; and (iv) trial date certainty the proportion of important case processing provisions that are held according to the schedule finalized.

The approach which has been suggested, based on the unit system, is as follows:

"Applying The Unit System to Assess Required Judge Strength

(1) Number of judges required to dispose of the annual "flow" of new cases ("break even")

. Every court should calculate in units its average annual filing over the previous five years for all types of cases.

. Divide the annual filing units above by the number of annual units required to be disposed of by a judge for VERY GOOD performance.

. This will give for each court, the number of judges required to ensure "break even", i.e., disposal equals the number of new cases filed every year in that court. (ii)

Number of judges required for disposal of backlog of cases

. First, every court should calculate in units its backlog", i.e. the number of cases of all categories pending for more than the maximum time standard set by it for disposal (e.g., three years)

. Second, a suitable time period may be established within which this "backlog" should be cleared (e.g. 5 years).

. Third, divide the total backlog in units by the number of years within which it has to be cleared (e.g. 5 years). This will give the required annual disposal of "backlog".

. Fourth, divide the required annual disposal of backlog by the number of annual units required to be disposed of by each judge (units required for VERY GOOD performance).

. This gives the number of judges required to dispose of "the backlog" within the prescribed time frame.

. The judge strength so assessed should be monitored annually.

iii. Total number of judges required for achieving "break even" plus "disposal of backlog"

. Add the number of judges required for "break even" to the number of Judges required to disposal of backlog, as determined above.

iv. Trigger for creation of new courts."

7. In para 7 of the said affidavit, it is also mentioned that in pursuance of the decision of the Hon'ble Apex Court in the case of **Imtiyaz Ahmad (supra)**, the High Court has already proposed for creation of total 9149 courts vide Letter No. 9553/Main-B/Admin (A-3) dated 11.08.2021 and in consequence of the same, the Finance Department has advised

to create the 9149 courts in a phased manner.

Thereafter, a meeting was organised under the chairmanship of Chief Secretary, Government of U.P. on 22.04.2024, in which, creation of courts in the first phase was decided. Paragraphs 7 to 10 of the affidavit is reproduced hereunder :

"7. That in furtherance of the above decision of the Hon'ble Supreme Court regarding the determination and creation of the number of judges/courts in the District Court, the Hon'ble High Court of Allahabad has proposed for the creation of a total of 9149 courts vide letter no. 9553/Main-B/Admin (A-3) dated 11-08-2021. In consequence of the above proposal of Hon'ble High Court of Allahabad with regard to the creation of 9149 courts, the proposal was referred to the Finance Department for consent, in furtherance to which the Finance Department has advised to create the above 9149 courts in a phased manner.

In consultation of the above advice of the Finance Department it was requested to the Hon'ble High Court Allahabad to determine that the said courts shall be created in how many phases in furtherance to which the Hon'ble Court has been pleased to determine the same at the level of the governance. Thereafter in order to determine the phases of creation of 9149 courts in furtherance of the advice of the Finance Department and the proposal made by the Hon'ble High Court, Allahabad, a meeting was organized under the chairmanship of the Chief Secretary, Government of U.P on 22-04-2024. It is respectfully submitted that in the said meeting the creation of the courts in the first phase was decided/opined as under :-

(i) The sanctioned courts of the cadre of Higher Judicial Services/posts shall be doubled. At present there is 1690 Courts/posts are sanctioned in the cadre of Higher Judicial Services and as such to create 1690 additional courts/posts.

(ii) Total 50 % of the additional posts of the present 805 sanctioned courts/posts of Civil Judge (Senior Division) shall be created, which counts to 402 more courts/posts.

(iii) Total 50% of the additional posts of the present 1203 sanctioned courts/posts of Civil Judge (Junior Division) shall be created, which counts to 601 more courts/posts.

It was also decided that after the first phase, decision would be taken regarding creation of the remaining courts out of 9149, in compliance of the orders/directives passed by the Hon'ble Supreme Court in Misc. Application No. 2362/2370 of 2019 in Criminal A No-254-262/2012 "Imtiaz Ahmad Vs. State of U.P & others".

A true copy of the minutes of the meeting dated 22-04-2024 held under the chairmanship of the Chief Secretary Government of U.P. is enclosed herewith as

Annexure No.- 1 to this affidavit for kind perusal of the Hon'ble Court.

8. That it is respectfully submitted that in furtherance of the meeting held and the decision taken under the chairmanship of the deponent the proposal for creation of the above courts/posts, the file was referred to the Finance Department for consent of the Finance Department, in furtherance to which the Finance Department has made following inquiries/questions:-

(i) Details of the pending cases in the various courts of State.

(ii) Details of the new cases filed in the different courts 4-5 years before.

(iii) Action plan to dispose the pending cases on priority in a phased manner.

(iv) Details of the posts on the creation of each court.

(v) Details of expenditure on establishment, vehicle and other grants, office and residential buildings of the Hon'ble Courts.

(vi) Basis of the calculation of number of suits.

(vii) By making the NCMS report available on file, the status of pending cases in the State on the basis of national average.

(viii) Information related to AOR's letter.

9- That in addition to the above mentioned 8 points of para 5 above, the Finance Department has requested to sent a clear proposal providing information/related records on a total of 14 points including information previously sought:-

1. Details are not submitted with regard to the existing sanctioned posts of HJS, Civil Judge (Senior Division), Civil Judge (Junior Division) and details with regard to how many posts of different categories are sanctioned, have also not been given.

2. What standard has been set up by the State Government for the creation of posts and the details of the cases which are pending in different categories of courts in each district have not been mentioned in the comments.

3. Details of the posts required to be created as per the proposed courts and their categories and the financial expenditure required in proportion to the same have not been given by the administrative department.

4. It is noteworthy that as a result of the formation of subordinate courts, there is a need for proper arrangement of basic infrastructure facilities. Therefore, in view to provide the infrastructure facilities, the estimated expenditure burden has not been assessed, so that it can be made clear as to how much financial burden will be generated for the same.

5. Request has been made to Administrative Department to provide the details of Judge to case ratio.

6. Request shall be made to the Administrative Department to provide the existing examples in other States.

It is respectfully submitted that information regarding the above points no. 1 to 5 have been provided by the Hon'ble High Court, Allahabad vide letter no.4066/Main-B/Admin (A-3), dated 04-04-2022 and with respect of the point no. 6 a request has been made to obtain information from the state level itself.

10- That it is respectfully submitted that in order to provide information regarding point number (I-VII) mentioned in the above paragraph no. 5, the Hon'ble High Court, Allahabad has been requested by the government letter no. 570/Saat-Nyay-2-2023-Writ 09/2020 dated 11-07-2024 and to obtain information regarding point number 6 mentioned in paragraph no. 6 other States have been requested to provide requisite information vide letter no.600/Saat- Nyay-2-2024-writ 09/2020 dated 11-07-2024.”

8. Mr. Manoj Kumar Singh, Chief Secretary, Government of U.P., Civil Secretariat, Lucknow in his affidavit dated 09.09.2024 also admitted that the request of the High Court with regard to creation of 9149 courts has been considered and in the meeting held on 22.04.2024, it has been decided that in

the first phase, 2693 posts would be created.

Paragraphs 1 to 8 of the said affidavit dated 09.09.2024 are as under :

“1. That the deponent is presently posted as Chief Secretary, Government of U.P and the deponent is filing the instant personal affidavit in compliance of the order dated 08-07-2024 and 25.07.2024 passed by the Hon'ble Court.

2. That Hon'ble Supreme Court has been pleased to pass an order dated 02-01-2017 in Misc. Application No. 2362-2370 of 2019 in Criminal A No.254-262/2012 "Imtiyaz Ahmad Vs. State of U.P. & another" for creation of additional courts in districts.

3. That based on the formula suggested by the Hon'ble Supreme Court in above case, Hon'ble High Court vide its letter no.9553/Main-B/Admin (A-3) Dated 11.08.2021 sent a proposal of creation of 9,149 Courts. This is based on the criteria suggested by National Court Management Committee (NCMS). The recommendation of the NCMS has been accepted by the Hon'ble Supreme Court in Criminal A No.254-262/2012 "Imtiyaz Ahmad Vs. State of U.P. & another".

4. That in furtherance of the above proposal of Hon'ble High Court with regard to the creation of 9149 courts, a request had been made to the Hon'ble High Court by the Government vide its letter dated 21.07.2023 seeking guidance on number of phases in which these additional Courts be created. In pursuance to Government's above request the Registrar General Hon'ble High Court vide letter dated 18.09.2023 has proposed that the Government should take decision on phasing of these 9149 courts.

5. A request letter dated 24.07.2024 was sent by the Government to the Registrar General, Hon'ble High Court about the information on pendency of cases in District Courts. The response to above letter has been received on 13.08.2024. The information furnished shows a pendency of approximately 1.11 crores cases and disposal of approximately 1.04 lacs in a year (April 2022 to March 2023).

6. Hon'ble High Court in its order dated 25.07.2024 has observed that "... To file better affidavit after taking note of present population of the State of U.P.". The present population of the State is approximately 24 crores. The norm of Judge to population ratio of 50 judges on 10 lac population requires creation of 12000 Courts.

7. The number of existing District level Courts is approximately 3500, so there is a gap of 8500 by above Judge to Population formula. The huge pendency of cases and the number of cases being disposed in a year as give in Para- 5 above cannot be handled by only increasing the number of Courts. There is a definite requirement of streamlining the other processes and ensuring higher number of disposal by each district level Court.

8. That to decide the number of phases a meeting was organized under the chairmanship of the Chief Secretary, Government of U.P on 22-04-2024. It is respectfully submitted that in first phase it has been decided to create 2693. The details of which are as follows:

(i) The sanctioned courts of the cadre of Higher Judicial Services/posts shall be doubled. At present there is 1690 Courts/posts are sanctioned in the cadre of Higher Judicial Services and as such to create 1690 additional courts/posts.

(ii) Total 50% of the additional posts of the present 805 sanctioned

courts/posts of Civil Judge (Senior Division) shall be created, which counts to 402 more courts/posts.

(iii) Total 50% of the additional posts of the present 1203 sanctioned courts/posts of Civil Judge (Junior Division) shall be created, which counts to 601 more courts/posts.

It was also decided that after the first phase, decision would be taken regarding creation of the remaining courts out of 9149, in compliance of the orders/directives passed by the Hon'ble Supreme Court in Misc. Application No. 2362/2370 of 2019 in Criminal A No- 254-262/2012 "Imtiaz Ahmad Vs. State of U.P & others".

A true copy of the minutes of the meeting dated 22-04-2024 held under the chairmanship of the deponent is enclosed herewith as **Annexure No. 1** to this affidavit for kind perusal of the Hon'ble Court."

9. Mentioning the similar facts, Mr. Deepak Kumar, Additional Chief Secretary, Department of Finance, Government of U.P., Civil Secretariat, Lucknow, in his affidavit dated 19.10.2024, stated that the State Government is ensuring the compliance of the directions of the Hon'ble Apex Court in the case of **Imtiyaz Ahmad (supra)** to make 9149 courts operational. It is also admitted in the affidavit that points have already been considered in the meeting held on 15.10.2024 under the chairmanship of Chief Secretary, Government of U.P.

Paragraphs 4 to 12 of the said affidavit are as under :

"4- That it is respectfully submitted in compliance to the order dated 17-07-2021 passed by the Hon'ble Supreme Court in Misc. Application No. 23522370 of 2019 in Criminal A No. 254-262/2012

"Imtiyaaz Ahmad Vs. State of U.P. & another", a total of 9149 courts are to be constituted in the State in different phases.

5- That in the context of Goal No. 16 of Sustainable Development Goals 2030, a one-time plan is also made to increase the number of courts and judges on per lakh of population.

6- That vide order dated 02-01-2017 passed by the Hon'ble Supreme Court the number of judges in the subordinate courts are to be determined as per the number of cases pending in the courts.

7- That at present, there are 3698 sanctioned courts in the State of Uttar Pradesh. Under SDG Goal No. 16, there should be 4.25 courts on per lakh of population. At present, 1.59 courts have been created on per lakh of population in the State of Uttar Pradesh, whereas the national average is 1.85 on per lakh of population and thus, the number of courts on per lakh of population in the State of Uttar Pradesh is much less than the national average.

8- That in reference to Goal No. 16 of Sustainable Development Goals, 2030, the Government of U.P, Nyay Anubhag- 2 (Subordinate Courts), a meeting was organized under the chairmanship of the Chief Secretary on 22-04-2024 in order to increase the number of courts and Posts on per one lakh of population.

9- That in compliance of the orders/directives passed by the Hon'ble Supreme Court in Misc. Application No. 2362.2370 of 2019 in Criminal Case No. 254.262/2012, "Imtiyaz Ahmad Vs. State of U.P. & another", regarding formation of 9149 courts in the State, a meeting was held on 22-04-2024 under the chairmanship of the Chief Secretary, wherein a decision has been taken to set up 2693 courts in the

first phase as against the total proposed 9149 courts, as follows:-

(i) The number of courts/posts sanctioned in HJS cadre at present should be doubled. At present, 1690 courts/posts are sanctioned in HJS cadre and 1690 more courts/posts should be created.

(ii) 50% of the present sanctioned number of 805 Courts/posts of Civil Judge (Senior Division) should be created i.e. 402 more Courts/posts should be created.

(iii) 50% more courts/posts of Civil Judge (Junior Division) out of the present sanctioned number of 1203 courts/posts be created i.e. 601 more courts/posts be created.

10- That in the 75 Districts of the State, there are 2443 courts of HJS cadre, 3966 courts of Civil Judge (Senior Division), 2740 courts of Civil Judge (Junior Division), thus in the process of formation of total 9149 courts, the current status of the created, filled and vacant posts is shown in a table, which is as follows:-

S I	Cad re	San ctio ned Stre ngth	Wo rki ng Str eng th	Va can cy	Propo sed Streng th In compl iance of Hon. S.C. order Imtiya z Ahma d vs UP State dt. 17.07. 2021 for	Tota l Prop osed San ctio ned Stre ngth 8=3 +6(b)

					NCM Sc		
1	2	3	4	5	6 a	6 b	
1	Hig her Jud icia l ser vic e	169 0	126 8	422	1 1 5 2	2 4 4 3	413 3
2	Civ il Jud ge (Ju nior Div isio n)	805	575	230	4 4 7 3	3 9 6 6	477 1
3	Civ il Jud ge (Se nior Div isio n)	120 3	889	314	2 3 8 4	2 7 4 0	394 3
4		369 8	273 2	966	8 0 0 9	9 1 4 9	128 47

Note:

. Out of total 3698 sanctioned Courts, 02 Courts at Gonda 9 one each in the cadre of Civil Judge, S.D and Civil Judge, J.D.) and 02 courts Moradabad (one each in the cadre of Civil Judge, S.D. and Civil Judge, J.D.) have been kept in abeyance.

. 212 temporary Fast Track Courts i.e. 72 in H.J.S. Cadre, 72 in Civil

Judge strength. The term of these courts has been extended up to 29.02.2024."

11- That in the meeting convened on 15-10-2024 under the chairmanship of the Chief Secretary, after a due consideration with the present departments following opinion has been settled :-

(i) On the basis of the report of N.C.M.S.C constituted by Hon'ble Supreme Court, in view of the 9149 different categories of courts enumerated by Hon'ble High Court, Allahabad and accordingly keeping in view the number of posts, in the first year, 900 courts/posts (as per the proposal of the department of Law mentioned in the meeting convened at the level of the Chief Secretary on 22.04.2024, H.J.S 75 X 3 = 225, Civil Judge Senior Division 75 X 5 = 375, Civil Judge Junior Division 75 X 4= 300 i.e. total 900) shall be established.

(ii) Similarly, in the second year, again 900 courts of different categories and corresponding posts will be established and in each of the subsequent 7 years, different categories of courts and corresponding posts will be established. As per the above procedure, in the final tenth year, 1049 courts of different categories and corresponding posts will be established, achieving the target of total 9149 courts/posts and ensuring

compliance of the decision dated 02-01-2017 passed by the Hon'ble Supreme Court in "Imtiyaz Hussain Vs. State of U.P."

(iii) It was also expected that efforts would be made by the Law Department to fill up a total existing 966 vacancies in present (422 of H.J.S, 230 for Civil Judge Senior Division (C.J.S.D) and 314 for C.J.D),

(iv) Besides this, the Law Department will also inform, firstly about the estimated expenditure covered by the

recurring (maintenance work) and non-recurring (construction work) related to establishment of one office of each level of Court such as H.J.S, CJSD and CJJD and secondly, about the recurring expenditure related to salary etc. of supporting staff relating to each level of court in the light of arrangements made in the standard Government Orders for creation of posts.

It is necessary to inform about the estimation of estimated recurring and non-recurring expenditure by the Law Department so that the Finance Department may make appropriate budget provision in respect of estimated expenditure related to establishment of posts in 900 different categories of each courts and office staff, every year, in the Budget Estimates of each year for the Law Department in time and as required.

(v) It is also expected that on receipt of the final report of the NCMSC, the Department of Law will reconsider the matter in due course and as necessary.

12- That in the meeting held on 22-04-2024, under the chairmanship of Chief Secretary, after due deliberation, in continuation of the opinion taken regarding creation of 2693 courts against the total proposed 9149 courts in the first phase, on 15-10-2024, 900 courts of different categories and the posts accordingly in the first years, similarly 900 again in the second year as aforesaid and 900 courts of different categories and the post accordingly in each year in the subsequent 07 years, while establishing 1049 courts of different categories and the posts accordingly in the final tenth year, ensuring compliance of the decision dated 02-01-2017 passed by the Hon'ble Supreme Court in "Imtiyaz Hussain Vs. State Government", a target of total 9149 courts/posts will be achieved."

10. In a recent judgment of Hon'ble Apex Court dated 22.11.2024 passed in the case of **Sonu Agnihotri Vs. Chandra shekhar & Ors., 2024 SCC OnLine SC 3382**, it is observed by the Hon'ble Supreme Court that in the case of **All India Judges' Association & Ors. Vs. Union of India (UOI) & Ors., (2002) 4 SCC 247**, it was directed that endeavour should be made within five years to increase the judge-to-population ratio in trial judiciary to 50 per million. However, the ratio of 25 per million has not been achieved till the year 2024.

11. This Court also notices that several petitions are being filed before this Court, like the present one, for expedite disposal of the suits, trial of criminal cases pending before the Magistrate, trial of session matters as well as matters related to family dispute along with other matters.

It is crystal clear from the affidavits filed by Mr. Vinod Singh Rawat, Principal Secretary Law, Government of U.P., Civil Secretariat, Lucknow, Mr. Manoj Kumar Singh, Chief Secretary, Government of U.P., Civil Secretariat, Lucknow as well as by Mr. Deepak Kumar, Additional Chief Secretary, Department of Finance, Government of U.P., Civil Secretariat, Lucknow that the directions of the Hon'ble Apex Court passed in the case of **All India Judges' Association & Ors.** (supra) on 21.03.2002, which has been taken note of in the case of **Sonu Agnihotri** (supra) by the Hon'ble Apex Court, has not been complied with till today.

12. Learned members of the Bar jointly submitted that this issue is having wider impact on our judicial system and, therefore, requested that the issue may be

dealt as Public Interest Litigation for ensuring the 9149 courts operational.

13. Hon'ble Supreme Court has already laid down that, in case of a situation, in which, issue of public interest is involved, the same may be referred to the Bench dealing with PIL matters. Reference may be made to Para 10 of the decision of Hon'ble Apex Court in the case on **State of Uttar Pradesh & Ors. Vs. Neeraj Chaubey & Ors., (2010) 10 SCC 320**, which reads as under :

“10. In case an application is filed and the Bench comes to the conclusion that it involves some issues relating to Public Interest, the Bench may not entertain it as a Public Interest Litigation but the court has its option to convert it into a public interest litigation and ask the Registry to place it before a Bench which has jurisdiction to entertain the PIL as per the Rules, guidelines or by the roster fixed by the Chief Justice but the Bench cannot convert itself into a PIL and proceed with the matter itself.”

14. In view of above facts and circumstances, this Court is of the view that the issue related to creation of 9149 courts is related to interest of public at large and, therefore, the Registry is directed to register the PIL as a separate case and place it before Hon'ble the Chief Justice for appropriate direction.

(2025) 1 ILRA 288

**ORIGINAL JURISDICTION
CIVIL SIDE**

**DATED: LUCKNOW 30.01.2025
BEFORE**

THE HON'BLE ABDUL MOIN, J.

Writ A No. 17904 of 2020
With other connected cases

**Om Prakash & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Petitioners:

Sanjay Kumar Srivastava, Akshat Kumar,
Jitendra Singh

Counsel for the Respondent:

C.S.C., Puneet Singh, Rishabh Kapoor

Civil Law - Uttar Pradesh Water Supply and Sewerage Act, 1975 - Sections 8 & 89 - Constitution of India, 1950 - Article 226 - Salary, family pension - Retrospective regularization - Petitioners initially appointed on daily wages basis in Nigam - By Government order dated 12.04.2011 they were regularized with immediate effect - Later on, Nigam passed order dated 26.04.2011 regularized petitioners w.e.f Government order - Nigam on its own accord indicated for purpose of pay fixation, petitioners would be entitled for counting of their service after five years of continuous service of their initial appointment i.e w.e.f 01.04.1991 to 01.04.1995, no arrears admissible for aforesaid period till 11.04.2011 - Nigam order was contrary to Government order, various letters including letter dated 12.02.2020 were written seeking clarification. (Para 23, 25)

St. Government by impugned order dated 18.08.2020 declared all regularizations done w.e.f 01.04.1991 to 01.04.1995 wrong and cancelled, any payment/pay fixation, increments, time scale of pay etc. given are erroneous and pay fixation modified by regularized w.e.f 26.04.2011, direction for recovery of excess amount paid, department action against guilty officials and petitioners entitled for New Pension Scheme w.e.f 01.04.2005 - Nigam withdrawn benefits pertaining to pay fixation. (Para 26, 27)

Held, when Government decided to regularize with immediate effect, Nigam bound by said directions and could not proceed beyond order and granted any

benefits retrospectively - No vested right accrued to petitioners to claim benefit, no error committed by St. Government and Nigam. (Para 34)
By not challenging Government order, petitioners themselves believed regularization with prospective effect and not retrospective effect - Thus, respondents are restraining from recovery of pension, excess amount on account of fixation or gratuity from petitioners who retired prior to issuance of impugned orders. (Para 41, 45, 47)

Writ petition partly allowed. (E-13)

List of Cases cited:

1. St. Of Punjab & ors. Vs Rafiq Masih (White Washer), (2015) 4 SCC 334, (Para 12)
2. S.L.Kapoor Vs Jagmohan & ors., MANU/SC/0036/1980, (Para 17)
3. Aligarh Muslim University Vs Mansoor Ali Khan, MANU/SC/0533/2000
4. Central Council for Research in Ayurvedic Sciences & anr. Vs Bikartan Das & ors., (2023) SCC OnLine SC 996, (Para 51)

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

1. Heard Shri Sanjay Kumar Srivastava, Shri Jitendra Singh and Ms. Savita Jain, learned counsels for the petitioners, learned Standing Counsel for the State respondents, Shri Rishabh Kapoor, Shri Madhav Om, Advocate holding brief of Shri Samir Om and Shri Ankit Singh, learned counsels appearing on behalf of the Jal Nigam.

2. Learned counsels appearing on behalf of the contesting parties contend that the issue involved in all the aforesaid writ petitions is same. As such, the Court proceeds to hear and decide all the writ petitions together by a common order. For the sake of convenience,

the facts of WRIT - A No. - 17904 of 2020 are being taken into consideration.

3. Instant writ petition (WRIT - A No. - 17904 of 2020) has been filed praying for the following main reliefs:-

"(I) Issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 18.08.2020 passed by the Opposite Parties No. 1 & 2 contained as Annexure No. 1 to the writ petition.

(II) Issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 20.08.2020 passed by the Opposite Party No. 4 contained as Annexure No. 2 to the writ petition.

(III) Issue writ, order or direction in the nature of mandamus commanding the Opposite Parties not to give effect of the impugned orders dated 18.08.2020 and 20.08.2020 passed by the Opposite Parties No. 1, 2 & 4 contained as Annexure No. 1, 2 & 4 to the writ petition.

(IV) Issue writ, order or direction in the nature of mandamus commanding the Opposite Parties to continue to make payment of salary and other service benefits regularly every month including future post-retiral dues and pension as and when it becomes due ignoring the imugned orders to the petitioners No. 1 to 227 and 2870.

(V) Issue writ, order or direction in the nature of mandamus commanding the Opposite Parties to continue to make paymet of pension/family pension along will all other post-retiral dues as and when it becomes due to the petitioners no. 2272 to 2869 ignoring the impugned orders."

4. As per the learned counsels appearing on behalf of the contesting parties, the petitioners of the instant writ petition and other connected writ petitions

can be divided into three categories namely:-

(A) the petitioners who have retired prior to passing of the impugned orders dated 18.08.2020 & 20.08.2020 and have received their retiral dues and are in receipt of pension.

(B) the petitioners who have retired from service on attaining the age of superannuation during pendency of the instant writ petition and

(C) the petitioners who are in service.

5. Bereft of unnecessary details, the facts of the case are that all the petitioners, were initially appointed on daily wages basis/muster roll/work charge basis in the Uttar Pradesh Jal Nigam (In short "Nigam") and were continuing to work in the same capacity when in pursuance to the Government order dated 12.04.2011, a copy of which is annexure 15 to the writ petition, which directed for regularization of the services of the persons like the petitioners with immediate effect, were regularized vide order dated 26.04.2011 issued by the Nigam, a copy of which is annexure 16 to the writ petition. In pursuance to the order dated 26.04.2011, the pay of the petitioners were fixed w.e.f completion of five years of continuous service after their appointment as specified in paragraph 6 of the order dated 26.04.2011 but were not granted any arrears on account of the said fixation up to 11.04.2011.

6. It is contended by the learned counsel appearing on behalf of the contesting parties that at the time of filing of the writ petitions, the Nigam was one unit but subsequent thereto, it has been bifurcated into Uttar Pradesh Jal Nigam

Urban and Uttar Pradesh Jal Nigam Rural. However, it is stated by the learned counsel for the contesting parties that the said bifurcation would not make any difference to the orders impugned.

7. Subsequent to the said orders and prior to passing of the orders impugned dated 18.08.2020 & 20.08.2020, various petitioners retired and received gratuity and other retiral dues and are in receipt of pension on the basis of the said regularization orders which were passed with retrospective effect.

8. It is contended that the subsequent to the order dated 26.04.2011, a letter dated 12.02.2020, copy of which is annexure 17 to the writ petition was sent by the Nigam to the State Government seeking clarification as to whether those persons who have been regularized w.e.f a previous date, whether they should be given the service benefits/retiral benefits on the basis of the regularization with retrospective effect or by treating the date of regularization as 12.04.2011. Various letters were also earlier sent by the Nigam in this regard to the State Government.

9. The State Government thereafter issued the order impugned dated 18.08.2020, a copy of which is annexure 1 to the writ petition directing that (a) regularization orders w.e.f. 04.1991/01.04.1992/.01.04.1993/01.04.1994/01.04.1995 are erroneous and should be cancelled (b) the benefits which have been given with effect from 01.04.1991/01.04.1992/.01.04.1993/01.04.1994/01.04.1995 upto 26.04.2011 i.e annual increments, time scale of pay, ACP etc have erroneously been granted and the same should be rectified by considering the date of regularization as 26.04.2011 and the

excess amount paid should be recovered and action should be taken against the guilty officials and (c) as the regularization had to be done with immediate effect i.e in terms of the order dated 26.04.2011 and new pension scheme having come into force w.e.f 01.04.2005 as such, none of the persons would be entitled for the benefit of the old pension scheme.

10. In pursuance thereof, the consequential order impugned dated 20.08.2020, a copy of which is annexure 2 to the writ petition was passed by Nigam reiterating the order dated 18.08.2020 and taking away the service benefits accrued to the petitioners on account of the regularization prior to 26.04.2011, treating the petitioners as regularized w.e.f 26.04.2011 and for treating such regular person as covered by New Pension Scheme.

11. Being aggrieved by the orders impugned dated 18.08.2020 & 20.08.2020, the instant writ petition has been filed.

12. The grounds taken by the learned counsel for the petitioners seeking to challenge the order impugned dated 18.08.2020 are that as vested rights have accrued to the petitioners on account of the retrospective regularization in terms of the order dated 26.04.2011 that had been issued by the Nigam and which was cancelled without affording any opportunity of hearing consequently, the said order is in gross violation of the rules of natural justice and as such, merits to be quashed on this ground alone.

13. Another ground which has been taken by the learned counsels for the petitioners is that the petitioners have already received the higher pay and other

attendant benefits on account of the order dated 26.04.2011 and they being Class-IV employees as such, keeping in view the law laid down by the Apex Court in the case of **State Of Punjab & Ors vs Rafiq Masih (White Washer)- (2015) 4 SCC 334**, the said monetary benefits cannot be recovered from them..

14. Yet another ground which has been taken by the learned counsel for the petitioners is that once a large number of petitioners had retired prior to passing of the impugned orders dated 18.08.2020 & 20.08.2020 and have also received the pension and other retiral benefits consequently, the same cannot be taken away retrospectively by means of the orders impugned.

15. Responding, Sri Rishabh Kapoor, Sri Samir Om and Sri Ankit Singh, learned counsels appearing on behalf of the contesting parties have argued that admittedly all the petitioners were working on daily wages basis/muster roll/work charge basis in the Nigam. An order dated 12.04.2011 was issued by the State Government for regularizing persons like the petitioners with immediate effect. By means of the said Government order, posts were also created on which the eligible persons were to be regularized.

16. In pursuance thereof, the Nigam passed an order dated 26.04.2011 whereby the services of the petitioners were regularized with effect from the issuance of the Government order dated 12.04.2011. For the purpose of their pay fixation alone, it was provided that they would be entitled for benefits at par with those persons who had been regularized previously after completion of five years of continuance in service with effect from the date of their

appointment but no arrears for the said period up to 11.04.2011 would be payable. Thus, by means of the order dated 26.04.2011, the pay fixation of the petitioners was also done.

17. It is contended that when the fault of fixation of pay and other benefits retrospectively was discovered, the State Government issued the Government order dated 18.08.2020 by which the fault committed by the Nigam was indicated and it was directed to cancel the regularizations which have been made w.e.f 01.04.1991, 01.04.1992, 01.04.1993, 01.04.1994 & 01.04.1995; to recover the benefits of annual increment, time scale of pay etc. which was erroneously granted on the basis of treating the regularization with retrospective effect and that the regularization of the persons should only be treated w.e.f 26.04.2011 and consequently, the said persons would only be entitled for the benefit of the new pension scheme. On the basis of the same, the Nigam also issued the order impugned dated 20.08.2020.

18. The argument of Sri Kapoor is that when the Government order dated 12.04.2011 itself indicated that the regularization was to be made with immediate effect and in pursuance thereof, the Nigam issued the order dated 26.04.2011 categorically specifying that the regularization of the petitioners was being done with effect from the date of issuance of the Government order dated 12.04.2011 consequently, any benefit of pay fixation etc. which has been given with retrospective effect erroneously to the petitioners is clearly impermissible in the eyes of law.

19. Further argument is that the petitioners have not challenged either the Government order dated 12.04.2011 wherein the services of the petitioners were directed to be regularized with immediate effect as well as the order dated 26.04.2011 passed by the Nigam which has regularized their services w.e.f 12.04.2011 and thus having acquiesced to the said orders, they cannot be permitted to challenge the orders impugned.

20. The other argument of Sri Kapoor is that considering Section 89 read with Section 8 of the Uttar Pradesh Water Supply and Sewerage Act, 1975 (hereinafter referred to as "Act, 1975"), the Nigam is guided by directions on question of policy as may be given to it by the State Government and further even the appointment of the petitioners, as has been done in the instant case, would be governed by Section 8 of the Act, 1975 which categorically provides that the appointment of the employees has to be done as per the general or special order determining the terms and conditions with the approval of the State Government.

21. Sri Kapoor also argues that considering the fact that the Government order had only directed for regularization of the petitioners w.e.f 12.04.2011 consequently, any benefit which has been given to the petitioners erroneously and on account of an erroneous interpretation of the Government order dated 12.04.2011 by the Nigam as finds place in paragraph 6 of the order dated 26.04.2011 as issued by the Nigam would not vest any right to the petitioners, the same being erroneous and against the provisions of the Act, 1975.

22. Heard learned counsel appearing on behalf of the contesting parties and perused the records.

23. From the arguments as raised by the learned counsel appearing on behalf of the contesting parties and perusal of records it emerges that the petitioners were initially appointed on daily wages basis/muster roll/work charge basis in the Nigam and were continuing to work in the same capacity. The Government order dated 12.04.2011 was issued directing for regularization of the services of the persons like the petitioners with immediate effect. For the purpose of the regularization, various posts were also created. In pursuance thereof, the Nigam passed the order dated 26.04.2011 regularizing the petitioners in service w.e.f the date of issuance of the said Government order i.e 12.04.2011. However, in paragraph 6 of the order dated 26.04.2011, despite the Government order dated 12.04.2011 not providing so, the Nigam on its own accord indicated that only for the purpose of pay fixation, the petitioners would be entitled for counting of their service after five years of continuous service of their initial appointment i.e w.e.f 01.04.1991, 01.04.1992, 01.04.1993, 01.04.1994 & 01.04.1995. It was also provided that the pay fixation of the petitioners would be done but no arrears would be admissible to them for the aforesaid period till 11.04.2011.

24. In pursuance thereof, the pay fixation of the petitioners were done.

25. When the fault was discovered by the Nigam of having passed an order which was contrary to the Government order dated 12.04.2011 which had only directed for regularization of the petitioners with

immediate effect from the date of the issuance of the aforesaid Government order consequently, the Nigam sent various letters including a letter dated 12.02.2020 seeking a clarification as to whether the benefits that have been given to the petitioners by treating their regularization with retrospective effect, can be said to be valid or that the petitioners would be entitled for the benefits w.e.f the date of their regularization i.e 12.04.2011.

26. The same has resulted into the Government order/impugned order dated 18.08.2020 being passed by the State Government directing that all the regularizations that have been done w.e.f 01.04.1991, 01.04.1992, 01.04.1993, 01.04.1994 & 01.04.1995 are wrong and should be cancelled; any payment/pay fixation, increments, time scale of pay etc. which has been given w.e.f the aforesaid dates of 1991 to 1995 are erroneous and the said pay fixation should be modified by treating the persons regularized w.e.f 26.04.2011 and that the excess amount paid to the persons be recovered and an appropriate department action be taken against the guilty officials and that as the petitioners have been regularized vide order dated 26.04.2011 consequently, they would be entitled only for the New Pension Scheme which has come into force w.e.f 01.04.2005.

27. In pursuance thereof, the Nigam passed the order impugned dated 20.08.2020 reiterating the said order and withdrawing the benefits that had been given to the petitioners pertaining to pay fixation etc and hence the petitions.

28. Various grounds have been taken by the learned counsel for the petitioners for challenging the orders impugned dated

18.08.2020 & 20.08.2020 including the ground that the vested rights which accrued to the petitioners prior to passing of the orders impugned could not be withdrawn; no opportunity of hearing having been accorded to the petitioners prior to passing of the orders impugned and keeping in view the law laid down by the Apex Court in the case of **Rafiq Masih (White Washer) (supra)** no recovery can be made from the petitioners for the excess amount that has been received by them as they are all Class-IV employees.

29. The aforesaid grounds though attractive on the face of record are found to be patently misconceived.

30. The reason is that a perusal of the order dated 12.04.2011 as passed by the State Government itself indicates that the petitioners were to be regularized with immediate effect. The Nigam on its own accord and erroneously interpreting the order dated 12.04.2011 regularized the petitioners with retrospective effect and also granted them pay fixation which could not have validly been done considering the provisions of Section 8 and 89 of the Act, 1975 which read as under:-

"8. Appointment of employees.

(1) Subject to the provision of sub-section (2), the Nigam may appoint such employees as it considers necessary on such terms and conditions as it thinks fit for the efficient performance of its functions: Provided that the appointment of such employees as the State Government may, by general or special order specify, shall be made in their terms and conditions shall be determined with the approval of the State Government.

2) The Nigam may, with the previous approval of the State Government,

appoint a servant of the Central Government or the State Government as an employee of the Nigam on such terms and conditions as it thinks fit.

89. Directions to the Nigam on questions of policy.

(1) In the discharge of its functions, the Nigam shall be guided by such directions on questions of policy as may be given to it by the State Government.

(2) If any question arises whether any matter is or is not a matter as respects which the State Government may issue a direction under sub-section (1), the decision of the State Government shall be final."

31. A perusal of Section 8 of the Act, 1975 indicates that the Nigam may appoint such employees as it considers necessary. The proviso to sub Section (1) of Section 8 of the Act, 1975 provides that the appointment of such employees as the State Government may, by a general or special order specify, shall be made on the terms and conditions as determined with the approval of the State Government.

32. Likewise, Section 89 of the Act, 1975 categorically provides that in the discharge of its functions, the Nigam shall be guided by such directions on questions of policy, as given to it by the State Government.

33. When Sections 8 & 89 of the Act, 1975 are read, they clearly provide that the appointments of the employees and the terms and conditions are to be determined with the approval of the State Government and that in the discharge of its function, the Nigam shall be guided by the directions on question of policy as given by the State Government.

34. When the State Government took a conscious decision of regularizing the persons working in the Nigam and their regularization was only with immediate effect vide order dated 12.04.2011 consequently, the Nigam was bound by the directions that had been issued by the State Government and could not have proceeded beyond the said order i.e beyond regularizing the employees like the petitioners with effect from the date of the Government order dated 12.04.2011 and could not have granted any benefits retrospectively including the benefits of pay fixation etc. Thus, in case the Nigam on its own accord gave certain benefits to the petitioners which were erroneous and beyond the Government order dated 12.04.2011 consequently, considering the provisions of the Act, 1975 and the Government order dated 12.04.2011, no vested right accrued to the petitioners to claim benefit of the same and thus no error has been committed by the State Government and the Nigam while passing the orders impugned of withdrawing the benefits as had erroneously been given to the petitioners by treating their regularization retrospectively. □

35. So far as the ground that no opportunity of hearing had been accorded to the petitioners prior to passing of the orders impugned, it is settled proposition of law that natural justice is not an empty formality and in case only one view is possible then there would not be any requirement of giving an opportunity of hearing.

36. The Court has itself considered as to whether any other view was possible to be taken in the matter and as to whether in case any opportunity would have been

accorded to the petitioners, could a different view be possible ?

37. Considering the provisions of the Act, 1975 and the Government order dated 12.04.2011 it is apparent that it is the Nigam which has erred in passing an order of retrospective regularization and there being no other view consequently, even if an opportunity of hearing had been given to the petitioners, the same per se would not have resulted in any other orders than what have been passed by the respondents.

38. In this regard, the Court may refer to the judgment of the Apex Court in the case of **S.L.Kapoor Vs. Jagmohan and ors-MANU/SC/0036/1980** wherein the Apex Court has held as under:-

*"17. Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. **Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the nonobservance of natural justice but because Courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary.**"*

(emphasized by the Court)

39. The said judgment has also been considered subsequently by the Apex Court in the case of **Aligarh Muslim University Vs. Mansoor Ali Khan-MANU/SC/0533/2000.**

40. As regards, the ground that the petitioners had acquired a vested right to get pension and other retiral dues on the basis of their regularization that was made retrospectively, the said ground may also not detain the Court inasmuch as there cannot be any vested rights against law. Once the Government order itself provided for grant of benefits with immediate effect and the Nigam erred in granting the benefit with retrospective effect as such, the same cannot give any vested rights to the petitioners to claim any benefit on account of their wrong retrospective regularization. Thus, the said ground is also rejected.

41. A relevant aspect of the matter is that the petitioners have acquiesced to the Government order dated 12.04.2011 which provided for regularization with immediate effect. The said order has not been challenged in the instant writ petition meaning thereby that the petitioners are themselves of the view that the regularization, as per Government order dated 12.04.2011 could only have been given with prospective effect and not retrospective effect as has wrongly been done by the Nigam. The said act of not challenging the Government order dated 12.04.2011 would bind the petitioners as well as the Nigam more particularly considering Sections 8 & 89 of the Act, 1975.

42. Having considered the merits of the matter, now the Court proceeds to see as to whether any benefits can be given to the three sets of employees who are before this Court namely (A) the petitioners who have retired prior to passing of the impugned orders dated 18.08.2020 & 20.08.2020 and have received their retiral dues and are in receipt of pension (B) the petitioners who have retired from service

on attaining the age of superannuation during pendency of the instant writ petition and (C) the petitioners who are in service.

43. With regard to the employees in category (A) i.e the petitioners who have retired prior to passing of the impugned orders dated 18.08.2020 & 20.08.2020 and have received their retiral dues and are in receipt of pension, as the said petitioners have received pension, gratuity and other benefits even prior to passing of the orders impugned consequently, this Court while exercising extra ordinary jurisdiction under Article 226 of the Constitution of India finds that it would be inequitable that the benefits that have already been given to them should be withdrawn.

44. In this regard, it would be apt to refer of the judgment of the Apex Court in the case of **Central Council for Research in Ayurvedic Sciences and Anr Vs. Bikartan Das and ors- (2023) SCC OnLine SC 996** wherein the Apex Court has held as under:-

"51. The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the

realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not."

45. Consequently, exercising □ the jurisdiction under Article 226 of Constitution of India, the Court restrains the respondents from making any recovery of either pension or gratuity or other benefits that have been given to such petitioners in category (A) i.e those who have retired prior to issuance of the impugned orders dated 18.04.2020 & 20.04.2020 meaning thereby that the said petitioners would continue to draw the pension and other retirement benefits which they were drawing at the time of their retirement with all consequential benefits. This direction would only cover the employees in category of (A) as indicated above.

46. So far as the employees in categories (B) & (C) are concerned i.e □ (B) the petitioners who have retired from service on attaining the age of superannuation during pendency of the instant writ petition and (C) the petitioners who are in service, the principle of law as laid down by the Apex Court in the case of **Rafiq Masih (White Washer)** (supra) would be attracted wherein the Apex Court has held as under:-

"12. 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 employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*

(ii) *Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*

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

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

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

47. From a perusal of aforesaid judgment, it emerges that recovery from the employees belonging to Class-III & IV service or Group C & D service is clearly impermissible in the eyes of law. Thus, the recovery of excess amount on account of fixation which has been given to the petitioners of categories (B) & (C) □ shall not be recovered.

48. Keeping in view the aforesaid discussion, the writ petition is partly allowed. The orders impugned dated 18.08.2020 & 20.08.2020, copies of which

are annexures 1 & 2 to the writ petition respectively so far as they direct for recovery of the excess amount from the petitioners in categories (B) & (C) are quashed.

49. Consequences to follow.

44. The Court records the assistance of Mr. Mohd. Azam Siddiqui, Research Associate of this Court.

(2025) 1 ILRA 298

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 29.01.2025

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ A No. 23739 of 2021

With

Writ A No. 22141 of 2021

Anand Kumar

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Ghaus Beg

Counsel for the Respondents:

C.S.C., Namit Sharma, Shailendra Singh Chauhan

Service Law-The Uttar Pradesh Public Service Commission, Rules, 2016---

Petitioner initially appointed on contract basis in the Nagar Nigam in the year 1998. The Government order dated 23.07.2012 was issued for terminating the services of the employees engaged in an irregular manner/contract/temporary basis---In the meanwhile the Rules, 2016 had been issued for regularization and the petitioner being found eligible for regularization, was regularized vide order dated 23.06.2021--- Persons who are continuing even after the date of promulgation

of the Rules i.e 12.09.2016, a right stood crystallized in such contractual employees to be considered for regularization of their service on the basis of the Rules, 2016. Admittedly, the petitioner was continuing in service on the date of promulgation of the Rules i.e 12.09.2016 and thus he was correctly regularized vide order dated 23.06.2021---Once the petitioner already stood regularized there was no occasion for a Government order dated 28.07.2021 to be issued indicating that the regularization was subject to decision of the special appeal, so far as it pertains to the petitioner and for that matter for the consequential impugned order dated 26.08.2021 to be issued by the Nagar Nigam cancelling the regularization order of the petitioner---So far as the ground that no post is now lying vacant on which the petitioner can continue as urged by the respondents, the said ground is found to be patently misconceived inasmuch as the regularization order of the petitioner dated 23.06.2021 itself indicates that the petitioner has been regularized against a vacant post of Lighter/Porter in the pay scale of Rs.5200-20200 and thus if at this stretch of time, no post is lying vacant, the same will not effect the case of the petitioner---Impugned orders quashed--- **Petition allowed. (Para 33 & 37)** (E-15)

List of Cases cited:

1. Writ Petition No. 6755 (S/S) of 2012 in re: Vinay Kumar Shukla & ors. Vs St. of U.P. & ors.

2. Writ petition No. 4334 (S/S) of 2012 in re: Neeraj Babu Vs St. of U.P. & ors.

3. Special Appeal (Defective) No. 96 of 2018 in re: Umesh Chandra Yadav Vs St. of U.P. & ors.

4. Writ Petition No. 18342 (S/S) of 2020 in re: Ajay Bajpai & Ors. Vs St. of U.P. & ors.

5. Writ Petition No.2983 (S/S) of 2020 in re: Irfan Affas & ors. Vs St. of U.P. & ors..

6. Special Appeal (Defective) No. 284 of 2021 in re: Shiv Kumar & ors. Vs St. of U.P. & ors.

7. Special Leave Petition (Civil) Diary No. 18904 of 2023 in re: Nagar Ayukta Lucknow Nagar

Nigam Lucknow U.P. & anr.Vs Umesh Chandra Yadav & ors.

8. Central Council for Research in Ayurvedic Sciences & anr.Vs Bikartan Das & ors.- (2023) SCC OnLine SC 996

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

1. Heard Shri Ghaus Beg, learned counsel for the petitioner, learned Standing Counsel for the respondent nos. 1 and 2, Shri Namit Sharma along with Shri Shailendra Singh Chauhan, learned counsels for the respondent nos. 3, 4 and 5.

2. Learned counsels appearing on behalf of the contesting parties contend that the issue involved in both the writ petitions is same. As such, the Court proceeds to hear and decide both the writ petitions together by a common order. For the sake of convenience, the facts of Writ - A No. - 23739 of 2021 are being taken into consideration.

3. This is a peculiar case and peculiarities are indicated in the body of the judgment.

4. Instant petition has been filed praying for following main reliefs :-

"i. issue a writ, order or direction in the nature of certiorari quashing the impugned office memorandum No.358/मु०वि०/विविध dated 26.8.2021 passed by the opposite party No.3 and, impugned letter/ order dated 28.7.2021 issued by the opposite party No.1, as contained in Annexure No.1 and 2 respectively to writ petition.

ii. issue a writ, order or direction in the nature of certiorari quashing the oral termination order dated 1.9.2021 passed by the opposite party No.3.

iii. issue a writ, order or direction in the nature of mandamus commanding the opposite parties to allow the petitioner to work and discharge duties on the post of Lighter/ Porter (Class-IV post) in Street Light Department of Nagar Nigam, Lucknow and pay him salary regularly in pursuance to the regularization order dated 23.6.2021 (Annexure No. 13 to the writ petition)."

5. Bereft of unnecessary details, the facts of the case are that the petitioner was initially appointed on a contract basis in Nagar Nigam, Lucknow on 01.09.1998 and had continued for sufficiently long time. A Government Order dated 23.07.2012 was issued by Principal Secretary, Government of Uttar Pradesh and addressed to all District Magistrates, all Municipal Commissioners, etc. for terminating the services of the employees engaged in an irregular manner or on contract/temporary basis.

6. The said Government Order was challenged by the petitioner along with several others by filing various writ petitions. The writ petition filed by the petitioner is **Writ Petition No. 6755 (S/S) of 2012 in re: Vinay Kumar Shukla & 32 Ors. Vs. State of U.P. and Ors.**

7. All the writ petitions were decided by means of judgment and order dated 02.02.2018 leading being writ petition **No. 4334 (S/S) of 2012 in re: Neeraj Babu Vs. State of U.P. and Ors** whereby the writ petitions were dismissed. The copy of the judgment and order dated 02.02.2018 is Annexure No. 10 to the petition. However, despite dismissal of writ petition, the petitioner continued to work and discharge duties under the respondents.

8. Certain persons, being aggrieved by the said judgment, filed various special

appeals. One of the Special Appeals was **Special Appeal (Defective) No. 96 of 2018 in re: Umesh Chandra Yadav Vs. State of U.P. and Ors.** The Division Bench of this Court, vide order dated 14.03.2018, a copy of which is Annexure No. 11 to the petition, directed for maintenance of status quo as it existed on the date of judgment of the writ Court to be continued to be maintained.

9. Incidentally, the petitioner did not prefer any special appeal challenging the judgment and order dated 02.02.2018 at that stretch of time.

10. Subsequent thereto, in the year 2020 the petitioner filed **Writ Petition No. 18342 (S/S) of 2020 in re: Ajay Bajpai & Ors. Vs. State of U.P. and Ors.**, in which the petitioner was petitioner no. 4, praying for a direction to the respondent no.1 i.e. the State to take decision for creation of supernumerary posts for the regularization of the petitioners' services working in the street light department of Lucknow considering the provisions of U.P. Regularization of Persons working on Daily Wages or Work Charged or on Contract in Government Departments on Group - C and Group D Posts (outside the Purview of U.P. Public Service Commission) Rules, 2016 (hereinafter referred to as "Rules, 2016").

11. The writ petition was disposed of vide order dated 22.10.2020, a copy of which is Annexure No. 12 to the petition, with a direction to the Municipal Commissioner, Nagar Nigam, Lucknow to take a decision on the representation of the petitioners taking into consideration the judgment and order dated 04.02.2020 passed by this Court in **Writ Petition**

No.2983 (S/S) of 2020 in re: Irfan Affas and others vs. State of U.P. and others.

12. In pursuance thereof, the respondent - Nagar Nigam, Lucknow passed an order dated 23.06.2021, a copy of which is Annexure No. 13 to the petition, whereby the service of the petitioner was regularized on a vacant post of Lighter/Porter in the Pay Scale of Rs. 5200-20200/- and Grade Pay of ₹ 2400/- with effect from 23.06.2021.

13. In the meanwhile, the State Government issued the order impugned dated 28.07.2021 directing the Nagar Nigam to modify the regularisation orders already issued by indicating that the said regularisation would be subject to the final order passed in the special appeal.

14. Strangely, despite his regularization on 23.06.2021, the petitioner preferred a **Special Appeal (Defective) No. 284 of 2021 in re: Shiv Kumar and Others Vs. State of U.P. and Others**, on 17.08.2021 in which the petitioner was appellant no. 3. However, the said appeal was dismissed as withdrawn in view of changed circumstances vide order dated 19.08.2021, a copy of which is Annexure No. 16 to the petition.

15. The matter may have attained a quietus thereto but for the fact that the respondents, vide order dated 21.08.2021, a copy of which is Annexure No. 15 to the petition, considering an order that had been issued by the State Government, directed the petitioner to submit papers or documents pertaining to the special appeal that he might have filed against the order of the writ Court of the year 2018.

16. Subsequent thereto, the bunch of special appeals that had been filing challenging the judgment and order dated 02.02.2018 were decided by the Division Bench of this Court leading being **Special Appeal No. 96 of 2018 in re: Umesh Chandra Yadav Vs. State of U.P. & Others** vide judgment and order dated 23.09.2022.

17. Though various directions had been issued by the Division Bench of this Court pertaining to the appellants therein yet a perusal of paragraph 15 of the judgment would indicate that the Division Bench of this Court was of the view that for those persons who were continuing even after 12.09.2016 i.e. the date of effect of Rules, 2016, the rights had crystallized in such contractual employees to be considered for regularization of their services on the basis of the provisions contained in the Rules, 2016 which could not be denied to them.

18. Incidentally, the judgment and order dated 23.09.2022 has been affirmed with the dismissal of **Special Leave Petition (Civil) Diary No. 18904 of 2023 in re: Nagar Ayukta Lucknow Nagar Nigam Lucknow U.P. & another Vs. Umesh Chandra Yadav & others** vide the order dated 05.07.2023, as indicated in the order annexed with supplementary affidavit (I.A. No. 5 of 2024).

19. Subsequent thereto, the respondents, vide impugned order dated 26.08.2021, a copy of which is Annexure No. 1 to the petition, have cancelled the regularization order of the petitioner dated 23.06.2021 on the ground that in the special appeal which has been filed by various other persons the name of the petitioner does not find place and the special appeal

filed by the petitioner has been dismissed as withdrawn on 19.08.2021.

20. Thereafter, the respondents have also orally terminated the services of the petitioner with effect from 01.09.2021.

21. However, vide interim order dated 08.10.2021 passed in the instant petition, this Court has provided that the petitioner's services in Class - IV in Municipal Corporation shall not be dispensed with, which interim order still continues and the petitioner continues to work on a Class IV post.

22. Contention of learned counsel for the petitioner is that when despite the order of writ Court dated 02.02.2018 vide which writ petition filed by the petitioner had been dismissed and the services of the petitioner have already been regularized on 23.06.2021 consequently there was no occasion for the petitioner to have challenged the judgment and order dated 02.02.2018. However in his wisdom the petitioner filed the special appeal against the judgment and order dated 02.02.2018 which was dismissed as withdrawn considering the fact that he already stood regularized and further no cause of action subsisted thereafter for the petitioner to have challenged the judgment and order dated 02.02.2018.

23. Even otherwise, the special appeal which had been filed by various persons who were aggrieved by the judgment and order dated 02.02.2018 has been allowed. Even though directions had been issued pertaining to the appellants-petitioners of the said special appeals yet a general direction had also been issued and as per paragraph 15 of the judgment passed in **Umesh Chandra Yadav (Supra) on**

23.09.2022, regularization of the persons who were continuing in service was required to be considered in terms of Rules, 2016 and in fact, the same was considered by the respondents and the services of the petitioner were regularized vide order dated 23.06.2021 and consequently the ground which has been prevailed by the respondent in now cancelling the regularization of the services of the petitioner vide order dated 28.07.2021 merits to be set aside on these grounds alone more particularly when the petitioner has been in service since the year 1998.

24. On the aforesaid grounds, it is argued that the consequential order impugned dated 26.08.2021 also merits to be set aside.

25. On the other hand, Shri Namit Sharma along with Shri Shailendra Singh Chauhan, learned counsels for the respondent/Corporation have argued that the fact of the matter remains that the petitioner along with others had challenged the Government Order dated 23.07.2012 which had directed for termination of the services of the employees engaged in irregular manner or on contract/temporary basis which writ petitions were dismissed on 02.02.2018. The special appeal filed by the petitioner against the said judgment and order dated 02.02.2018 was dismissed as withdrawn on 09.08.2021. Thus, the validity of the Government Order dated 23.07.2012 was upheld so far as it pertains to the petitioner and the petitioner stood dismissed from service considering the Government Order dated 23.07.2012 which fact was not noticed by the respondents while passing the regularization order date 23.06.2021. As other persons were aggrieved by the order dated 02.02.2018 they filed the special appeals and the order

of status quo had been granted by the Division Bench of this Court consequently, the petitioner was also required to submit the documents pertaining to the special appeal that might have been filed by him. The petitioner had however already filed a special appeal and the same was dismissed as withdrawn vide order dated 19.08.2021 meaning thereby the judgment and order dated 02.02.2018, so far as it pertains to the petitioner, had attained finality and consequently once an error had been committed by the respondents by regularising the services of the petitioner consequently no error has been committed by them by passing order dated 26.08.2021 vide which regularisation order of the services of the petitioner had been cancelled. Also, there is no error in the order dated 28.07.2021 whereby the State Government had directed the regularization of the petitioner subject to the outcome of the special appeal and as the special appeal filed by the petitioner already stands dismissed, as such there is no question of regularizing of the services of the petitioner.

26. It is also contended that no post is now lying vacant on which the petitioner can continue.

27. Heard learned counsel for the contesting parties and perused the records.

28. From the arguments as advanced by the learned counsel for the contesting parties and perusal of records it emerges that the petitioner was initially appointed on contract basis in the Nagar Nigam in the year 1998. The Government order dated 23.07.2012 was issued for terminating the services of the employees engaged in an irregular manner/contract/temporary basis. The writ petition filed by the petitioner

challenging the said Government order was dismissed along with several other petitions vide judgment and order dated 02.02.2018. However, despite issuance of the said Government order and the writ petition being dismissed, the petitioner continued to work. In the meanwhile, the Rules, 2016 had been issued for regularization and the petitioner being found eligible for regularization, was regularized vide order dated 23.06.2021. The matter would have ended at this but for the fact that the petitioner in his wisdom chose to file a special appeal challenging the judgment and order dated 02.02.2018. The said special appeal was thereafter withdrawn by the petitioner in view of the changed circumstances considering that he already stood regularized in service despite the Government order dated 23.07.2012 having been upheld with dismissal of the writ petition. The respondents vide order dated 21.08.2021 considering an earlier order issued by the State Government directed the petitioner to submit papers and documents pertaining to the special appeal that he might have filed against the order of the writ Court of the year 2018.

29. The said order was issued considering the order issued by the State Government dated 28.07.2021 that had required the regularization order of the persons to indicate that the same was subject to the special appeal. As the special appeal filed by the petitioner had already been withdrawn by him on account of his regularization consequently, the respondents passed the order impugned dated 26.08.2021 cancelling the regularization order of the petitioner dated 23.06.2021 on the ground that in the special appeal which has been filed by various other persons, the name of the petitioner does not find placed and the special appeal filed by the petitioner has been dismissed as withdrawn on 19.08.2021.

30. The peculiar facts with which the Court is seized are that the petitioner has been working right since the year 1998 and despite dismissal of the writ petition filed by him challenging the Government order dated 23.07.2012 per which the services were to be terminated, he stood regularized by the respondents themselves without any concealment or misrepresentation on his part. The special appeal that had been filed by the other persons challenging the judgment and order dated 02.02.2018 have all been disposed of with certain directions vide judgment and order dated 23.09.2022 passed in bunch of special appeals, the leading being Appeal of **Umesh Chandra Yadav (supra)** with a spate of directions. But for the fact that the petitioner withdrew the special appeal on account of he having been regularized in service, he would also have been entitled for the benefit of the order passed in the special appeal vide judgment and order dated 23.09.2022. However, despite the aforesaid facts, the services have been dispensed with on the ground that the special appeal filed by him has been withdrawn without considering that the withdrawal of the special appeal was on account of the petitioner having already been regularized in service even prior to filing of the special appeal, the regularization order being dated 23.06.2021, the special appeal having been filed on 17.08.2021 and having been withdrawn on 19.08.2021.

31. The Division Bench of this Court vide judgment and order dated 23.09.2022 in the case of **Umesh Chandra Yadav (supra)** had issued the following directions:-

"26. Having regard to the overall facts and circumstances of the case and also taking into account the right of the appellants-petitioners of being considered for regularization under the Regularization

Rules, 2016 which admittedly have been enforced by means of the notification dated 12.09.2016 and have been adopted to be applicable to the Urban Local Bodies by means of the Government Order dated 03.01.2017, we dispose of this bunch of special appeals with the following directions;-

(i) Cases of all the appellants-petitioners shall be considered for regularization of their services in terms of the provisions contained in Regularization Rules, 2016.

(ii) Accordingly, the appointing authority shall prepare an eligibility list of the candidates, who may be found eligible to be considered for regularization of their services in terms of the Regularization Rules, 2016 within three months from the date of production of certified copy of this order before the authority concerned.

(iii) The appointing authority shall constitute a Selection Committee as per the provisions contained in the Regularization Rules, 2016 and refer the eligibility list to be prepared in terms of the Regularization Rules, 2016 to the Selection Committee which shall adjudge the suitability of the eligible candidates and take decision for regularizing their services. This exercise shall be completed, as observed above in (ii) within three months from the date this order is communicated to the authority concerned.

(iv) In case on completion of this exercise in the respective Urban Local Bodies where the appellants-petitioners were engaged/are working, certain eligible contractual employees still remain to be considered for regularization for want of vacant posts, the Local Body concerned shall seek approval of the State Government for creation of supernumerary posts in terms of the provisions contained

in the proviso appended to rule 5 of the Regularization Rules, 2016.

(v) In case of such a need, the proposal seeking approval of the State Government for creation of supernumerary posts shall be made by the Local Body concerned to the State Government at the earliest after the exercise of regularizing the services of contractual employees against the available vacant posts is completed.

(vi) Once any such proposal from the respective Urban Local Bodies is received by the State Government seeking approval for creation of supernumerary posts, the State Government shall take decision thereon as mandated by the proviso appended to Rule 5 of the Regularization Rules, 2016 within eight weeks from the date of receipt of proposal.

(vii) Once the approval for creation of supernumerary post is accorded by the State Government, the process of regularizing the services of remaining contractual employees, who could not be regularized for want of availability of vacant post shall be initiated and completed within next three months thereafter.

(viii) We also direct that cases of all the appellants-petitioners in this bunch of special appeals shall be considered afresh for regularization of their services in terms of the Regularization Rules, 2016 irrespective of any such exercise having earlier been done.

(viii) Those appellants-petitioners who are continuing as on today shall continue to work till their cases for regularization under the Regularization Rules 2016 are considered and decided in terms of this order. However, once any contractual employee is not found eligible and suitable for regularization of his/her services, his/her services shall be

terminated in terms of the provisions contained in Regularization Rules, 2016."

32. However, the aforesaid directions may not have any applicability for the petitioner inasmuch as he had already been regularized in service. Consequently, it is the observations as made in paragraph 15 of the judgment and order dated 23.09.2022 in the aforesaid special appeal which would be applicable on the petitioner which for the sake of convenience are reproduced below:-

"15..... Accordingly, so far as the applicability of Regularization Rules, 2016 in the case of the appellants-petitioners in this bunch of special appeals is concerned, in view of what has been observed by the Division Bench in its judgment dated 10.04.2017 the rules may not apply to those contractual employees whose services were dispensed with prior to the date of enforcement of the Regularization Rules, 2016, that is to say, prior to 12.09.2016, however those who are continuing even after the said date i.e. after 12.09.2016 the rights crystallized in such contractual employees to be considered for regularization of their services on the basis of the provisions contained in Regularization Rules, 2016, in our considered opinion, cannot be denied to them."

(emphasized by the Court)

33. From a perusal of the aforesaid observations, it is apparent that the Division Bench was of the view that those persons who are continuing even after the date of promulgation of the Rules i.e 12.09.2016, a right stood crystallized in such contractual employees to be considered for regularization of their service on the basis of the Rules, 2016.

Admittedly, the petitioner was continuing in service on the date of promulgation of the Rules i.e 12.09.2016 and thus he was correctly regularized vide order dated 23.06.2021. Thus, once the petitioner already stood regularized there was no occasion for a Government order dated 28.07.2021 to be issued indicating that the regularization was subject to decision of the special appeal, so far as it pertains to the petitioner and for that matter for the consequential impugned order dated 26.08.2021 to be issued by the Nagar Nigam cancelling the regularization order of the petitioner.

34. In this regard, it would be apt to refer of the judgment of the Apex Court in the case of **Central Council for Research in Ayurvedic Sciences and Anr Vs. Bikartan Das and ors- (2023) SCC OnLine SC 996** wherein the Apex Court has held as under:-

"51. The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the

equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not."

35. Consequently, considering the peculiar facts and circumstances of the case as well as exercising the jurisdiction under Article 226 of Constitution of India and in view of the aforesaid discussion, it is thus apparent that the Government order dated 28.07.2021 merits to be quashed so far as it pertains to the petitioner along with the order dated 26.08.2021.

36. So far as the ground taken by the respondents that the regularization order of the petitioner was irregular, the same may not detain the Court keeping in view of the observations made by the Division Bench of this Court in the case of **Umesh Chandra Yadav (supra)** as reproduced above per which the petitioner acquired a right to be regularized in view of the Rules, 2016.

37. So far as the ground that no post is now lying vacant on which the petitioner can continue as urged by the respondents, the said ground is found to be patently misconceived inasmuch as the regularization order of the petitioner dated 23.06.2021 itself indicates that the petitioner has been regularized against a vacant post of Lighter/Porter in the pay scale of Rs.5200-20200 and thus if at this stretch of time, no post is lying vacant, the same will not effect the case of the petitioner.

38. Consequently, the writ petition is *allowed*. The orders impugned dated

26.08.2021, a copy of which is annexure 1 to the writ petition and order dated 28.07.2021, a copy of which is annexure 2 to the writ petition so far as it pertains to the petitioner, respectively, are quashed.

39. Consequences to follow.

40. At this stage, learned counsel for the respondents states that there might be some difficulty in fixing the seniority of the petitioner viz-a-viz the other persons who have been regularized in pursuance to the order of the Division Bench of this Court in the case of **Umesh Chandra Yadav (supra)** subsequent to the petitioner. As already indicated above, this order has been passed in peculiar facts and circumstances of the case and shall not be considered as a precedent.

(2025) 1 ILRA 306
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2025

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ C No. 32144 of 2021

M/S Annapurna Construction Co.
...Petitioner
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Girish Chandra

Counsel for the Respondents:
 Sri Mukul Tripathi, S.C., Sri Vivek Saran

**Civil Law - Constitution of India, 1950-
 Article 226-The petitioner, a registered
 contractor, sought a writ of mandamus for
 the release of payment for the contractual**

work executed under the Basic Services to the Urban Poor Yojana- The construction work was completed within stipulated period, and houses were handed over to allottees, however, the petitioner alleged that payments totaling Rs. 15,81,540/- along with a security deposit Rs. 96000/- remain unpaid despite multiple representations- Held, the disputed questions of fact regarding payments made or due under a contract cannot be adjudicated under Article 226 of the Constitution-Relying on Supreme court precedents, (Kerala SEB VsKurien, Orrissa Agro Industries corp. Ltd. Vs Bharati Industries) the court reiterated that contractual disputes without a statutory element should be resolved through appropriate civil or arbitral proceedings rather than writ jurisdiction. (Para 1 to 13) (E-6)

List of Cases cited:

1. Ker. SEB Vs Kurien E. Kalathil (2000) 6 SCC 293
2. Ori. Agro Indus. Corp. Ltd.Vs Bharati Indus.(2005) 12 SCC 725
3. M/s Biotech System Vs St. of UP & ors.(2020) 11 ADJ 488 DB
4. U.O.I. Vs Puna Hinda (2021) 10 SCC 690

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. The present petition has been filed under 226 of the Constitution of India seeking issuance of a writ of mandamus directing the State respondent to release the payment for the contractual work done by the petitioner with regard to the work orders given by the Respondent No. 4/The Project Manager, Slum Urban Development Authority, on behalf of State Government under the contract.

2. The factual matrix of the case is delineated below:

a. The petitioner is a registered contractor with the Public Works Department, Kanpur, who was awarded work for the construction of residence under the Basic Services to the Urban Poor Yojana at Kishanpur, Kanpur Nagar, which was introduced as a reform under a scheme namely 'Jawaharlal Nehru National Urban Renewal Mission' launched by the Union Government for urban poor under the slum development program. The funding pattern for this scheme was, 30% participation by the Union Government and 70% by the State Government.

b. Vide work orders dated February 3, 2014 and March 4, 2014, the petitioner was tasked with the construction of houses by the Respondent No.3 under the said Yojna in Kishanpur, Kanpur Nagar.

c. The petitioner completed the construction work within the stipulated period under the supervision of the Project Manager (Respondent No. 4). The work was verified through spot visits by Respondent No. 3 and the Project Manager.

d. Upon satisfaction, the houses were handed over to allottees in multiple phases between June 18, 2014 to June 17, 2015, with proper documentation maintained and submitted to respondent authorities.

e. Bills amounting to Rs.15,81,540/- were submitted on June 17, 2014, which were duly scrutinized and passed by the concerned authorities. Additionally, the petitioner claims that a security deposit of Rs. 96,000/- remains unreleased.

f. The petitioner was also directed to complete additional work (sewer line, window fitting, and brick flooring) without a formal work order. Despite completion and verification of this work, neither was a work order created nor bills processed.

g. Completion certificate was issued on December 27, 2019.

h. Multiple representations were made by the petitioner since October 16, 2015, but payment remains pending. Through letter dated March 4, 2020, the unit in-charge informed that old payments cannot be processed as per state level authorities.

CONTENTION OF THE PETITIONER

3. Sri Girish Chandra, counsel appearing on behalf of the petitioner has made the following submissions:

i. The petitioner had completed the entire work in the year 2014 and after inspection, bills were duly submitted, also quality of work was found to be in consonance to the norms and standards of the terms and conditions mentioned in the contract but the authority had not made any payment for the executed work.

ii. The bills raised against the work order were duly approved by the Additional Project Manager/Sub Engineer, who are the competent authority, therefore, the same is liable to be paid.

iii. As per the procedure under clause 15 of the terms and condition of the work order, any dispute arising out of the contract shall be decided by the officer in-charge of unit only and the decision shall be final but the authority had neither decided the representation of the petitioner nor paid the amount.

iv. The State authority cannot deny payment for work done and financial constraint is not a valid defence on the part of the respondents authority.

CONTENTION OF THE RESPONDENTS

4. Sri Vivek Saran and Sri Mukul Tripathi, counsel appearing on behalf respondents have made the following submissions:

i. Pursuant to the execution of alleged work order for construction of houses, the bill amounting to Rs.15,81,540/- had been raised by the petitioner and the payments had already been made to the petitioner. Since the said bill was again presented before the respondents therefore, the same was rejected by the then Engineer on the ground of being already paid. So far as the payment of security amount is concerned, it had not been paid due to shortcomings found during the spot inspection of the work done.

ii. Bills, which have been raised by the petitioner, were not approved by the competent authority and the Sub-Engineer, who has allegedly signed the said bills was under suspension during that time, therefore, that would not be treated as bills approved by the competent authority. Hence, the said bills can not be claimed to be admitted one. Notice was also issued to the Sub-Engineer on complained made by the petitioner.

iii. Other bills of the petitioner issued by the U.P. Rajkiya Nirman Nigam Limited, were subject to the verification by the Resident Engineer which has not been done. Hence, the payment of the bills has not been made.

ANALYSIS AND CONCLUSION

5. Upon hearing the learned counsel appearing on behalf of the parties and upon perusal of the records, this Court is of the view that there is dispute of fact with regard to the payment having been made for execution of the work.

6. Counsel appearing on behalf of petitioner submits that the payment of work and security amount has not been made till date and if the payment has been made then the Respondent should show the mode of payment.

7. Per contra, counsel on behalf of respondents submit that the payment of executed work has already been made to the petitioner but security amount has been retained due to some shortcomings found in the executed work.

8. The Supreme Court in the case of **Kerala SEB v. Kurien E. Kalathil reported in (2000) 6 SCC 293** has held that writ court is not the proper forum for resolution of disputes in contractual matters. The relevant paragraph is delineated below:

“10. We find that there is a merit in the first contention of Mr Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that

would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.”

9. The Supreme Court in the case of **Orissa Agro Industries Corpn. Ltd. v. Bharati Industries** reported in **(2005) 12 SCC 725** dealt with the maintainability of a petition under Article 226 specifically on disputed questions of fact involved in contractual matters. The relevant paragraphs are delineated below:

“7. A bare perusal of the High Court's judgment shows that there was clear non-application of mind. On one hand the High Court observed that the disputed questions cannot be gone into a writ petition. It was also noticed that the essence of the dispute was breach of contract. After coming to the above conclusions the High Court should have dismissed the writ petition. Surprisingly, the High Court proceeded to examine the case solely on the writ petitioner's assertion and on a very curious reasoning that though the appellant Corporation claimed that the value of articles lifted was nearly Rs 14.90 lakhs no details were specifically given. From the counter-affidavit filed before the High Court it is crystal-clear that relevant details disputing claim of the writ petitioner were given. Value of articles lifted by the writ petitioner is a disputed factual question. Where a complicated question of fact is involved and the matter requires thorough proof on factual aspects, the High Court should not entertain the writ petition. Whether or not the High Court should exercise jurisdiction under Article 226 of the Constitution would largely depend upon the nature of dispute and if the dispute cannot be resolved without going into the factual controversy,

the High Court should not entertain the writ petition. As noted above, the writ petition was primarily founded on allegation of breach of contract. Question whether the action of the opposite party in the writ petition amounted to breach of contractual obligation ultimately depends on facts and would require material evidence to be scrutinised and in such a case writ jurisdiction should not be exercised.

9. In the instant case the High Court has itself observed that disputed questions of fact were involved and yet went on to give directions as if it was adjudicating the money claim in a suit. The course is clearly impermissible.”

10. The coordinate Bench of this Court in the case of **M/S Bio Tech System v. State Of U.P. and Others reported in (2020) 11 ADJ 488DB** has emphasised the limited power of the writ court exercising obligation in contractual matters . The relevant paragraphs are delineated below:

“39. The general principles which may be culled out from the aforementioned judgments is that in a case where the contract entered into between the State and the person aggrieved is of a non-statutory character and the relationship is governed purely in terms of a contract between the parties, in such situations the contractual obligations are matters of private law and a writ would not lie to enforce a civil liability arising purely out of a contract. The proper remedy in such cases would be to file a civil suit for claiming damages, injunctions or specific performance or such appropriate reliefs in a civil court. Pure contractual obligation in the absence of any statutory complexion would not be enforceable through a writ.

40. The remedy under Article 226 of the Constitution being an extraordinary remedy, it is not intended to be used for the purpose of declaring private rights of the parties. In the case of enforcement of contractual rights and liabilities the normal remedy of filing a civil suit being available to the aggrieved party, this Court may not exercise its prerogative writ jurisdiction to enforce such contractual obligations.”

11. The Supreme Court in a recent case of **Union of India v. Puna Hinda reported in (2021) 10 SCC 690** has further held that the jurisdiction of High Court under Article 226 of the Constitution of India is wide, but pure contractual matters in field of private law, having no statutory flavour, are better adjudicated upon by forum agreed to by parties. Dispute could not be raised by way of a writ petition on disputed question of facts. The relevant paragraphs are delineated below:

“24. Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact. Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallised. Therefore, in the absence of any acceptance of joint survey report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time. Maybe, the resurvey cannot take place but the measurement books of the work executed from time to

time would form a reasonable basis for assessing the amount due and payable to the writ petitioner, but such process could be undertaken only by the agreed forum i.e. arbitration and not by the writ court as it does not have the expertise in respect of measurements or construction of roads.

25. A perusal of the matter shows that collusion of some of the officers of the appellants with the contractor cannot be ruled out. Such collusion seems to be the basis of the writ petition filed before the High Court.”

12. In the present factual matrix, the petitioner has not been able to bring on record any document wherein the respondent authorities have admitted that a particular sum is owed to them. On the contrary, the respondents have disputed the claim of the petitioner in their counter affidavit. One has to keep in mind that when disputed questions of fact are present, the writ jurisdiction is not the viable forum, as such disputes cannot be decided upon bare exchange of affidavits. As clearly enunciated in the judgments cited above, in areas of contractual disputes, parties have to approach the civil courts or go for arbitration (if provided for). The writ court would only in exceptional circumstances, when the outstanding payments are admitted by the respondents, enter into the arena and pass a writ of mandamus and in no other case.

13. Accordingly, the writ petition is dismissed.

(2025) 1 ILRA 311

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 10.01.2025

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

THE HON'BLE JAYANT BANERJI, J.

Writ C No. 33495 of 2024

Vikash Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Mahendra Singh, Sr. Advocate

Counsel for the Respondents:
 C.S.C.

A. Practice and Procedure – Constitution of India, 1950 – Article 226 – Writ – Maintainability – Block Pramukh, against whom no confidence motion was moved, was though impleaded as respondent no. 4, but could not be impleaded by name – Effect – Held, the purpose of impleadment of a person is only for a notice being sent to the person to provide an opportunity of hearing. The respondent No. 4 has already put in appearance and her counsel has been heard – In any case, improper impleadment is a curable defect and can never be fatal for a writ petition. (Para 22)

B. Local bodies Law – UP Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 – Section 15(2) – No Confidence Motion – Competence of District Panchayat Raj Officer to take decision on its notice – Failure of Collector to perform its duty – Effect – Held, when under the provisions of S. 15, jurisdiction is vested in the Collector to convene a meeting and take other steps, it is the Collector himself who is responsible to undertake the exercise of recording his prima facie satisfaction as to the validity of the notice and pass appropriate order thereon – The District Panchayat Raj Officer has no role to play and has no jurisdiction to either reject or to accept a notice of a motion of no confidence – Either the Collector does not understand his duties under the Act or he has willful permitted an illegality to happen. No one can be permitted to deviate from a solemn obligation imposed

on him by statute – High Court imposed cost of Rs. 50,000/- (Para 33, 35 and 37)

Writ petition partly allowed. (E-1)

List of Cases cited:

1. Smt. Sheela Devi & ors. Vs St. of U.P. & ors.; 2015 (2) ADJ 325
2. Niyazuddin & ors. Vs St. of U.P. & ors.; 2020 (3) ADJ 398
3. Writ C No. 11485 of 2024; Narendra Kumar Gupta and 04 others decided on 10.7.2024
4. Kavita Vs St. of U.P. & ors.; AIR 2018 SC 4143
5. Arti Vs St. of U.P.; 2017 (7) ADJ 30 (DB)

(Delivered by Hon'ble Anjani Kumar
Mishra, J.
&
Hon'ble Jayant Banerji, J.)

1. The writ petition, as initially framed, sought a writ of certiorari for quashing the order dated 21.08.2024 passed by the District Panchayat Raj Officer, District-Kushinagar, which is based on an inquiry report. Subsequently, by an amendment, an order passed by the District Magistrate/Collector, Kushinagar on 12.11.2024 has also been challenged. This order has been passed during the pendency of the instant writ petition.

2. The petition has been filed by two petitioners who claim to be elected members of Block Dudhahi, District-Kushinagar, having been elected in the election held in the year 2021. Respondent No. 4 was elected as Block Pramukh, Block Dudhahi. The strength of elected members of the Block Development Council is stated to be 139. Out of these, 101 members are stated to have moved a notice of no

confidence in the prescribed pro-forma along with a notary affidavit on 12.08.2024. The notice of no confidence motion was moved before the Collector, as provided under Section 15(2) of the U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 19611.

3. When no order was passed by the Collector, a petition, being Writ-C No. 29128 of 2024, was filed before this Court whereupon on 03.09.2024, learned Standing Counsel was directed to obtain instructions. When the matter was taken up on 4.9.2024, a statement was made by the learned Standing Counsel, on the basis of instructions received, that the notice for no confidence motion has been rejected by an order dated 21.8.2024. The said writ petition was, therefore, dismissed as infructuous.

4. It appears that on receipt of certain affidavits by persons saying that their signatures on notice of no confidence were forged, a Committee was constituted by the Collector to look into the allegations.

5. The order of 21.08.2024, initially impugned in the writ petition, was an order passed consequent to the report of this Committee, which rejected the notice of no confidence on the ground that it was not maintainable as it was not in accordance with the relevant rules.

6. On the petition being filed, on 04.10.2024, a detailed order was passed noting the contention of the respective counsel for the parties and directing the Collector to file his personal affidavit.

7. A personal affidavit of the Collector was filed on the next date.

8. Subsequently, when the matter was taken up on 13.11.2024, the order dated 12.11.2024 passed by the Collector was produced by the learned Standing Counsel. It is this order which has been subjected to challenge by means of an amendment to the writ petition.

9. It has been submitted by Shri Shashi Nandan, learned Senior Advocate appearing for the petitioners, that the order dated 21.08.2024 of District Panchayat Raj Officer, which is based upon a report of the Committee constituted by Collector, rejects the notice of no confidence on the ground that several signatures thereon were stated to be forged. The Inquiry Committee in its report dated 17.08.2024 found that there were affidavits of 48 members stating that they were shown as signatories to the notice of no confidence, fraudulently and by forging their signatures thereon. Consequently and since the signatures of less than half of the members of the Council were found to be genuine, the show-cause notice was rejected.

10. It is submitted that during the pendency of the writ petition, the Collector has passed the order dated 12.11.2024 which is on the same lines as the inquiry report and the order of the District Panchayat Raj Officer.

11. In the afore-noted factual background, Shri Shashi Nandan states that District Panchayat Raj Officer has no jurisdiction to pass the order dated 21.8.2024. Under the Act, 1961, it is only the Collector exercising powers under Section 15, who may pass such an order.

12. Insofar as the order passed by the Collector is concerned, he has submitted that under sub-section 3(i) of Section 15, a time

frame has been provided. Under this provision, the Collector is required to convene a meeting for consideration of notice of no confidence which shall not be later than 30 days from the date the notice under sub-section (2) of Section 15 is delivered to him.

13. Section 15(3)(ii) of the Act, 1961 also provides for not less than 15 days notice being provided to the elected members prior to convening the meeting to consider the motion of no confidence.

14. It is next submitted that Section 15 only requires the Collector to examine as to whether the notice of no confidence has been signed by at least half of the total number of elected members of the Kshettra Panchayat. No further inquiry is required or mandated by law. Therefore, the direction of the Collector to constitute a committee to examine the notice of no confidence was without any sanction of law. Once at least half of the total number of elected members had appended their signatures on the notice of no confidence, the only option available to the Collector was to convene the meeting to consider the motion of no confidence. The issue raised through the motion of no confidence made to the Collector, therefore, would necessarily be required to be decided on the floor of the House and cannot be sought to be scuttled by an inquiry Committee constituted by the Collector considering the validity of the motion of no confidence in the manner done.

15. He has relied upon judgments in the cases of *Smt. Sheela Devi & Ors. v. State of U.P. & Ors.*² and *Niyazuddin & Ors. v. State of U.P. & Ors.*³.

16. Learned Standing Counsel supporting the impugned order has submitted that a valid notice to bring a

motion of no confidence has to be signed by at least half of the elected members. The Collector received a complaint from 48 members who were alleged to be signatories of the notice of no confidence, stating that they had not put their signatures thereon. Hence, a Committee was constituted by the Collector to examine this aspect of the matter and in doing so, the Collector committed no illegality.

17. In support of his contentions, he has placed reliance upon the judgment of this Court in the case of **Narendra Kumar Gupta and 04 others**⁴. The judgment cited, placing reliance upon the Full Bench decision in **Smt. Sheela Devi**, has observed as follows:-

“From the afore-cited judgment, it clear emerges that the District Magistrate has to be at least prima facie satisfied that the notice of no confidence is a valid notice as per the requirements of Section 15(2) of the Act.”

18. It is therefore, submitted that it is for achieving this prima facie satisfaction and since there were complaints of forged signatures on the notice of no confidence, the Inquiry Committee was duly constituted. The same therefore, cannot be faulted with.

19. Shri Sanjeev Singh, who appears for the respondent No. 4, has submitted that the respondent No. 4 should be impleaded by name which has not been done. Since the Block Pramukh against whom the notice of no confidence was given is a necessary party and since she has not been impleaded properly, the writ petition must necessarily fail.

20. He has relied upon paragraph 23 of the judgment of the Apex Court in

Kavita v. State of U.P. and others⁵ as also upon certain paragraphs of **Narendra Kumar Gupta** (supra).

21. We have considered the submissions made by learned counsel for the parties and perused the record. The following questions arise for determination in the writ petition:-

(i) Whether the writ petition is liable to fail as the respondent No. 4, the Block Pramukh, against whom, the notice of no confidence has been moved, having not been impleaded by name?

(ii) Whether the Collector was competent to order a fact finding inquiry to go into the question of alleged forgery of signatures on the notice of no confidence?

(iii) Whether the District Panchayat Raj Officer had any jurisdiction to pass the order dated 21.08.2024?

(iv) Whether the order dated 12.11.2024 passed by the Collector is valid?

(v) Relief, if any, to which the petitioner is entitled?

22. As regards the first question, it is the contention of learned counsel for the respondent No. 4 that the said respondent has not been impleaded by name, therefore, the petition has to fail. In our considered opinion, this submission is liable to be rejected. The purpose of impleadment of a person is only for a notice being sent to the person to provide an opportunity of hearing. The respondent No. 4 has already put in appearance and her counsel has been heard. Therefore, if she has not been impleaded by name, yet she has been afforded opportunity of hearing, the submission lacks substance. In any case, improper impleadment is a curable defect and can never be fatal for a writ petition.

The first question is answered accordingly.

23. The reply to the second question framed, as to whether Collector was competent to order a fact finding inquiry by a Committee of three persons, is to be found in paragraph 6 of the judgment of Supreme Court in the case of **Kavita** and which referring to a Full Bench of this Court in **Smt. Sheela Devi**, held as follows:-

“6. As aforesaid, since the stated notice has already been acted upon and the no confidence motion has been passed against the appellant by majority, no further enquiry into the grounds urged by the appellant is warranted. Be that as it may, even the first ground urged by the appellant has been justly negated by the High Court following the exposition of the Full Bench of the same High Court in **Smt. Sheela Devi v. State of U.P. and Ors.**, MANU/UP/0129/2015 : AIR 2015 which decision adverts to the dictum of another Full Bench decision of the same High Court in **Mathura Prasad Tewari Vs. Assistant District Panchayat Officer, Faizabad** 1966 ALJ 612. In the impugned judgment, the Division Bench has reproduced paragraph 23 of the Full Bench decision in **Sheela Devi**, (supra) which reads thus:

“23. For these reasons, we have come to the conclusion that where a notice is delivered to the Collector under sub-section (2) of Section 15, the Collector has the discretion to determine whether the notice fulfills the essential requirements of a valid notice under sub-section (2). However, consistent with the stipulation of time enunciated in sub-section (3) of Section 15 of convening a meeting no later

than thirty days from the date of delivery of the notice and of issuing at least a fifteen days' notice to all the elected members of the Kshettra Panchayat, it is not open to the Collector to launch a detailed evidentiary enquiry into the validity of the signatures which are appended to the notice. Where a finding in regard to the validity of the signatures can only be arrived at in an enquiry on the basis of evidence adduced in the course of an evidentiary hearing at a full-fledged trial, such an enquiry would be outside the purview of Section 15. The Collector does not exercise the powers of a Court upon receipt of a notice and when he transmits the notice for consideration at a meeting of the elected members of the Kshettra Panchayat. Hence, it would not be open to the Collector to resolve or enter findings of fact on seriously disputed questions such as forgery, fraud and coercion. However, consistent with the law which has been laid down by the Full Bench in Mathura Prasad Tewari's case, it is open to the Collector, having due regard to the nature and ambit of his jurisdiction under sub-section (3) to determine as to whether the requirements of a valid notice under sub-section (2) of Section 15 have been fulfilled. The proceeding before the Collector under sub-section (2) of Section 15 of the Act of 1961 is more in the nature of a summary proceeding. The Collector for the purpose of Section 15, does not have the trappings of a Court exercising jurisdiction on the basis of evidence adduced at a trial of a judicial proceeding. Whether in a given case, the Collector has transgressed the limits of his own jurisdiction is a matter which can be addressed in a challenge under Article 226 of the Constitution. We clarify that we have not provided an exhaustive enumeration or list of circumstances in which the Collector can

determine the validity of the notice furnished under sub-section (2) in each case and it is for the Collector in the first instance and for the Court in the exercise of its power of judicial review, if it is moved, to determine as to whether the limits on the power of the Collector have been duly observed."

24. It is pertinent to mention here that in the case of **Smt. Sheela Devi**, the Full Bench of this Court referred to and approved the observations made by a Division Bench of this Court in **Utma Devi vs. State of U.P. & Ors.**⁶ The Full Bench has observed as follows:-

"19. In that case, of the 82 elected members of the Kshettra Panchayat, a notice of no confidence was presented with the signatures of forty nine members. Thirty six appeared before the District Magistrate and their signatures/thumbs impressions were verified. Nineteen persons had filed affidavits supporting the motion but subsequently respondent no 5 therein filed affidavits of the same persons denying their earlier signatures. Accordingly, a notice was issued to those members to appear before the District Magistrate, of whom seven appeared and supported their affidavits filed in support of the motion of no confidence. The District Magistrate held that since the remaining ten members who had filed their affidavits in support of the motion for no confidence did not appear and notice on two members could not be served, the motion was not supported by the required number of half of the elected representatives. Holding that this was an improper exercise of jurisdiction, the Division Bench observed as follows:

"There cannot be a presumption about the signatures being forged or not

being that of the members. Contention raised on behalf of the petitioner appears to be correct. Under the Act, 1961 and the Rules prescribed, there is no requirement of any actual physical presence of the members before the District Magistrate in support of the motion. What is only required is that the motion should be signed by more than half of the members, and if there are affidavits on record in support of the motion and further if there are affidavits to the contrary submitted by the Block Pramukh, it is the duty of the District Magistrate to satisfy himself from the records of the Kshettra Panchayat as to whether prima facie the motion bears the signatures of members or not. He is not required to act as the Civil Court and enter into the necessities of evidence for coming to the conclusion that the signatures on the motion are genuine or not."

Here again, the Division Bench has clearly laid down that the District Magistrate is not required to act as a civil court and to enquire into matters of evidence for coming to the conclusion as to whether the signatures on the motion are genuine or otherwise."

(emphasis supplied)

25. It is pertinent to refer to some of the provisions of Section 15 of the Act, 1961, which are as follows:-

"15 Motion of non-confidence in Pramukh –

(1) A motion expressing want of confidence in the Pramukh or any of a Kshettra Panchayat may be made and proceeded with in accordance with the procedure laid down in the following sub-sections.

(2) A written notice of intention to make the motion in such form as may be

prescribed, signed by at least half of the total number of elected members of the Kshettra Panchayat for the time being together with a copy of the proposed motion, shall be delivered in person, by any one of the members signing the notice, to the Collector having jurisdiction over the Kshettra Panchayat.

(3) The Collector shall thereupon:-

(i) convene a meeting of the Kshettra Panchayat for the consideration of the motion at the office of the Kshettra Panchayat on a date appointed by him, which shall not be later than thirty days from the date on which the notice under sub-section (2) was delivered to him; and

(ii) give to the elected member of the Kshettra Panchayat notice of not less than fifteen days of such meeting in such manner as may be prescribed.

Explanation – In computing the period of thirty days specified in this sub-section, the period during which a stay order, if any, issued by a Competent Court on a petition filed against the motion made under this section is in force plus such further time as may be required in the issue of fresh notices of the meeting to the members shall be excluded.”

26. It is evident from perusal of the provisions of Section 15, as quoted above, that an onerous responsibility is on the Collector for compliance of the provisions to the letter. Under sub-section (5) of Section 2 of the Act, 1961, the term 'Collector' includes an Additional Collector to whom the Collector may have, by order in writing, delegated any of his function under the Act, 1961. The Legislature, in its wisdom, has confined the power of delegation by the Collector to the Additional Collector alone. That is to say, other than the Collector, it is only the

Additional Collector to whom any of the functions of the Collector under the Act can be delegated by order in writing. The provision does not envisage delegating or sub-delegating of the power of the Collector to a Committee for satisfying himself regarding genuineness of the signatures of the members signing the notice. As observed by this Court in *Utma Devi* and affirmed in the case of *Smt. Sheela Devi*, where there are affidavits on record in support of the motion and further if there are affidavits to the contrary submitted, it is the duty of the Collector to satisfy himself from the record of the Kshettra Panchayat as to whether, *prima facie*, the motion bears the signatures of members or not. He is not required to act as a civil court and enter into the niceties of evidence for coming to a conclusion that the signatures on the motion of no confidence are genuine or not.

27. What we find from the record is that a scrutiny report (परीक्षण आख्या) dated 17.8.2024 was prepared by a three members Inquiry Committee consisting of the Assistant Development Officer (Panchayat), the Block Development Officer and the District Panchayat Raj Officer pursuant to an office order dated 16.8.2024 passed by the Chief Development Officer. The scrutiny report is to the effect that on 12.8.2024, some members of Kshettra Panchayat Dudhahi alongwith 101 members of the Kshettra Panchayat submitted a notarized affidavit before the Chief Development Officer/Incharge Collector for purpose of moving a no confidence motion against Smt. Ramawati Devi, Pramukh, Kshettra Panchayat Dudhahi, District Kushinagar with a demand for fixing a date in that regard. That on 16.8.2024, the applicant, Deepak Kumar Mishra, and other members

submitted a complaint to the Collector, Kushinagar to the effect that on the basis of fraudulent documents, a no confidence motion is being brought against the Block Pramukh. For inquiry into the matter and for verification of documents, the Chief Development Officer constituted a three members Verification/Inquiry Committee by an order dated 6.8.2024 under the Chairmanship of the District Panchayat Raj Officer, the members of which Committee were those aforesaid.

28. In the inquiry report, it was stated that the total elected members of Kshettra Panchayat Dudhahi is 139, of which one member has died and, therefore, at present 138 members are there; that 48 members presented themselves before the Committee and their identity cards were scrutinized and verified; that the Block Development Officer and the Assistant Development Officer (Panchayat), Dudhahi identified all those 48 members of the Kshettra Panchayat and they were found to be correct; that all those members submitted affidavits to the Block Development Officer, Dudhahi to the effect that prior to that they had not submitted any affidavits and if any person has submitted affidavits with signatures of the members, the same should be considered as forged and fabricated; that additionally, the verification/inquiry Committee got the entire procedure video recorded in which all the members present there stated that they had never signed any letter relating to no confidence and in that no confidence motion, their fabricated signatures have been made; that the aforesaid 48 Kshettra Panchayat members' list was compared to the list of 101 Kshettra Panchayat members enclosed alongwith the no confidence motion filed on 12.8.2024; that the names of all the 48 members were found in the no

confidence motion enclosed in the list of members of the Kshettra Panchayat; and that since these 48 Kshettra Panchayat members have denied their signatures on the no confidence motion against the Pramukh of the Kshettra Panchayat Dudhahi, therefore, only the resultant number of 53 members who support the motion for no confidence filed on 12.8.2024, remain.

29. It is further mentioned in the inquiry report that under the provisions of Section 15(2) of the Act, 1961, a minimum of half of the total number of the elected members of the Kshettra Panchayat are mandated to sign the written notice and the total number of the elected members of the Kshettra Panchayat Dudhai is 139 and, therefore, the half of the members would be 70 in number, who necessarily had to sign the no confidence motion; that on the confidence motion, only 53 members have been found to have signed which is less than 50% of the specified number. It is further stated that as per Rule 1 of the Rules with regard to moving a no confidence motion against the Pramukh and Up-Pramukh, the proposal means a written notice in Form-1 of the Schedule thereof; that the no confidence motion filed on 12.8.2024 is not in accordance with the prescribed format and, therefore, the no confidence motion is not maintainable.

30. On 21.8.2024, an order was passed by the District Panchayat Raj Officer that the application dated 12.8.2024 regarding the no confidence motion is rejected.

31. As regards the notice not being in the proper format, a coordinate Bench of this Court in the case of **Arti vs. State of U.P.**⁷ has held that though the relevant

rules provide for a particular format, however, if in the written notice, intention to make a motion for no confidence is reflected from perusal of the notice, it would be sufficient notice of intention to make the motion and as such it is not mandatory for the motion to be in the prescribed format. The relevant observations are as follows:

“18. The object of giving a written notice of the intention to make the motion of no confidence is to make possible for the Collector to ascertain as to whether the motion is backed by at least half of the elected members or not. The said requirement is of a mandatory character. If the written notice of intention to make the motion is not signed by at least half of the total number of the elected members, the Collector would not get jurisdiction to take cognizance of the same, nor to issue notice under sub-section (3) of section 15. However, at the same time, even if notice of the intention to make the motion is not given in the prescribed format but it contains all the ingredients of Form-I, it is always open to the Collector to cull out the intention of the members giving the notice and to act upon it. The object of prescribing Form-I is only of a procedural nature to enable the Collector to understand its import and to act without delay. Where a written notice of intention to make the motion is given in prescribed format, it becomes easy for the Collector to decipher intention of those giving the notice and to act accordingly. The copy of the written notice of intention to make the motion is thus for the convenience of the Collector. A person giving notice to the Collector which is not in prescribed format is always at the risk of Collector not taking due cognizance of the same. However, in a case where the Collector acts on a notice of intention to

bring forth motion of no-confidence, though not contained in prescribed format, the person against whom the motion is brought cannot complain of the same. He is in no manner prejudiced thereby as the notice is not meant for him but for the Collector. Even its copy is not required to be sent to the members or the person against whom the motion is brought. Only the copy of the proposed no confidence motion is to be annexed alongwith the notice of the Collector.”

32. As far as the denial of signatures by 48 members, as stated in the inquiry report, is concerned, it is for the Collector personally to verify the signatures appearing in the written notice of intention to make a motion of non-confidence with the records of the Kshettra Panchayat as to whether, *prima facie*, the motion bears the signatures of members or not.

33. Insofar as the jurisdiction of District Panchayat Raj Officer to reject a no confidence motion is concerned, under Section 15 of the Act, 1961, it is the Collector to whom a notice of no confidence is to be delivered in person by any one of the persons signing the notice. It is for the Collector, thereafter, to either reject the same lawfully, or to call a meeting for consideration of the no confidence motion after giving at least 15 days notice to the members to participate in such meeting. When under the provisions of section 15, jurisdiction is vested in the Collector to convene a meeting and take other steps, it is the Collector himself who is responsible to undertake the exercise of recording his *prima facie* satisfaction as to the validity of the notice and pass appropriate order thereon. Any power conferred by the Act, 1961 cannot be delegated by the Collector to any person,

other than the authority to whom delegation is permitted. The involvement of District Panchayat Raj Officer in this process is absolutely alien to the relevant provisions under Section 15 of the Act, 1961. The District Panchayat Raj Officer has no role to play and has no jurisdiction to either reject or to accept a notice of a motion of no confidence. The order of the District Panchayat Raj Officer dated 21.08.2024 is, therefore, wholly and completely without jurisdiction. **The question nos.2 and 3 are answered accordingly.**

34. Insofar as the fourth question framed by the Court is concerned, given the mandate of Section 15 of the Act, 1961, in our considered opinion, the Collector is mandated to pass such an order promptly. The legislature was conscious of the fact that in matters relating to no confidence motion being moved and the same being put before a House for vote in due course, time is the essence. The elements of coercion and offers to members of the House to sway the votes cannot be ruled out. The Collector is expected, therefore, to act with alacrity, which has not been done in the instant case. We find that in his order dated 12.11.2024, the Collector has merely relied upon the inquiry report dated 17.8.2024, which is illegal and deserves to be set aside.

35. There is another aspect of the matter. The Collector took no steps whatsoever to consider the motion for non-confidence as to whether the application was in order. He stood on the sidelines, thereby abdicating his responsibility and his solemn obligation under the Act, 1961. Either the Collector does not understand his duties under the Act or he has willful permitted an illegality to happen. No one

can be permitted to deviate from a solemn obligation imposed on him by statute.

36. It is pertinent to mention here that even when the personal affidavit of the Collector was filed in Court on 21.10.2024, he sought to justify his actions or rather his inaction. When the matter was next listed on 4.11.2024, certain oral observations were made by the Court regarding the conduct of the Collector. It was then that the Collector passed the order on 12.11.2024 and that too solely on the basis of a so-called report of the Chief Development Officer dated 20.8.2024 (Annexure PA-5 to the personal affidavit) which report merely affirms the aforesaid scrutiny/inquiry report dated 17.8.2024. The order of 12.11.2024 has been passed hurriedly, as a 'knee jerk' reaction to the oral observations of the Court on 4.11.2024 and is an afterthought and an attempt by the Collector to 'cover his tracks' which is nothing but a masquerade. It has been passed after nearly 3 months of the delivery of the motion of no confidence on 12.8.2024 and that too without considering the mandate of this Court in *Utma Devi*. No independent application of mind is reflected in the order dated 12.11.2024. Therefore, the order is illegal and invalid. We find that the Collector has acted contrary to the statute. Accordingly, **the fourth question framed by this Court is answered in the negative.**

37. Under the facts and circumstances of this case, the impugned orders dated 21.08.2024 and 12.11.2024 are quashed. The inquiry report dated 17.8.2024 was made by a Committee constituted contrary to the letter and spirit of the Act, 1961 and, therefore, it is also set aside.

38. Since the actions of the Collector concerned in constituting the Committee to conduct an inquiry and permitting the District Panchayat Raj Officer to pass the impugned order dated 21.8.2024 has been held to be an abdication of statutory responsibility by the concerned Collector leading to provisions of the Act, 1961 being sought to be rendered nugatory, we partly **allow** the writ petition with cost of Rs.50,000/- that shall be paid by the State Government to the petitioners within a month from today. It shall be open to the State Government to recover the amount of cost from the concerned authority/Collector.

39. The District Magistrate/Collector is directed to personally undertake the exercise of satisfying himself as to the validity of the notice in terms of the judgment in **Utma Devi** as affirmed by a Full Bench of this Court in **Smt. Sheela Devi**, the extract of the judgment whereof is quoted in paragraph no. 24 above. If the District Magistrate is, *prima facie*, satisfied as to the signatures of the members of the Kshettra Panchayat in the written notice of intention to make the no confidence motion after looking into the records of the Kshettra Panchayat, he shall proceed to convene a meeting of Kshettra Panchayat for consideration of 'no confidence motion' at the office of Kshettra Panchayat on a date appointed by him, within a period of thirty days from today and shall give to the elected members of Kshettra Panchayat notice of not less than fifteen days of such meeting in the manner prescribed.

(2025) 1 ILRA 321

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 17.01.2025

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.**

Writ C No. 41517 of 2024

M/S Arya Rice Mill ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sadhana Dubey, Shashi Kant Shukla

Counsel for the Respondents:
C.S.C.

Civil Law – The Code of Civil Procedure, 1908 - Section 21 – Objections to jurisdiction – Arbitration and Conciliation Act, 1996 - Section 16 – Competence of arbitral tribunal to rule on its jurisdiction – Objection to jurisdiction, particularly in regard to territorial or pecuniary jurisdiction, is to be taken at the earliest possible opportunity and, in any case, before settlement of issues. If such objection is not taken at the earliest, it cannot be allowed at a subsequent stage. In terms of sub-section (2) of Section 16 of the Arbitration and Conciliation Act, a plea that the arbitral tribunal does not have jurisdiction should be raised not later than the submission of the defence. If the excess of jurisdiction crops up during the proceedings, the objection should be made at that very time. In any case, objection on the question of jurisdiction has to be made before the arbitral tribunal itself, and the arbitral tribunal has the power to rule on its own jurisdiction. (Paras 9, 10, 11)

Civil Law – The Code of Civil Procedure, 1908 - Section 21 – Objections to jurisdiction – Arbitration and Conciliation Act, 1996 – Petitioner assailed the order passed by the Arbitrator on the ground that the Executive Director, U.P. State Employees' Welfare Corporation, had

issued the recovery certificates earlier, and therefore, he could not have been appointed as Arbitrator in the case. Held: Petitioner did not raise any objection with regard to the appointment of the Executive Director as Arbitrator in the case at the very first instance. Petitioner has not been able to point out what prejudice was caused to him by the fact that the Executive Director was appointed as Arbitrator. Petitioner, having participated in the proceedings without any objection in regard to the jurisdiction or any perceived bias of the Arbitrator, would be dis-entitled from raising any such objection in subsequent proceedings. (Paras 8, 12)

Dismissed. (E-5)

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondent.

2. Present writ petition seeks to challenge an order dated 19.11.2024 passed by respondent no.3, in his capacity as Arbitrator, and the subsequent recovery certificates dated 20.11.2024 issued by respondent no.2, and also the order dated 29.11.2024 passed by respondent no.6, restraining the petitioner from hulling of Custom Milled Rice (CMR) for the year 2024-25.

3. The petitioner has described itself as a firm engaged in the business of hulling paddy to convert it into rice. In respect of dues regarding CMR deficit, for the year 2018-19, recovery certificates dated 4.3.2020 were issued against the petitioner. Certain representations are stated to have been moved against the aforesaid recovery

certificates. Subsequently, a citation dated 29.5.2023 was issued in pursuance of the recovery certificates issued earlier.

4. The petitioner, at this stage, preferred a writ petition, being Writ-C No.22401 of 2023 which, vide order dated 2.8.2023, was permitted to be withdrawn with liberty to avail the remedy of arbitration by approaching the Arbitrator.

5. The petitioner, thereafter approached respondent no.2 for initiation of arbitration proceedings. It is stated that respondent no.2 appointed himself as an Arbitrator and after hearing the parties, has passed an order dated 19.11.2024, rejecting the representation/claim of the petitioner. Consequent to the aforesaid order, recovery certificates dated 20.11.2024 have been issued by respondent no.2, and also an order dated 29.11.2024 has been passed by respondent no.6, whereby the petitioner has been restrained from hulling work of CMR for the year 2024-25 till further orders.

6. The only ground that has been pressed before us by learned counsel for the petitioner to assail the order dated 19.11.2024 passed by the Arbitrator is that respondent no.2/Executive Director, U P State Employees' Welfare Corporation, had issued the recovery certificates earlier, and therefore, he could not have been appointed as Arbitrator in the case.

7. Learned counsel for the State, referring to Section 21 of the Code of Civil Procedure, 19081, has submitted that the objection to the jurisdiction or objection to a person being Arbitrator ought to have been raised at the very first instance. He has also submitted that the objection also sought to have been made to the effect that the petitioner had been prejudiced because

of the fact that the Arbitrator, i.e. the Executive Director was appointed as an Arbitrator.

8. Having heard learned counsel for the petitioner and learned counsel for the State, we find that it is not disputed that the petitioner did not raise any objection with regard to the appointment of the Executive Director as an Arbitrator in the case at the very first instance. Counsel for the petitioner has not been able to point out as to what prejudice was caused to the petitioner by the fact that the Executive Director was appointed as an Arbitrator.

9. The principles underlying in Section 21 of the CPC are to the effect that objection to jurisdiction, particularly in regard to territorial or pecuniary jurisdiction, are to be taken at the earliest possible opportunity and in any case, before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed at a subsequent stage.

10. Section 21 of CPC, in fact, gives statutory recognition to the principle that objection with regard to jurisdiction can be waived, and that subsequently, on account of this waiver, the party concerned would be precluded from taking any such objection.

11. The general law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996, which was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Section 16 of the Arbitration and Conciliation Act, 1996 provides for challenge to the jurisdictional authority of the Arbitral Tribunal. In terms of sub-section (2) thereof, a plea that the arbitral tribunal does not

have jurisdiction should be raised not later than the submission of the defence. If the excess of jurisdiction crops up during the proceedings, the objection should be made at that very time. In any case, objection on the question of jurisdiction has to be made before the arbitral tribunal itself, and the arbitral tribunal has the power to rule on its own jurisdiction.

12. In the instant case, learned counsel for the petitioner has not been able to point out that the petitioner had raised any objection with regard to the competence or the jurisdiction of the Arbitrator during the course of the arbitration proceedings. The petitioner, having participated in the proceedings without any objection in regard to the jurisdiction or any perceived bias of the Arbitrator, the same would dis-entitle the petitioner from raising any such objection in subsequent proceedings.

13. Under such circumstances, we refrain from interfering in this case and accordingly, the writ petition is **dismissed**.

14. The petitioner may avail such other legal remedy as may be available to it under law.

(2025) 1 ILRA 323

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 16.01.2025

BEFORE

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

Application U/S 482. No. 41426 of 2024

Anand Kumar Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Dhirendra Kumar Srivastava

Counsel for the Opposite Parties:

G.A.

Criminal Law - Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994-Section 23-

though explicit reasons are not required to be recorded while passing summoning orders- but satisfaction or opinion of court, regarding prima facie case must be recorded before issuing summon -even if the case is filed by a public servant-no satisfaction was recorded by the court below-impugned order quashed.

Application allowed. (E-9)**List of Cases cited:**

1. Lalankumar Singh & ors. Vs St. of Mah.; 2022 SCC Online 1383

2. Sarif Ahmed & anr. Vs St. of U.P. & anr.; 2024 SCC OnLine SC 726 [S.L.P. (Crl.) No. 1074 of 2017]

3. Dayle De'souza Vs U.O.I. (2021) 20 SCC 135

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

1. Heard Sri Dharendra Kr. Srivastava, learned counsel for the applicant and Sri Brijesh Kr. Dwivedi, learned A.G.A. for the State.

2. The instant application has been filed seeking quashing of the summoning order dated 21.6.2024 as well as the entire proceeding of Complaint Case No. 10707 of 2024, under Section 23 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, P.S. Balua, District Chandauli, pending before C.J.M., Chandauli.

3. The sole contention of learned counsel for the applicant is that the summoning order ex facie is illegal, being passed by non-application of mind. It is

further submitted that the Apex Court in the case of *Lalankumar Singh and others vs. State of Maharashtra; 2022 SCC Online 1383* has clearly observed that summoning a person is a serious matter and while summoning a person, the court should record its satisfaction which should be reflected from the order itself.

4. Learned A.G.A. though opposed the prayer, but could not dispute that no satisfaction, regarding *prima facie case*, was recorded in the summoning order.

5. After hearing the submissions of learned counsel for the parties and on perusal of the record, it appears that the impugned complaint was filed on behalf of the State of U.P. through Additional Chief Medical Officer, Chandauli on the basis of inspection of the premises of diagnostic centre of the applicant on 28.5.2024 wherein several illegalities were found.

6. From the perusal of the impugned summoning order, it appears that the court below has not mentioned any satisfaction whether any prima facie case is made out against the applicant or not and also did not discuss about any material which is the basis of filing this complaint. The Apex Court in paragraph No.38 of the judgement in *Lalankumar Singh (supra)* has clearly observed that summoning of a person is serious matter, therefore, issuance of process is not an empty formality and learned Magistrate should apply his mind whether there exists any ground for summoning the person or not. Paragraph No. 38 of the *Lalankumar Singh (supra)* is quoted as under:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as

to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal v. Central Bureau of Investigation⁹, which reads thus:

“51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words ‘sufficient ground for proceeding’ appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is

sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.”

7. In a recent judgement, in the case of **Sarif Ahmed and another vs. State of U.P. and another; 2024 SCC OnLine SC 726 [S.L.P. (Crl.) No. 1074 of 2017]**, the Apex Court has observed that though while issuing summon, the concerned court is not required to record detailed reasoning, but it should record its satisfaction on the basis of material available on record. Paragraph No. 17 of the **Sarif Ahmed (supra)** is quoted as under:-

"17. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issue of summons and this is not a prerequisite for deciding the validity of the summons. Nevertheless, the requirement of the Code is that the summons is issued when it appears to the Magistrate that there is sufficient ground for proceeding against the accused. Summons is issued to the person against whom the legal proceedings have commenced. Wilful disobedience is liable to be punished under Section 174 of the Penal Code, 1860¹⁴. As a sequitur, keeping in mind both the language of Section 204 of the Code and the penal consequences, the Magistrate is mandated to form an opinion as to whether there exists sufficient ground for summons to be issued. While deciding whether summons is to be issued to a person, the Magistrate can take into consideration any prima facie

improbabilities arising in the case. The parameters on which a summoning order can be interfered with are well settled by the decision of this court in Bhushan Kumar (supra). The Magistrate in terms of Section 204 of the Code is required to exercise his judicial discretion with a degree of caution, even when he is not required to record reasons, on whether there is sufficient ground for proceeding. Proceedings initiated by a criminal court are generally not interfered with by High Courts, unless necessary to secure the ends of justice."

8. Similarly, the Apex Court in the case of **Dayle De'souza vs. Union of India (2021) 20 SCC 135**, again observed that summoning of a person should not be made in routine and mechanical manner and the court should record its satisfaction before summoning a person. Paragraph No. 36 of the **Dayle De'souza (supra)** is quoted as under:-

"36. Equally, it is the court's duty not to issue summons in a mechanical and routine manner. If done so, the entire purpose of laying down a detailed procedure under Chapter XV of the 1973 Code gets frustrated. Under the Proviso (a) to Section 200 of the 1973 Code, there may lie an exemption from recording pre-summoning evidence when a private complaint is filed by a public servant in discharge of his official duties; however, it is the duty of the Magistrate to apply his mind to see whether on the basis of the allegations made and the evidence, a prima facie case for taking cognizance and summoning the accused is made out or not. This Court explained the reasoning behind this exemption in National Small Industries Corpn. Ltd. v. State (NCT of Delhi) [National Small Industries Corpn. Ltd. v.

State (NCT of Delhi), (2009) 1 SCC 407 : (2009) 1 SCC (Civ) 192 : (2009) 1 SCC (Cri) 513] : (SCC p. 415, para 12)

"12. The object of Section 200 of the Code requiring the complainant and the witnesses to be examined, is to find out whether there are sufficient grounds for proceeding against the accused and to prevent issue of process on complaints which are false or vexatious or intended to harass the persons arrayed as accused. (See Nirmaljit Singh Hoon v. State of W.B. [Nirmaljit Singh Hoon v. State of W.B., (1973) 3 SCC 753 : 1973 SCC (Cri) 521]) Where the complainant is a public servant or court, clause (a) of the proviso to Section 200 of the Code raises an implied statutory presumption that the complaint has been made responsibly and bona fide and not falsely or vexatiously. On account of such implied presumption, where the complainant is a public servant, the statute exempts examination of the complainant and the witnesses, before issuing process."

The issue of process, resulting in summons, is a judicial process that carries with it a sanctity and a promise of legal propriety."

9. From the above legal position it is clear that though explicit reasons are not required to be recorded while passing summoning orders, but it should not be cryptic and at least satisfaction or opinion of court, regarding prima facie case on the basis of available material, must be recorded by the court below before issuing summon to a person, even if the case is filed by a public servant.

10. In the present case, no satisfaction was recorded by the court below about prima facie case against the applicant while passing summoning order dated 21.6.2024. Therefore, the impugned order is absolutely

cryptic and erroneous which deserves to be quashed.

11. Accordingly, the impugned summoning order dated 21.6.2024, passed in Complaint Case No. 10707 of 2024, under Section 23 of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, P.S. Balua, District Chandauli, is hereby set aside.

12. The court below is directed to pass a fresh order in accordance with law.

13. With the above observation, present application is **allowed**.

(2025) 1 ILRA 327
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2025

BEFORE

THE HON'BLE AJIT KUMAR, J.

Civil Revision No. 524 of 2011

Pawan Kumar Kothiwal & Ors.

...Revisionists

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Revisionists:

Archit Mehrotra

Counsel for the Opposite Parties:

C.S.C.

A. Civil Law – Transfer of Property Act – Unregistered Lease – Section 107 of T.P.A. provides that a lease of immoveable property for any term exceeding one year can be made only by a registered instrument. All other leases of immoveable property may be made either by a registered instrument or by oral

agreement accompanied by delivery of possession. Section 106 of the T.P.A. states that in the absence of a contract, 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. No lease rights can flow in respect of immoveable property beyond the period prescribed under Section 107 of the Transfer of Property Act from an unregistered instrument/document. (Para 16)

B. Civil Law - Registration Act, 1908 - Registration of agreement entered between the private party and the Government *in respect of private land* - Section 90(1)(d), Registration Act, 1908 provides: that Nothing contained in the Registration Act shall be deemed to require, or to have at any time required, the registration of sanads, inam, title-deeds and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land. Section 90(1)(d) of the Registration Act stipulates only such certificates and documents which are issued by the Government creating rights in respect of *Government land* or any other rights in respect of such lands. Section 90(1)(d) cannot be interpreted to mean any agreement entered between the private party and the Government *in respect of private land*. Any right in respect of immoveable property which is not creating or conferring any assignment or right as contemplated under Section 90(1)(d), is required to be compulsorily registered under the Registration Act. (Para 18)

C. Plaintiff's eviction suit. There was no agreement in writing creating tenancy rights in favour of the respondents. Letter issued on behalf of Governor stipulated

that tenancy was till 30.06.2009. Plaintiff's case was that it was a fixed term tenancy starting from 01.07.1995 to end on 30.06.2009 and, therefore, the respondents were liable to be evicted upon expiry of the term of tenancy and in the event of their failure to vacate the premises, the tenancy was liable to be determined by issuance of notice under Section 106 of the Transfer of Property Act. Respondent presented an unregistered agreement before the court to demonstrate that there was not fixed term tenancy. Document on non-judicial stamp was filed by respondent and claimed to have been signed by the landlord creating tenancy w.e.f. 01.07.1994. However, it referred to payment of rent only till 30.05.2005. That document contained Clause 6 which prescribed that after expiry of the period new lease would be executed with further 25% enhancement of rent. No such agreement was re-entered. Question arose as to which document is to be read to interpret tenancy rights. Trial Court held that in view of agreement relied upon by the respondents there appeared to be no fixed term tenancy and, hence, it amounted to tenancy in perpetuity and plaintiff having continued the respondents in tenancy by their act and conduct, the benefit under Section 116 of the Transfer of Property Act of holding over was liable to be extended to the tenant-respondent. *Issue:* Whether an unregistered document presented by the respondent can be read into to draw an inference that there was a tenancy in perpetuity and therefore, could not have been determined by issuance of a notice under Section 106 of the Transfer of Property Act, 1882? *Held:* Looking to the relevant clause of the document of lease as filed by the respondent which prescribed for period running from 01.07.1994 till May, 2005, it was necessarily required to be registered as per Section 107 of the Transfer of Property Act. Since that document was not registered, it could not create lease rights beyond a period of twelve months. As the lease was neither for agricultural purposes, nor for manufacturing purposes,

therefore, lease would be taken as the one on month to month basis. As the lease in question would have been on month to month basis, no justification for extending benefit of Section 116 to the respondent. The notice issued by the landlord-plaintiff determining lease on 30.07.2009 was valid. Findings returned by the court below that there was a lease in perpetuity was based upon misreading of the document as well as interpretation of relevant provisions of law and cannot be sustained in law. SCC Suit decreed directing the respondents to vacate the premises in question. (Para 17, 18, 19)

Allowed. (E-5)

List of Cases cited:

1. Sevoke Properties Ltd. Vs West Bengal State Electricity Distribution Comp. Ltd., (2020) 11 SCC 782
2. Park Street Properties Pvt. Ltd. Vs Dipak Kumar Singh & anr., (2016) 9 SCC 268
3. Rajeev Kumar Vs St. of U.P. through Secretary Finance and Revenue Department U.P. at Lucknow & ors., 2016 (165) AIC 939 (All HC)
4. U.O.I. & ors. Vs Sudarshan Lal Talwar, 2022 ALL LJ 1623
5. Anish Ahmad Vs Special/Additional District Judge, Saharanpur & ors., 1997 SCC OnLine All 303

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

1. Heard Shri Archit Mehrotra, learned Advocate appearing for revision-applicants and Shri O.P. Singh Sikarwar, learned Standing Counsel appearing for State of U.P. and Regional Food Controller, Civil Lines, Moradabad, the tenant respondents.

2. The sole issue that arises for consideration before the Court is as to

whether an unregistered document presented by the respondent can be read into to draw an inference that there was a tenancy in perpetuity and therefore, could not have been determined by issuance of a notice under Section 106 of the Transfer of Property Act, 1882.

3. In the instant case revision-applicant/ plaintiff has been non-suited in the eviction suit only for the reason that respondent presented an unregistered agreement before the court to demonstrate that there was not fixed term tenancy contrary to the stand taken by plaintiff that there was a fixed term tenancy to expire on 30.06.2009 and, therefore, the respondents were liable to be evicted upon expiry of the term of tenancy and in the event of their failure to vacate the premises, the tenancy was liable to be determined by issuance of notice under Section 106 of the Transfer of Property Act. The trial court while dislodging the stand of the plaintiff to determine the tenancy by issuing notice under Section 106 of the Transfer of Property Act held that in view of agreement relied upon by the respondents there appear to be no fixed term tenancy and, hence, it amounted to tenancy in perpetuity and plaintiff/ revision-applicant having continued, the respondents in tenancy by their act and conduct, the benefit under Section 116 of the Transfer of Property Act of holding over was liable to be extended to the tenant respondent.

4. The submission advanced by learned counsel appearing for revision-applicant for assailing the judgment is that no unregistered agreement in respect of immovable property can create lease rights beyond prescribed period of 12 months as per Section 107 of the Transfer of Property Act and Section 17 of the Registration Act

in such circumstances, therefore, an unregistered agreement would only mean to create tenancy right on month to month basis determinable with 30 days notice in advance as it then stood on the statute vide provision 106 of the Transfer of Property Act, 1882. Thus, it is submitted that the court below was not justified in holding the lease to be a valid agreement creating tenancy rights in perpetuity and then conferring benefit of Section 116 of the Transfer of Property Act in favour of the tenant respondents for the act and conduct of plaintiff in continuing them in tenancy beyond the period prescribed as per their own document of five years of tenancy which was not acted upon. According to learned counsel appearing for revision applicant, revision applicant would be tenant in sufferance upon issuance of notice under Section 106 and therefore, would not be entitled to benefit under Section 116 of the Transfer of Property Act.

5. Learned counsel appearing for revision-applicant has relied upon the judgment of Supreme Court in the case of **Sevoke Properties Limited v. West Bengal State Electricity Distribution Company Limited (2020) 11 Supreme Court Cases 782** and placed before the Court paragraphs 12 and 13 of the judgment that run as under:

"12. The essence of the dispute in the present case is as to whether a notice of termination under Section 106 was necessary. In the judgment of this Court in Satish Chand Makhan, the father of the plaintiff had leased open land to the defendant for a period of five years under a registered deed of lease. After the expiry of the initial term, there was a draft agreement for renewal for a further period

of nine years, which, however, was not registered under Section 17 (1) (d) of the Registration Act, 1908. The plaintiff served a notice for the determination of the tenancy on the ground of forfeiture under Section 111 (g) and brought a suit for ejectment. The High Court held that the lease had been determined by efflux of time under Section 111 (a) upon the expiry of the term of nine years and hence, no notice under Section 106 was required for determination of the lease. While determining the correctness of the judgment of the High Court, this Court observed that "the defendants have nowhere admitted that the lease was for a specific term of nine years". On the contrary, the defendants had pleaded that they were tenants holding over under Section 116 of the TP Act. This Court held that the unregistered draft lease agreement was inadmissible in evidence under Section 49 of the Registration Act except for a collateral purpose of providing the nature and character of the possession of the defendants. The terms of the lease did not constitute a collateral purpose. Consequently, the unregistered draft lease was held to be inadmissible to create a valid lease for a renewed term of nine years. In this background, this Court held that the defendants were tenants holding over under Section 116 in which event it was necessary for the plaintiff to serve a notice under Section 106. In the absence of such a notice, the suit, it was held would not be maintainable.

13. Mr. Sundaram has sought to distinguish this decision, since in that case this Court found that the defendant was a tenant holding over within the meaning of Section 116. We find merit in the submission which has been urged by Mr. Sundaram. In the case before this Court noted above, the defendants had not

admitted that the term of the lease was for a period of nine years. This was noted by the Court, as we have extracted earlier. On the contrary, we find that in the present case, there is an express admission on the part of the defendants that they were in occupation under the lease agreement for a period of fifteen years with effect from 1981 and that the period of lease expired on 24-5-1996. Such a specific admission on the part of the defendants is contained in Para 22 of the written statement. Under Section 111 (a), a lease of immovable property determines by efflux of time limited thereby. Once this be the position, there can be no manner of doubt that the position of the respondent on the expiration of the lease was of a tenant at sufferance. In the circumstances, there was no necessity of a notice for the termination of the lease under the provisions of Section 106. The respondent having squarely admitted in its written statement that it was in occupation for a term of fifteen year, that term having expired, the lease stood determined by efflux of time. Once the lease stood determined by efflux of time, there was no necessity for a notice of termination under Section 106."

6. He has further relied upon the earlier judgment of Supreme Court in the case of **Park Street Properties Private Limited v. Dipak Kumar Singh and another (2016) 9 Supreme Court Cases 268** where exhaustive consideration has been given to provision as contained under Section 106 of Transfer of Property Act and Section 17 (1) (d) read with Section 39 of the Registration Act. He has placed before the Court paragraphs- 9,10,17, 19 which run as under:

"9. The learned Senior Counsel places reliance on the decision of this

Court in Samir Mukherjee v. Davinder K. Bajaj, the relevant portion of which is extracted as hereunder:

6. Section 107, prescribes the procedure for execution of a lease between the parties. Under the first paragraph of this section a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument and remaining classes of leases are governed by the second paragraph, that is to say all other leases of immovable property can be made either by a registered instrument or by an oral agreement accompanied by delivery of possession.

7. In the case in hand, we are concerned with an oral lease which is hit by the first paragraph of Section 107 of the Transfer of Property Act. Under Section 107 parties have an option to enter into a lease in respect of an immovable property either for a term less than a year or from year to year, for an term exceeding one year or reserving a yearly rent. If they decide upon having a lease in respect of any immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, such a lease has to be only by a registered instrument. In absence of a registered instrument, no valid lease from year to year or for a term exceeding one year or reserving a yearly rent can be created. If the lease is not a valid lease within the meaning of the opening words of Section 106, the rule of construction embodied therein would not be attracted. The above is the legal position on a harmonious reading of both the section.

8. In Ram Kumar Das Section 106 was considered by a Bench of four Judges of this Court. This Court held that this Section 106 lays down the rule of construction which is to be applied when

there is no period agreed upon between the parties and in such cases duration has to be determined by reference to the object for the purposes for which tenancy is created. It was also held that the rule of construction embodied in this section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent and other circumstances. It was further held that it is not disputed that a contract to the contrary as contemplated by Section 106 of the Transfer of property Act need not be an express contract; it may be implied but it certainly should be a valid contract. On the fact of that case, the Court held that

13. ... the difficulty in applying this rule to the present case arises from the fact that a tenancy from year to year or reserving an yearly rent can be made only by registered instrument, as lays down in Section 107 of the Transfer of Property Act.

10. The learned Senior Counsel Mr Sundaram further placed reliance on the decision of this Court in K.B. Saha & Sons (P) Ltd v. Development Consultant Ltd. wherein it was held as under:

34. From the principles laid down in the various decisions of this Court and the High Court, as referred to hereinabove, it is evident that:

1. A document required to be registered, if unregistered, is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its term can be admitted in evidence and that to use a document for the purpose of providing an important clause would not be using it as a collateral purpose.

35. In our view, the particular clause in the lease agreement in question cannot be called a collateral purpose. As noted earlier, it is the case of the appellant that the suit premises were let out only for the particular named officer of the respondent and accordingly, after the same was vacated by the said officer, the respondent was not entitled to allot it to any other employee and was therefore, liable to be evicted, which, in our view, was an important term forming part of the lease agreement. Therefore, such a clause, namely, Clause 9 of the lease agreement in this case, cannot be looked into even for collateral purposes to come to a conclusion that the respondent was liable to be evicted because of violation of Clause 9 of the lease agreement, which is admittedly unregistered, can be looked into for the purpose of evicting the respondent from the suit premises only because the respondent was not entitled to induct any other person other than the named officer in the same.

17. A perusal of Section 106 of the Act makes it clear that it creates a deemed monthly tenancy in those cases where there is no express contract to the contrary, which is terminable at the notice period of 15 days. The Section also lays down the requirements of a valid notice to terminate the tenancy, such as that it must be in writing, signed by the person sending

it and be duly delivered. Admittedly, the validity of the notice itself is not under challenge. The main contention advanced on behalf of the respondents is that the impugned judgment and order is valid in light of the second part of Section 107 of the Act, which requires that lease for a term exceeding one year can only be made by way of a registered instrument.

19. It is also a well-settled position of law that in the absence of a registered instrument, the court are not precluded from determining the factum of tenancy from the other evidence on record as well as the conduct of the parties. A three judge Bench of this Court in *Anothony v. K.C Ittoop & sons* held as under:

12.... A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. the provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property, a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first paragraph has been extracted above and it deals with the mode of creating the particular kinds of lease mentioned therein. The third paragraph can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second paragraph. Thus dehors the instrument parties can create a lease as envisaged in the second paragraph of Section 107 which reads thus...

13. When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.

16. Taking a different view would be a contrary to the reality when parties clearly intended to create a lease though the document which they executed had not gone into the processes of registration. That lacuna had affected the validity of the document, but what had happened between the parties in respect of the property became a reality. Non-registration of the document had caused only two consequences. One is that no leased exceeding one year was created. Second is that the instrument became useless so far as creation of the lease is concerned. Nonetheless the presumption that the lease not exceeding one year stood created by conduct of parties remains unrebutted.

Thus, in the absence of registration of a document, what is deemed to be created is a month-to-month tenancy, the termination of which is governed by Section 106 of the Act. "

7. He has also placed reliance upon the Division Bench judgment of this Court in the case of **Rajeev Kumar v. State of U.P. through Secretary Finance and Revenue Department U.P. at Lucknow and others [2016 (165) AIC 939 (Alld.HC)]** where lease created in respect of secured assets for a period of nine years required to be compulsorily registrable but executed upon a notarized document, was held to have no binding effect. He has placed before the Court paragraphs 9 and 10 which run as under:

"9. Having analyzed the legal position, we now proceed to apply the same to the facts of the case in hand. Admittedly, petitioner claims to have a lease of the premises in dispute in his favour on the basis of a notarized document for a period of nine years on payment of rent. The question for consideration is whether the notarized document which is a deed of rental agreement (Annexure-1 to the writ petition) upon which the petitioner places reliance can be said to be a document to establish that he is bona fide lessee of the secured assets. Section 107 of the Transfer of Property Act prescribed how the lease is to be made.

"107. Lease how made - A lease of immovable property from year to year, or any term exceeding one year, or reserving a yearly rent can be made only by registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee;

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

10. A bare reading of the provision goes to show that lease of immovable property from year to year or for any term except one year can be made

only by registered agreement and all other leases of immovable property can be made either by registered instrument or oral agreement though by delivery of possession. In the case in case the period mentioned in the document is from 6.1.2012 to 5.1.2012 i.e. 9 years under section 107 of the Transfer of Property Act such a instrument has to be necessarily registered. Since the petitioner has failed to produce any registered document executed in his favour by the lessor, he cannot be held to be entitled to remain in possession of the secured assets for any term except one year from the date of execution of the document. Admittedly, the document being relied upon by the petitioner, executed on 6.1.2012, is an unregistered document, his possession is liable to be protected for a period of one year from the said date. Thus, only irresistible conclusion is that petitioner is not entitled to possession of the secured assets for more than one year from the date of instrument/ date of rental agreement dated 6.1.2012"

8. He has also placed relevant paragraphs of Co-ordinate Bench judgment of this Court in the Case of **Union of India and other v. Sudarshan Lal Talwar 2022 ALL L.J. 1623** in which the Court has held that mere acceptance of rent after period of termination of tenancy does not amount of waiver. He has placed before the Court paragraph-18 of the judgment which runs as under.

"18. In the light of these decision I therefore, find that mere acceptance of rent after the period of termination of the tenancy does not amount to waiver of notice to quite. There must be some intention of waiver. In the present case, the opposite party actively prosecuted the suit for ejectment filed by him. Therefore, it

cannot be accepted that the notice has been waived. I, accordingly find that the trial Court has rightly held that the notice to quit has not been waived and, therefore, the revisionist are liable to ejectment"

9. He has also relied upon another judgment of learned Single Judge in the case of **Anish Ahmad v. Special/ Additional District Judge, Saharanput and others 1997 SCC Online All 303**. Placing before the Court paragraphs 5, 6, 7 and 8 regarding doctrine of waiver in the case of termination of tenancy. Paragraphs 5, 6, 7, 8 and 9 are reproduced hereunder:

"5. A landlord can waive the notice as provided under Section 113 of the Transfer of Property Act which provides that the notice given under Section 111, Clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting. the person claiming that the notice has been waived has to satisfy two essential ingredients (i) the intention of the landlord was to treat the lease as subsisting, and (ii) he had a knowledge of the fact that this conduct amount to waiver.

6. In **Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh**, the Hon'ble Supreme Court made the following observation:

"A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.

7. In **Ram Krishna v. Jhaman Das**, it was held that if the landlord accepts the rent after the institution of the suit for

the period subsequent to the, date of termination of tenancy, it cannot be held that he has waived the notice.

8. *In Gulab Singh Rawat v. District, Judge, Uttar Kashi, it was held that if the landlord accepts the rent from the tenant after expiry of the time granted to the tenant for vacating the premises, it would not amount to waiver of termination of tenancy unless it is proved that a fresh contract of tenancy was entered into between the landlord and tenant.*

9. *If the landlord accepts the rent for the period subsequent to the date of termination of tenancy, that does not amount to waiver of notice, unless there are other compelling circumstances to indicate that there was intention of the landlord to treat the lease as subsisting."*

10. Meeting the arguments so advanced above by learned counsel appearing for revision applicant Shri O.P. Singh Sikarwar, learned Standing Counsel has placed before the Court Section 90 of the Registration Act, 1908 and has placed before the Court Sub-Section 1 (d) of Section 90 that runs as under:

"90. Exemption of certain documents executed by or in favour of Government.

.....(d) sanads, inam title-deeds and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land; or....."

11. Shri Sikarwar, sought to urge that this was a kind of right created in respect of an immovable property through a document and since it provided for an interest in land may be other than government land, it should be taken to be covering the property in question and, therefore, the law of

exemption would stand attracted. Shri Sikarwar, defended the order passed by the court dismissing the suit for the above very reasons. However, Shri Sikarwar, would very fairly concede that in the matter where tenant status is of a tenant-in-sufferance, such a tenant would not be entitled to the benefit of Section 116 of the Transfer of Property Act. Shri Sikarwar also, could not cite any authority laying down law contrary to authorities cited by learned counsel appearing for revision applicant.

12. Having heard learned counsel appearing for respective parties and having perused the records of this revision as well as trial court's records produced before the Court, it comes out an admitted position on the part of the plaintiff-revision applicant that there was no agreement in writing as such creating tenancy rights in favour of the respondents. However, letter issued on behalf of Governor by the Deputy Secretary on 19.05.2006 clearly stipulated that tenancy was till 30.06.2009. Thus, it was a fixed term tenancy starting from 01.07.1995 to end on 30.06.2009 and another is a document on non-judicial stamp filed by respondent and claimed to have been signed by the landlord creating tenancy w.e.f. 01.07.1994. This document refers to lease rights created in favour of respondents. The question arises as to which document is to be read to interpret tenancy rights. Admittedly petitioners before this Court denied to have executed any document creating such rights and only placed reliance upon authorized letter issued on behalf of Governor. This can only be taken to be a collateral document as possessory rights and for a limited purpose to decide jural relationship of landlord and tenant relationship. Therefore, the court even if did not rely upon this document to have created any fixed time tenancy, the

findings cannot be held to be erroneous but since the jural relationship of landlord tenant has come to be determined and the parties do agree to this, at the most, it can be referable to only tenancy rights limited to the year 2009. This is a case where one has to acknowledge this fact that parties do agree to jural relationship then such documents can of course, be taken into consideration only for the purposes of determination of such relationship and to that extent its admissibility cannot be doubted.

13. The question that now arises is, as to how to determine any fixed term tenancy to have ever existed or this was a tenancy in perpetuity as has been held by the court below. Coming to the other document which is on non-judicial stamp filed before the court below and upon which respondents have placed heavy reliance as it is their document, this evidences the factum that the tenancy started from 01.07.1994, however, it referred to payment of rent only till 30.05.2005. This document interestingly contained another clause paragraph 6 which prescribed that even after expiry of the period new lease would be executed with further 25% enhancement of rent. It is not a case between the parties that any such agreement was re-entered. This document has been interpreted by the court below in two ways: firstly the landlord petitioners having continued the respondent beyond the prescribed period w.e.f. 1.7.1994 to 30.05.2005, have by their conduct continued the tenancy and, therefore, tenant respondent would automatically get entitled to the benefit under Section 116 and secondly, in view of clause-6 of the said agreement, it amounted to tenancy in perpetuity and not a fixed term tenancy.

14. Here it becomes important and rather pertinent to refer to relevant provisions of the Transfer of Property Act to define the status of such document. Admittedly the court below has proceeded to hold that the documents created a lease right. Section 107 of the Transfer of Property Act provides for the manner and method in which leases have to be made in respect of immovable property for the purposes of period exceeding one year. Section 107 of the Transfer of Property Act reads as under:

"107. Lease how made - A lease of immovable property from year to year, or any term exceeding one year, or reserving a yearly rent can be made only by registered instrument."

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee;

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession".

(Emphasis added)

15. From a bare reading of aforesaid provision as quoted above, the intendment of the legislature appears to be absolutely clear that leases beyond period of twelve

months in respect of immovable property have to be through registered instruments. Thus, looking to the relevant clause of the document of lease as filed by the respondent which prescribed for period running from 01.07.1994 till May, 2005 it was necessarily required to be registered as per Section 107 of the Transfer of Property Act. Since this document is admittedly not registered one, it cannot create lease rights beyond a period of twelve months. It is not disputed also between the parties that this lease was not neither for agricultural purposes, nor for manufacturing purposes and, therefore, in such circumstances, lease was to be taken as the one on month to month basis and determinable with issuance of thirty days' advance notice as per the provisions contained under Section 106 of the Transfer of Properties Act as it then stood on the statute. Section 106 is reproduced hereunder:

"106. Duration of certain leases in absence of written contract or local usage.?"

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely

because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

16. I have already quoted the relevant paragraphs of the judgment in the cases of ***Park Street Properties Private Limited (supra)*** and ***Rajiv Kumar (supra)*** in which the Courts have held that such lease rights can only be created in respect of immovable property through registered instrument only in view of Section 17 read with Section 49 of the Registration Act and, therefore, no lease rights can flow in respect of immovable property beyond the period prescribed for under Section 107 of the Transfer of Property Act from an unregistered instrument/ document.

17. In such above view of the matter, therefore, the findings returned by the court below that there was a lease in perpetuity appears to be absolutely upon misreading of the document as well as interpretation of relevant provisions of law as discussed above and these findings, therefore, cannot be sustained in law.

18. Since I have already held above that the lease in question would have been on month to month basis in view of the relevant provisions of the Transfer of Property Act and the judgment discussed

and cited above, I do not see any justification for the court in extending benefit of Section 116 to the respondent. The provisions as contained under Section 90 (1) (d) of the Registration Act as quoted above clearly stipulates only such certificates and documents which are issued by the Government creating rights in respect of Government land or any other rights in respect of such lands and these provisions cannot be interpreted to mean any agreement entered between the private party and the Government in respect of private land. Any right in respect of immovable property which is not creating or conferring any assignment or right as contemplated under Section 90(1) (d), is required to be compulsorily registered under the Registration Act, reading down the relevant provisions of the Transfer of Property Act with the provisions of the Registration Act as discussed above.

19. In view of the above, therefore, the notice issued by the landlord plaintiff determining lease on 30.07.2009 was a valid notice and since the notice has not been disputed and the Act No. 13 of 1972 was not applicable, the suit deserves to be decreed. Hence, the judgment and decree passed by the trial Judge in SCC suit No. 16 of 2009 deserves to be set aside and suit deserves to be decreed. Hence, the SCC Suit No. 16 of 2009 is hereby decreed directing the respondents to vacate the premises in question.

20. At this stage, learned Standing Counsel states that the State is running its office from the demise premises, so some reasonable time may be given to vacate the premises.

21. Accordingly, respondents are directed to vacate the premises in question

on or before 31.12.2025. Since it is a land ad-measuring 4150 sq. feet is in possession of the respondent and the ground floor of the building is already let out at the rate of Rs. 100 per sq. feet, respondents are directed to pay Rs. 50,000/- per month and in the event they fail to vacate the premises in question on 31.12.2025, they shall be paying damages at the rate of Rs. 50 per sq. feet until they vacate the premises in question.

22. Let decree be drawn accordingly.

23. It is clarified that this judgment will not come in the way of the parties seeking fresh agreement in respect of premises in question, if they so desire.

(2025) 1 ILRA 338

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 29.11.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Criminal Appeal No. 1490 of 1984

Kunwar Pal & Anr.	...Appellants
	Versus
State of U.P.	...Respondent

Counsel for the Appellants:

R.S. Yadav, Arvind Yadav, B.N. Narain, J.S. Tomar, K.D. Tiwari, Krishna Dutt Tiwari, Noor Mohammad

Counsel for the Respondents:

A.G.A.

A. Criminal Law – Murder - The prosecution had not been able to prove the charges as were framed against the appellants. The presence of the P.W.2, was also very doubtful. The appellant No. 1 has

already died; the appellant No. 2 is acquitted of the charges as were leveled against him. The appellant No. 2 is on bail; he need not to surrender. Sureties be discharged. (Para 17)

In the present case, it was very unnatural that when the accused persons, i.e., Ramphal and Kunwar Pal, had come searching for the husband of the deceased, they had actually killed the deceased and had let go the husband, who had appeared on the scene without any fire arm etc and had admittedly raised a hue and cry. The case of the prosecution, Kunwar Pal was carrying a country-made pistol and Ramphal was carrying a single-barrel gun, but they spared the husband, whom they had come searching for.

Another contradiction, which goes to the root of the matter is that the husband was stating that the other daughter was not sleeping with him, whereas the P.W.2 had St.d that, in fact, she was sleeping on the cot in between the P.W.1 and P.W.2. Normally, such a contradiction could have been ignored, but when P.W.1 was a lawyer and had a room to himself to sleep in, he could not have ignored the presence of a fully grown daughter in his room.

Hon'ble Court was convinced that P.W.2 and P.W.3 were got up witnesses, as they throughout St.d that they were present on the date of the incident, but very irresponsibly, when they were required to give their St.ments before the police, they had disappeared. This shows that the P.W.2 and P.W.3 were in fact not there on the spot but subsequently were brought into the picture. It appears that in the FIR the name of P.W.2 had not been mentioned because P.W.1 was not confident that he would appear on the scene and give his St.ment. It was for a matter of fact that P.W.2 in fact appeared only on 10.12.1982 and P.W. 3 appeared on 26.12.1982. In fact, the other witness on whom the P.W.1 had confidence, i.e., Jagat Veer etc., did not appear in the witness box at all. (Para 16)

Appeal allowed. (E-4)

Present criminal appeal challenges the judgment and order dated 23.04.1984, passed by the IV Addl. Sessions Judge,

Moradabad, convicting and sentencing the appellant no. 1 - Kunwar Pal for life imprisonment u/s 302 I.P.C. and appellant no. 2 Ramphal for life imprisonment u/s 302 r/w Section 34 of I.P.C.

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

1. The instant Criminal Appeal has been filed against the judgment and order dated 23.04.1984 passed by the IVth Additional Sessions Judge, Moradabad in Sessions Trial No. 260 of 1983 convicting and sentencing the appellant no. 1 - Kunwar Pal for life imprisonment under Section 302 I.P.C. and appellant no. 2 Ramphal for life imprisonment under Section 302 read with Section 34 of I.P.C.

2. When an incident had taken place in the night of 28/29 November, 1982 at around 1:30 a.m, the first information report was lodged on 29.11.1982 at 8:00 a.m. The first informant, Badam Singh informed the police about the murder of his wife and he had alleged that the same was committed by Kunwar Pal. The reason which had been given was that the first informant who was a lawyer appeared in the case of Nanhu Vs. Kishaniya and during the proceedings of said case, Kishaniya had by means of a sale deed, sold the property to Kunwar Pal son of one Khem Karan. Kunwar Pal attempted to forcibly take possession of the land and when the first informant had opposed possession being taken over forcibly, Kunwar Pal had talked to the first informant and had threatened him with dire consequences.

3. It has been stated in the first information report that in the night of 28/29.11.1982 while the first informant was

sleeping on the first floor of the double storied house along with Chhoke Lal son of Munna, the miscreants namely Kunwar Pal and Ramphal had entered into the house after removing the main door of the house from its hinges at around 1:30 a.m. and had shot at Ramwati, the wife of the first informant, who was sleeping on the ground floor along with a daughter of theirs named Pinki who was aged about three months. The sound of the knock woke him and Chhoke Lal who was sleeping near him. When they came down the stairs, they had seen that Kunwar Pal, had a country made pistol and Ramphal had a single-barrelled gun in their hands. In the first information report itself, it had been stated that Ramphal who had a single-barrelled gun, had asked the wife as to where her husband was (wakeel Kahan Hai) and the wife when she had refused to give the information, then Ramphal had stated that if she did not give the information, then she would be shot dead. At that point of time, Kunwar Pal who had a country made pistol shot at the wife of the first informant. He has stated in the first information report itself that the entire incident was seen by him and Chhoke Lal in the light of a lantern which was lit in the Verandah. When they raised a hue and cry, Kunwar Pal and Ramphal fled from the place of occurrence and people from the neighbourhood carrying torches, came to the place of the incident. It has been stated that Har Narayan and Jagatvir the neighbours who had come had seen the two accused persons running away from the house.

4. Upon the first information report being lodged investigation had followed. The police had collected evidence from the place of incident along with the cot which had blood on it. Also, the torch by which Chhoke Lal and Har Narayan had seen the

incident had been taken into custody and all these recovery memos were exhibited as Exhibit Nos. Ka-10, Ka-11 and Ka-21. Thereafter Panchayatnama was conducted which commenced at 10:00 a.m. on 29.11.1982 and concluded at 1:00 p.m. on the same day. The Panchayatnama was followed by a postmortem which was conducted on 13.11.1982 at around 3:30 p.m. Thereafter, upon the conclusion of the investigation, the police submitted its report and when the report was taken cognizance of, the Court of Additional Sessions Judge, Moradabad on 08.08.1983, framed charges against Kunwar Pal under Section 302 IPC and against Ramphal it framed charges under Section 302 read with Section 34 of the IPC. When the accused persons denied the charges the trial commenced.

5. To prove the case of the prosecution, it produced as many as six witnesses. Badam Singh who is the husband of the deceased and also the first informant was examined as P.W.-1. He has stated that he recognized the two accused persons, namely Kunwar Pal and Ramphal who were present in the Court. He has reiterated the case as had been stated in the first information report that at the time of the incident a case in the courts was going on by the description of Nanhu Vs. Kishaniya of the village Nadhaus and it related to a land. He has further stated that the accused Kunwar Pal had got executed a Farzi sale deed in his favour from Kisaniya and had wanted to get his name mutated over the land in question and had also tried to take illegal possession. He had also thereafter got himself impleaded in the case. Not only that, Kunwar Pal had requested the first informant, who was a lawyer, not to do pairvi in the case and because of the fact that the first informant

had continued to do the pairvi in the case the accused had committed the crime. On the date, it has been stated that the first informant along with Chhoke Lal was sleeping in the room situate at the first floor of the house. It has further been stated that in the ground floor, the wife Ramwati with her small child aged around three months was sleeping and that when the main door was removed from the hinges by the miscreants, the first informant and Chhoke Lal had come out their room where they were asleep. When they came down they found that two persons Kunwar Pal and Ramphal who were carrying a country made pistol and a single-barrel gun respectively were standing next to the cot of the wife of the first informant. It has further been stated that within the hearing of the P.W.-1 Kunwar Pal asked his wife where the advocate (husband) was. The P.W.-1 had thereafter stated that when his wife had refused to give the information, then Ramphal had said that if she did not give the information, then she would be shot dead. At that point of time, Kunwar Pal fired upon her with his country made pistol. Upon the incident having happened, the P.W.-1 Chhoke Lal raised a hue and cry and Jagatvir along with Har Narayan came with their torches to the place of incident. The first informant had stated that his wife thereafter had died because of the firing upon her.

6. In the cross-examination, P.W.-1 remained consistent with his statements made during the examination-in-chief and had stated that he was a teacher before becoming a practicing lawyer one and the half years prior to the incident and that Ramphal was still a teacher. He has stated that the case of Kishaniya was going on since 1982. He had also stated that wrongly the police had recorded that the P.W.-1 was

doing pairavi on behalf of Kishaniya. He had stated that with regard to the daughter, who was his youngest daughter of three months, he had not informed the police during investigation whatsoever. In paragraph 13 of his cross-examination, the P.W.-1 described the locations of the various houses in his neighbourhood and had also described as to where the houses of Jagatvir and Har Narayan were situated in his neighbourhood. Further, he had also stated that Kunwar Pal lived in his neighbourhood. He has further stated in paragraph 15 that Kunwar Pal had been visiting his house quite often. Other people from the village also kept coming to see them. He has stated that on the bed which was there on which his wife and child were sleeping, there was no blood. In the first information report, he had not given any position with regard to the lantern. He had further stated that he had informed the police about the position of the lantern but if the position of the lantern had not been given in the site plan, the P.W.-1 did not know why. He had also stated that the first information report was lodged in the morning of 29.11.1982 and he did not go to the police in the night as he was afraid to go then. On 06.12.1983, in the cross examination, he had stated that the police had mentioned that the first informant had stated that Ramphal had asked his wife as to where the P.W.-1 was, and she had refused to give the information. He had stated that the police had wrongly recorded his statement. He had stated that in fact it was Kunwar Pal who had asked his wife that as to where the first informant was. When he was asked as to why the fact that the main door had been removed from its hinges, was not mentioned in the police report, then he had stated that he had shown the police the main door and had also informed that it was removed by the

miscreants. If the police did not mention, he did not know why. He has also stated that the daughter who was sleeping besides his wife had no blood on her. He has categorically stated that the other daughter was also sleeping with his wife and has stated that wrongly he had stated that on the date of incident the daughter was sleeping with him on the first floor. He has further stated that Chhoke Lal was sleeping on the northern side and the third cot was vacant. He has stated that despite the fact that he had immediately reached the place of incident after the shot was fired, no harm was caused to him. He has thereafter stated that there was some policy which he had got from the General Finance and Investment Limited Company where his wife was a field officer. He has also stated that the money which was required to come from that policy was not given to him as the company was suspecting that the murder had been got done to get the money.

7. P.W.-2, Chhokey Lal, is another eyewitness in the case. He has also narrated the incident in a manner similar to the manner in which the P.W.-1 had described. He has stated that he was sleeping in the first floor of the double storied house of the first informant. However, he has not stated that the main door was removed from the house to allow the accused persons to enter the house, but he has stated that when a sound come because of the opening of the door then he had come out of his sleep. He has thereafter stated that in the room at the first floor, P.W.-1 was sleeping and a child was also there. He has thereafter stated that both the P.W.-1 and he himself and had started tracking the sound which had come from the ground floor. He has further stated that while Kunwar Pal had a country made pistol, Rampal had a single-barrel gun in

his hand. The P.W.-2 had also stated that he had seen the incident in the light of the lantern which was lit. He has stated that he recognised the accused persons. He has thereafter stated that in his village there was one Karan Jatav who had got a case lodged against him, and in that case, whether Kunwar Pal was a witness, he had no idea. He has thereafter stated that when the P.W.1 had got lodged another case against around 13 persons, then he was a witness in that case. Upon being asked as to whether he was a professional witness who used to give evidence on taking money, he denied the same. He has stated that P.W.1 had come to the village one to two days prior to the date of the incident, and on that date he had gone to sleep in his house. Before that day he had never slept in the house of P.W.1. The reason he gives for sleeping at the house of the P.W.1 was that they had arranged to go for bathing in the Ganges in the morning, and then he has stated that his house was only 100-150 steps away. He has thereafter stated that he had told the police that it was Kunwar Pal who had asked the deceased as to where her husband was. He states that if the police had recorded that Rampal had asked the question about the husband of the deceased, then he did not know the reason for that. He has thereafter very categorically stated that there were three beds in the room where he was sleeping with P.W. 1. On one bed the daughter of the P.W. 1 was sleeping, while the P.W.-1 and he himself were sleeping on the other beds. The daughter was sleeping in between the two cots where P.W.1 and P.W.2 were sleeping. He has, in paragraph 9, stated that he did not see any blood on the cot where the deceased was sleeping. He has stated that they had raised the hue and cry only after the shot was fired. He has, thereafter, denied the statement under Section 161 of

the Cr.P.C. which was recorded by the police that the P.W.2 was in the house of the P.W.1 because the P.W.1 had called him for his own security and safety.

8. P.W. 3, is Har Narayan, and he is a witness who had seen the two accused running away from the house of P.W.1. In his cross-examination, he has stated that the police had recorded the statement twenty days after the incident. He was not available after the incident had occurred, and he had gone to his sasural after the cremation, etc., was done of the deceased Ramwati.

9. P.W. 4 is the doctor who has very categorically stated that the entry wound was a close-range wound and there was blackening and tattooing around the injury.

10. P.W.5 is the investigating officer, Manveer Singh, who has, in his cross-examination, very categorically stated that Chokhey Lal, Har Narayan, and Jagatveer, after the incident had occurred, were not to be found in the village. Ramphal was arrested on 2.12.1982, and Kunwar Pal was arrested after the proceeding was initiated under Sections 82 and 83 of the Cr.P.C. He has categorically stated that the statement of Chokhey Lal was recorded on 10.12.1982, which was after 12 days of the incident, and that the statement of Jagatveer was recorded on 26.12.1982 after a period of 28 days. Even though he had seen the lantern, inadvertently he had not mentioned about it in the site plan. In his cross examination, he had stated that he had shown the houses of the witnesses in the site plan. He has stated that he had not found the other child of the first informant in the house. He has thereafter stated that he was told by the complainant/first informant that he was infact doing pairavi

on behalf of Kunwar Pal. He has also stated that the door, which had been taken off from its hinges, was not taken into custody by him. He has stated that it was wrong to say that it had not been taken away from the hinges and therefore he had not mentioned about the door in the police report. He had further stated that he has been told by the P.W.1, that it was infact Ramphal, who began with asking where her husband was. He has thereafter stated that Chokhey informed him that he was there with the P.W.1. as P.W.1 had said that there was danger to his life from Kunwar Pal.

11. P.W.6 is Doongar Singh, who had stitched the dead body and had taken it for the postmortem.

12. Thereafter, the two accused had got their statements recorded under Section 313 of the Cr.P.C.

13. When the fourth Additional District and Sessions Judge on 23.04.1984 had convicted the two accused and had directed them for the imprisonment for life on account of their being convicted under Section 302 and under Section 302 read with Section 34 of the Cr.P.C., the instant criminal appeal was filed. During the pendency of the appeal, the appellant Kunwar Pal had died, and thereafter the appeal had been dismissed as abated vis-à-vis Kunwar Pal.

14. Learned counsel for the appellant, Sri Noor Mohammad, had argued that the appellant, Ramphal, was innocent, and he had made the following submissions:-

(i) Learned counsel for the appellant states that the case brought forth by the prosecution that upon seeing that the

P.W. 1 was helping the adversary of Kunwar Pal, the appellants had gone to the house of the P.W.1 to kill his wife, did not appear very plausible. The accused, when they have a grudge against the P.W. 1, would have actually killed him and would not have run away when the P.W.-1 came to his wife. He submits that for no reason the deceased Ramwati had been killed. Learned counsel for the appellant submits that, in fact, there was some other reason for which Ramwati had been killed and the accused who had been known to the first informant were named in the FIR and were falsely implicated. Learned counsel for the appellant states that to kill the wife and let the husband go, who was standing there like a lame duck, was absolutely against human nature, and therefore the only conclusion that could be drawn was that the appellants were being falsely implicated by the first informant.

(ii) Learned counsel for the appellant has further drawn the attention of the court to the statement of P.W.1, wherein he had stated that it was, in fact, Ramphal who had asked his wife to tell as to where her husband was, but subsequently in his cross-examination he had mentioned that it was not Ramphal who had asked so but it was Kunwar Pal who had asked this question. He also drew the attention of the court to the first information report wherein it had been very categorically mentioned that Ramphal was the person who had asked as to where the husband of the deceased was. He submits that the role of exhortation, which had been given to Ramphal in the first information report, was also done away with in the subsequent statement that was given by P.W. 1 when he states that Ramphal had, in fact, not even asked about the husband of the deceased. Learned counsel for the appellant further stated that even P.W.2 had

mentioned in so many words that it was Kunwar Pal who had asked as to where the husband of the deceased was and it was not Ramphal who had asked, where her husband was. At page 25 of the paper book, the following words as uttered by P.W.-1 become important:-

“मैंने दरोगा जी को यह बयान नहीं दिया था कि ‘रामफल ने मेरी बीवी से पूछा कि वकील कहां है तो उसने बताने से इनकार कर दिया’ अगर रामफल वाली बात लिखी हो तो मैं नहीं कह सकता कि कैसे लिखी है। कुंवर पाल मेरी बीवी से पूछ रहा था कि वकील कहां है यह बात मैंने रपट में भी लिखी और दरोगा जी को भी बताई थी।”

Learned counsel for the appellant states that since the P.W. 1 was not there and he had got the FIR lodged in a huff, the statement was being improved when he was giving the statement in the court.

(iii) Learned counsel for the appellant has stated that if the statement of P.W. 2 is seen, it also becomes evident that, in fact, P.W. 2 was not there on the spot. He has made a statement which is very different from the statement of P.W. 1. The P.W.1 in his statement in chief and in his cross-examination had stated that the other daughter was not sleeping on the third bed that was there in the first floor room where the informant and the P.W.2 were sleeping. In fact, he had stated that the third bed was lying vacant, but the P.W.2, had given an entirely different statement in chief and had also stated so in his cross-examination, that the other child was sleeping on the third cot, which was in between the cot of the first informant and the P.W.2. He therefore states that the entire case was based on wrong facts that the P.W.1 and P.W.2 had heard from someone else and they were absolutely contradictory to each other.

Learned counsel for the appellant states that the P.W.2 and P.W.3 appeared to be very close to the P.W.1. P.W.2 had

stated that he was sleeping in the same house where the incident had occurred, and P.W.3 had taken the trouble in the night to reach the spot after the incident had occurred on the night of 28/29.11.1982. If that was the case, then they should have stayed back to give the statement to the police, but in fact both the witnesses had appeared before the police on 10.12.1982 and 26.12.1982, respectively, to give their statements before the police. The P.W.2 had given his statement before the police that he was sleeping in the house of the first informant because the latter had some danger to his life from Kunwarpal, but in the statement, which he had made before the court, he had taken a volte-face and had stated that in fact he was in the house of the P.W.1 because they had arranged to go for a bath in the Ganges in the morning.

IV. Learned counsel for the appellant states that even no source of light was mentioned in the place of the incident. He submits that the lantern, as had been mentioned by P.W. 1, was not shown by the police in the site plan. P.W.2, despite the fact that he had stated that he was there, learned counsel for the appellant has stated that in fact P.W.2 was not there on the spot at all. He has mentioned that there was no blood on the cot, but in fact there was blood present, as per the police report, and it had also been recovered by the police, and a memo of it was also prepared.

15. Learned AGA Sri Rahul Asthana has, however, supported the judgement and order dated 23.04.1984 and opposed the appeal. He has submitted that the incident had been witnessed by two eyewitnesses, and there was very little reason to disbelieve the two eyewitnesses. He has also stated that the injury, etc., as was reported in the FIR and had been stated in the court by the prosecution witnesses No.

1 & 2, matched with the injuries as were there in the post-mortem report. He further states that if there were some minor contradictions, then they had to be ignored.

16. Having heard the learned counsel for the appellant, Sri Noor Mohd. assisted by Sri Irshad Mohd. and the learned AGA Sri Rahul Asthana, we find that the first informant had stated in the first information report that the appellant No. 2 Ramphal had in fact questioned the deceased as to where her husband was but subsequently on page 25 of the paper book he had taken a volte face and had stated that it was in fact Kunwar Pal who had asked the statement. This probably the P.W.1 was doing as the P.W.2 in his statement before the police had stated that it was Kunwar Pal who had put this question to the deceased. We find that the P.W.2 Chokhey had also stood firm with his statement that it was Kunwar Pal who had put this question to the deceased. We therefore find that, in fact, Ramphal, though has been shown to be present was not in fact there and therefore his role of exhortation goes. Kunwar Pal, who is now dead, could have gone to kill the deceased. We are also convinced by the argument of the learned counsel for the appellant that it was very unnatural that when the accused persons, i.e., Ramphal and Kunwar Pal, had come searching for the husband of the deceased, they had actually killed the deceased and had let go the husband, who had appeared on the scene without any fire arm etc and had admittedly raised a hue and cry. In the instant case, we find that as per the case of the prosecution, Kunwar Pal was carrying a country-made pistol and Ramphal was carrying a single-barrel gun, but they spared the husband, whom they had come searching for. Another contradiction, which goes to the root of the matter is that the husband was stating that

the other daughter was not sleeping with him, whereas the P.W.2 had stated that, in fact, she was sleeping on the cot in between the P.W.1 and P.W.2. Normally, such a contradiction could have been ignored, but when P.W.1 was a lawyer and had a room to himself to sleep in, he could not have ignored the presence of a fully grown daughter in his room. We are also convinced that P.W.2 and P.W.3 were got up witnesses, as they throughout stated that they were present on the date of the incident, but very irresponsibly, when they were required to give their statements before the police, they had disappeared. This shows that the P.W.2 and P.W.3 were in fact not there on the spot but subsequently were brought into the picture. It appears that in the FIR the name of P.W.2 had not been mentioned because P.W.1 was not confident that he would appear on the scene and give his statement. It was for a matter of fact that P.W.2 in fact appeared only on 10.12.1982 and P.W. 3 appeared on 26.12.1982. In fact, the other witness on whom the P.W.1 had confidence, i.e., Jagat Veer etc., did not appear in the witness box at all.

17. Under such circumstances, for all the reasons we have given we are of the view that the prosecution had not been able to prove the charges as were framed against the appellants. Also, we are of the view that the presence of the P.W.2, was also very doubtful. The appellant No. 1 has already died; the appellant No. 2 is acquitted of the charges as were leveled against him. The appellant No. 2 is on bail; he need not to surrender. Sureties be discharged.

18. The appeal stands allowed; judgment and order dated 23.04.1984 are set aside.

(2025) 1 ILRA 346
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.01.2025

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 10939 of 2024

Vishu **...Appellant**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Appellant;
 Atul Kumar

Counsel for the Respondents:
 G.A.

A. Criminal Law – The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 14-A(2) – Appeal to the High Court against order refusing bail – Right to default bail – Code of Criminal Procedure, 1973 - Section 167(2)(a)(i) - No Magistrate shall authorise the detention of the accused person in custody for a total period exceeding 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; and, on the expiry of the said period of ninety days, the accused person shall be released on bail if he is prepared to and does furnish bail. Held: If on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the court has no option but to release the accused on bail. However, once the charge-sheet is filed within the stipulated period, the right of the accused to statutory bail came to an end and the accused would be entitled to pray for regular bail on merits. Once the charge-sheet is filed, the right to statutory bail under proviso to Section 167(2)(a) Cr.P.C. ceases and does not revive only

because a further investigation order is pending or cognizance over the charge-sheet has not been taken by the court concerned. The statutory requirement under Section 167 Cr.P.C. is only the filing of the charge-sheet within the stipulated time. There is no additional requirement of cognizance having to be taken within the period prescribed under proviso (a) to Section 167(2) Cr.P.C., failing which the accused would be entitled to default bail even after filing of the charge-sheet within the stipulated period.(Para 15, 16, 17)

B. Criminal Law – The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 14-A(2) – Default bail - In the instant case, the accused/appellant was detained in judicial custody under Section 302 IPC and Section 3(2)(v) of the SC/ST Act. First remand was granted on 22.05.2024. On submission of the charge-sheet, the court passed an order for further investigation vide order dated 03.08.2024. Application for statutory bail under Section 167(2)(a)(i) Cr.P.C. dated 08.10.2024 was moved before the court concerned, but the same was rejected vide order dated 08.10.2024. *Held:* Once the charge-sheet is filed within the stipulated period, the right of the accused to statutory bail comes to an end. Appeal dismissed. (Para 18)

Dismissed. (E-5)

List of Cases cited:

1. Ritu Chhabaria Vs U.O.I., Writ Petition (Criminal) No. 60 of 2023, dated 26.04.2023
2. Dinesh Dalmia Vs CBI, (2007) 8 SCC 770
3. Suresh Kumar Bhikamchand Jain Vs St of Mah. & anr., (2013) 3 SCC 77
4. Serious Fraud Investigation Office Vs Rahul Modi & ors., (2023) 15 SCC 311; 2022 SCC OnLine SC 153 (Criminal Appeal Nos. 185–186 of 2022, decided on 7th February, 2022)

(Delivered by Hon'ble Nalin Kumar Srivastava, J.)

1. Heard learned counsel for the appellant, learned A.G.A. for the State and perused the material available on record.

2. This criminal appeal under Section 14-A (2) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act hereinafter referred as the SC/ST Act has been preferred by the appellant- **Vishu** against the order dated 08.10.2024 passed by the learned Additional District & Sessions Judge/Special Judge, SC/ST Act, Muzaffarnagar whereby the application under section 167 (2) (a) (i) Cr.P.C. moved by the accused/appellant was rejected.

3. The matter as brought before this Court, is that in a case under section 302 IPC which provides the punishment for imprisonment for life or death sentence alongwith fine, the first remand of the accused was granted on 22.05.2024 which was extended from time to time and non-submission of charge-sheet within a statutory period of 90 days resulted into accrual of right to statutory bail in favour of the accused/appellant.

4. It is submitted by the learned counsel for the accused/appellant that the accused/appellant is detained in judicial custody in case crime no. 117 of 2024 under section 302 IPC and section 3(2)(v) of the SC/ST Act, Police Station Titavi, District Muzaffar Nagar. His first remand was granted by the court under section 167 Cr.P.C. on 22.05.2024 and since then he is detained in jail. The Investigating Officer of this case did not file charge-sheet even after the lapse of 90 days and by virtue of the provisions of section 167 (2) Cr.P.C. a right to default bail accrued in favour of the

appellant. On this ground an application for statutory bail under section 167(2)(a)(i) Cr.P.C dated 08.10.2024 was moved before the court concerned but the same was rejected vide order dated 08.10.2024 and it was observed that since after submission of charge-sheet the court had passed an order for further investigation in the matter vide order dated 03.08.2024 and regular bail application of the accused/appellant was pending before the High Court, his application for default bail was liable to be rejected. Resting on the aforesaid facts it is vehemently submitted that the impugned order is illegal and not sustainable and it was passed in an arbitrary manner. The accused/appellant is entitled for default bail under the proviso to section 167(2) Cr.P.C.

5. Per contra, learned AGA has opposed the prayer for default/statutory bail and it has been contended that charge-sheet in this matter was submitted by the Investigating Officer on 03.08.2024 i.e. before the expiry of statutory period. The court concerned after perusing the entire case diary and applying its judicial mind, sent the matter for further investigation with certain directions and the further investigation is now completed. The first remand of the accused/appellant was granted on 22.05.2024 u/s. 302 IPC and section 3(2)(v) of the SC/ST Act and since charge-sheet was submitted on 03.08.2024 well within the period prescribed for an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years as provided under section 167 (2) (a) (i) of Cr.P.C, the application for statutory bail was rightly rejected by the court.

6. It is further submitted by learned counsel for the State that since first remand of accused/appellant was granted on

22.05.2024 and the charge-sheet was submitted on 03.08.2024, no right for default bail accrued in favour of the accused/appellant in the light of the provisions of section 167(2) Cr.P.C.

7. For the purpose of disposal of instant appeal a perusal of provisions envisaged under section 167(2) Cr.P.C. is required which reads as under:-

"Section 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 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;

(i) 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."....."

8. Learned counsel for the accused/appellant has relied upon the judgment of Hon'ble Apex Court in ***Ritu Chhabaria Vs. Union of India, Writ Petition (Criminal) No. 60 of 2023 decided on 26th April, 2023.***

9. In ***Ritu Chhabaria (Supra)*** the Hon'ble Supreme Court found an opportunity to deal with the issue which is under consideration in the instant matter. The Hon'ble Apex Court emphasized upon protection of civil liberty of individuals in the society at large and held that the relief of statutory bail under section 167 (2) Cr.P.C. is a fundamental right directly flowing from Article 21 of the Constitution of India. It was further observed that the grant of remand beyond the statutory period fixed under section 167 can lead to serious abuse, as an arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a

leisurely manner. The Hon'ble Apex Court further observed that it is thus axiomatic that first investigation is to be completed and only then a chargesheet or a complaint can be filed within the stipulated period and failure to do so would trigger the statutory right of default bail under Section 167(2) of Cr.P.C. In the case of Union Of India vs Thamisharasi & Ors. (1995) 4 SCC 190, which was a case under the Narcotic Drugs and Psychotropic Substances Act, 1985, on finding that the investigation was not complete and a chargesheet was not filed within the prescribed period, denial of default bail was held to be in violation of Article 21 of the Constitution of India and it was further held that even the twin limitations on grant of bail would not apply.

10. A perusal of aforesaid decision of Hon'ble Apex Court in ***Ritu Chhabaria (Supra)*** reveals that the issue in that matter was quite different from the present case. The Hon'ble Apex Court in the said writ reiterated the law over the subject that if the charge-sheet is filed within the stipulated period valuable right of statutory bail is extinguished. At the same time it was also noticed that the practice of filing preliminary reports has now taken the form of filing chargesheets without actually completing the investigation, only to scuttle the right of default bail and resultantly in effect negates the purpose of introducing provisions regarding default bail. In the above mentioned matter before the Hon'ble Apex Court some supplementary chargesheets were filed without completing the investigation and in consequence thereof the remand of the accused was continued and he was not released on default bail. This fact was also taken cognizance of that investigation was still pending as mentioned in the supplementary

chargesheet. It was in this backdrop of such events the writ petition was allowed by the Hon'ble Apex Court.

11. But the position in the case in hand is different and the simple reason behind it is that admittedly charge-sheet in this matter was filed within statutory period and it was not a preliminary or supplementary charge-sheet. The charge-sheet dated 12.07.2024 was filed under section 306 IPC and section 3 (2) (v) of the SC/ST Act before the court on 03.08.2024 after concluding the investigation and no offence under section 302 IPC was found to be made out as mentioned in the charge-sheet itself. It reveals from the perusal of record that the trial court after examining the charge-sheet without taking cognizance over the same passed an order dated 03.08.2024 for further investigation in the matter after noticing some lacunas and omissions in the investigation and subsequently further investigation was culminated into charge-sheet. It is apparent from the perusal of record that although trial court found some slip and laxity on the part of the Investigating Officer and for that reason order for further investigation was passed but in the charge-sheet itself it was nowhere mentioned that it was a preliminary or supplementary charge-sheet and any investigation was still pending after submission of the charge-sheet. In view of that it was the final outcome of investigation which was now completed.

12. As noticed earlier the first remand of the accused under section 167 Cr.P.C. was granted by the court on 22.05.2024 and since then the accused had been detained in jail and the court used to grant further remand to the accused on the request of the Investigating Officer of the case. Since the matter was pertaining to a case under

section 302 IPC and section 3(2)(v) of the SC/ST Act wherein sentence of life imprisonment/death sentence could be passed the charge-sheet ought to have been filed within 90 days from 22.05.2024. A perusal of the record explicitly reveals that charge-sheet was filed on 03.08.2024 under section 306 IPC which was punishable with imprisonment for a maximum period of ten years alongwith section 3(2)(v) of the SC/ST Act which was punishable with imprisonment for life and with fine meaning thereby that it was submitted well before the stipulated period of 90 days.

13. From the submissions/contentions raised by the rival sides particularly in the given facts and circumstances of the instant matter, two legal issues emerge out to be examined by this Court firstly, as to whether the charge-sheet will be presumed as not to be submitted before the Court if cognizance over the same was not taken and secondly, what would be the effect of the order of the Court for further investigation into the matter after receiving the charge-sheet with reference to the instant matter.

14. The answer of the aforesaid questions is found in ***Dinesh Dalmia Vs. CBI (2007) 8 Supreme Court Cases 770*** which reads as under:

"39. The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under Sub-section (2) of Section 173 and further investigation contemplated under Sub-section (8) thereof. Whereas only when a charge sheet is not filed and investigation is kept pending, benefit of proviso appended to Sub-section (2) of Section 167 of the Code would be available to an offender. Once, however, a charge

sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of Sub-section (8) of Section 173 of the Code."

15. Also, referring to an earlier judgment passed in ***Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra and Another (2013) 3 SCC 77 in Serious Fraud Investigation Office Vs. Rahul Modi & Others (2023) 15 SCC 311, 2022 SCC Online SC 153 (Criminal Appeal Nos. 185-186 of 2022, decided on 7th February, 2022)*** it has been expressly held by the Hon'ble Supreme Court as extracted below-

"9. The issue is squarely covered by a judgment of this Court in Bhikamchand Jain (supra), as contended by the Appellant. It is necessary to closely examine the judgment passed in Bhikamchand Jain (supra). The petitioner in the said case was arrested on 11.03.2012 on the allegation of misappropriation of amounts meant for development of slums in Jalgaon City. The petitioner therein was accused of committing offences punishable under Sections 120-B, 409, 411, 406, 408, 465, 466, 468, 471, 177 and 109 read with Section 34, IPC and also under Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. The contention of the petitioner therein was that he could not have been remanded to custody in view of cognizance not being taken for want of sanction within the statutory period of 90 days. The scheme of the provisions relating to remand of an accused first during the stage of investigation and thereafter, after cognizance is taken, indicates that the legislature intended investigation of certain crimes to be completed within the period

prescribed therein, according to this Court in Bhikamchand Jain (supra). This Court held that in the event of investigation not being completed by the investigating authorities within the prescribed period, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. This Court was of the firm opinion that if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the court has no option but to release the accused on bail. However, once the charge-sheet was filed within the stipulated period, the right of the accused to statutory bail came to an end and the accused would be entitled to pray for regular bail on merits. It was held by this Court that the filing of charge-sheet is sufficient compliance with the provisions of proviso (a) to Section 167(2), CrPC and that taking of cognizance is not material to Section 167."

16. The Hon'ble Apex Court further proceeded to hold that in respect of the issue of default bail under Section 167(2) Cr.P.C there is no additional requirement of cognizance having to be taken within the period prescribed under Proviso (a) to section 167(2) Cr.P.C., failing which the accused would be entitled to default bail even after filing of the charge-sheet within the stipulated period.

17. The aforesaid discussion is connotative to the fact that once the charge-sheet is filed, the right to statutory bail under Proviso to Section 167(a)(2) Cr.P.C. ceases and does not revive only because a further investigation order is pending or cognizance over the charge-sheet has not been taken by the court concerned. The decisions of Hon'ble Apex Court in **Dinesh Dalmia (Supra)** and **Serious Fraud**

Investigation Office (Supra) directly apply to the facts and circumstances of the case in hand. Charge-sheet in this matter as a final outcome of investigation was submitted by the police within the stipulated period of 90 days for the purpose of the provisions of Proviso to Section 167(2) (a) (I) Cr.P.C. If the court did not take cognizance over the same or the matter was ordered for further investigation it does not falsify the factum of submission of charge-sheet within stipulated time. It is avowed in the judicial dictums as narrated above that it is never necessary for a court to take cognizance of charge-sheet in any condition because it is not a statutory requirement under section 167 Cr.P.C. and in fact the litmus test is only the filing of charge-sheet within stipulated time and nothing further. The questions formulated above are answered accordingly.

18. In the given facts and circumstances of this case and also relying upon the dictum of law promulgated by the Hon'ble Apex Court in the judgments referred hereinabove, this Court is of considered view that the law submitted by the learned counsel for the appellant in **Ritu Chhabaria (Supra)** case does not offer any help to the appellant. The appeal is devoid of merit and deserves to be dismissed. Hence, the appeal is accordingly *dismissed*.

(2025) 1 ILRA 352

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 13.12.2024

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Criminal Revision Defective No. 753 of 2024

Shabana Bano

...Revisionist

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Mujeeb Khan, Naveen Kumar

Counsel for the Opposite Parties:

G.A., M.A. Siddiqui

Criminal Law - The Code of Criminal Procedure, 1973 - Sections 125 & 397(1) - Constitution of India, 1950 - Article 19 - Enhancement of maintenance amount - After marriage, respondent-husband demanded additional dowry - When demand not met, she was subjected to cruelty, threats of divorce, etc. - Later on revisionist served with Talaknama along with copy of Mufti's decision. (Para 3, 5)

Revisionist filed complaint against her husband and other family members under sections of IPC and Domestic Violence Act, thereafter learned Chief Judicial Magistrate issued summons - Order challenged, matter stayed and referred to Mediation with directions, proceedings pending. (Para 6, 8, 9)

Maintenance Application dismissed for want of prosecution - Revisionist filed restoration application, dismissed - Second application filed, dismissed on grounds of res judicata - Challenged before High Court, allowed with directions. (Para 10)

Family Court issued fresh notice to respondent, not appeared - Application partly allowed ex-parte granting maintenance amount of Rs.20,000/- p.m, not complied by respondent - Execution Application filed - Simultaneously, revisionist challenged impugned order through present petition on various grounds. (Para 11, 12)

Held, learned Family Judge ascertained respondent's income based on letter dated 30.6.2023, concerning Second Pay Commission's implementation report and not on St.ment of revisionist and

husband's salary - Family Judge unable to determine whether respondent holds position of entry-level officer in district cadre or selection-grade officer, actual salary not assessed, his salary must be at least Rs.1,44,840/- p.m, as per second national judicial pay commission. (Para 24)

Revisionist filed application for interim maintenance, case listed for 47 times, application remained undecided till dismissed for non-prosecution - Family Judge repetitively adjourned case without recording reasons, nearly 32 times personal exemption application allowed on ground of leave application not sanctioned - Impugned orders set- aside. (Para 35)

Revision petition allowed. (E-13)

List of Cases cited:

1. Rajnesh Vs Neha, (2021) 2 SCC 324
2. Chaturbhuj Vs Sita Bai, (2008) 2 SCC 316
3. Shabana Bano Vs Imran Khan, (2010) 1 SCC 66
4. Parul Tyagi Vs Gaurav Tyagi, (2023) SCC OnLine All 2684, (Para 51, 52, 65, 70, 71, 73)
5. Rajesh Babu Saxena Vs St. of U.P. & ors., (2024) SCC OnLine All 2260, (Para 19, 20, 21, 27)

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard learned counsel for the revisionist-wife, learned counsel for the respondent-husband, learned A.G.A. for the State-respondent, and perused the entire record.

2. This present revision has been preferred seeking enhancement of the maintenance amount awarded by the learned Principal Judge, Family Court, Sonbhadra in Criminal Misc. Case No.387

of 2019, filed by the revisionist-wife on 17.8.20219.

3. Succinctly, the brief facts are that the revisionist-wife and the respondent-husband were married on 4.5.2002, according to Muslim rites and rituals. At the time of marriage, the respondent-husband was serving as a Civil Judge (Junior Division) at the District Court in Sonbhadra. Currently, he holds the position of Special Judge (UP Dacoity Affected Area) in District Etah and previously served as Additional Principal Judge at the Family Court in Jaunpur from 3.8.2019 to 4.7.2022. The revisionist-wife asserts that her parents spent approximately Rs.30 lakhs on the marriage. Additionally, during the engagement ceremony, Rs.11 lakhs were provided to purchase an Indica car; however, the respondent-husband declined to register the car in his name due to his recent judicial appointment. Shortly after the marriage, the respondent-husband allegedly demanded an additional dowry of Rs.20 lakhs from the revisionist-wife's parents. When this demand was not met, he purportedly subjected her to cruelty, including physical assaults, beatings, verbal abuse, and threats of divorce.

4. The revisionist-wife endured all acts of cruelty because her husband was a judge who commanded significant respect in society. To preserve his honour and reputation and hoping that he would eventually change, she initially refrained from filing any complaints or maintenance applications. She also chose not to disclose his conduct to his colleagues or their spouses to maintain the family's honour. The couple has four children from their marriage; Km. Rana Rajak, Km. Nazia Rajak, Km. Subhana, and Isha Rajak, all of

whom have been living with the respondent-husband since birth.

5. On 18.11.2013, the revisionist-wife was thrown out of the matrimonial home and was also served with a Talaknama dated 2.12.2013 along with a copy of Mufti's decision in this regard by post, which was accordingly returned and replied to by the revisionist-wife vide reply dated 30.12.2013 as a bundle of lies and false assertions.

6. Leaving no option for conciliation and compromise, on 20.1.2014, the revisionist-wife filed a Criminal Complaint No.366 of 2014 against her husband Ali Raza and 12 Others, under Sections 498-A, 504, 506, 323, 120-B IPC read with Section 3/4 of the Domestic Violence Act and two cases under Section 125 Cr.P.C. bearing Misc. Case No. 21 of 2014 and Misc. Case No.387 of 2021 on 30.1.2014 and 17.8.2019, respectively, against the respondent-husband before the learned Family Judge, Sonbhadra.

7. In Complaint Case No.366 of 2014, the learned Chief Judicial Magistrate, Sonbhadra, issued summons on 11.9.2015 to Ali Raza (respondent-husband), Abdul Rahim, Smt. Jahida Begum, Sohrab Ali, Sabnam, Zareena, Shyara, Neha, Tarrunum, Babloo, Moin, and Smt. Ruksana under Sections 498-A, 323, 504, and 506 of the IPC, read with Sections 3/4 of the Dowry Prohibition Act and Hazrat Ali was summoned under Sections 498-A, 323, 354, 504, and 506 of IPC, read with Sections 3/4 of the Dowry Prohibition Act.

8. The order dated 11.9.2015 was challenged before this Court through Application U/S 482 No.32214 of 2025. On 3.11.2015, this Court referred the matter to

the Mediation and Conciliation Center, directing the applicants to deposit a sum of Rs.15,000/- in the name of the revisionist-wife through a demand draft with the Registrar General of this Court within three weeks of the order. The mediation proceedings were to be concluded within three months. The Court also stayed the proceedings in Complaint Case No.366 of 2014 until the next date of listing.

9. Since then, the matter has been listed seven times before this court without any effective hearing, with the last listing on 27.11.2021. Consequently, the trial court proceedings have not advanced. Notably, this Court's order dated 27.4.2016 clarified that, *"it is clarified that the interim order of stay if there is any, is not extended."* However, the trial court failed to resume proceedings, repeatedly citing a repetitive order *"stay from the High Court"* since 2016. The matter has since been listed 65 times without further progress.

10. The Maintenance Application No.21 of 2014 was dismissed for want of prosecution on 1.3.2017. The revisionist-wife filed a restoration application, which was also dismissed. Subsequently, she filed a second application under Section 125 of the Cr.P.C., registered as Case No.387 of 2019. This application was dismissed on 20.5.2022 by the learned Principal Judge, Family Court, Sonbhadra, on the grounds of res judicata. The dismissal order dated 20.5.2022 was challenged before this Court by way of Application U/S 482 No.2559 of 2023 by the revisionist-wife, which was allowed vide order dated 4.4.2023, with the direction to the learned Family Judge, Sonbhadra, to decide the Misc. Application No.387 of 2019 afresh on merits, preferably within a period of six months from the date of production of the certified copy of the order.

11. The learned Principal Judge, Family Court, Sonbhadra, in compliance with this Court's order dated 4.4.2023, issued a fresh notice to the respondent-husband. However, the respondent-husband failed to appear before the court. Consequently, the second maintenance application was partly allowed ex-parte vide order dated 3.10.2023, granting a maintenance amount of Rs.20,000/- per month, effective from the date of filing of the application before the court.

12. The maintenance order dated 3.10.2023 has not been complied with by the respondent-husband. Consequently, the revisionist-wife filed an Execution Application No.552 of 2023 under Section 128 Cr.P.C. for realization of the maintenance amount. Simultaneously, the revisionist-wife has challenged the impugned order dated 3.10.2023, seeking an enhancement of the maintenance amount before this Court through the present petition on the grounds stated inter alia: (i) the revisionist-wife has diligently and respectfully fulfilled her matrimonial obligations towards the respondent-husband. Out of their wedlock, three female and one male child were born. Despite this, the respondent-husband unjustifiably threw out the revisionist-wife from the matrimonial home on 18.11.2013. Furthermore, without her consent or knowledge, the respondent-husband married another woman who is 22 years younger to him, (ii) the first maintenance application under Section 125 Cr.P.C., filed on 13.1.2014, was erroneously dismissed in default by the learned Family Court under the undue influence of the respondent-husband, who holds the position of a sitting judge, (iii) the revisionist-wife's restoration application was also improperly dismissed for non-prosecution by the learned Family

Court, again under the undue influence of the respondent-husband, (iv) the second maintenance application was dismissed on the grounds of res judicata by the learned Family Court. However, this order was set aside by a co-ordinate Bench of this Court, who directed the case of the revisionist-wife to be decided on merits, (v) without properly considering the actual income and expenses of the respondent-husband, the application under Section 125 Cr.P.C. was only partially allowed, erroneously awarding a maintenance amount of Rs.20,000/- per month, (vi) the impugned ex-parte order has been passed in contravention of the law laid down by the Supreme Court in **Rajnish v. Nehal; Chaturbhuj v. Sita Bai**²; and **Shabana Bano v. Imran Khan**, (vii) the affidavit of assets and liabilities was neither filed by the respondent-husband nor sought by the learned Principal Judge, Family Court, for the reasons best known to the learned Family Judge. The application specifically averred that the respondent-husband had previously worked as a judge in the Family Court at Jaunpur and is one of the senior-most judges in the district judiciary. This fact was not taken into consideration by the court while deciding the maintenance application, (viii) the learned Principal Judge, Family Court, Sonbhadra, erroneously concluded that the revisionist-wife did not disclose the actual income of the respondent-husband. Consequently, the minimum salary of Rs.1,44,840/- for a district judge at the entry level, as per the second judicial pay commission, was mistakenly taken into account for the maintenance award. Furthermore, in the absence of any reply or affidavit of assets and liabilities from the respondent-husband, the court erroneously concluded that the respondent-husband has no independent source of income except his

salary. The revisionist-wife's counsel has relied upon the judgments passed by this Court in *Parul Tyagi v. Gaurav Tyagi⁴ and Rajesh Babu Saxena v. State of U.P. and others* in support of his arguments.

13. This is how the matter has reached this Court for the enhancement of the maintenance amount. For clarity, the revisionist-wife has filed two maintenance applications against the respondent-husband; (i) Misc. Case No.21 of 2014, and (ii) Misc. Case No.387 of 2019. Therefore, this Court deemed it appropriate in the given facts and circumstances to summon the complete judicial record pertaining to Misc. Case No.21 of 2014 and Misc. Case No.387 of 2019, titled *Shabana Bano v. Ali Raza*, along with a typed copy of all the orders passed, and the copies of the service reports submitted by the process server, in order to gain a comprehensive view of the proceedings conducted by the learned Principal Judge, Family Court, against respondent-husband. A notice was also issued to the respondent-husband at his official address at the Special Judge (UP Dacoity Affected Area), Etah, through the District Judge, Etah, directing him to file a counter-affidavit in response to the contentions raised by the revisionist-wife.

14. In response to the notice, the respondent-husband appeared through his counsel, Shri M.A. Siddiqui, and he sought for a week's time to file a counter affidavit in response to the contentions raised in the instant revision and to the proceedings conducted before the learned Family Court in Misc. Case No.21 of 2014 and Misc. Case No.387 of 2019- the maintenance applications under section 125 Cr.P.C.

15. Thus, in compliance with the order dated 10.5.2024, the learned Principal

Judge, Family Court, transmitted the original record of both cases. Upon examination of the record in Misc. Case No.21 of 2014, it was revealed that (i) the case was repeatedly listed for hearing nearly 64 times, (ii) the first hearing was conducted on 15.1.2014, during which a notice was issued to the respondent-husband, and the case was posted for further proceedings on 22.2.2014, (iii) the order dated 19.3.2014 indicates that service was effected on the respondent-husband on the previous date, and despite providing sufficient opportunity, no one appeared on his behalf. Therefore, the case proceeded ex-parte, and it was again posted for 17.4.2014 for recording of evidence, (iv) the ex-parte order was recalled, and the matter was referred for mediation and conciliation. Similar orders were passed numerous times- more than 35 times. It was also observed in the order dated 28.8.2015 that the respondent-husband had been intentionally delaying the proceedings for ulterior reasons, (v) on 17.8.2015, the revisionist-wife filed an application for the award of interim maintenance, which was registered as Application No.30-G. This application was objected to by the opposite party, and despite the case being listed for nearly 47 times after the interim application for maintenance, it was never decided till the case was consigned to the records after being dismissed in default for non-appearance, (vi) the respondent-husband filed personal exemption applications 32 times, citing that he could not appear before the court for recording of evidence due to his leave application being declined. Unfortunately, all these personal exemption applications were allowed, (vii) a circular dated 03.07.2015 was issued by the Hon'ble Administrative Judge of District Sonbhadra, Lucknow Bench of this Court, directing the C.J.M., A.C.J.M., and

Principal Judge, Family Court, to strictly adhere to the provisions related to adjournments, (viii) on many occasions, the revisionist-wife also filed personal exemption applications, mainly citing illness and unavailability, (ix) there is no record suggesting that the respondent-husband ever personally appeared either at the mediation and conciliation center to resolve the matrimonial dispute or before the court, (x) the case was dismissed in default on 1.3.2017 for the non-appearance of the revisionist-wife, and (xi) the restoration application, bearing No.138 of 2017, filed by the revisionist-wife was also dismissed in default on 8.2.2018 for non-appearance.

16. Upon examination of the record in Criminal Misc. Case No.387 of 2019, it is revealed that; (i) the second maintenance application was filed on 17.8.2019 on a fresh cause of action. Accordingly, notice was issued to the opposite party after hearing the applicant's counsel, and the case was listed for 19.8.2019 for filing objections and mediation, (ii) the case was listed nearly 42 times, (iii) the order dated 12.3.2020 indicates that the notice to the opposite party was served on 17.2.2020 through registered post, (iv) on 15.2.2021, the revisionist-wife filed an application to proceed ex-parte, as the registered postal receipt (i.e., the track consignment report) confirmed delivery of the notice at the District Court in Jaunpur, where the respondent-husband was posted at the time. However, the application was surprisingly rejected, with the finding of the court that service via postal receipt cannot be considered valid service under the law, as it is deemed secondary evidence according to the relevant provisions of the Indian Evidence Act, 1872 and the Code of Civil Procedure (C.P.C.), (v) vide order dated

3.3.2023, the court proceeded ex-parte, observing that for the past two years, no one has appeared on behalf of the opposite party, and sufficient time has been given for the opposite party to file objections, (vi) the order dated 22.3.2022 indicates that the revisionist-wife/applicant filed a list of witnesses through affidavits of PW-1, PW-2, and PW-3. The recording of ex-parte evidence was concluded, and the case was listed for arguments on 2.4.2022, (vii) a downloaded copy of the service record for the respondent-husband has been marked as Document No.37B/2, (viii) an affidavit of assets and liabilities, filed by the revisionist-wife in accordance with the judgment in **Rajnish v. Neha case (supra)**, has been marked as 49-B/1, (ix) a letter dated 19.7.2023, issued by Shri Rajendra Singh-IV, the learned Principal Judge of Sonbhadra, to the Registrar General of the High Court, Allahabad, requesting the service of summons to the respondent-husband and directing him to appear before the Family Court on 9.8.2023, (x) a letter dated 7.8.2023, by the Officer-In-Charge, Central Nazir, District Court, Etah, informing the Registrar General of this Court about the service on the respondent-husband, has been marked as 53-B/1, (xi) there are numerous orders of miscellaneous nature, in which either the respondent-husband or the revisionist-wife has moved personal exemption applications citing various reasons, (xii) the order dated 25.4.2022 suggests that the objection raised by the respondent-husband and the documents filed in his support shall be considered as evidence. This was allowed vide order dated 29.4.2022, and after hearing the revisionist-wife, the maintenance application was dismissed on the ground of res-judicata on 20.5.2022, (xiii) aggrieved by the order dated 20.5.2022, the revisionist-wife filed

Application No.35559/2023 under Section 482 Cr.P.C. for setting aside the order. This application was allowed vide order dated 4.4.2023, with the direction to the learned Family Judge to decide the maintenance application on merits, preferably within six months.

17. In compliance with the order dated 27.5.2024, a counter affidavit was filed by the respondent-husband. Upon examination, it's revealed that the counter affidavit has not been filed in conformity with the order dated 27.5.2024, despite being given proper opportunity. Therefore, the respondent-husband was directed to appear in person before this Court on 11.6.2024. On 11.6.2024, the respondent-husband appeared in person, along with a copy of a supplementary counter affidavit, which was taken on record. The respondent-husband was also heard in person and confronted with numerous orders passed by the learned Family Judge in Misc. Application No.21 of 2014 and Misc. Application No.387 of 2019. The first query was why, despite being involved in litigation since 2014, he has not personally appeared before any court or mediation centre to resolve the issue amicably; his answer was in complete silence. The respondent-husband was then confronted with the findings recorded by the Principal Judge, Family Court, Sonbhadra, in the order dated 3.10.2023, whether notice was served to him through the Registrar General of this Court. He was asked why it was necessary for the Presiding Officer to effect the service through Registrar General of this Court. Again, his answer was in complete silence. The respondent-husband was also confronted with various orders passed by the learned Principal Judge, Family Court, but he chose not to respond. It is important

to note that both cases were listed almost 106 times before the learned Family Court.

18. In the counter affidavit dated 29.5.2024, filed by the respondent-husband, it is stated that the respondent-husband has no house in his name, except for one ancestral house in his village, which is shared equally among his four brothers. The respondent-husband purchased a residential plot on 19.12.2019 for Rs.28,40,000/- at village Murgai Pargna Arail, District Prayagraj, which was communicated to the High Court. The possession of the flat could not be delivered to him due to a dispute pending before the RERA Court in Lucknow. Subsequently, the respondent-husband purchased another residential plot measuring 40 x 50 feet situated at village Siromanpur, Pargna Khairagarh, Meja, Bharatganj, District Prayagraj, for Rs.25 lacs. This information was also provided to the High Court. The respondent-husband is responsible for taking care of the well-being of four siblings: (i) Km. Rana Rajak, aged about 20 years, (ii) Km. Nazia Rajak, aged about 18 years; (iii) Subhana, aged about 13 years; and (iii) Isha Raza, aged about 14 years; all of whom are studying, and a significant amount is being spent on their education. Additionally, the respondent-husband has employed a driver, for which he pays Rs.1,60,000/- annually towards salary. It is also mentioned that the revisionist-wife is a well-educated lady, having graduated from Bhau Devras Government College, Dudhi, Sonbhadra, and is capable of earning for her maintenance. Therefore, he claims that he is not in a position to pay Rs.20,000/- per month towards maintenance.

19. In the first counter affidavit, the respondent-husband did not provide the necessary details required under Enclosure-

I, as mandated in ***Rajnish v. Neha case (supra)***. Consequently, he was directed to file a supplementary affidavit. Upon examination of the supplementary affidavit dated 19.6.2024, it is revealed that from 2019 to 2022, when the revisionist-wife had filed the second maintenance application, the respondent-husband's gross salary was Rs.1,59,773/- per month, with a net salary of Rs.99,373/- after deductions. In the financial year 2020-2021, his gross salary was Rs.1,63,189/- per month, with a net salary of Rs.1,12,789/- after deductions. In the financial year 2022-2023, his gross salary was Rs.2,01,734/-, and he was receiving Rs.1,31,334/- as net salary. For the financial year 2023-2024, his gross salary was Rs.3,18,960/- per month, with a net salary of Rs.2,23,560/- per month.

20. The respondent-husband has also invested Rs.12,69,201.39/- in equity shares for the future welfare of his dependents. He further states that he has two bank accounts; account no.42197838591 and account no.31417926245 with SBI bank. He was unable to provide the last two years' account statements for account no.31417926245 due to time constraints. The respondent-husband also mentions that the revisionist-wife has been residing separately since 18.11.2013, and he issued a Talaq on 3.12.2013. In addition to the above details, the respondent-husband has filed a copy of his reply submitted to the Principal Judge, Family Court, Sonbhadra, in Case No.384 of 2014, under Section 126(2) Cr.P.C. This reply outlines the reasons for his non-appearance before the learned Family Court, as well as details regarding the restoration application and the recall of the ex-parte order. The affidavit also contains allegations against his counsel, who did not appear before the learned Principal Judge, Family Court,

despite instructions to diligently and effectively defend the respondent-husband.

21. Upon examination of the trial court records, posting details uploaded on the official website of this Court, and the impugned order, this Court notes that the respondent-husband is a judicial officer. He joined the Judicial Service as a Munsif/Civil Judge on 4.7.2001 and was promoted to the Higher Judicial Services under Rule 22(1) of the U.P. Higher Judicial Services Rules, 1975, on 17.2.2018. Since then, the respondent-husband has served in various capacities. Between 3.8.2019 and 4.7.2022, he worked as an Additional Principal Judge, Family Court, at Jaunpur, and is currently serving as a Special Judge (U.P. Dacoity Affected Area) at Etah.

22. The record further shows that the revisionist-wife filed an application under Section 125 Cr.P.C., registered as Case No.21/2014, which was dismissed in default on 1.3.2017 for non-appearance and restoration application on 08.02.2028 after being listed 64 times. During this period, the application for interim maintenance was also not decided by the court, even though case was listed 47 times till it was dismissed in default by court after filing the application for interim maintenance. Specific allegations were made in that application regarding cruelty and willful desertion by the respondent-husband, including (i) that he was working as an Additional Sessions Judge at Jaunpur, (ii) his salary was Rs.1,50,000/- per month, and (iii) he owned his own house and agricultural lands, in addition to other properties, and earned approximately Rs.2,50,000/- per month. Based on these averments, the revisionist-wife claimed maintenance of Rs.1,00,000/- per month.

23. The record further reveals that the revisionist-wife then filed a second maintenance application under Section 125 Cr.P.C., which was registered as Misc Case No.387 of 2019. This application was dismissed on 20.5.2022 on the ground of *res judicata*. Thereafter, the revisionist-wife challenged the order dated 20.5.2022 under Section 482 Cr.P.C. before this Court. This Court, by order dated 4.4.2023, restored Misc Case No.387 of 2019 to its original number and directed the learned Family Judge to decide the case on its merits within six months. The Principal Family Judge, Sonbhadra, became aware of the order dated 4.4.2023 on 13.7.2023, following which a notice dated 9.8.2023 was served to the respondent-husband through the Registrar General of this Court. Despite receiving the notice on 9.8.2023, the respondent-husband did not appear before the Court to present his defense in response to the Section 125 Cr.P.C. application. As a result, the learned Family Court proceeded to pass an impugned *ex-parte* order on the merits against the respondent-husband.

24. Upon examining the impugned order, it is evident that the learned Family Judge ascertained the respondent-husband's income based on a letter dated 30.6.2023 issued by the Judicial Section, Government of Uttar Pradesh, concerning the Second Pay Commission's implementation report and not based on the statement of the revisionist-wife and respondent-husband's salary- an open secret for a serving Judge. The Principal Judge, Family Court, awarded maintenance of Rs.20,000/- per month to the revisionist-wife from the date of filing the application under Section 125 Cr.P.C. filed in 2019. The Family Judge, Sonbhadra, observed that based on the documents filed by the revisionist-wife and

the perusal of the order dated 22.07.2022, it could not be determined whether the respondent-husband holds the position of entry-level officer in the district cadre or a selection-grade officer. Therefore, his actual salary could not be accurately assessed, but it is clear that his salary must be at least Rs.1,44,840/- per month, as per the second national judicial pay commission.

25. It is surprising that the learned Family Judge was unaware of the salary structure for High Judicial Service Officers in Uttar Pradesh and, for the reasons best known to him, erroneously assumed the respondent-husband's salary to be equivalent to the salary of an entry-level judicial officer in the cadre of district judge to ascertain his actual income. Needless to say, both - learned Judge Family Court, Sonbhadra and respondent-husband - have been serving in the District Judge Cadre in Uttar Pradesh and are Judge for almost 25 years; both were posted as Civil Judge (Junior Division) in Sonbhadra between 2003-2004. Shockingly, the learned Presiding Judge, Family Court, Sonbhadra, remains unaware of the respondent-husband's basic pay, whether he holds the position of selection grade level or entry grade level. Without making any comments on the learned Judge's wisdom and impartiality, as he is not present before this court, I leave it for him to self-introspect and realize. However, I must express my disappointment that the learned Principal Judge, Family Court, has not been fair and impartial towards the revisionist-wife and has failed to uphold the law and the directions issued by the constitutional courts concerning the award of maintenance to a wife in sting of judgements.

26. Learned counsel for the revisionist-wife relied upon **Parul Tyagi case (supra)**, and **Rajesh Babu Saxena's case (supra)**. The relevant portion of Rajesh Babu Saxena's case is extracted herein below:

"19. The concern and anguish were expressed by the Supreme Court in Shamima Farooqui v. Shahid Khan³ the Supreme Court was of the view that an application for grant of interim maintenance has to be disposed of at the earliest. When the wife applies for a grant of maintenance, the delay in the disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. These litigations can corrode human relationships not only today but will also impact for years to come, potentially taking a toll on society. The Court must have complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when it shall land on the shores or take shelter in a corner tree that stands "still" on some unknown river bank. It cannot allow it to sing the song of the brook, "men may come, and men may go, but I go on forever." This would be the greatest tragedy to the adjudicating system, which is required to deal with the most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard, and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. The delay occurs due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts.

20. The object of maintenance proceedings is not to punish a person but to

prevent vagrancy by compelling those who can support those who cannot support themselves and have a moral claim to support them. Section 125 Cr. P.C. measures social justice⁴. It is specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution of India⁵. The object of maintenance is to prevent the vagrancy and destitution of a deserted wife by providing her food, clothing, and shelter through a speedy remedy. It affects a man's fundamental rights and natural duties to maintain his wife, children and parents who cannot maintain themselves⁶.

21. The maintenance allowance to the wife is the absolute maintenance right. The husband cannot absolve himself from his obligation to provide maintenance merely on the plea of financial constraints and inability to earn despite being able-bodied.

27. The courts should adhere to constitutional principles and legal precedents established by the Constitutional Courts, employing a consistent and rational approach. The underlying and fundamental tenet behind Section 125 of the Criminal Procedure Code aims to improve the financial circumstances and alleviate the emotional distress endured by a woman when compelled to depart from the marital residence. The principle of sustenance gets more heightened when the children are with her."

27. In the Parul Tyagi case (supra), this Court thus held:

"51. Purity of judicial administration is necessary; a condition precedent for success of independence of

administration of justice. In essence, the equal, uniform and consistent application of law is the hallmark of the judicial administration. The primary reason for enforcing superior courts' guidelines is to preserve the authority and credibility of the judiciary. If their guidelines are routinely ignored, for whatever reasons, it erodes public trust in the legal system and sets dangerous precedents. It can lead to inconsistent application of the law, which undermines the principles of legal certainty.

52. The non-adherence of the Supreme Court guidelines by subordinate courts undermines the very essence of the rule of law, leading to unequal treatment leading to erosion of judicial precedent, perpetuating injustice and inequality, loss of public confidence in the judiciary by the citizens, and a fragmented legal landscape, where each court operates independently.

65. Litigants approach the courts with grievances, seeking resolution and redress for their issues. Their cases are not just legal matters but significant aspects of their lives, rights, and property are involved. The outcome of the case can profoundly impact their well-being, livelihood, and sense of security.

70. This Court has also noticed on numerous occasions that the application/petitions for maintenance by legally wedded wives and old-aged parents are kept pending for years and years without an effective hearing, and they are not timely decided or attended to.

71. In due course or over time, when a litigant finally receives some relief from the Court after a long and arduous legal battle, it may not serve the immediate purpose. By the time, the litigant get relief from the courts, have already endured

substantial hardship and uncertainty. The associated stress, financial burdens, and emotional tolls makes a litigant disappointed.

73. Efforts to expedite the legal process and provide timely relief are crucial for the effectiveness of justice and ensuring that litigants receive fair and meaningful outcomes. It is essential for the judges to recognise the significance of time in the pursuit of justice and work towards reducing delays, improving efficiency, and providing a sense of closure to those seeking redress through the legal system.

28. The conduct and approach of the respondent-husband are deeply concerning for the reasons that he is not an ordinary individual without means or resources, rather he is an educated and capable person with a background in law and extensive experience in the dispensation of justice. The role of a judge is critical in maintaining public trust in the judiciary and fostering a culture where rights are upheld, laws are respected, and matrimonial disputes are resolved amicably.

29. It is true that judges, like all individuals, are entitled to the rights guaranteed to every citizen, but they must also be mindful of the elevated status and respect afforded to them, and such status comes with a greater responsibility to discharge personal, social, and judicial duties in a manner that upholds the rule of law. Unfortunately, the respondent-husband has failed to meet these expectations, thereby undermining the principles of justice and the values he was entrusted to uphold.

30. The legal profession has long been anchored in principles of honesty and

integrity, forming its foundation and ensuring the proper administration of justice. These virtues are particularly emphasized for judges, whose role is central to dispensing justice impartially and equitably. However, when members of the judiciary themselves become embroiled in personal litigation, the focus shifts to a critical intersection and needs to deal with greater caution and responsibility.

31. Judges are not mere adjudicators of law; they embody the legal system's credibility and are held to the highest standards of accountability. Their professional integrity must, without fail, be reflected in their personal conduct. Judges involved in personal litigation face a dual standard of scrutiny. It is undisputable that a judge's personal actions in court influence public perception of the judiciary. If a judge appears vindictive, manipulative, or unreasonably combative, it risks undermining public trust in the legal system.

32. A judge embroiled in litigation must tread carefully to ensure their actions do not conflict with the principles they espouse in the courtroom and shall adhere to procedural fairness. Judges should remain mindful that their conduct, even as private citizens, reflects on the institution they represent.

33. The conduct of the respondent-husband would seriously prejudice the rights of the revisionist-wife, firstly, because she has been living a destitute life since 2018. The respondent-husband has been a Judicial Officer since 2001 and is well aware of the rights of a wife under Section 125 Cr.P.C. for maintenance. Instead of fulfilling his obligations, he has chosen to prolong the case through various

legal manoeuvres, delaying justice. The precious time of the revisionist-wife has been consumed in court battles. Additionally, he remarried a woman without the knowledge and consent of his first wife, even though he claims to have divorced the revisionist-wife in the year 2018. However, this fact has been seriously contested and disputed by the revisionist-wife. The learned Judges failed to observe this, and thus, he deserves no sympathy from this Court.

34. Section 397(1) of the Cr.P.C. empowers the High Court or the Sessions Judge to call for and examine the records of any proceeding before a subordinate criminal court. This provision ensures the correctness, legality, or propriety of any finding, sentence, or order and the regularity of the proceedings. The purpose of revisional power is to prevent miscarriage of justice, and the revisional court may exercise this power suo motu to rectify errors that go to the root of the case, ensuring justice is served. When revisional powers are applied prudently, these powers reinforce public trust in the judiciary by ensuring that justice is not only done but also seen to be done.

35. Based on aforesaid deliberations, it is concluded that the Mis. Case No. 21/14 was dismissed in default erroneously by the trial court. The case was listed for hearing nearly 64 times, and no substantial proceeding has been conducted by the learned Family Judge ensuring the objective enshrined in Article 19 of the Constitution of India read with 125 Cr.P.C. The revisionist-wife filed an application for interim maintenance on 18.5.2017, and despite the case being listed for nearly 47 times after the interim application for maintenance, the said application remained

undecided till the case was dismissed for non-prosecution. The learned Family Judge repetitively adjourned the case without recording reasons, and nearly 32 times personal exemption application was allowed on the same ground that his leave application has not been sanctioned. Therefore, the orders dated 1.3.2017 and 8.2.2018 passed in Miscellaneous Case No.21 of 2014 are found to be legally unsustainable and thus set- aside.

36. As held in the case of **Rajnesh v. Neha case (supra)**, the Court is vested with the discretion to grant maintenance either from the date of the application or from the date of the order under Section 125(2) Cr.P.C. The Supreme Court concluded that it would be appropriate to grant maintenance from the date of the application in all cases, including applications under Section 125 Cr.P.C. The respondent-husband has been contesting the cases vigorously and avoiding his obligation to pay maintenance by using all possible influences and misusing the court procedures since 2014. Therefore, the objectives enshrined under Article 19 and Section 125 Cr.P.C., as well as the directives of the constitutional courts, would be fulfilled by awarding the maintenance from the date of filing of Miscellaneous Case No.21 of 2014.

37. Accordingly, in light of the foregoing discussions, the present revision petition is allowed with the following directions:

(a) The respondent-husband shall pay Rs.20,000/- per month to the revisionist-wife from the date of filing of the first maintenance application, i.e., Case No. 21 of 2014, until 16.8.2019,

and thereafter Rs.30,000/- per month from 17.8.2019 onwards, i.e. from the date when the Case No. 387/19 was filed.

(b) The monthly maintenance amount shall be deposited directly into the account of “*Shabana Bano*” (Account No. 701510110006536, IFSC Code BKID0007015, Bank of India, Dudhi Sonbhadra Branch) from the respondent-husband’s salary account, commencing with the next month’s salary,

(c) The learned Principal Judge, Family Court, Sonbhadra, is directed to calculate the outstanding arrears in accordance with this Court’s directions within three weeks of receiving this order.

(d) The respondent-husband is further directed to pay litigation costs of Rs.50,000/- to the revisionist-wife.

(e) The respondent-husband is given liberty to approach the Principal Judge, Family Court, Sonbhadra, to pay arrears in instalments. However, the learned Principal Judge, Family Court, Sonbhadra, shall ensure that the outstanding maintenance amount is fully paid to the revisionist-wife within the next six months. If any amount has already been paid, the same shall be adjusted accordingly.

38. The office is directed to send back the trial court records to the concerned court forthwith.

39. The Registrar (Compliance) is directed to communicate a copy of this order forthwith to the learned Principal Judge, Family Court, Subhadra, and the District Treasury Officer, Etah, for necessary compliance.

(2025) 1 ILRA 365
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2025

Prem Kumar Rastogi Vs M/s. On-UP Automobiles
Pvt. Ltd. & ors., 2019 (3) A.D.J. 491 (DB) (LB)

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

BEFORE
THE HON'BLE KSHITIJ SHAILENDRA, J.

First Appeal No. 844 of 2024

Nimmi Infratech Private Limited
(Previously Satya Homes Private Limited)
...Appellant
Versus
Fundan & Ors. ...Respondents

Counsel for the Appellant:
Nisheeth Yadav

Counsel for the Respondents:
Anil Kumar Mehrotra, Srijan Mehrotra, Yash
Tandon

Civil Law-The Code of Civil Procedure, 1908-Section 96 - Order-VII Rule 11 & 14 - The Uttar Pradesh Revenue Code, 2006-Sections 144 & 206-- Since the land in dispute is not held or occupied for purposes connected with agriculture, it cannot be said to be a "holding"--- The plaintiff has not come up with a claim as 'bhumidhar' or 'asami' of land but has raised a grievance before the civil court arising out of execution of sale deeds to the detriment of its interest and non-execution of sale deed of remaining land in its favour but in favour of third parties--- Once it is found that the land in dispute covered by the agreement for sale or the disputed sale deeds under challenge has gone beyond the definition of "land" or "holding", no provision of Code of 2006 would apply and, in that event, only civil court would have jurisdiction to grant decree as prayed for---Impugned order set aside. (Para 19 & 21)

Appeal allowed. (E-15)

List of Cases cited:

ANALYSIS OF BAR OF SUIT
INVOKING U.P. REVENUE CODE, 2006
VIS-A-VIS REJECTION OF PLAINT
UNDER ORDER 7 RULE 11 C.P.C.

THE APPEAL

1. The instant appeal under Section 96 of the Civil Procedure Code, 1908 (hereinafter referred to as 'C.P.C.') assails validity of the impugned judgment and order dated 16.08.2024 and decree dated 20.08.2024 based thereupon, whereby the learned Civil Judge, (Senior Division), Gautam Buddha Nagar has allowed an application 20-~~क~~ filed by the defendant-respondent No.6 under Order VII Rule 11 C.P.C. and rejected the plaint of Original Suit No.828 of 2024 (Nimmi Infratech Pvt. Limited vs. Fundan and others). The order impugned amounts to a decree under Section 2(2) C.P.C., hence this regular appeal.

FACTUAL MATRIX

2. The aforesaid suit was filed with the averments that Satya Homes Private Limited being a private limited company incorporated and registered under the provisions of the Companies Act, 1956, was subsequently nomenclatured as Nimmi Infratech Private Limited. Defendants No.1 to 4 were alleged to be owners of the property in dispute with an averment that their names were recorded in the revenue records and that they had entered into an agreement for sale dated 02.05.2014 with the plaintiff-Company and out of the total proposed sale consideration of

Rs.15,21,37,274/-, a sum of Rs. 3,00,00,000/- was paid by the Company; the agreement was registered in the office of Sub-Registrar concerned; possession of the property was delivered to the appellant as per the agreement itself; stamp duty amounting to Rs.76,12,100/- was paid on the entire sale consideration; a sale deed dated 14.12.2015 was executed by the executant Mehar Chand in favour of the plaintiff-Company in respect of part of land covered by gata No.795 and a sum of Rs.29,23,700/- was paid in relation to the agreement for sale which was adjusted towards sale consideration and remaining amount was paid to the defendants No.1 to 4. Further averments were made regarding another sale deed dated 20.06.2015 executed in respect of some part of gata No.793 and adjustment of money paid with reference to agreement for sale.

3. The cause of action giving rise to the suit was alleged on account of the fact that the defendants No.1 to 4, instead of executing sale deed in furtherance of the agreement for sale in respect of remaining part of the land, executed six sale deeds in favour of other defendants and though a suit being Original Suit No.1183 of 2023 (Satya Homes Private Limited vs. Fundan and others) was previously filed in the court of Civil Judge, (Senior Division), Gautam Buddha Nagar claiming a decree of specific performance of the agreement and, in which, a temporary injunction order dated 10.10.2023 was passed, the sale deeds were executed in violation thereof. Terming the sale deeds as void and adversely affecting the rights of the plaintiff for multiple reasons, decree was claimed to the effect that sale deeds be declared as illegal, forged, fabricated and void documents and ineffective qua the rights of the plaintiff-Company and such

endorsement be made in the records of the Sub-Registrar concerned. A further decree for injunction restraining the respondents from alienating the property based upon the void sale deeds was also claimed with a further relief of damages to the tune of Rs.15,00,000/- per month.

4. The trial court, on 21.05.2024, passed an ex-parte ad-interim injunction order directing the parties to maintain status quo and issued notices to the defendants. The injunction order was extended from time to time and, later on, an application 20-~~फ~~ was filed by defendant No.6 under Order VII Rule 11 C.P.C. with a prayer to reject the plaint. Pursuant to an order dated 02.07.2024 passed by this Court in Matter Under Article 227 No.7743 of 2024 (M/s Aahaan Infrastructure v. Nimmi Infratech Private Limited and 9 others), whereby the trial court was directed to make all endeavours to decide the application under Order VII Rule 11 C.P.C., the trial court took up the said application for consideration and has rejected the same by the order impugned.

APPLICATION UNDER ORDER VII RULE 11 C.P.C.

5. The application under Order VII Rule 11 C.P.C. raised the ground for rejection of the plaint as valuation of the suit on thirty times of land revenue as is done in case of agricultural land; pendency of previous suit being Original Suit No.1183 of 2023 raising a bar under Order II Rule 2 C.P.C. and non-payment of adequate Court fees though the land had been declared as “non-agricultural” under Section 143 of the **Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950** (hereinafter referred to as ‘the

Act of 1950'), as per the recitals contained in the sale deeds under challenge.

ORDER REJECTING PLAINT

6. The trial court has rejected the plaint by referring to Sections 144 and 206 of **Uttar Pradesh Revenue Code, 2006** (hereinafter referred to as 'the Code of 2006') read with Section 9 C.P.C. and held that since the plaintiff has valued the suit on land revenue payable qua agricultural land and a declaratory decree has been claimed, in view of the bar contained under Section 206 of the Code of 2006, the suit is barred.

LEARNED COUNSEL HEARD

7. I have heard Shri C.B. Yadav, learned Senior Counsel assisted by Shri Anand Kumar Yadav, learned counsel for the plaintiff-appellant; Shri Yash Tandon, learned counsel for the respondent Nos.1 to 4 and Shri Anil Kumar Mehrotra, learned counsel assisted by Shri Ashwani Kumar Patel and Shri Srijan Mehrotra, learned counsel for respondent No.6. The record of the trial court has already been received and the appeal has been admitted on earlier occasion.

POINT FOR DETERMINATION

8. Following point for determination arises for consideration in this appeal and is framed under Order XLI Rule 31 C.P.C.:-

“Whether rejection of plaint by invoking bar of civil court with reference to provisions of U.P. Revenue Code, 2006 is justified?”

ARGUMENTS OF APPELLANTS

9. Shri C.B. Yadav, learned Senior Counsel submits that since jurisdiction to declare sale deeds as null and void vests only with civil court and revenue court has no jurisdiction to grant such a decree, rejection of plaint is per se illegal. Elaborating his submissions, it is urged that suit for adjudging registered sale deeds as null and void does not fall under any clause or sub-clause or entry of Schedules II and III referable to Section 206 of the Code of 2006 and no declaration of rights as 'bhumidhar' or 'asami' having been claimed by the plaintiff, neither Section 206 nor Section 144 of the Code of 2006 has any application and, hence, gross error has been committed by the trial court. It is also urged that since the defendant No.6, in his application under Order VII Rule 11 C.P.C. itself, alleged that the land mentioned in the disputed sale deeds has already been declared as “**non-agricultural**” under Section 143 of the Act of 1950, the trial court was not justified in rejecting the plaint merely on the ground that suit has been valued or Court fees has been paid as per the provisions applicable for agricultural land. Submission is that issue of wrongful valuation of suit or deficient court fees may become subject matter of trial later on but the same, in itself, could not become a ground for rejecting the plaint at its threshold.

10. Another argument advanced is based upon Section 4(14) of the Code of 2006 which contains definition of “**land**” and it is urged that since as per the defendant-respondent No.6 itself, the land is not held or occupied for purposes connected with agriculture, it goes beyond the purview of Code of 2006 and, hence, no provision of the Code could have been invoked to reject the plaint.

ARGUMENTS OF RESPONDENTS

11. *Per contra*, learned counsel for the respondents submits that for considering an application under Order VII Rule 11 C.P.C., only averments contained in the plaint can be seen and since the plaint does not disclose the nature of land as non-agricultural, rather the plaintiff itself has valued the suit on the principles applicable for valuation of agricultural land, mere statement contained in application under Order VII Rule 11 C.P.C. regarding declaration of land as non-agricultural under Section 143 of the Act of 1950 would be irrelevant. It is further urged that a statement contained in an application cannot be deemed to be an admission on the part of the defendants so as to adjudge the maintainability of the suit while considering the application. As regards jurisdiction of civil court to grant the decree as claimed in the suit, it is urged that admittedly, the plaintiff is not the owner or bhumidhar of the land and, even if, the sale deeds are cancelled, the same would not confer ownership or bhumidhari rights qua the land upon the plaintiff and, therefore, for obtaining a declaration in its favour, if any, the plaintiff should approach revenue court as per Section 144 of the Act of 1950 and, hence, in view of entries contained in III Schedule read with Section 206 (2)(b) and those contained in II Schedule of the Code of 2006, only the revenue court would have jurisdiction; the jurisdiction of civil court would be barred and, therefore, the trial court has not committed any error. In support of his submissions, learned counsel for the respondents has placed reliance on the following authorities:-

(i). Shri Ram and others v. Ist A.D.J. & others, A.I.R. 2001 SC 1250;

(ii). Kamla Prasad & others v. Kishna Kant Pathak & others, (2007) 4 S.C.C. 213;

(iii). Jai Prakash Singh v. Bachchu Lal and others, 2019 S.C.C. Online All 3522;

(iv). Pyare Lal v. Shubhendra Pilania (Minor) through natural guardian (Father) Shri Pradeep Kumar Pilania and others, (2019) 3 SCC 692;

(v). Bansraj & others v. Moti and others, 2019 S.C.C. Online All 4238;

(vi). Sarla Pal and others v. Addl. District Judge, Court No.6, Kanpur Dehat and others, (2019) 144 RD 751;

(vii). Vijay Pal and others v. Rajendra Kumar, 2021 (4) A.D.J. 182;

(viii). Shree Surya Developers and Promoters v. N. Sailesh Prasad & others, (2022) 5 S.C.C. 736;

(ix). Smt. Kushma Devi v. Darshan Singh and 4 others; 2024 (4) ADJ 247;

(x). Bhagwati Devi v. Radhey Shyam and others, 1976 (2) A.L.R. 702;

(xi). Narendra Kumar Mittal & others v. Nupur Housing Development Pvt. Ltd., (2020) 20 S.C.C. 158;

(xii). Mangoo Singh & others v. Ram Autar, 2024 (9) ADJ 351."

ANALYSIS OF RIVAL CONTENTIONS

12. Having heard learned counsel for the parties, this Court finds that the plaint has been rejected by invoking sub-rule (d) of Rule 11 of Order VII, i.e., the bar of U.P. Revenue Code, 2006 in this case and, therefore, it thinks it proper to first refer provisions of Order VII Rule 11 (d) C.P.C. which reads as under:-

"Order VII Rule 11 C.P.C.

11. Rejection of plaint.-The plaint shall be rejected in the following cases:-

.....

(d) where the suit appears from the statement in the plaint to be barred by any law;”

13. It is known to everyone that C.P.C. was drastically amended by Act No. 46 of 1999 w.e.f. 01.07.2002. One of the amendments was made in Rule 14 of Order VII which is in relation to documents relied on in plaint. The Rule is quoted hereunder:-

“Order VII Rule 14

Documents relied on in plaint

14. Production of document on which plaintiff sues or relies.- (1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiff’s witnesses, or, handed over to a witness merely to refresh his memory.”

14. The amended provisions of Rule 14, therefore, caste an obligation upon plaintiff to enter documents in a list and produce the same when the plaint is presented when he sues or relies upon such documents that are in his possession or power in support of his claim. Sub-rule (3) of Rule 14 creates a bar against subsequent production of such documents and provides that the same shall not be received in evidence at the hearing of the suit without leave of the Court. In view of the amended provisions, the intention of legislature becomes crystal clear that the statement contained in the plaint has to be read with the documents produced alongwith the plaint and pleadings cannot be segregated with the documents filed alongwith the plaint. Similar view has been taken by Division Bench of this Court in **Prem Kumar Rastogi v. M/s. On-UP Automobiles Pvt. Limited and others, 2019 (3) A.D.J. 491 (DB) (LB)**. Relevant extract from the judgment is reproduced as under:-

“.....

23. The above quoted provision i.e. Rule 11 relates to rejection of plaint on certain grounds mentioned therein and Rule 14 relates to production of documents by the plaintiff on which plaintiff sues or relies. A perusal of the Rule 14 would show that if a plaintiff sues upon a document or relies upon a document in that event he shall produce the said documents in Court when the plaint is presented. In other words, the plaintiff is under obligation to file the basis of the suit/document on which the plaint is based at the time of filing of the suit or presenting the plaint.

24. Needless to say that both the provisions are part and parcel of Order 7. Rule 10 of Order 7 authorises the Court to return the plaint for want of jurisdiction for

presenting the same in competent court of jurisdiction.

25. A conjoint reading of the aforesaid provisions would show that the Court is empowered to consider the documents filed under Order 7 Rule 14, being filed in support of allegations/averments made in the plaint as basis of suit/pleint, at the time of dealing with the application moved either under Rule 10 or Under Rule 11 of the CPC. “

15. In the instant case, the documents produced at the time of presentation of plaint are not the photo-stat copies thereof but fall in the category of either primary or secondary evidence and it is apparent from record that certified copies of disputed sale deeds were not only entered into a list of documents by the plaintiffs but the same were filed in support of its claim. What would be the fate of these documents or their effect on trial or ultimate decision to be taken in the suit is altogether different, however, as observed above, when a Court proceeds to consider an application under VII Rule 11 C.P.C., the documents filed alongwith the plaint cannot be ignored, rather, they would be read alongwith statements made in the plaint.

16. Therefore, in order to ascertain as to whether the suit giving rise to this appeal is barred by the provisions of Code of 2006, when the statement contained in the plaint is read with the recitals contained in the registered sale deeds challenged by way of suit, it is found that all the sale deeds disclosed purpose of sale/purchase as “residential” and the stamp duty had been paid on the circle rates applicable for residential properties. Apart from this, the agreement for sale dated 02.05.2014 also describes that stamp duty was paid on circle rates applicable for residential

properties. It is nowhere provided in any of the documents that the land in dispute is agricultural in nature. Further the list of documents filed by the plaintiff included revenue records relating to the property in question which contained reference of declaration made by the Competent Authority under Section 143 of Act of 1950 declaring the property as “non-agricultural”.

17. When the aforesaid documents are analysed in the light of arguments of Shri C.B. Yadav based upon definition of “land” contained in the Code of 2006, this Court deems it appropriate to reproduce the same alongwith some other provisions. Relevant provisions of Code of 2006 are extracted as under:-

“**4(12).** ‘*holding*’ means a parcel of lands held under one tenure or one lease, engagement or grant;

4(14). ‘land’, except in Chapters VII and VIII and Sections 80, 81 and Section 136, means land held or occupied for purposes connected with agriculture;

144. Declaratory suits by tenure-holders.- (1) Any person claiming to be a Bhumidhar or asami of any holding or part thereof, whether exclusively or jointly with any other person, may sue for a declaration of his rights in such holding or part.

(2) In every suit under sub-section (1) instituted by or on behalf of:-

(a) a Bhumidhar, the State and the Gram Panchayat shall be necessary parties;

(b) an asami, the land-holder shall be a necessary party.

206. Jurisdiction of Civil Court and Revenue Courts.- (1) Notwithstanding anything contained in any law for the time being in force, but subject

to the provisions of this Code, no Civil Court shall entertain any suit, application or proceeding to obtain a decision or order on any matter which the State Government, the Board, any revenue court or revenue officer is, by or under this Code, empowered to determine, decide or dispose of.

(2) Without prejudice to the generality of the provisions of sub-section (1), and save as otherwise expressly provided by or under this Code-

(a) no Civil Court shall exercise jurisdiction over any of the matters specified in the **Second Schedule**; and

(b) no Court other than the revenue court or the revenue officer specified in [**Column 3**] of the Third Schedule shall entertain any suit, application or proceeding specified in [**Column 2**] thereof.

(3) Notwithstanding anything contained in this Code, an objection that a court or officer mentioned in sub-section (2)(b) had or had no jurisdiction with respect to any suit, application or proceedings, shall not be entertained by any appellate, revisional or executing court, unless the objection was taken before the court or officer of the first instance, at the earliest opportunity, and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.”

18. As far as Schedules II and III corresponding to Section 206 of the Code of 2006, as considered by the trial court in the impugned order are concerned, the Court need not quote or reproduce the same as it would be a futile depiction for the simple reason that the provisions of Section 206 read with the associated Schedules could have been relevant only when the lis is regarding “land” or “holding”

respectively defined under sections 4(14) and 4(12) of the Code of 2006 and not in respect of the land or holding which goes out of purview of the Code on account of its very nature, as reflected from the plaint and/or associated documents. Since the trial court has invoked bar of section 206 and has held that plaintiff-appellant should claim a declaration under section 144 of the Code 2006, it is to observe that section 144 applies when any person claiming himself to be a ‘bhumidhari’ or ‘asami’ of any holding or part thereof sues for a declaration of his rights in such holding or part thereof. ‘**Holding**’, as per Section 4(12) of the Code, has been defined as a “**parcel of lands**” held under one tenure or one lease, engagement or grant. ‘**Land**’, as per section 4(14), means land held or occupied for purposes connected with agriculture.

19. As noted above, since the land in dispute is not held or occupied for purposes connected with agriculture, it cannot be said to be a “holding” and, hence, the provisions of Section 144 would not apply. They would not apply also for the reason that the plaintiff has not come up with a claim as ‘bhumidhar’ or ‘asami’ of land but has raised a grievance before the civil court arising out of execution of sale deeds to the detriment of its interest in defiance of a claim based upon registered agreement for sale dated 02.05.2014 and some sale deeds in furtherance thereto in its favour and non-execution of sale deed of remaining land in its favour but in favour of third parties.

20. It is also significant to observe that both plaintiff-appellant and contesting defendant-respondent No.6 are construction/infrastructure companies and, during the course of arguments in this appeal on all occasions, both sides raised

allegations against each other regarding raising of constructions on the spot by the transferees. This also reflects that the land is neither held nor occupied for the purposes connected with agriculture and even the sale deeds are meant for raising residential constructions.

21. The Court does not want to enter into a detailed discussion based upon the authorities cited as regards power of civil court to grant a decree for cancellation or adjudging the written instrument as null and void in a case when the person seeking such adjudication is not a recorded tenure-holder. This is so because, in the facts of this case, once it is found that the land in dispute covered by the agreement for sale or the disputed sale deeds under challenge has gone beyond the definition of “land” or “holding”, no provision of Code of 2006 would apply and, in that event, only civil court would have jurisdiction to grant decree as prayed for.

22. As far as the alleged wrongful valuation of the suit is concerned, it is always open for the trial court to frame issues as regards proper valuation and payment of Court fees and, in that event, appropriate order can be passed but, at this stage of proceedings, mere statement based upon valuation of the suit on thirty times of land revenue could not create a bar of provisions of Code of 2006 so as to warrant rejection of plaint under Order VII Rule 11 (d) C.P.C.

23. Although Shri Yadav submits that there was an injunction order operative when the plaint was rejected and, therefore, if the Court allows the appeal and revives the plaint, it should also revive the injunction order, this Court is not in a position to accept this submission for the

reason that prior to the institution of the suit in question, admittedly, another suit being Original Suit No.1183 of 2023 was filed by the plaintiff, in which, a conditional interim order with reference to record of rights qua the land in dispute was passed on 10.10.2023 and reference thereof is contained in the plaint of the subsequent suit also. Even ex-parte ad-interim injunction order passed in subsequent suit giving rise to this appeal is also conditional on the same lines. Hence, though the Court is satisfied that rejection of plaint is illegal, it does not find any good ground to revive the injunction order as any observation made by this court in that regard may nullify/modify the injunction order(s) passed in two suits and that would be beyond the scope of this appeal.

CONCLUSION

24. In view of the above, the solitary point for determination is answered in favour of the plaintiff-appellant holding that rejection of plaint invoking bar of the provisions of U.P. Revenue Code, 2006 was not lawful and the trial court has grossly erred in passing the order impugned.

25. Consequently, the appeal succeeds and is **allowed**.

26. The judgment, order and decree detailed in 1st paragraph of this judgment are **set aside**. The plaint of Original Suit No. 828 of 2024 stands **revived** for all purposes.

27. Office is directed to forthwith remit the trial court's record to the Civil Judge, (Senior Division), Gautam Buddha Nagar.

(2025) 1 ILRA 373
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2025

BEFORE

THE HON'BLE AJIT KUMAR, J.

S.C.C. Revision No. 95 of 2023

Sri Raman Arora ...Revisionist
Versus
Susheel Kumar (Deceased) & Ors. ...Opposite Parties

Counsel for the Revisionist:
Mahender, Mohan Srivastava

Counsel for the Opposite Parties:
Vijay Prakash Mishra

A. Tenancy Law – Maintainability of eviction suits in cases of unwritten agreement - Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 - U.P. Civil Laws Amendment Act, 1972 - Central Provincial Small Causes Courts Act, 1887.

From a bare reading of Section 1(4), it is clear that legislature intended to give retrospective effect to the Act No. 16 of 2021 with effect from the issuance of ordinance i.e. 11.01.2021 and, therefore, there is no scope of doubt left to hold that the Act would be taken to have come into force with effect from 11.01.2021. (Para 7)

B. Maintainability of eviction suits in cases of unwritten agreement - No provision which is very clear in its language can be interpreted otherwise to either enlarge its scope of application or to narrow it down.

The language of Section 38(2) is very clear and it bars in quite an unequivocal terms exercise of jurisdiction by Rent Authority in cases when written agreement are not there between landlord and tenant as per format prescribed under 1st Schedule to Act No. 16 of 2021. The legislature uses every word cautiously and with

a meaningful purpose. The Act of 2021 aims at improving upon the existing tenancy laws with new legislation and intends to bind parties to enter tenancy agreements in writing to remove uncertainties as to rent, terms and tenure of tenancy with an object to protect interest of both landlord and tenant. **Any interference to present rent authority to entertain cases in cases of unwritten tenancy would defeat the very object of the Act.** (Para 8)

C. If a Bench of same strength arrives at a different view on a point of law from earlier view expressed by an earlier Bench, it should in proprietary, refer the matter to a larger Bench. (Para 9)

Thus, if a bench of same strength comes to conclude that earlier co-ordinate Bench had either ignored a particular provision of law or has failed to properly appreciate the same, it has only option to refer it to a larger Bench. It, in propriety and to maintain judicial discipline cannot take a different view altogether. (Para 10)

Thus, since, the small cause suit in the matter of unwritten agreement between the parties u/s 15 of the Provincial Small Causes Courts Act have been made applicable by the U.P. Civil Laws (Amendment) Act, 1972 with the Presidential assent, the suit is held to be maintainable on this count and in view of the law laid down by this Court in the case of *Amit Gupta (infra)*. (Para 11)

Revision application dismissed. (E-4)

Precedent followed:

1. Amit Gupta Vs Gulab Chandra Kanodia and Shri Mewak Ram, MANU/UP/1559/2023 SCC Revision No. 158 of 2022 (Para 4)
2. Keshav Dev Khemka Samaj Sewa Sadam Samiti Vs Kuldeep Chand Malik, S.C.C. Revision Defective No. 48 of 2022 decided on 15.05.2023 (Para 4)
3. Mary Pushpam Vs Telvi Curusumary & ors., (2024) 3 SCC 224 (Para 9)

Precedent distinguished:

Amarjeet Singh, Writ A No. 3023 of 2024

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

1. Heard Shri Mohan Srivastava, learned Advocate appearing for revision applicant and Shri Vijay Prakash Mishra, learned Advocate appearing for tenant respondent.

2. By means of this revision application, revision applicant has questioned the order passed by Additional District Judge, Court No. 15, Bulandshahar dated 15.07.2023 whereby it has upheld the maintainability of eviction suit instituted by the landlord before the Judge Small Causes taking a legal view of the enforcement of the Act, namely, Act No. 16 of 2021, namely the Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 with effect from the date of its publication in the gazette on 24.08.2021. Questioning the maintainability of suit before the Judge Small Causes Court, the tenant had taken the objection that the ordinance that had later on got converted into an enactment was enforced on 11.01.2021 and, therefore, the Act would be taken to have commenced with effect from 11.01.2021 in view of sub-section 4 of Section-1 of the U.P. Regulation of Urban Premises Tenancy Act, 2021.

3. Learned Advocate appearing for tenant/ revision applicant has argued that statute enacted by competent legislature would prevail upon ordinance, government order and executive notifications including notification of the act in Gazette and, therefore, once the Act itself provided for its enforcement vide Section 1 (4), with effect from 11.01.2021, the court took an erroneous view in law that its enforcement

would be taken to be with effect from date of its publication in the official gazette.

4. *Per contra*, it is argued by learned Advocate appearing for landlord respondent that even if the Act is taken to have come into force with effect from 11.01.2021, in view of the fact that there was no written agreement of lease in respect of demised premises between the parties, the suit before the Judge Small Causes under the Provincial Small Causes Act, 1887 was absolutely maintainable in view of the judgment of this Court in the matter of ***Amit Gupta v. Gulab Chandra Kanodia and Shri Mewak Ram and Keshav Dev Khemka Samaj Sewa Sadam Samiti v. Kuldeep Chand Malik MANU/UP/1559/2023 SCC Revision No. 158 of 2022 and SCC Revision Defective No. 48 of 2022*** decided on 15.05.2023, which still holds the field. He argues that the U.P. Civil Laws Amendment Act, 1972 having the Presidential assent, the maintainability of suit in respect of unwritten tenancy agreements not covered by the first schedule of the Act No. 16 of 2021 before the Judge Small Causes, cannot be questioned only on the premise that tenancy agreements in writing or information thereof as required under various sub-Sections of Section 4 to the rent authority is not sine qua non for maintaining an application under Section 21 (2) of the new Act. He has taken the Court to the relevant provisions as contained under Section 38 (2) of the new Act that specifically confers jurisdiction on the rent authority to try tenancy disputes only in the matter of tenancy agreement that are submitted to it as per prescribed format specified in first Schedule. Section 38 (2) of the new Act is reproduced hereunder:

"(2) The jurisdiction of the Rent Authority shall be limited to tenancy agreement submitted to it as specified in the First Schedule and shall not extend to the question of title or ownership of premises."

5. Learned Advocate appearing for respondent submits that reading down the provisions as contained under various sub-sections of Section 4 along with sub-section 2 of Section 38, would definitely lead a prudent mind to conclude that written agreement as contemplated under the new Act is necessary for invoking the provisions under Section 21 (2) of the Act No. 16 of 2021. He further submits that the new Act being the State Act having only the Governor's assent, will not be having overriding effect upon the U.P. Civil Laws Amendment Act, 1972 which amends the Central Provincial Small Causes Courts Act, 1887 in its application to the State of Uttar Pradesh to maintain eviction suits in respect of leases of urban buildings, with the Presidential assent. He argues that in the case of **Amarjeet Singh (Writ A No. 3023 of 2024)** which is subsequent in point of time to **Amit Gupta (supra)**, has not dealt with this aspect of matter at all and, hence, will not be a binding judicial precedent. Besides this he also argues that on the principle of propriety, if a Coordinate Bench was taking a different view from what had already been taken by another Coordinate Bench in its judgment which was earlier in point of time and which had not been overruled, then subsequent Coordinate Bench ought to have referred the matter to a Larger Bench. He submits that there being no written agreement between the parties as to tenancy/ lease qua the premises in question, the small causes suit was absolutely maintainable in view of the provisions as

contained under the U.P. Civil Laws Amendment Act, 1972 having the Presidential assent even in the event the new Act is taken to have been brought into force with effect from 11.01.2021.

6. Having heard learned counsel appearing for respective parties and having perused the order passed by Judge Small Causes/ Additional District Judge, Court No. 15, Bulandshahar dated 15.07.2023 and the judgment in the case of **Amit Gupta (supra)** and the judgment in the case of **Amarjeet Singh (supra)** I find force in the submissions advanced by learned counsel appearing for respondent even though I do not find myself in agreement with the view taken by the Judge Small Causes that the new Act being Act No. 16 of 2021 should be taken to have been brought into force only with effect from 24.08.2021. The Judge Small Causes though has referred to the ordinance earlier issued by the Governor on 11.01.2021 which later on got translated into a legislative enactment but has failed to appreciate Sub-Section 4 of Section 1 of the Act No. 16 of 2021. Sub-Section 4 of Section 1 runs as under:

"1.(4) It shall be deemed to have come into force with effect from January 11, 2021."

7. From a bare reading of the aforesaid provision it is clear that legislature intended to give retrospective effect to the Act No. 16 of 2021 with effect from the issuance of ordinance i.e. 11.01.2021 and, therefore, there is no scope of doubt left to hold that the Act would be taken to have come into force with effect from 11.01.2021.

8. The question now arises as to the legal position qua maintainability of eviction suits in cases of unwritten

agreement. While in Amit Gupta's case (supra) such suits have been held to be maintainable, under Provincial Small Causes Courts Act, 1887 despite Act No. 16 of 2021 coming into existence but recently a Co-ordinate Bench in the matter of Amarjeet Singh (supra) has taken a different view holding that written agreement is not sine qua non to maintain a case for eviction at the instance of landlord under Section 21 (1) of the Act No. 16 of 2021. The principle evolved is that new Act provides a forum to cover all rent cases when tenancy is admitted to the parties. With great respect to his Lordship, I find there to be hardly any discussion as to the scope of Section 28 (2) of the Act No. 16 of 2021 in as much as the status of small causes courts' jurisdiction under U.P. Civil Law Amendment Act, 1972 which has the Presidential assent. The language of Section 38 (2) is very clear and it bars in quite an unequivocal terms exercise of jurisdiction by Rent Authority in cases when written agreement are not there between landlord and tenant as per format prescribed under Ist Schedule to Act No. 16 of 2021. No provision which is very clear in its language can be interpreted otherwise to either enlarge its scope of application or to narrow it down. The legislature uses every word cautiously and with a meaningful purpose. The Act of 2021 aims at improving upon the existing tenancy laws with new legislation and intends to bind parties to enter tenancy agreements in writing to remove uncertainties as to rent, terms and tenure of tenancy with an object to protect interest of both landlord and tenant. Any interference to present rent authority to entertain cases in cases of unwritten tenancy would defeat the very object of the Act. Much detailed analysis has been done in Amit Gupta's Case but all that has remained virtually unnoticed in

subsequent judgment of a Co-ordinate Bench in Amarjeet Singh's case. The Court has not discussed and analysed the aspect whether that such an interpretation as was being made in the case (Amarjeet Singh's case) would give an overriding effect to State Act with only Governor's assent upon earlier enactment having presidential assent and if yes, whether such an interpretation would be justified.

9. Now, question is about binding judicial precedent qua this subsequent judgment. The Courts have repeatedly held that if a Bench of same strength arrives at a different view on a point of law from earlier view expressed by an earlier Bench, it should in propriety, refer the matter to a larger Bench. Recently in the case of **Mary Pushpam v. Telvi Curusumary and others (2024) 3 Supreme Court Cases 224** vide paragraphs 20 and 21 the Court has held thus:

"20. The legal position on coordinate Benches has further been elaborated by this Court in State of Punjab v. Devans Modern Breweries Ltd:

339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred to a larger Bench.

340. In Halsbury's Law of England (4th Edn) Vol. 26 at pp 297-98 para 578, it is stated

'A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before, it in which case it must decide which case to follow.'

21. *We have already discussed about the importance of ensuring judicial discipline and the same has also been upheld by various judgment of this Court in Central Board of Dawoodi Bohra Community v. State of Maharashtra, this court has summed up the legal position of rules of judicial discipline as follows:*

12. ... (1) *The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.*

(2) *A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the bench of lesseer quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted"*
(Emphasis added)

10. Thus, if a bench of same strength comes to conclude that earlier co-ordinate Bench had either ignored a particular provision of law or has failed to properly appreciate the same, it has only option to refer it to a larger Bench. It, in propriety and to maintain judicial discipline can not take a different view altogether.

11. Thus, since, the small cause suit in the matter of unwritten agreement between the parties under Section 15 of the Provincial Small Causes Courts Act have

been made applicable by the U.P.Civil Laws (Amendment) Act, 1972 with the Presidential assent, I hold the suit to be maintainable on this count in view of the law laid down also by this Court also in the case of *Amit Gupta (supra)*.

12. Thus, in view of the above, I do not subscribe to the view taken by the Judge Small Causes regarding applicability of Act No. 16 of 2021 only with effect from 24.08.2021, I still hold the small causes suit filed by the landlord to be maintainable before the Judge Small Causes.

13. Hence, I decline to grant interference with the suit proceedings.

14. The revision application on this count, therefore, stands dismissed.

(2025) 1 ILRA 377

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 20.01.2025

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 7309 of 2024

Ankit Agrawal

...Petitioner

Versus

Smt. Monika Agrawal

...Respondent

Counsel for the Petitioner:

Paritosh Joshi, Raghav Dev Garg, Sr. Advocate

Counsel for the Respondent:

Amrit Shanker Dubey

Civil Law-The Hindu Marriage Act, 1955-Section 13B - The Constitution of India, 1950-Article 227--- Petitioner residing at United St.s of America, therefore, he could not

personally present to file the petition. However petitioner ensured his presence through virtual mode where he verified the identity of his wife and his special power of attorney holder. Petitioner was not in a position to come back to India in order to pursue his petition as he is currently employed in a company based in United St.s of America, therefore, he has preferred to move an application which was rejected--- There is no dispute on the point that during the course of time, there is lot of technological development and there are so many mode of virtual appearance i.e. skype, video calling etc., therefore, application for appearance before the Court through virtual mode cannot be rejected---Impugned order set aside----Directions issued to the learned court below to permit the petitioner to appear through video conferencing or any other electronic mode and be allowed to participate in further proceeding. (Para 9, 14 & 17)

Petition allowed. (E-15)

List of Cases cited:

1. Amardeep Singh Vs Harveen Kaur; (2017) 8 Supreme Court Cases 746
2. Shilpa Chaudhary Vs Principal Judge & ors.; 2016 (4) ADJ 262.
3. Aditya Jagannath & ors.; 2021 (1) HLR 201 (M.F.A. No. 4453 of 2020 (FC)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for petitioner.

2. On 05.07.2024, this Court has issued notice to respondent and as per Office report dated 25.07.2024, notice has been served upon the respondent no. 22.07.2024, but even after service of notice, no one has turned up on her behalf, therefore, Court is proceeded to decide the case on merits.

3. Present petition has been filed seeking following reliefs:-

“i. Issue any order or direction, setting aside the dated 16th of May 2024 passed by the Ld. Principal Judge, Family Court, Firozabad, in H.M.P. No. 508 of 2023 (Ankit Agrawal vs. Monika Agrawal) under Section 13-B of Hindu Marriage Act.

ii. Issue any order or direction upon the Court of Ld. Principal Judge, Family Court, Firozabad, to exempt the petitioner's physical presence in the proceedings under section 13B of the Hindu Marriage Act, which is registered as H.M.P. No. 508 of 2023 (Ankit Agrawal vs. Monika Agrawal) and the petitioner may be allowed to participate in the further proceedings, including any mediation conducted by the court, either virtually or through its special power of attorney holder.”

4. Brief facts of the case are that marriage of petitioner and respondent was solemnized on 25.07.2015 as per Hindu Rites and Rituals. Till 2018, petitioner was working as Computer Engineer in Noida and subsequently, petitioner along with respondent shifted to United States of America. In due course of time, some differences took place between the parties leading to initiation of criminal proceeding as well as proceeding under the provisions of Domestic Violence Act against the petitioner. Lastly, in order to give logical conclusions to the aforesaid proceedings, a memorandum of understanding/settlement dated 06.05.2023 was entered between the petitioner, through his special power of attorney holder and the respondent wherein it was decided between the parties to file a petition under section 13B of the Hindu Marriage Act before family court at Firozabad for divorce by mutual consent. It

was also resolved between the parties that respondent shall not pursue the criminal proceeding against the petitioner and his family members. Consequently, a petition under section 13B of Hindu Marriage Act was filed by the petitioner through its special power of attorney holder before the family court at Firozabad on 06.05.2023. The said petition was registered as H.M.P. No. 508 of 2023.

5. Principal Judge, Family Court, Firozabad has decided to proceed with mediation in the matter, but as the petitioner was residing at United States of America, therefore, he could not personally present to file the petition. However petitioner ensured his presence through virtual mode where he verified the identity of his wife and his special power of attorney holder. Petitioner was not in a position to come back to India in order to pursue his petition as he is currently employed in a company based in United States of America, therefore, he has preferred to move an application dated 09.05.2023. After considering the said application, Principal Judge, Family Court, Firozabad has rejected the same vide impugned order dated 16.05.2024.

6. Learned counsel for petitioner submitted that similar dispute arising out of Section 13-B of Hindu Marriage Act was came up before the Apex Court in the matter of *Amardeep Singh vs. Harveen Kaur; (2017) 8 Supreme Court Cases 746*, in which Apex Court has taken a clear cut view that Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings.

7. He next submitted that in light of judgment given by the Apex Court,

rejection of application of petitioner is bad and impugned order dated 16.05.2024 is liable to be set aside.

8. I have considered submissions advanced by counsel for petitioner and perused the records as well as judgments occupying the field.

9. There is no dispute on the point that during the course of time, there is lot of technological development and there are so many mode of virtual appearance i.e. skype, video calling etc., therefore, application for appearance before the Court through virtual mode cannot be rejected.

10. This issue was also before this Court in the matter of *Shilpa Chaudhary vs. Principal Judge and Ors.; 2016 (4) ADJ 262*. Relevant paragraph nos. 1, 16, 17, 18, 19 & 20 of the said judgment are being quoted below:-

“1. The applicant and the second respondent contracted marriage as per hindu rites and custom on 20 November 2010. In August 2013 a joint petition under Section 13B of the Hindu Marriage Act, 1955 was instituted before the Family Court, at Muzaffarnagar, seeking divorce on mutual consent. The petition being Case No. 1149 of 2014 (Smt. Shilpa Chaudhary vs. Vikram Singh). Though dates were fixed by the Court, however, the matter could not be taken for hearing, finally the applicant left the country for Boston, USA, for pursuing her carrier. The applicant executed power of attorney in favour of her mother for parivi and to enter into a compromise for dissolution of the marriage before the Family Court. On 28 November 2015 applicant filed an application (11Ka) through her counsel and prayed for decision/disposal of the case, but by the

impugned order dated 17 December 2015 the application was rejected.

16. Increasingly Family Courts have been noticing that one of the parties is stationed abroad. It may not be always possible for such parties to undertake trip to India, for variety of good reasons. On the intended day of examination of a particular party, the proceedings may not go on, or even get completed, possibly, sometimes due to pre-occupation with any other more pressing work in the Court. But, however, technology, particularly, in the Information sector has improved by leaps and bounds. Courts in India are also making efforts to put to use the technologies available. Skype is one such facility, which is easily available. Therefore, the Family Courts are justified in seeking the assistance of any practicing lawyer to provide the necessary skype facility in any particular case. For that purpose, the parties can be permitted to be represented by a legal practitioner, who can bring a mobile device. By using the skype technology, parties who are staying abroad can not only be identified by the Family Court, but also enquired about the free will and consent of such party. This will enable the litigation costs to be reduced greatly and will also save precious time of the Court. Further, the other party available in the Court can also help the Court in not only identifying the other party, but would be able to ascertain the required information.

17. Reliance was placed on a decision rendered by Calcutta High Court in *Amitabh Bagchi vs. Ena Bagchi*¹⁰ wherein, the Court relying upon Dr. Praful (supra) held that "presence" does not necessarily mean actual physical presence in the Court. Section 3 of the Indian Evidence Act provides that evidence means and includes all statements which the Court

permits or requires to be made before it by witnesses, in relation to the matters of fact under enquiry; evidence would, therefore, include videoconferencing which apply in all cases and not necessarily in criminal matters.

18. Then under Order 18 Rule 4(3) of the amended Code of Civil Procedure, presence in the Court does not necessarily mean physical presence. Rule 4(3) provides for recording evidence either by writing or mechanically in presence of the judge.

19. The Karnataka High Court in *Twentieth Century Fox Films Corporation vs. N.R.I. Film Production Associates (P) Limited*¹¹ held that mechanical process includes the electronic process both for the Court and Commissioner. Those are empowered to adopt the mode of evidence as per the amended Evidence Act.

20. Dispensation of justice entails speedy justice and justice rendered with least inconvenience to the parties as well as to the witness. If a facility is available for recording evidence through videoconferencing, avoids any delay or inconvenience to the parties such facilities should be resorted to. There is no requirement that the witness must be required to come to court and depose in the physical presence in the court. "

11. Apex Court in the matter of *Amardeep Singh (Supra)* has also considered the issue of video conferencing. Relevant paragraph nos. 20 & 21 are being quoted below:-

"20. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming

cohabitation and there are chances of alternative rehabilitation.

21. Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.”

12. Similar controversy was also came up before the High Court of Karnataka in the matter of Aditya Jagannath and Ors.; 2021 (1) HLR 201 (M.F.A. No. 4453 of 2020 (FC) in which facts are also identical to this case. Relevant paragraph nos. 16 to 20 of the said judgment are being quoted below:-

“16. In recent times, we find that the parties who seek for dissolution of their marriage by a decree of divorce by mutual consent do so after long negotiation and discussion, some times they, being located at different parts of the globe, through skype, telephonically or use of other forms of technology, such as whatsapp calls, video conferencing etc. On account of the parties residing in different parts of the country or across the globe and owing to constraints of job or other constraints, such as illness etc., it may not be possible for both parties to sign and verify the pleadings and jointly present the petition for dissolution of their marriage by mutual consent before the Court of Law. This is so in the instant case. In such circumstances, one of the parties to the petition may avail of the facility of appointing a Power of Attorney/agent, in whom the party has full trust and confidence to represent her or him in a proceeding to be filed as in the instant case before the Family Court or any other

Court seeking matrimonial or any other relief. Therefore, the provisions of the various enactments must be harmoniously read and interpreted, so as to make it conducive for availing or taking recourse through appointment of a Power of Attorney holder, to represent a party in a proceeding. This is particularly, as in the instant case, where parties are seeking dissolution of their marriage by a decree of divorce by mutual consent. Moreover, in such cases, a party can carefully think over the matter and appoint a person in whom the party would have full trust and confidence to be as her or his Power of Attorney holder. It is on the strength of such a document of Power of Attorney that the Power of Attorney holder would represent a party to jointly file a petition for dissolution of their marriage through mutual consent on behalf of the executor or Power of Attorney. The Family Court may insist on satisfying itself that indeed the parties have an intention that they should seek a decree of divorce by mutual consent and in order to fully satisfy itself, the Court may, apart from examining the Power of Attorney holder representing any party, also through video conferencing, (which is now widely being used on account of the Covid-19 pandemic), examine the parties including the party who is represented through the Power of Attorney holder. That merely because one of the parties would file the petition seeking dissolution of marriage by mutual consent jointly with the other party, through a Power of Attorney, one cannot ignore the fact that the Court must satisfy itself about the genuineness of the petition filed by the parties seeking dissolution of their marriage by a decree of divorce by mutual consent irrespective of whether it is filed through a Power of Attorney. In fact, the filing of such a petition is an exception to what has been

stated in Section 23 of the Act. Even so, the Court ought not to be pedantic but must apply a flexible procedure which is in accordance with law and not a procedure, but not one which is incongruent in law.

17. In fact, recently, the Hon'ble Supreme Court in the case of Amardeep Singh vs. Harveen Kaur (2017) 8 SCC 746 while considering Section 13B(2) of the Act, which stipulates a cooling off period of six months which is also a period of *locus poenitentiae*, after filing a petition of divorce under Section 13B(1) of the Act, so as to give an opportunity to the parties to rethink over the decision and thereafter, to confirm their decision six months later, has made the said provision less rigid and more pro-litigants by bearing in mind the changed circumstances and peculiarities of the case. Nevertheless, in the said case, it has been observed that the period of six months should be waived owing to the circumstances of the particular case, the exigencies of the situation and bearing in mind the interest of the parties so that justice would be subserved in the matter. In this regard, the Hon'ble Supreme Court has observed that the period mentioned in Section 13B(2) could be construed to be as directory and not mandatory and it would be open to the Court to exercise its discretion in the facts and circumstances of each case, where there are no possibilities of parties to reconcile, cohabit and there are no chances of alternative rehabilitation. In Paragraph No.21 of the said judgment, the Hon'ble Supreme Court has also observed as under:-

"Needless to say that in conducting such proceedings the court can also use the medium of videoconferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and

valid reason as may satisfy the court, to advance the interest of justice."

18. A reading of the above would clearly indicate that the Hon'ble Supreme Court has also made it flexible in the context of representation of the parties by their close relatives, partners or siblings or any other person in whom they have complete trust to be appointed as a Power of Attorney holder. In fact, as already noted, the Court can always satisfy itself about the genuineness of the intention of the parties who approach the Court either by themselves or through a Power of Attorney holder by way of video conferencing, so that any doubts about the genuineness of the petition being filed before the Court is removed.

19. On a perusal of the aforesaid observations of the Hon'ble Supreme Court, it is clearly permissible for the parties to be represented by their partners or siblings in a proceeding filed under Section 13B(1) of the Act or any other similar provision in any other enactment, which provides for dissolution of marriage by a decree of divorce by mutual consent.

20. In the circumstances, we find that in the instant case Family Court ought to have permitted the father of appellant No.2, for signing and verifying the pleadings as her Power of Attorney holder and to represent her in the proceedings. Moreover, for the sake of satisfying and genuineness of the petition, the Family Court could always resort to video conferencing through the medium of which, both the parties could appear apart from the Power of Attorney holder of the second appellant appearing for her, so as to completely satisfy itself about the genuineness of the petition filed by the parties just as presently in this appeal, the appellants have both appeared through video conferencing, first appellant from

Bengaluru and the second appellant from Toronto, Canada. In this regard, we can also briefly advert to the decisions relied upon by the learned counsel for appellants.”

13. Now coming to the present case. Facts of this case are squarely similar to the facts of the judgments cited above, therefore, this Court has no reason to have a different opinion. It is required on the part of Court to permit the petitioner to appear through virtual mode as prayed.

14. Therefore, under such facts of the case as well as law laid down by the Courts, impugned order dated 16.05.2024 is bad and hereby set aside.

15. Writ petition is accordingly *allowed*.

16. No order as to costs.

17. Principal Judge, Family Court, Firozabad is directed to permit the petitioner to appear through video conferencing or any other electronic mode and be allowed to participate in further proceeding.

18. It is open for the Principal Judge, Family Court, Firozabad to verify the identity of petitioner by the respondent while he is appearing through electronic mode.

(2025) 1 ILRA 383
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 24.01.2025

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 12692 of 2024

Ajit Singh Yadav **...Petitioner**
Versus

Smt. Neelam Yadav

...Respondent

Counsel for the Petitioner:

Upendra Nath Yadav

Counsel for the Respondent:

**Civil Law-The Hindu Marriage Act, 1955-
Section 13B(2) -The Constitution of
India, 1950-Article 227---Cooling off the**

India, 1950-Article 227---Cooling off the period of six months as provided in Section 13-B(2) is not mandatory but directory---In the present case, both the parties are living separately since 20.12.2021 and also filed divorce petition jointly. Apart that, earlier attempts of mediation was failed, but later on, in another proceeding, mediation took place between the parties with agreement to dissolve the marriage and withdraw the criminal cases pending between them. Therefore, under such facts, there is no occasion to direct the petitioner to wait for cooling off period as provided in Section 13-B(2) ---Impugned order set aside---Principal Judge, Family Court, is directed to proceed with the divorce petition waiving off the cooling period of six months as provided in Section 13-B(2) **(Para 9 & 13)**

Petition allowed. (E-15)

List of Cases cited:

Amardeep Singh Vs Harveen Kaur; (2017) 8
Supreme Court cases 746

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for petitioner.

2. Present petition has been filed seeking following reliefs:-

"i. Set aside the impugned order dated 11.09.2024 passed by the Principal Judge, Family Court, Ghazipur in Hindu Marriage Petition No. 551 of 2024, (Ajit Singh Yadav vs. Smt. Neelam Yadav)

under Section 13-B of Hindu Marriage Act, by which the court below has rejected the application dated 10.09.2024.”

3. Brief facts of the case are that marriage of petitioner and respondent was solemnized on 11.12.2020. After some time, some differences took place between the parties and they have decided to live separately from 20.12.2021. All attempts made for reconciliation have been failed between the parties. As there was no scope for reconciliation between the parties, therefore, they have filed divorce petition with specific averment that they are living separately since 20.12.2021. The said petitioner was registered as Hindu Marriage Petition No. 551 of 2024, under section 13(B) of the Hindu Marriage Act, 1955 (hereinafter referred to as ‘Act, 1955’) before Principal Judge, Family Court, Ghazipur. Thereafter, order dated 30.07.2024 has been passed directing the parties to appear before the mediation centre on 10.09.2024 and further 01.02.2025 was fixed for hearing/evidence. Both the parties have appeared before mediation centre on 10.09.2024 and thereafter, mediation proceedings were dropped. As long date of 01.02.2025 was fixed, therefore, parties have moved application no. 11(c) dated 20.09.2024 for waiver off statutory period of six months as provided under Section 13-B(2) Act, 1955, which was rejected vide impugned order dated 11.09.2024.

4. Learned counsel for petitioner submitted that once there is no scope of mediation between the parties, in the light of judgment of Apex Court in the matter of *Amardeep Singh vs. Harveen Kaur; (2017) 8 Supreme Court cases 746*, it is required on the part of Court to waive off the cooling period of six months.

5. He next submitted that in another Criminal Case No. 652 of 2021, matter was again referred to mediation centre and this time both the parties have appeared before the mediation centre and an agreement dated 01.08.2024 took place between them to dissolve their marriage. In the said agreement, it was also admitted that out of total settlement amount of Rs. 13 lakh, respondent had already received Rs. 8 lakh and remaining Rs. 5 lakh shall be given to her after decree of divorce. He firmly pointed out that under such facts, impugned order is bad and liable to be set aside.

6. I have considered submissions made by counsel for petitioner and perused the records as well as copy of agreement dated 01.08.2024 before Mediation and Reconciliation Centre, Ghazipur.

7. From the perusal of records, it is apparently clear that as on date, parties are living separately and there is no scope of reconciliation between the parties. Agreement dated 01.08.2024 also provides very same facts that now parties are agreed to withdraw all criminal cases between them and further proceeded with divorce petition to obtain decree of divorce.

8. In the case of *Amardeep Singh (Supra)*, Apex Court has taken same view. Relevant paragraph nos. 14 to 20 are being quoted below:-

“14. Learned Amicus Curiae submitted that waiting period enshrined under Section 13-B(2) of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in *K. Omprakash v. K. Nalini*, Karnataka High Court in *Roopa*

Reddy vs. Prabhakar Reddy, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra and Madhya Pradesh High Court in Dinesh Kumar Shukla vs. Smt. Neeta. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Jayan Moorkkanatt. It was submitted that Section 13B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13B(2). Thus, the Court should consider the questions:

- i) How long parties have been married?
- ii) How long litigation is pending?
- iii) How long they have been staying apart?
- iv) Are there any other proceedings between the parties?
- v) Have the parties attended mediation/conciliation?
- vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

15. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

16. We have given due consideration to the issue involved. Under

the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.

17. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

18. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th

Edn., 2004), has been cited with approval in *Kailash versus Nanhku and ors.* as follows: (SCC pp. 496-97, para 34).

“34.....The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: “No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.” (p. 338)

“For ascertaining the real intention of the legislature’, points out Subbarao, J. ‘the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered’. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the

object of enactment, the same will be construed as directory.” (pp. 339-40)

19. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.

20. Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.”

9. Facts of this case are fully covered with the parameters laid down by the Apex Court in *Amardeep Singh (Supra)*. In the present case, both the parties are living separately since 20.12.2021 and also filed divorce petition jointly. Apart that, earlier attempts of mediation was failed, but later on, in another proceeding, mediation took place between the parties with agreement to dissolve the marriage and withdraw the criminal cases pending between them. Therefore, under such facts, there is no occasion to direct the petitioner to wait for cooling off period as provided in Section 13-B(2) of Act, 1955.

10. Therefore, under such facts of the case as well as law laid down by the Apex Court in *Amardeep Singh (Supra)*, impugned order dated 11.09.2024 is bad and hereby set aside.

11. Writ petition is accordingly, *allowed*.

12. No order as to costs.

13. Principal Judge, Family Court, Ghazipur is directed to proceed with the divorce petition waiving off the cooling period of six months as provided in Section 13-B(2) of Act, 1955.

(2025) 1 ILRA 387
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2025

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters Under Article 227 No. 15637 of 2024

Hari Shankar		...Petitioner
	Versus	
Rakesh Kumar		...Respondent

Counsel for the Petitioner:

Pankaj Agarwal

Counsel for the Respondent:

Akanksha Gaur

Civil Law — U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 — Section 21(1)(a) — Release application — Bonafide need — Tenant's plea that landlord's son already running business independently in two other shops — GST documents showing son as proprietor held irrelevant as they related to period prior to institution of release application — No document of relevant year filed to establish son's independence — Cancellation of GSTIN in son's name in 2018 — Relevance of documentary evidence is to be judged with reference to date of institution of case—Landlord's need to settle son in business held genuine — Finding of Prescribed Authority and Appellate Court affirming bonafide need not perverse — Petition dismissed. (Paras 10 and 11)

HELD:

From the perusal of the documents that have been brought on record by means of supplementary affidavit filed by petitioner, he admits that these were the only documents in the form of GST receipts that were led in evidence and evidence is always said to be relevant and cogent to return a finding on facts and issues if it relates to a fact position as to the consideration of a point on the date of institution of the case. Relevancy of documents as to the facts in issue would therefore, would be determinable as to status on the date of institution of the case. In the present case I find that the document that has been lead in evidence by the petitioner in support of the averment made in the written St.ment that son was independently settled in a business in the name of Sanskar Traders were not of the year 2020 and onwards while the release for bona fide needs was set up in the year 2020 for the first time. Any document that showed that GST receipts were issued in the name of Sanskar Traders with Akash Varshney as proprietor of the firm would have been relevant had it been

of the relevant year of release case being instituted. Moreover, I find that the 2018 GST receipt showed itself that the GSTIN number standing in the name of Sanskar Traders with Akash Varshney as proprietor came to be cancelled. A document evidencing a factm of cancellation of registration of firm for GST would not have been relevant enough in support of the averments that son Akash Varshney was doing independent business. Evidence is led to prove a fact, relevant to issue. So evidence becomes a medium to prove a fact pleaded. Evidence of course, can be oral or documetary. A party not able to prove a fact would be certainly leading documentary evidence or material but such evidence must be relevant to the fact in issue. Sometime an inference can be drawn from a document filed but in instant case since the GSTN receipt itself showed that Sanskar Trader's TIN in the name of Akash stood cancelled, only adverse inference could have been drawn. The court of appeal, therefore, was fully justified in ignoring the said document and placing more reliance upon the averments made by the petitioner himself that son was doing business with his father. Even otherwise the document brought on records by means of supplementary affidavit of the landlord respondents shows that since September, 2018 onwards the firm stood registered in the name of Rakesh Varshney only as proprietor of the firm. (Para 10)

Thus, if the son has been doing business with his father, he has every right to get settled independently in a business and father is absolutely justified in setting up a need for the release of the shop in question to settle his son. Need therefore, was liable to be rendered as bona fide and I do not see any manifest error either in law or on facts in the orders passed by the Prescribed Authority as well as by the appellate court. (Para 11)

Petition dismissed. (E-14)

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

1. Supplementary affidavit filed by learned counsel appearing for petitioner as well as supplementary affidavit filed by

learned counsel appearing for respondent landlord are taken on records.

2. Heard Shri Pankaj Agarwal, learned counsel appearing for petitioner and Ms. Akansha Gaur, learned Advocate appearing for respondent landlord.

3. By means of this petition filed under Article 227 of the Constitution, petitioner has questioned the order passed Prescribed Authority granting release in favour of landlord respondent qua demise premises under Section 21 (1) (a) of U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972 (for short ?Act No. 13 of 1972?) on the point of bona fide need. Petitioner unsuccessfully questioned the order in appeal and, hence, the order passed by the appellate authority dated 18.10.2024 is also under challenged.

4. The main argument that has been advanced questioning the findings returned by the Prescribed Authority as well as the court of appeal by learned counsel appearing for petitioner Mr. Agarwal, is that he had lead sufficient document of GST forms qua registration of firm, namely, Sanskar Traders which demonstrated the GSTIN number of the business which was both in the name of father and the son and the son was since paying tax, therefore, the son cannot be said to be doing□ business absolutely in subordination of his father and this also corroborated the averments made in the written statement by the petitioner that there were three shops in possession of landlord respondent, out of which in two shops business was going on. It is submitted that even if the son was doing business of the father, since there were two shops in possession of the landlord respondents, therefore, one of the shops

could have gone to the needy son very conveniently and, hence, the need was not a *bona fide* one.

5. In support of his above submission, learned counsel for petitioner has taken the Court to page Nos. 49 to 53 of the supplementary affidavit which are receipt of the Goods and Service Taxes in which the TIN number of the firm is there showing that the business was in the name of Akash Varshney and since it was a proprietorship firm, therefore, it was sufficiently proved that the entire business was being run by Akash Varshney, the son and he was, therefore, running the business independently. It is further submitted that the court of appeal had not adverted to this aspect of the matter at all and even while it referred to these documents, it did not deal with them and merely relied upon the statement made by the tenant petitioner before the Prescribed Authority that both father and son were doing business jointly. It is thus, submitted that the judgment and order passed by the Prescribed Authority and the order affirming the judgment by appellate authority are both suffering from the vice of perversity having overlooked the relevant documents.

6. *Per contra*, Ms. Akansha Gour, learned Advocate appearing for respondent landlord, meeting the arguments advanced on behalf of petitioner submitted that the release application itself was filed in the year 2020 whereas the documents that have been brought on record in the form of GST receipts to demonstrate that business was being run as proprietorship firm of son Akash Varshney, was only of the year running between 2017-2018. She submitted that in 2018, the GSTIN number came to be cancelled and a new proprietorship firm in the name of Sanskar Traders with father

Rakesh Varshney as proprietor of the firm came into existence with effect from 10.09.2018.

7. In support of her above submission she has also filed a supplementary affidavit in which the GST receipts have been brought on record which contain GSTIN number in the name of proprietorship firm of Rakesh Varshney. She has also argued that since this document which has been filed at page 53 of the supplementary affidavit by the petitioner was there before the courts below and which itself demonstrated that the GSTIN registration of the proprietorship firm in the name of Akash Varshney have stood cancelled, the court below rightly placed reliance upon the statement of the petitioner that both the father and son were doing business in the year 2020 jointly. The document, therefore, according to her sufficiently demonstrated that son was virtually a helping hand to his father in the business which was being run chiefly by the father in the year 2020 when the release application came to be filed.

8. It is also argued by Ms. Gour that the theory of three shops set up by petitioner was also not correct because the survey commission report sufficiently demonstrated that there were only two shops that were found during survey on the spot.

9. Having heard learned counsel for respective parties, their arguments raised across Bar, the only point that I see requires consideration and that has also been pressed by learned counsel for petitioner, is as to whether the court of appeal was justified in ignoring the GST receipts while arriving at a finding that *bona fide* need was there to grant release and so was rightly done by the Prescribed Authority.

10. From the perusal of the documents that have been brought on record by means of supplementary affidavit filed by petitioner, he admits that these were the only documents in the form of GST receipts that were led in evidence and evidence is always said to be relevant and cogent to return a finding on facts and issues if it relates to a fact position as to the consideration of a point on the date of institution of the case. Relevancy of documents as to the facts in issue would therefore, would be determinable as to status on the date of institution of the case. In the present case I find that the document that has been lead in evidence by the petitioner in support of the averment made in the written statement that son was independently settled in a business in the name of Sanskar Traders were not of the year 2020 and onwards while the release for *bona fide* needs was set up in the year 2020 for the first time. Any document that showed that GST receipts were issued in the name of Sanskar Traders with Akash Varshney as proprietor of the firm would have been relevant had it been of the relevant year of release case being instituted. Moreover, I find that the 2018 GST receipt showed itself that the GSTIN number standing in the name of Sanskar Traders with Akash Varshney as proprietor came to be cancelled. A document evidencing a factm of cancellation of registration of firm for GST would not have been relevant enough in support of the averments that son Akash Varshney was doing independent business. Evidence is led to prove a fact, relevant to issue. So evidence becomes a medium to prove a fact pleaded. Evidence of course, can be oral or documetary. A party not able to prove a fact would be certainly leading documentary evidence or material but such evidence must be relevant to the fact in issue. Sometime an inference can be drawn from a

document filed but in instant case since the GSTN receipt itself showed that Sanskar Trader's TIN in the name of Akash stood cancelled, only adverse inference could have been drawn. The court of appeal, therefore, was fully justified in ignoring the said document and placing more reliance upon the averments made by the petitioner himself that son was doing business with his father. Even otherwise the document brought on records by means of supplementary affidavit of the landlord respondents shows that since September, 2018 onwards the firm stood registered in the name of Rakesh Varshney only as proprietor of the firm.

11. Thus, if the son has been doing business with his father, he has every right to get settled independently in a business and father is absolutely justified in setting up a need for the release of the shop in question to settle his son. Need therefore, was liable to be rendered as *bona fide* and I do not see any manifest error either in law or on facts in the orders passed by the Prescribed Authority as well as by the appellate court.

12. Petition lacks merits and is accordingly dismissed.

(2025) 1 ILRA 390
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2025

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.

Special Appeal No. 367 of 2024

Shiv Dutt Sharma	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:

Rajesh Kumar, Rajesh Kumar Mishra, Sr.
Advocate

5. Ashwani Kumar Gautam Vs St. of U.P.;
(2011) SCC OnLine All 1854

6. Mohd. Sartaj Vs St. of U.P.; (2006) 2 SCC 315

Counsel for the Respondents:

C.S.C., Yatindra

(Delivered by Hon'ble Dr. Yogendra
Kumar Srivastava, J.)

A. Service Law – Compassionate appointment – Cancellation – Appointment on the post of Assistant Teacher was made even without having necessary qualification – Permissibility – Held, eligibility for a higher post like Assistant Teacher is separate from the compassionate appointment process and it must adhere to the requisite qualification and selection rules – D. Dinesh Chandra Sharma's case relied upon. (Para 24)

B. Service Law – Compassionate appointment – Cancellation – Though the benefit of appointment on compassionate grounds was availed earlier, the same benefit was availed second time for higher post – Permissibility – Held, the petitioner, having earlier been appointed on compassionate grounds on the post of Chaukidar/Chapraasi, the said right to claim appointment on compassionate ground stood exhausted and it would not open to the petitioner to seek appointment to the post of Assistant Teacher again on compassionate grounds. (Para 31)

Second Appeal dismissed. (E-1)

List of Cases cited:

1. St. of Rajasthan Vs Umrao Singh; (1994) 6 SCC 560

2. St. of Haryana Vs Naresh Kumar Bali; (1994) 4 SCC 448

3. Krishna Kumar Pandey Vs St. of MP; (2023) SCC OnLine MP 7036

4. D. Dinesh Chandra Sharma Vs District Inspector of Schools; (2000) SCC OnLine All 861

1. Heard Sri R.K. Ojha, learned Senior Counsel assisted by Sri Rajesh Kumar Mishra, learned counsel for the appellant, Sri Tej Bhanu Pandey, learned Standing Counsel appearing for the State-respondent and Sri Yatindra, learned counsel for respondent nos.2 to 5.

2. The present special appeal is directed against the judgment and order dated 07.03.2024 passed in Writ-A No.6916 of 2019 (Shiv Dutt Sharma Vs. State of UP and others) whereby the writ petition has been disposed of with certain observations and directions.

3. The basic facts of the case which are available on record indicate that the appellant-petitioner was granted appointment on compassionate grounds on the post of *Chowkidar* in Junior High School, Badagaon, Vikas Kshetra Arnia, District Bulandshahar vide appointment order dated 10.11.1981.

4. On an application dated 06.02.1984, the petitioner was permitted to apply for admission in B.Ed. (Shiksha Shashtri) Course. The petitioner was directed to take admission after seeking sanction of unpaid leave for the purpose, with stipulation that he himself join duties in the same school after expiry of the leave period.

5. In due course of time, the petitioner claims to have been appointed against the post of Assistant Teacher by an order dated 16.08.1986 passed by the District Basic

Education Officer, Bulandshahar, in terms of a decision dated 03.07.1986 of the Appointment/Promotion Committee for Teachers of Basic Schools of District Bulandshahar. The appointment order was stated to have been issued on the basis of the qualification shown in the application form of the petitioner.

6. The petitioner continued to serve as Assistant Teacher for about 32 years. However, a few months before the date of his retirement i.e. 31.03.2019, when he was working as Principal at Primary School, Salempur, Pahadgarhi, a notice/order dated 21.12.2018 was issued from the Block Education Officer, Block Arnia stating that the petitioner by concealing the fact relating to his first appointment on compassionate grounds, had obtained the appointment against the post of Assistant Teacher. The petitioner was directed to submit his explanation alongwith evidence in regard to the same failing which it would be presumed that he had nothing to say in the matter, and departmental proceedings would be initiated against him.

7. The petitioner submitted a response to the aforesaid notice on 27.12.2018, wherein no reply was given on the facts mentioned in the notice and the notice was termed as baseless.

8. The petitioner submitted another reply dated 05.01.2019 stating therein that he had applied for appointment on compassionate grounds as per his educational qualifications; however, he had given appointment on the post of *Chaprasai/Chowkidar*, which was not as per his educational qualifications. It was further submitted that after obtaining permission from the department, the petitioner passed the B.Ed. examination by

taking leave without pay and thereafter on the basis of a decision dated 03.07.1986 by the Appointments Committee for Basic Schools, he was given appointment as trained Assistant Teacher, and he took charge on the said post on 16.08.1986. It was stated that he had not concealed any fact from the department and that as he was to attain the age of superannuation on 31.01.2019, and was to retire on 31.03.2019 after completing the academic session, the notice dated 21.12.2018 had no justification.

9. The Basic Education Officer, Bulandshahr upon considering the aforesaid reply, issued an office order dated 08.02.2019 stating therein that the petitioner had been appointed on the post of Chowkidar in the Junior High School, Badagaon, Block Arnia, District Bulandshahar and again he was appointed on compassionate grounds on the post of Assistant Teacher at Primary School, Badauli, Block Arnia and he took charge on 16.08.1986. In view of the aforesaid, the petitioner was directed to furnish certain documents within a week. The aforesaid office order dated 08.02.2019 is being reproduced below:-

“जिला बेसिक शिक्षा अधिकारी, बुलन्दशहर
पत्रांक प्रबन्ध/१५७०७-८ /२०१८-१९
दिनांक ०८.०२.२०१९
कार्यालय आदेश
श्री शिवदत्त शर्मा(प्रधानाध्यापक),
प्राथमिक विद्यालय सलेमपुर,
पहाड़गढ़ी,
विकास क्षेत्र अरनियां,
जनपद बुलन्दशहर।

आप अपने पत्र दिनांक ०५.०१.२०१९ का सन्दर्भ ग्रहण करें, जिसके माध्यम से आप द्वारा अवगत कराया गया है कि मृतक आश्रित के रूप में विभाग द्वारा आपकी नियुक्ति चौकीदार के पद पर जूँहा० स्कूल, बडागांव विकास क्षेत्र अर्नियां में की गयी, जिसमें आपका अभिकथन है कि उक्त नियुक्त पद पर आप द्वारा दिनांक २०.०१.१९८२ को सशर्त योगदान किया था। दिनांक २०.०१.१९८२ के उपरान्त आप द्वारा बी०एड०(व्यवसायिक प्रशिक्षण) प्राप्त करने हेतु विभागीय अनुमति तथा अवैतनिक अवकाश लेकर बी०एड० (व्यवसायिक प्रशिक्षण) उत्तीर्ण किया। पुनः विभाग द्वारा मृतक आश्रित के रूप में आपकी नियुक्ति प्राथमिक विद्यालय बादौली विकास क्षेत्र अर्नियां में सहायक अध्यापक के पद पर की गयी तथा आप द्वारा दिनांक १६.०८.१९८६ को कार्यभार ग्रहण किया गया।

अतः उक्त परिस्थिति को दृष्टिगत रखते हुये तत्काल प्रभाव से आपको आदेशित किया जाता है कि आप निम्नांकित अभिलेख एक सप्ताह के अन्दर अद्योहस्ताक्षरी कार्यालय में प्राप्त कराना सुनिश्चित करें।

१. चौकीदार पद हेतु आवेदित पत्रावली की छायाप्रति।

२. चौकीदार पद के नियुक्ति पत्र की छायाप्रति।

३. चौकीदार के पद पर की गयी दिनांक २०.०१.१९८२ की कार्यभार ग्रहण आख्या की छायाप्रति।

४. सशर्त अभिलेख मूल रूप में।

५. बी०एड०(व्यवसायिक प्रशिक्षण) विभागीय अनुमति तथा अवैतनिक अवकाश स्वीकृति आदेश की छायाप्रति।

६. अध्यापक नियुक्ति समिति का निर्णय दिनांक ०३.०७.१९८६ की छायाप्रति।

७. सहायक अध्यापक पद हेतु आवेदित पत्रावली की छायाप्रति।

८. सहायक अध्यापक के पद का नियुक्ति पत्र की छायाप्रति।

९. सहायक अध्यापक के पद पर की गयी दिनांक १६.०८.१९८६ की कार्यभार ग्रहण आख्या की छायाप्रति।

१०. ऐसा कोई आवश्यक अभिलेख जिसे आप देना चाहते हैं।

नोट:- यदि आप द्वारा निर्धारित समयावधि में उल्लेखित अभिलेख अद्योहस्ताक्षरी कार्यालय में प्राप्त नहीं कराये जाते हैं, तो विभागीय कार्यवाही अमल में लायी जायेगी।

ह० अप०

(अम्बरीष कुमार)

जिला बेसिक शिक्षा अधिकारी,

बुलन्दशहर।”

10. A three-member inquiry committee was constituted by an order dated 25.02.2019 of the District Basic Education Officer, Bulandshahar and the petitioner was granted opportunity to

submit his written reply/explanation, by means of a notice/communication dated 18.03.2019, which is being reproduced below:-

“कार्यालय खण्ड शिक्षा अधिकारी विकास क्षेत्र डिबाई।

पत्रांक/ २०१८-१९ दिनांक-१८.०३.२०१९

श्री शिवदत्त शर्मा प्रधानाध्यापक

उच्च प्राथमिक विद्यालय

सलेमपुर पहाडगढी

विकास क्षेत्र अरनियां।

कार्यालय जिला बेसिक शिक्षा अधिकारी बुलन्दशहर के कार्यालय आदेश पत्रांक पत्रांक/प्रबन्ध/१६४०४-०८/२०१८-१९ दिनांक २५.०२.२०१९ के द्वारा आपकी नियुक्ति से सम्बंधित प्रकरण की विस्तृत जाँच हेतु जाँच समिति गठन कर जाँच आख्या उपलब्ध कराये जाने हेतु आदेशित किया गया है। आदेश में आप द्वारा मृतक आश्रित के रूप में अनुकम्पा के आधार पर जू०हा० स्कूल, बड़ागांव विकास क्षेत्र अरनियां जनपद बुलन्दशहर में चौकीदार के पद भर नियुक्ति प्राप्त कर लेने के उपरान्त तथ्यों को छिपाते हुये पुनः सहायक अध्यापक के पद पर प्राथमिक विद्यालय बादौली विकास क्षेत्र अरनियां में नियुक्ति प्राप्त करने का उल्लेख किया गया है। इस प्रकार आपके ऊपर मृतक आश्रित के रूप में एक बार नियुक्ति प्राप्त करने के उपरान्त तथ्य गोपन कर द्वितीय नियुक्ति प्राप्त करने का आरोप है।

अतः आप उक्त आरोप के सम्बन्ध में अपना लिखित पक्ष / स्पष्टीकरण, जिसमें दोनो नियुक्तियों से सम्बंधित आप द्वारा आवेदित पत्रावली, नियुक्ति पत्र, कार्यभार ग्रहण आख्या व अपने बचाव से सम्बंधित अन्य साक्ष्य (यदि कोई हो) पत्र प्राप्ति के तीन दिन के अन्दर पंजीकृत डाक से अथवा स्वयं कार्यालय में उपस्थित होकर प्रस्तुत करना सुनिश्चित करें। आप द्वारा निर्धारित समयावधि के अन्तर्गत प्रस्तुत लिखित पक्ष / स्पष्टीकरण पर परीक्षणोपरान्त नियमानुसार जाँच आख्या जिला बेसिक शिक्षा अधिकारी बुलन्दशहर महोदय को प्रेषित की जायेगी। यदि आप द्वारा अपना लिखित पक्ष / स्पष्टीकरण निर्धारित समयावधि के अन्तर्गत प्रस्तुत नहीं कराया जाता है, तो यह मानते हुये कि आपके ऊपर लगाये गये आरोप सत्य है, तदनुसार जाँच आख्या जिला बेसिक शिक्षा अधिकारी बुलन्दशहर महोदय की सेवा में प्रेषित कर दी जायेगी।

(चन्द भूषण प्रसाद) (पुष्पेन्द्र कुमार) (प्रकाश चन्द्र)
खण्ड शिक्षा अधिकारी खण्ड शिक्षा अधिकारी खण्ड शिक्षा अधिकारी
विकास क्षेत्र डिबाई विकास क्षेत्र लखावटी विकास क्षेत्र अगौता"

(emphasis supplied)

11. The inquiry committee submitted an inquiry report dated 28.03.2019 before the District Basic Education Officer. A copy of the inquiry report was placed before the writ Court alongwith a counter

affidavit filed on behalf of the State-respondents. Certain extracts of the aforesaid inquiry report which have been noticed in the judgment of the learned Single Judge, are being reproduced herein below:-

“श्री शिवदत्त शर्मा प्रधानाध्यापक प्राथमिक विद्यालय सलेमपुर पहाड़गढी विकास क्षेत्र अरनियां द्वारा प्रस्तुत आख्या/प्रार्थना पत्रों, पत्रावली में उपलब्ध सेवा पुस्तिकाओं व अन्य साक्ष्यों के आधार पर प्रकरण की जाँच आख्या निम्नवत् है-

०१. श्री शिवदत्त शर्मा द्वारा अपने पिता स्व० श्री राम स्वरूप शर्मा की मृत्यु के उपरान्त मृतक आश्रित के रूप में जूनियर हाई स्कूल, बड़ागांव विकास क्षेत्र अरनियां जनपद बुलन्दशहर में चौकीदार के पद पर की गयी नियुक्ति के क्रम में दिनांक २०.०१.१९८२ को कार्यभार ग्रहण किया गया।

०२. चौकीदार के पद पर नियुक्ति के समय श्री शिवदत्त शर्मा की शैक्षिक योग्यता स्नातक थी।

०३. इसके उपरान्त आपके कार्यालय (कार्यालय जिला बेसिक शिक्षा अधिकारी बुलन्दशहर)के पत्रांक:प्रबन्ध/१८३६-३७/८६-८७ दिनांक १६.०८.१९८६ के द्वारा श्री शिवदत्त शर्मा की नियुक्ति प्राथमिक विद्यालय बादौली विकास क्षेत्र दनकौर जनपद बुलन्दशहर में सहायक अध्यापक के पद पर की गयी, जिसके क्रम में श्री शिवदत्त शर्मा पुत्र स्व० श्री राम स्वरूप शर्मा द्वारा

दिनांक १६.०८.१९८६ को ही प्राथमिक विद्यालय बादौली विकास क्षेत्र दनकौर जनपद बुलन्दशहर में सहायक अध्यापक के पद पर कार्यभार ग्रहण किया गया।

०४. श्री शिवदत्त शर्मा द्वारा अपने प्रार्थना पत्र दिनांक २८.१२.२०१८, जो शिक्षा सचिव महोदय बेसिक शिक्षा विभाग लखनऊ (उत्तर प्रदेश) को सम्बोधित है, में स्पष्ट उल्लेख किया गया है कि "कार्यालय जिला बेसिक शिक्षा अधिकारी बुलन्दशहर के आदेश संख्या ६०३४-८/८३-८४ दिनांक १३.०२.१९८४ के अनुसार मैंने बी०एड० के लिये लिखित अनुमति मांगी थी, जिसमे आदेश हुआ कि श्री शिवदत्त शर्मा, चौकीदार जूनियर हाई स्कूल बड़ागांव को उनके प्रार्थना पत्र दिनांक ०६.०२.१९८४ तथा प्रधानाध्यापक की संस्तुति के आधार पर बी० एड० शिक्षा / शास्त्री में प्रवेश की अनुमति दी जाती है जिसके बाद मैंने वर्ष १९८४ में अनुक्रमांक ११६ अपनी बी०एड० शिक्षा/शास्त्री में प्राप्त की"। श्री शिवदत्त शर्मा द्वारा उक्त से सम्बंधित कोई भी साक्ष्य संलग्न नहीं किया गया है। ५. श्री शिवदत्त शर्मा द्वारा अपने प्रार्थना पत्र दिनांक २८.१२.२०१८, जो शिक्षा सचिव महोदय बेसिक शिक्षा विभाग लखनऊ (उत्तर प्रदेश) को सम्बोधित हैं, में स्पष्ट उल्लेख किया गया है कि "सहायक अध्यापक के पद पर मेरी नियुक्ति मेरे आवेदन पत्र और मेरी योग्यता के अनुसार प्रदान की गयी है, ना कि मृतक आश्रित के रूप में या किसी

अन्य कारण का लाभ देकर सहायक अध्यापक के पद पर नियुक्त किया है, यह नियुक्ति प्रार्थी को उसकी योग्यता के मानदंडों को देखकर और मुझे सहायक अध्यापक पद के लिये उपयुक्त एवं योग्यता को देखकर दी गयी।" श्री शिवदत्त शर्मा द्वारा आवेदन से सम्बंधित कोई भी साक्ष्य संलग्न नहीं किया गया है।

उक्त के आधार पर निम्न तथ्य प्रमाणित हो रहे हैं-

०१. श्री शिवदत्त शर्मा द्वारा अपने पिता स्व० श्री राम स्वरूप शर्मा की मृत्यु के उपरान्त मृतक आश्रित के रूप में जू०हा० स्कूल, बड़ागांव विकास क्षेत्र अरनियां जनपद बुलन्दशहर में चौकीदार के पद पर नियुक्ति प्राप्त कर ली गयी।

०२. शिक्षक भर्ती नियमावली के अनुसार प्राथमिक विद्यालयों में सहायक अध्यापक के पद पर भर्ती के लिये तत्समय प्रशिक्षण योग्यता के रूप में बी०एड० प्रशिक्षण अर्ह नहीं था, जिसके कारण श्री शिवदत्त शर्मा की सहायक अध्यापक के पद पर सामान्य भर्ती में किया गया चयन नियम विरुद्ध है।

०३. श्री शिवदत्त शर्मा की नियुक्ति मृतक आश्रित के रूप में सहायक अध्यापक के पद पर होना भी नियम विरुद्ध है, क्योंकि इनके द्वारा पूर्व में ही मृतक आश्रित के रूप में चौकीदार के पद पर नियुक्ति का लाभ प्राप्त किया जा चुका है। अतः जाँच समिति की जाँच आख्या

आवश्यक कार्यवाही हेतु सेवा में सादर प्रेषित है।

संलग्न - पत्रावली।

(चन्द भूषण प्रसाद) (पुष्पेन्द्र कुमार) (प्रकाश

चन्द्र)

खण्ड शिक्षा अधिकारी खण्ड शिक्षा अधिकारी खण्ड शिक्षा अधिकारी

विकास क्षेत्र डिबाई विकास क्षेत्र लखावटी विकास क्षेत्र अगौता"

(emphasis supplied)

12. On the basis of inquiry report and the available facts, the District Basic Education Officer, Bulandshahar, by an order dated 28.03.2019, which was impugned in the writ petition, cancelled the appointment of the petitioner with immediate effect. Certain portions of the aforesaid order which have been noticed by the learned Single Judge in the judgment under appeal are being extracted below:-

“जाँच समिति द्वारा प्रस्तुत जाँच आख्या से स्पष्ट है कि श्री शिवदत्त शर्मा द्वारा अभिलेखों तथा तथ्यों को छुपाकर सहायक अध्यापक के पद पर बी०एड० योग्यता के आधार पर नियुक्ति प्राप्त की जबकि अध्यापक सेवा नियमावली १९८१ भाग ०४- अर्हताये के परन्तुक ८ के अन्तर्गत शैक्षिक अर्हताए निम्नवत हैं-

०१ . अध्यापक पद हेतु शैक्षिक योग्यता-माध्यमिक शिक्षा परिषद उत्तर प्रदेश की इंटरमीडिएट परीक्षा या राज्य सरकार द्वारा उसके समकक्ष मान्यता प्राप्त कोई अन्य परीक्षा जिसमें यथास्थिति विज्ञान, गणित, कॉफ्ट या विशिष्ट भाषा का

कोई एक विषय रहा हो जिससे उसकी ऐसी परीक्षा में प्रयोजनार्थ परीक्षा ली गयी हो।

०२. प्रशिक्षण अर्हता जिसके अन्तर्गत बेसिक अध्यापक प्रमाण पत्र, हिन्दुस्तानी अध्यापक प्रमाण पत्र, जूनियर अध्यापक प्रमाण पत्र, अध्यापक प्रमाण पत्र या सरकार द्वारा उसके समकक्ष मान्यता प्राप्त कोई अन्य प्रशिक्षण पाठ्यक्रम भी हो।

श्री शिवदत्त शर्मा द्वारा अपने पिता की मृत्यु के उपरान्त वर्ष १९८२ में मृतक आश्रित के रूप में अनुकम्पा के आधार पर चौकीदार के पद पर नियुक्ति प्राप्त करने के उपरान्त वर्ष १९८६ में तथ्यों को छुपाकर तथा अध्यापक पद की आवश्यक अर्हताएं प्राप्त न होने पर भी सहायक अध्यापक के पद पर नियुक्ति प्राप्त किया जाना अवैधानिक है।

अतः इस कार्यालय के पत्रांक: प्रबन्ध / १८३६-३७/८६-८७ दिनांक १६.०८.१९८६ से श्री शिवदत्त शर्मा द्वारा सहायक अध्यापक (प्राथमिक विद्यालय) के पद की प्रशिक्षण योग्यता न रखते हुये भी सहायक अध्यापक के पद पर प्राप्त की गयी नियुक्ति को तत्काल प्रभाव से निरस्त किया जाता है।”

(emphasis supplied)

13. Aggrieved against the aforesaid order dated 28.03.2019 cancelling his appointment, the petitioner preferred a writ petition which has been dismissed in terms of the judgment under appeal.

14. Learned Single Judge while dismissing the writ petition has recorded his reasoning and conclusion in the following manner:-

“४. पक्षों के विद्वान अधिवक्ता की बहस को श्रवण किया गया एवं पत्रावली का ध्यानपूर्वक परिशीलन किया गया। वर्तमान प्रकरण में यह अविवादित है कि, याचिकाकर्ता १०.११.१९८१ को मृतक आश्रित के रूप में चौकीदार के पद पर नियुक्ति हुआ और उसके प्रार्थना पत्र पर, अवैतनिक अवकाश पर उसे बी.एड. (शिक्षा शास्त्री) की शिक्षा प्राप्त करने की अनुमति दी गयी। इसके उपरान्त कब उसने चौकीदार के पद से त्याग पत्र दिया और किस प्रक्रिया के अंतर्गत परिषदीय अध्यापकों की नियुक्ति/पदोन्नति समिति ने उसको सहायक अध्यापक के पद पर नियुक्ति कर दिया, इसका पत्रावली पर कोई साक्ष्य नहीं है। यह भी जानकारी नहीं है कि यह नवीन नियुक्ति थी अथवा पदोन्नति। यह भी अस्वीकार नहीं किया जा सकता कि बी.एड. सहायक अध्यापक की अर्हता नहीं है। उसकी अर्हता बी.टी.सी. है जो याचिकाकर्ता के पास नहीं है। अतः वो सहायक अध्यापक के पद के लिए आरम्भ से ही अर्ह नहीं था।”

(emphasis supplied)

15. The learned Judge, held that the appointment of the petitioner was against the rules; however, since he had worked for a period of 32 years and was close to his

age of superannuation, the writ petition was disposed of without interfering in the order impugned, by providing that the payments made to the petitioner towards salary and other allowances would not be recovered.

16. Contention of the learned counsel appearing for the appellant-petitioner is based primarily on the assertion that the petitioner having worked on the post of Assistant Teacher for a fairly long period, the cancellation of appointment could not have been ordered at this stage particularly when the petitioner was to retire from service upon attaining the age of superannuation. As regards the lack of the requisite training qualification i.e. BTC, it was urged that at that point of time there was shortage of BTC trained teachers, consequently it was a practice in the basic schools to appoint teachers having a qualification of B.Ed.

17. Controverting the aforesaid submissions learned counsel appearing for the State-respondents and the Basic Shiksha Parishad have argued that the petitioner's appointment as Assistant Teacher was illegal inasmuch as he did not possess the prescribed training qualification at the time of his appointment. It has been pointed out that despite ample opportunity to produce the relevant documentary evidence in regard to his assertion that he had obtained the B.Ed. degree after obtaining permission from the concerned authority and also to support his claim with regard to his appointment having been validly made by following the due selection procedure under the relevant rules, the petitioner could not adduce any material to demonstrate that his appointment had been validly made or that he possessed the requisite qualification for the post.

18. It is also submitted that the petitioner having once been appointed on compassionate grounds on the post of *Chowkidar/Chaprasi* in a recognized basic school, he could not have obtained appointment again on compassionate grounds on the post of Assistant Teacher.

19. The principal issue, which arises for consideration, is as to whether in the light of the admitted position that the petitioner having not possessed the necessary qualification for the post of Assistant Teacher, the appointment granted to him without following due procedure, could be held to be valid.

20. The other issue, which would arise for consideration, would be as to whether the petitioner, having once availed the benefit of appointment on compassionate grounds on the post of *Chaukidar/Chaprasi*, could claim appointment on the post of Assistant Teacher again on compassionate grounds.

21. In the case of **State of Rajasthan Vs. Umrao Singh**, it was held that once a person is granted compassionate appointment and he accepts it, the right to claim further appointment on a higher post under the same scheme is extinguished. Relevant paragraphs of the said judgment are reproduced as under:-

“8. Admittedly the respondent's father died in harness while working as Sub-Inspector, CID (Special Branch) on 16-3-1988. The respondent filed an application on 8-4-1988 for his appointment on compassionate ground as Sub-Inspector or LDC according to the availability of vacancy. **On a consideration of his plea, he was appointed to the post of LDC by order**

dated 14-12-1989. He accepted the appointment as LDC. Therefore, the right to be considered for the appointment on compassionate ground was consummated. No further consideration on compassionate ground would ever arise. Otherwise, it would be a case of “endless compassion”. Eligibility to be appointed as Sub-Inspector of Police is one thing, the process of selection is yet another thing. Merely because of the so-called eligibility, the learned Single Judge of the High Court was persuaded to the view that direction be issued under proviso to Rule 5 of Rules which has no application to the facts of this case.

9. Since both the sides relied on *Naresh Kumar Bali's* case [(1994) 4 SCC 448 : 1994 SCC (L&S) 909 : (1994) 27 ATC 611 : JT (1994) 4 SC 184] , we will now refer to the same. We had indicated our mind in that very ruling in paragraph 15 of the said judgment. It reads as under: (SCC p. 452, para 15)

“Though the respondent claimed that he had applied for the post of a teacher the Subordinate Service Selection Board had not chosen him for the post of teacher because he did not have the requisite qualification. In fact, the respondent did not object to his appointment as a clerk and his claim for consideration for the post of teacher was one year after his appointment. *Thus, the appointment on compassionate ground as per the scheme had been completed.*”

(emphasis supplied)

22. A similar view was also taken in **State of Haryana Vs. Naresh Kumar Bali**; paragraph 15 thereof is as under:-

“15. We have set out the factual background in full. The letter of the

respondent's mother dated 3-8-1988 categorically states that her son (respondent) was willing to be appointed as a clerk. It was on that the appointment letter, extracted above, came to be issued. **Though the respondent claimed that he had applied for the post of a teacher the Subordinate Service Selection Board had not chosen him for the post of a teacher because he did not have the requisite qualification. In fact, the respondent did not object to his appointment as a clerk and his claim for consideration for the post of teacher was one year after his appointment. Thus, the appointment on compassionate ground as per the scheme had been completed.** The claim for appointment as Inspector was never made earlier. The High Court without even analysing the circumstances under which the seven persons mentioned in its judgment came to be appointed as Police Officers (ASI or Inspector), straight away has chosen to conclude that there was discrimination. We are not in a position to appreciate this line of reasoning. The positive finding ought to have been given whether the case of the respondent was comparable with those of the seven and then a finding of discrimination ought to have been rendered.”

(emphasis supplied)

23. In **Krishna Kumar Pandey Vs. State of MP**, it was held that seeking further or upgraded appointment under the scheme of compassionate appointment leads to ‘endless’ compassion which is against the spirit of such scheme. Relevant paragraphs of the said judgment are reproduced as under:-

“5. Now petitioner's grievance is that since petitioner is Higher Secondary pass, therefore, he should be given

appointment on a Class III post like Ward Boy, Patwari, Registration Clerk, etc. in terms of the circular of General Administration Department dated 18-8-2008.

6. Law in this regard is well settled that there cannot be an endless compassion. Once petitioner accepted appointment on compassionate basis on a Class IV post then, he cannot seek upgradation of his appointment after accepting appointment on a Class IV post and, therefore, in the light of the judgment of Hon'ble Supreme Court in case of *State of Rajasthan v. Umrao Singh*, (1994) 6 SCC 560, wherein it is held that once a compassionate appointment was given and accepted, the right to such appointment held stood exhausted. Second consideration for a higher post is not warranted. Therefore, prayer for grant of compassionate appointment on a higher post after accepting compassionate appointment on a Class IV post, cannot be granted to the petitioner.”

(emphasis supplied)

24. In a similar set of facts in the case of **D. Dinesh Chandra Sharma Vs. District Inspector of Schools**, it has been observed that eligibility for a higher post like Assistant Teacher is separate from the compassionate appointment process and it must adhere to the requisite qualification and selection rules. It was stated thus:-

“6. After hearing learned counsel for the petitioner at length and going through the entire documents filed along with the affidavit, we are of the view that when the father of the petitioner died petitioner was legally entitled to get an appointment on compassionate ground and he was rightly appointed as an assistant clerk as he was qualified for that post only

having qualification of intermediate only. **The law on compassionate ground is very clear. It is for the purpose of giving financial assistance to the dependents and the family members of the deceased who was a bread earner and died during the course of his employment.** It is apparent from the order passed by the District Inspector of Schools, Meerut, dated 24 April 1998, that the officer concerned considered the relevant rules and law reported in 1996 (2) L.L.N. 225 (vide supra), wherein it has been clearly held that **no person is entitled to claim the benefit under dying-in-harness rules more than once. Therefore, it cannot be said that the petitioner was entitled to get benefit of dying-in-harness rules for second time when he became qualified for the post of assistant teacher.** We are of the view that the case of the petitioner is fully covered by the decision quoted above and the judgment of the learned Single Judge does not require any interference in special appeal.”

(emphasis supplied)

25. The question as to whether once compassionate appointment is accepted, can there be a second consideration on a higher post under the same right was considered in the case of **Ashwani Kumar Gautam Vs. State of Uttar Pradesh**, and it was held that accepting a post on compassionate ground, even if it is a lower post, concludes the entitlement to any subsequent claim for a higher post under the same scheme.

“10. The question which arises in this appeal for consideration is **whether once compassionate appointment is accepted, can there be a second consideration on a higher post under the same right.**

11. It is an admitted fact that the appellant accepted the offer, of appointment against a Class-III post and pursuant thereto, he joined the service on 18th February, 1994. **We are, therefore, of the considered view that the appellant, having accepted the compassionate appointment against a Class-III post, his right to be considered under the Act/Regulations is exhausted. The appellant, at the most, was entitled to be considered for giving compassionate appointment. It does not give him indefeasible right to claim appointment against his choicest post. Therefore, we are of the considered view that the appellant cannot now apply or pursue to reconsider his claim under the same provision for giving a higher position keeping in view his qualification.**

12. Again in the case of *State of M.P. v. Ramesh Kumar Sharma*, 1994 Supp (3) SCC 661 : AIR 1994 SC 845 : (1994 AIR SCW 218), the Apex Court has held that a person claiming compassionate appointment has no right to any particular post of his choice.

13. In view of the exposition of law by the Apex Court, it stands concluded that once an incumbent accepts the post offered to him under the Rules or Regulations governing compassionate appointment, the right extended to him under the said Rules or Regulations, stands exhausted and there cannot be any second consideration for the said right.”

(emphasis supplied)

26. The petitioner, having not possessed the requisite training qualification, i.e. BTC for being considered for appointment on the post of Assistant Teacher is not disputed.

27. In a similar set of facts, the question with regard to the requirement of

possessing basic qualifications for the post of Assistant Teacher was examined in the case of **Mohd. Sartaj Vs. State of Uttar Pradesh** and, it was observed that in a case where, admittedly, the appellant did not hold the training qualification to be appointed to the post of Assistant Teacher as prescribed under the relevant rules, the orders cancelling the appointment could not be faulted.

28. The position in law with regard to non-entitlement of appointment on compassionate grounds more than once, is fairly well settled. The petitioner was, therefore, not entitled to claim the benefit of appointment on the post of Assistant Teacher on compassionate grounds, having availed the said benefit earlier. The legal position regarding the other point that once the basic qualifications for the post in question, are not fulfilled, no claim can be made for appointment, also needs no further elaboration, as it is well settled that in case where the basic qualifications are lacking, the person concerned cannot claim a right for appointment to the post in question.

29. The fact with regard to the petitioner, having been granted ample opportunity to produce material to demonstrate that his appointment on the post of Assistant Teacher had been made after following the due procedure, is not disputed.

30. Learned Single Judge has taken due note of the fact that despite opportunity, the petitioner could not adduce any evidence to demonstrate that his appointment on the post of Assistant Teacher had been made after following the relevant statutory rules. It has also been taken note of that the petitioner did not

(2025) 1 ILRA 402
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2025

BEFORE

Special Appeal No. 432 of 2024

Counsel for the Petitioner:
Siddharth Khare, Sr. Advocate

A. Civil Law - Reservation in Recruitment of Assistant Teachers – Deletion of Carry Forward Rule – Validity of Appointment - *Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 - Section 3(5) deleted by U.P. Act No. 12 of 2016 - By U.P. Act No. 12 of 2016 - sub-section (5) of Section 3 of the said Act, which provided for carrying forward of an unfilled reserved vacancy to the next year, had been deleted – Reserved category vacancy could not be carried forward to the next year – ‘Rule of carry forward’ in respect of reservation of posts in favour of physically handicapped candidates, being no longer applicable in view of the omission of sub-section (5) of Section 3 of the Act, 1993, in terms of the amending Act of 2016, the filling up of the said posts by general category candidates, cannot be said to suffer from any legal infirmity. (Para 11)*

B. Recruitment of Assistant Teachers – In the instnat case the advertisement, provided that in the first round of

34. The appeal is devoid of merit and is, accordingly, **dismissed**.

counselling, a candidate could apply for being appointed as Assistant Teacher only in the district from where he/she had done his/her BTC Training Certificate Course. It was also provided that in the second round of counselling, a candidate could apply for the remaining unfilled vacancies – Appellant had passed his BTC Training Certificate Course from district Varanasi and, therefore, he applied in district Varanasi. He was unsuccessful in the first round of counselling. There was an option that in the second round of counselling, application may be made for any district of the State. The appellant opted for district Mirzapur. Appellant appeared in the second round of counselling. Candidates, who had been selected in the first and the second round of counselling, both were shown in the composite list and the appellant's name appeared at serial no. 1 in the combined select list. Appellant was issued appointment letter and in pursuance thereof, he joined on 06.09.2016. On 18.11.2021, a show cause notice was issued to the appellant, stating therein that after completion of the first counselling, 17 posts of Assistant Teacher remained vacant in district Mirzapur, which included 3 posts under vertical reservation of Scheduled Castes and 14 posts under horizontal reservation out of which, 2 posts were reserved for Physically Handicapped candidates suffering from visual disability and 2 posts were for candidates suffering from hearing disability, 10 posts were for Ex-servicemen. In the show cause notice, it was stated that since there was no post for General Category candidate, the appellant was wrongly appointed in the second round of counselling. Appointment of the appellant was held to be invalid. Single Judge dismissed the writ petition. Held: The posts which were not filled in the first round of counselling could not be carried forward to the next process of selection in view of omission of sub-section (5) of Section 3 of the Act, 1993 and, therefore, the

vacant posts, by implication, could have been filled in by general candidates. Filling up of the posts by general category candidates, cannot be said to suffer from any legal infirmity. (Para 11)

Allowed. (E-5)

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, learned counsel for the petitioner-appellant and Sri Kushmondeya Shahi, learned counsel appearing for the Board of Basic Education.

2. Instant special appeal has been filed challenging the judgment and order dated 1.3.2024 passed by a learned Single Judge of this Court in Writ-A No.695 of 2023 (Padmakar Dixit vs. State of UP & Others), whereby the writ petition filed by the petitioner-appellant has been dismissed.

3. By a notification dated 16.6.2016, the State Government notified a recruitment of Assistant Teachers in the State of Uttar Pradesh to all the Basic Shiksha Parishad Schools and to that effect, an advertisement was also issued on 27.6.2016. Applications were invited for recruitment in all the districts of Uttar Pradesh between 30.6.2016 to 15.7.2016. In the advertisement, it was provided that in the first round of counselling, a candidate could apply for being appointed as Assistant Teacher only in the district from where he/she had done his/her BTC Training Certificate Course. However, it was provided that in the second round of counselling, a candidate could apply for the remaining unfilled vacancies in any district of Uttar Pradesh. The first round of

counselling was held on 16.8.2016 and 17.8.2016. The appellant had passed his BTC Training Certificate Course from district Varanasi and, therefore, he applied for the vacancies as were there in district Varanasi. However, he was unsuccessful in the first round of counselling and, therefore, he applied for the second round of counselling and since there was an option that in the second round of counselling, application may be made for any district of the State, the appellant opted for district Mirzapur and made that district as his first preference. The counselling, which was conducted for district Mirzapur, was so done on 24.8.2016 and when the merit list was prepared, the appellant was placed at serial no.1 of the merit list. Thereafter, the appellant was issued an appointment letter on 27.8.2016 by the Basic Shiksha Adhikari, Mirzapur and in pursuance thereof, he joined on 6.9.2016. However, on 18.11.2021, a show cause notice was issued to the appellant, stating therein that after completion of the first counselling, 17 posts of Assistant Teacher remained vacant in district Mirzapur, which included 3 posts under vertical reservation of Scheduled Castes and 14 posts under Horizontal Reservation out of which, 2 posts were reserved for Physically Handicapped candidates suffering from visual disability and 2 posts were for candidates suffering from hearing disability, 10 posts were for Ex-servicemen. In the show cause notice, it was stated that since there was no post for General Category candidate, the appellant was wrongly appointed in the second round of counselling. The appellant, replied to the show cause notice and thereafter, the Basic Shiksha Adhikari, Mirzapur, on 10.3.2022, passed an order for stopping the payment of salary to the appellant. This order was challenged by the appellant by filing of a

writ petition, being Writ Petition No.11964 of 2022 (Padmakar Dixit vs. State of UP & Others).

4. However, when the appointment of the appellant itself was held to be invalid by an order dated 2.12.2022, he challenged the same by means of a writ petition, being Writ-A No.695 of 2023. When the said writ petition was dismissed by the order impugned dated 1.3.2024 of a learned Single Judge, the instant appeal was filed.

5. Learned counsel for the appellant assailed the order of the learned Single Judge, by submitting that the inquiry itself was a belated inquiry, it having commenced after a period of six years of the initial appointment of the appellant. It has further been argued that the appellant was a simple candidate, who had participated in the second round of counselling and was unaware of the fact that the post on which he was being appointed was reserved for Visually Handicapped persons. Learned counsel for the appellant has also submitted that the termination order was not preceded by any departmental inquiry as was prescribed under the UP Basic Education (Staff) Service Rules, 1973 read with UP Government Servant (Punishment & Appeal) Rules, 1999. It has been further stated by learned counsel for the appellant that the objection which was taken in the impugned order, which was challenged in the writ petition, that the petitioner was appointed against a vacancy which stood covered under Horizontal Reservation for Physically Handicapped was absolutely misplaced. Learned counsel for the appellant has stated that even if the post on which the appellant was appointed was reserved for the purposes of accommodating a physically handicapped

candidate, which was left unfilled in the first round of counselling, in that case also, it became a vacancy which could be filled by a general category candidate, as the relevant Act with regard to reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen, i.e. the Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 had undergone an amendment and by the amendment, sub-section (5) of Section 3 of the said Act, which provided for carrying forward of an unfilled reserved vacancy to the next year, had been deleted by UP Act No.12 of 2016 and thus, conscious of the fact that the reserved category vacancy could not be carried forward to the next year, in the second round of counselling, the vacancy was filled by a general category candidate.

6. Learned counsel for the appellant still further assailed the order of the learned Single Judge, by submitting that the writ petition was dismissed on a wrong premise that the appellant could not bring on record any material in support of the charges levelled against him. Learned counsel has submitted that the appellant was expected to prove the fact that he had appeared in the second round of counselling. This evidence could not have been brought by the appellant. However, the fact that the appellant had appeared in the second round of counselling was clear from RA-1, which was filed to the Rejoinder Affidavit to the writ petition. Whether the appellant appeared in the first round or in the second round of counselling, could have been clarified only from the records of the respondents in the case. During the time, when the respondents were inquiring into the case of the appellant, an inquiry report was submitted by the Regional Assistant

Director of Education (Basic), Mirzapur before the Director General, School Education of Uttar Pradesh on 23.12.2021, and that was brought on record by means of Annexure-8 to the Supplementary Counter Affidavit filed on behalf of respondent nos.2, 4, 5 and 6. Following paragraphs were relevant according to learned counsel for the appellant, for the purpose of this case and, since he relied upon the same, they are reproduced as under:

“जिला बेसिक शिक्षा अधिकारी मीरजापुर से प्राप्त अनन्तिम चयनित सूची के अनुसार प्रथम चरण एवं द्वितीय चरण के अभ्यर्थियों की एक अनन्तिम चयन सूची तैयार की गयी है जबकि अलग-अलग होना चाहिए था क्योंकि प्रथम वरीयता जनपद के अभ्यर्थियों की मेरिट अलग एवं द्वितीय वरीयता के अभ्यर्थियों की मेरिट अलग होगी, किन्तु जिला बेसिक शिक्षा अधिकारी द्वारा एक ही सूची तैयार की गयी, जो कि नियमानुसार नहीं है।

प्रथम चरण के काउन्सिलिंग के अभ्यर्थियों का उपस्थिति पत्र जिला बेसिक शिक्षा अधिकारी मीरजापुर द्वारा उपलब्ध कराया गया है किन्तु द्वितीय चरण की काउन्सिलिंग के अभ्यर्थियों का उपस्थिति पत्रक जिला बेसिक शिक्षा अधिकारी मीरजापुर द्वारा उपलब्ध नहीं कराया गया है।”

7. Relying upon the aforesaid paragraphs, learned counsel for the appellant has submitted that it was the case of the respondents that a combined select list of the selected candidates was published by the Department and, therefore, there was no question to have two different select lists. Learned counsel for the appellant submits that since the candidates, who had been selected in the first and the second round of counsellings, both were shown in the composite list, therefore, it appears that the vacancies, which were earlier left unfilled in the first round of counselling, though could not be carried forward to the next year in view of the amendment in sub-section (5) of Section 3 of the Act, 1993, were erroneously shown as reserved category

vacancies. Learned counsel further states that against the aforesaid erroneous entry of the vacancies as reserved vacancy, the petitioner's name was shown and, therefore, the entire case was proceeded with against the appellant on a wrong premise.

8. During the hearing, learned counsel appearing for the Board of Basic Education, confined his argument only to the fact that in the select list prepared after the first round of counselling held on 16.8.2016 and 17.8.2016, the appellant was shown as selected candidate against the category of a Visually Handicapped candidate and that too, in the first round of counselling. He further submitted that the appellant had got his name entered in the select list fraudulently.

9. It has further been alleged that since the appellant had committed fraud, his name was shown in the select list against the vacancy which was reserved for a Visually Handicapped person.

10. After hearing learned counsel for the parties and after having perused the records, it appears that in the first round of counselling, the appellant had appeared from district Varanasi as he had completed his BTC Training Certificate Course from that very district, but when he was declared unsuccessful in the first round of counselling, he again appeared in the second round of counselling held on 24.8.2016 and was selected as an Assistant Teacher on 27.8.2016 to be appointed in a School, namely, Prathamik School Arajhi Devghata, Vikas Khand Lalganj, District Mirzapur.

11. We are definitely impressed by the argument advanced by learned counsel for

the appellant that whether the appellant appeared in the second round of counselling would not be a question to be answered by the appellant because the appellant's name appeared at serial no.1 in the combined select list, which has been annexed at page 51 of the supplementary counter affidavit. It mattered little that the post on which the appellant had been selected was shown as a post reserved for Visually Handicapped persons. This we say for the reason that the posts which were not filled in the first round of counselling could not be carried forward to the next process of selection in view of the amendment of sub-section (5) of Section 3 of the Act, 1993 and, therefore, the vacant posts, by implication, could have been filled in by general candidates.

12. The 'rule of carry forward' in respect of reservation of posts in favour of physically handicapped candidates, being no longer applicable in view of the omission of sub-section (5) of Section 3 of the Act, 1993, in terms of the amending Act of 2016, the filling up of the said posts by general category candidates, cannot be said to suffer from any legal infirmity.

13. Learned counsel appearing for the Board has also not been able to dispute the position of law with regard to the amendment of sub-section (5) of Section 3 of the Act, 1993, whereby the unfilled posts of reserved category could not have been carried forward to the next selection year and, therefore, the general category candidates could have been selected against those unfilled posts.

14. In the light of the arguments which have been made and the reasoning given, we are of the view that the order dated 2.12.2022, terminating the services of the

appellant, was suffering from an error apparent on the face of record, as it was passed after putting the burden of bringing the evidence wrongly on the appellant that he had participated in the second round of counselling. The fact of the matter is that all the relevant documents and the evidence with regard to the procedure of appointment/counselling were with the Board and in such a situation, the evidence of participating in the second round of counselling could not have been produced by the appellant. The appellant was selected as a general category candidate. In view of the amendment made in Section 5 (3) of the Act, 1993, there was now no provision to carry forward the vacancies in the reserved category to the next selection. Since in respect of the candidates who had been selected after both rounds of counselling, a single/combined select list had been prepared, as had been admitted by the respondents, there was no error in the petitioner's claim, whose name found place at serial no.1 of the select list published compositely.

15. In view of the foregoing discussions, we are of the opinion that the present special appeal deserves to be allowed and the same is, accordingly, **allowed**. The impugned order passed by the learned Single Judge dated 1.3.2024 is set aside. Consequently, the order passed by the Basic Shiksha Adhikari dated 2.12.2022 is also set aside. Since we have allowed the special appeal, the appellant be reinstated in service and he shall be entitled for all the consequential benefits.

(2025) 1 ILRA 407
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2025

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.

Special Appeal No. 614 of 2024

Manish Kumar ...Petitioner
Versus
G.M. Personnel Human Resource
Management & Ors. ...Respondents

Counsel for the Petitioner:
 Siddharth Khare, Sr. Advocate

Counsel for the Respondents:
 Krishna Mohan Asthana

A. Practice and Procedure – Special appeal – Judicial review – Scope – Re-appreciation of evidence – Permissibility – Held, this Court cannot sit in appeal and cannot re-appreciate the evidence. The scope of judicial review by this Court is very limited when the appellant-petitioner is in special appeal against the judgment of learned Single Judge by which the writ petition was dismissed while exercising the powers under Article 226 of the Constitution of India. (Para 9)

B. Practice and Procedure – Special appeal – Scope – Point was not raised before writ court – Permissibility to raise in Special Appeal – Held, the point, which was not raised before the Writ court, the same cannot be raised in special appeal. (Para 17)

C. Service Law – Departmental enquiry – Unauthorized absence from duty – Fact regarding this charge was admitted during departmental enquiry – Non-supply of enquiry report – Effect – Held, no prejudice was caused to the appellant even it is assumed that enquiry report was not supplied to him – Admitted facts need not be proved whereas in the present case full-fledged enquiry had taken place in accordance with law. (Para 17 and 18)

Special Appeal dismissed. (E-1)

List of Cases cited:

1. Managing Director, ECIL Vs B. Karunakar; (1993) 4 SCC 727

2. S.K. Singh Vs Central Bank of India & ors.; (1996) 6 SCC 415

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, learned counsel for the appellant-petitioner and Sri K.M. Asthana, learned counsel appearing for the respondent-Bank.

2. Present appeal has been filed challenging the impugned judgement and order dated 5.6.2024 passed by the learned Single Judge in Writ-A No. 7405 of 2021 (Manish Kumar vs. Human Resource Management & others).

3. The case of the appellant-petitioner, as narrated in the order impugned herein, is that the appellant-petitioner was appointed on 17.11.2008 on the post of a Probationary Officer (Assistant Manager) MMGS I with the Syndicate Bank at Chennai. He got promotion on 26.06.2014 to the post of MMGS II. It is his case that on account of promotion, he joined the City Center Branch, Gwalior. He worked upto 19.03.2016 without any break in service. He was transferred from time to time from one city to another and across states. He performed his duties honestly and with devotion. He was last transferred to District Etawah Branch on 16.09.2017, where he was posted as an Assistant Manager. He has worked for a total of 13 years without any break in service. During this period of time, his work and conduct have been well regarded amongst the higher officials of the Bank. He was transferred to the Syndicate Branch, Etawah from Ahmedabad Main

Branch in the year 2017, but unfortunately, due to what the appellant-petitioner described as serious illness resulting from his Diabetes etc., he was unable to perform his duties regularly with effect from 22.11.2018. Due to his ailment, he did not perform his duties and members of his family gave medical certificates, along with relevant documents of his treatment from time to time to the Bank establishment. He stated that after he was fit and discharged from hospital, he produced a medical certificate dated 05.06.2020 before the Bank. It is then pointed out that on 05.06.2020, some dispute relating to property between one Bhure Singh and the appellant-petitioner erupted, which made the appellant-petitioner lodge a First Information Report against Bhurey Singh. Bhurey Singh, as a measure of counterblast, lodged an FIR against the appellant-petitioner. In connection with Bhure Singh's the appellant-petitioner was arrested on 12.06.2020. He was granted bail by this Court on 10.11.2020 in the said crime. While the appellant-petitioner was in custody, he was suspended from service due to the long period of his absence and detention in custody. After release on bail, the appellant-petitioner requested the respondents to revoke his suspension and pay his salary. Instead, he was given a charge-sheet dated 10.03.2021. After service of the charge-sheet, he was deputed as an Assistant Manager, Baghpat Regional Office on 12.03.2021. He submitted a reply to the charge-sheet on 14.03.2021. He denied receipt of letters dated 16.03.2019 and 21.04.2019. The defence taken about his absence from 22.11.2018 till 12.06.2020, while posted at the Etawah branch of the Bank, was that he was seriously ill and admitted to the Sir Ganga Ram Hospital, Delhi. The Disciplinary Authority appointed an Inquiry Officer to

hold inquiry. At the end of the inquiry, the Inquiry Officer submitted a report, on the basis of which, after issue of a show cause notice to the appellant-petitioner, he was removed from service by the Assistant General Manager, Human Resources Management Section, Canara Bank, Lucknow. The appellant-petitioner preferred an appeal to the Appellate Authority on 10.04.2021. The appeal was dismissed by the Appellate Authority, the Deputy General Manager, Human Resources Management, Canara Bank, Head Office, Bangalore, affirming the Disciplinary Authority.

4. Aggrieved by the same, appellant-petitioner preferred a writ petition being Writ-A No. 7405 of 2021 (Manish Kumar vs. Human Resource Management & others), which was dismissed by the learned Single Judge vide impugned order dated 5.6.2024. Hence the present appeal.

5. The grounds taken in the appeal is that there exists no justification for conducting the entire proceedings only on 22.3.2021 in a haste manner and the same have been conducted in violation of principles of Article 14 of the Constitution in contravention of the 1976 Conduct and Appeal Rule. It is submitted that sufficient opportunity of hearing was not afforded to the appellant for leading evidence in his defence. It is further submitted that appellant was neither given any information with regard to enquiry report nor copy of same was supplied to the appellant-petitioner. It is submitted that the Presenting Officer himself led documentary evidence and testified as a witness on behalf of the Management (M.W.1) to prove the documents. It is submitted that the learned Single Judge while passing the impugned order has misconstrued the

grounds taken by the appellant-petitioner and failed to appreciate that the Presenting Officer was, in no manner, acquainted with the documents which were sought to be proved on his behalf. By drawing attention to the attendance register, it was further submitted that the attendance register clearly reflects that the appellant-petitioner was marked on leave by the Bank upto 6.6.2019 and was absent from 7.6.2019 and therefore, the charge against the appellant-petitioner that he was unauthorisedly absent from duties from 22.11.2018 to 12.6.2020 is incorrect.

6. Crux of the arguments of learned Senior Counsel appearing for the appellant-petitioner is threefold: firstly, preliminary enquiry was conducted before lunch and on the same day regular enquiry was also conducted after noon, therefore, no opportunity of hearing in the enquiry proceedings was afforded to the appellant-petitioner, which is clear violation of principles of natural justice and causes serious prejudice to the appellant-petitioner; secondly, the appellant-petitioner was never supplied copy of the enquiry report. Attention was drawn to the order of punishment dated 31.3.2021 annexed as Annexure-1 of the paper book wherein it has been written that the enquiry report was submitted on 25.3.2021 holding the employee guilty of charges and the employee has submitted his submissions on the findings of the enquiry report vide letter dated 23.3.2021, which is not possible, although the same was received by the authority concerned on 30.3.2021. Submission is that it, is, therefore, proved that the appellant-petitioner was in fact, never supplied copy of the enquiry report and therefore, the enquiry proceedings stands vitiated. Third argument of learned Senior Counsel, by drawing attention to the

attendance register annexed at page 163 of the paper book, is that the appellant-petitioner was marked on leave by the Bank upto 6.6.2019 and was shown absent only from 7.6.2019 and therefore, absence of the appellant-petitioner for a period of one and half years is not proved, hence, the charge is not proved.

7. Per contra, Sri K.M. Asthana, learned counsel appearing for the Bank submits that appellant-petitioner was initially appointed as Assistant Manager in the then Syndicate Bank in the year 2008. Subsequently, when the Syndicate Bank was amalgamated into Canara Bank w.e.f. 1.4.2020, services of the appellant-petitioner stood absorbed in the transferee Canara Bank and w.e.f. 1.4.2020 the employees of Syndicate Bank including the appellant-petitioner became the employee of the Canara Bank. It is submitted that the charge levelled against the appellant-petitioner is proved to the effect that he was unauthorizedly absent from 22.11.2018 to 12.6.2020. It was pointed out that several letters being letters dated 16.3.2019, 21.4.2019 and 19.11.2019 were issued to the appellant-petitioner directing him to report for duties immediately, failing which necessary disciplinary action would be initiated. It was pointed out that a chargesheet dated 10.3.2021 was issued to the appellant-petitioner, to which he submitted his reply dated 14.3.2021 wherein he has not denied the charges levelled against him and only admission was that he was not absent from duty consciously w.e.f. 22.11.2018 till 12.6.2020 due to his illness for which he pleaded that he was extremely sorry for this unpredicted absence and assured that such mistake will not be repeated in future. He also pointed out that in fact preliminary hearing had taken place before noon and regular

hearing had taken place after noon on 22.3.2021 and enquiry report dated 25.3.2021 was duly supplied to the appellant-petitioner, to which he submitted his reply on 30.3.2021 although he had deliberately mentioned wrong date of 23.3.2021 in his reply. It is also pointed out that appellant-petitioner never denied his unauthorized absence from 22.11.2018 while posted at Etawah Branch till 12.6.2020 and no proof to the contrary was placed by him. He also pointed out that during course of enquiry he produced neither any documentary evidence nor any witness in his support. It is submitted that order dated 31.3.2021 removing the appellant-petitioner from service passed by the disciplinary authority, which shall not be a disqualification for future employment under Regulation 4 (I) of Canara Bank, officer employee (Discipline and Appeal) Regulation 1976 was put to challenge under Regulation 17 of Regulation 1976 wherein also he had not denied his unauthorized absence and on the contrary, only pleaded 'circumstances under which it was not possible to wait for sanction of leave, such absence cannot be held to be wilful' and Enquiry Officer held that the absence was wilful. He pointed out that in any case, even before the appellate authority he only submitted that taking a lenient view a lesser punishment be awarded and thus, he has admitted his unauthorized absence from duty. It was also pointed out that he never claimed non-service of enquiry report even before the disciplinary authority or the appellate authority. It was submitted that although re-appreciation of evidence is not permissible under Article 226 of the Constitution of India as per settled law, however, as learned Senior Counsel appearing for the appellant-petitioner has placed much emphasis on the attendance register, it was

pointed out that even if it is assumed for the sake of argument that the appellant-petitioner was not absent in the entire dates even after reducing the period from 22.11.2018 to 6.6.2019 (6 months and 14 days), during which appellant-petitioner is claiming that he was on leave, out of the total period of unauthorized absence of one and half years, the balance period during which the appellant-petitioner was admittedly unauthorizedly absent comes to 12 months and 5 days and thus, unauthorized absence is admitted.

8. We have perused the record and proceeded to consider the rival contentions on merits.

9. It is the settled law that this Court cannot sit in appeal and cannot re-appreciate the evidence. The scope of judicial review by this Court is very limited when the appellant-petitioner is in special appeal against the judgement of learned Single Judge by which the writ petition was dismissed while exercising the powers under Article 226 of the Constitution of India. We need not burden our judgement by citing various judgements of Hon'ble Apex Court as the law is too well settled.

10. However, as the arguments have been raised on the grounds of flaw in conducting the enquiry and non-supply of enquiry report, we have gone through the documents carefully. Admitted position as emerges from the record is that the charge against the appellant-petitioner is that he was unauthorizedly absent from duty from 22.11.2018 to 12.6.2020. Charge against the appellant-petitioner as quoted in the impugned judgement clearly reflects that the appellant-petitioner was detained in jail on 13.6.2020 on account of impersonation as Police and Raw Officer and was

suspended vide order dated 16.6.2020. Although the charge of impersonation as Police and Raw Officer is not the charge levelled against the appellant-petitioner and is not the subject of matter of the writ petition, the same clearly reflects on the character of the appellant-petitioner coupled with the fact that the record reflects that on the earlier occasion also the appellant-petitioner was awarded punishment during service by the authority concerned. Further admitted position is that the appellant-petitioner was served with a copy of the chargesheet and he submitted his reply to the chargesheet. This fact is also admitted to the appellant-petitioner that in fact in the year 2019 he had attended the preliminary departmental enquiry at Lucknow syndicate bank, zonal office Halwasia Hazratganj on 24.2.2019, therefore, preliminary enquiry had taken place.

11. We find that the learned Single Judge has rightly observed that in fact it was not the preliminary enquiry, but it was the preliminary hearing that had taken place on 22.3.2021 before lunch and regular enquiry was conducted after lunch. There is nothing on record which reflects that regular enquiry was not conducted by the authority concerned and admittedly, no such objection was taken even before the appellate authority. Further admitted fact remains that during enquiry proceedings the employee had never claimed either before the Enquiry Officer or in his reply or before the disciplinary authority or even in the departmental appeal that he was on leave for a certain period out of the total period mentioned in the charge levelled against him and only submission made by the appellant-petitioner was that he could not join duty due to his illness. It is also admitted fact that without disputing his

unauthorized absence he had only pleaded before the appellate authority that he may be given lesser punishment. It is also not in dispute that in the writ petition also before this court except alleging his illness as a reason of absence, it is nowhere asserted that he was on leave. It is only by means of filing supplementary affidavit by supplementing his claim, assertion has been made that for a certain period from 22.11.2018 to 6.6.2019 he was on leave.

12. In this background, we find that the first argument that has been raised by the learned Senior Counsel for the appellant-petitioner is not sustainable. Learned Single Judge has rightly observed that preliminary hearing has taken place on 22.3.2021 before lunch and regular enquiry was conducted after noon and this finding requires no interference.

13. Insofar as the non-supply of enquiry report is concerned, this prejudice was never alleged before the appellate authority and the same has also not been alleged in categorical terms before the writ court. This argument has been subsequently developed only on the basis of date mentioned in his reply submitted by the appellant-petitioner by putting the date of 23.3.2021 and it was sought to be argued that it was not possible to be a reply to the enquiry report, which was submitted on 25.3.2021. It is not in dispute that this reply allegedly dated 23.3.2021 was actually received in the office on 30.3.2021. A bare glance over the reply allegedly dated 23.3.2021 received by the office on 30.3.2021 at page 281 of the paper book clearly reflects that assertion so made is incorrect. In fact the appellant-petitioner was supplied with enquiry report. A perusal of the documents at page 281 of the paper book annexed as annexure 1 to the

supplementary filed by the appellant-petitioner clearly reflects that the same is addressed to the Disciplinary Authority & Chief Manager/Senior Manager, CO Lucknow Canara Bank with the subject 'My written submission on inquiry dated 22.3.2021 in terms Chargesheet No. LC HRM DP CHO CS 06 2021 dated 10.3.2021'. It is clear that he was in receipt of chargesheet enquiry report dated 10.3.2021 and regular enquiry held on 22.3.2021 at Lucknow Canara Bank Circle Office. The relevant extract is quoted as under:

*"The
Disciplinary Authority & Chief
Manager/Senior Manager
CO Lucknow Canara Bank
Respected Sir*

*SUB: MY WRITTEN
SUBMISSIONS ON INQUIRY Dated:
22.03.2021 IN TERMS CHARGESHEET
No. LC HRM DP CHO CS 06 2021 DTD.
10.03.2021*

*I am in receipt of your
Chargesheet Inquiry Report No. LC HRM
DP CHO CS 06 2021 DTD. 10.03.2021
and Regular Enquiry Held on 22.03.2021
at Lucknow Canara Bank Circle Office.*

*I humbly submit my submissions
as under:*

*Proving myself innocent I have
submitted my reply to the Chargesheet.*

*I have faced the Inquiry and
during inquiry it has come on record before
the Inquiry Forum that:"*

(emphasis supplied)

14. In the same reply, on the next page he has accepted that he attended the preliminary departmental inquiry at Lucknow syndicate bank zonal office halwasia Hazratganj on 24.2.2019 and has admitted that he had made reference to the

medical documents and submitted that he was extremely sorry for this unpredicted absence and assured that there will be no such mistake in the future. Clear case of the Bank authority is that in fact the appellant-petitioner was supplied enquiry report along with letter dated 26.3.2021 and receiving of the aforesaid letter is admittedly dated 30.3.2021. Therefore, we do not find any good ground to interfere with the finding recorded by the learned Single Judge on this issue.

15. That apart, it is nowhere stated either in the writ petition or even in the grounds taken in special appeal as to what prejudice was caused to the appellant-petitioner due to non-supply of enquiry report. The law on this issue was settled by by a Five-Judge Bench of Hon'ble Apex Court in **Managing Director, ECIL vs. B. Karunakar**, (1993) 4 SCC 727, paragraph 2 whereof is quoted as under:

“2. The basic question of law which arises in these matters is whether the report of the Inquiry Officer/authority who/which is appointed by the disciplinary authority to hold an inquiry into the charges against the delinquent employee is required to be furnished to the employee to enable him to make proper representation to the disciplinary authority before such authority arrives at its own finding with regard to the guilt or otherwise of the employee and the punishment, if any, to be awarded to him. This question in turn gives rise to the following incidental questions:

(i) Whether the report should be furnished to the employee even when the statutory rules laying down the procedure for holding the disciplinary inquiry are silent on the subject or are against it?

(ii) Whether the report of the Inquiry Officer is required to be furnished

to the delinquent employee even when the punishment imposed is other than the major punishment of dismissal, removal or reduction in rank?

(iii) Whether the obligation to furnish the report is only when the employee asks for the same or whether it exists even otherwise?

(iv) Whether the law laid down in Mohd. Ramzan Khan, AIR 1991 SC 471 will apply to all establishments-Government and non-Government, public and private sector undertakings?

(v) What is the effect of the non-furnishing of the report on the order of punishment and what relief should be granted to the employee in such cases?

(vi) From what date the law requiring furnishing of the report should come into operation?

(vii) Since the decision in Ramzan Khan case (AIR 1991 SC 471) has made the law laid down there prospective in operation, i.e., applicable to the orders of punishment passed after 20th November, 1990 on which day the said decision was delivered, this question in turn also raises another question, viz., what was the law prevailing prior to 20th November, 1990?

16. The questions so framed have been answered by Hon'ble Apex Court in paragraph 30 of the said judgement, which is quoted as under:

“30. Hence the incidental questions raised above may be answered as follows:

(i) Since the denial of the report of the Inquiry Officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore,

invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.

(ii) The relevant portion of Article 311(2) of the Constitution is as follows:

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges."

Thus the Article makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The Article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded, and when the Inquiry Officer is not the disciplinary authority the delinquent employee will have the right to receive the Inquiry Officer's report notwithstanding the nature of the punishment.

(iii) Since it is the right of the employee to, have the report to defend himself effectively, and he would not know in advance whether the report is in his favour or against him, it will not be proper

to construe his failure to ask for the report, as the waiver of his right. Whether, therefore, the employee asks for the, report or not, the report has to be furnished to him.

(iv) In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the inquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan Khan's case (AIR 1991 SC 471) (supra) should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the Inquiry Officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

(v) The next question to be answered is what is the effect on the order of punishment when the report of the Inquiry Officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non- furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to

the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to a "unnatural expansion of natural justice" which in itself is antithetical to justice."

17. Above quoted paragraph clearly indicates that employee must establish as to what prejudice has been caused due to non-supply of the enquiry report, which was not done in the present case. At the cost of repetition, he may point out that this point was not raised before the Writ court and as per settled law it cannot be permitted to be raised subsequently. Therefore, the same cannot be raised in special appeal. However, in the interest of justice, this question was considered by us and we find that once the unauthorized absence was accepted by the appellant and only explanation submitted was that it was due to serious illness, he was absent and the

same will not be repeated in future and a prayer for awarding lesser punishment was made. Therefore, we find that in fact, no prejudice was caused to the appellant even it is assumed that enquiry report was not supplied to him although the discussion made hereinabove clearly reflects that the appellant has submitted his reply after the enquiry report.

18. In **S.K. Singh vs. Central Bank of India and others**, (1996) 6 SCC 415, similar argument was rejected on the ground that the employee has not suffered any prejudice due to non-supply of enquiry report. In the present case also, the fact remains that this ground was never raised before the appellate authority and on the contrary unauthorized absence was accepted and only explanation was submitted that due to serious illness he was extremely sorry for this unpredicted absence and assured that this will not be repeated in future and a prayer for awarding lesser punishment was made. Therefore, in fact he had accepted the charge levelled against him and only prayed for lesser punishment. It is the settled law that admitted facts need not be proved whereas in the present case full-fledged enquiry had taken place in accordance with law. Therefore, second argument of learned Senior Counsel that due to non-supply of enquiry report the proceedings stood vitiated is not sustainable and is, accordingly, rejected.

19. Insofar as the third submission of learned Senior Counsel for the appellant-petitioner that he was in fact, on leave granted by the Bank from 22.11.2018 to 6.6.2019 is concerned, as already noticed, the appellant-petitioner has admitted during the departmental enquiry that he was unauthorizedly absent for this period due to

his illness and only prayed for lesser punishment before the appellate authority. Still, even if for the sake of argument that period is excluded, undisputedly, the period of admitted unauthorized absence comes to 12 months and 5 days, for which absolutely no explanation has been offered by the appellant-petitioner.

20. That apart, it is the settled law that highest degree of devotion, integrity and discipline is required for those who are in bank service. A reference may be made to the judgement of Hon'ble Apex Court in *Canara Bank vs. V.K. Awasthy*, 2005 AIR SCW 2005. The appellant-petitioner has clearly admitted in his reply before the appellate authority at page 138 of the paper book that he was detained in jail on 13.6.2020 on account of impersonation as Police and Raw Officer. It has also come on record (paragraph 6 of the counter affidavit filed by the Bank) that earlier also he was punished and awarded punishment of reduction to a lower grade/scale 2 to 1 by the erstwhile syndicate bank.

21. Therefore, we do not find any legal infirmity in the order impugned herein.

22. Present special appeal is devoid of merit and is accordingly **dismissed**.

(2025) 1 ILRA 416

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 23.01.2025

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-A No. 1049 of 2024

Nand Kishor Shukla

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Alok Singh

Counsel for the Respondents:

C.S.C., Rishabh Tripathi

Service Law-Model Conduct, Discipline and Appeal Rules for Services of U.P. St. Enterprises Regulations-Rule 39 & 48---

After the retirement of the petitioner impugned order has been passed for recovering of a certain amount from the petitioner---In view of the undertaking that had been given by the petitioner authorising the respondents for recovering the amount from his dues in case any erroneous pay fixation was found and that the respondents in the order impugned having indicated that the amount of Rs.3,23,756/- is towards the erroneous pay fixation that had been done by the petitioner himself, consequently, no error is found in the order impugned dated 13.10.2023 so far as it pertains to recovering of an amount of Rs.3,23,756/- from the retiral dues of the petitioner--- So far as the recovery of Rs.2,29,651.29/- is concerned once the amendment in Rule 39 is read with Rule 48 of the Regulations, it clearly emerges that the said amendment of making recovery from a retired employee has only come into force w.e.f. 10.10.2022 and the instant case, the petitioner having retired at an earlier stretch of time i.e. 30.11.2021, would not be covered or governed by the said amendment whereby the Corporation has armed itself of making recovery after due proceedings from a retired employee---Recovery of Rs.2,29,651.29/- from the petitioner, is quashed. **(Para 20, 28 & 30)**

Petition partly allowed. (E-15)

List of Cases cited:

1. St. of Pun. & ors. Vs Rafiq Masih (White Washer) & ors. 2015 (4) SCC 334

2. High Court of Punjab & Haryana & ors. Vs Jagdev Singh 2016 (14) SCC 267

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

1. Heard learned counsel for the petitioner, Shri Pankaj Patel, learned Standing counsel appearing on behalf of respondent No.1 and Shri Rishabh Tripathi, learned counsel appearing on behalf of respondents No.2 to 4.

2. With the consent of learned counsels appearing for the contesting parties, the writ petition is finally being decided.

3. The instant petition has been filed praying for the following main relief(s):

"(i). Issue a writ, order or direction in the nature of certiorari thereby quashing the impugned order dated 13.10.2023 passed by the respondent No.3, a copy of which has been filed as annexure 1 to the petition.

(ii). Issue a writ, order or direction in the nature of mandamus commanding the respondents to pay the amount of Rs.553407.29/- along with interest which has been recovered by the respondents from the post retiral dues of the petitioner."

4. The contention of learned counsel for the petitioner is that the petitioner retired on attaining the age of superannuation on 30.11.2021 while working on the post of Sales Officer. Subsequent thereto, the respondents have issued the order impugned dated 13.10.2023, a copy of which is Annexure-1 to the writ petition, whereby they have made a recovery from the dues of the petitioner.

5. The contention is that at the time of retirement of the petitioner the Rules with which the petitioner was governed namely Model Conduct, Discipline and Appeal Rules

for Services of U.P. State Enterprises Regulations (**hereinafter referred to as "the Regulations"**) did not provide for taking of any action against a retired employee subsequent to the retirement of the employee concerned.

6. It is contended that an amendment in the Regulations has only been made by the respondent Corporation in its meeting held on 10.10.2022, a copy of which is part of Annexure SCA-2 to the supplementary affidavit dated 04.09.2024 per which it has been provided that in case subsequent to retirement of an employee any fact emerges then disciplinary proceedings can be held provided a period of four years has not lapsed since then.

7. The contention is that in terms of Rule 48 of the Regulations any amendment could only come into force after a decision is taken by the Board and a decision has only been taken by the Board for amending its rules on 10.10.2022 consequently the petitioner having retired prior to the said date, the amended rules could not be made applicable for the petitioner for the purpose of taking action against the petitioner by way of recovery and hence the order impugned so far it pertains to recovery from the dues of the petitioner, merits to be set-aside.

8. The further contention is that the respondents have also indicated about an excess payment having been made on account of wrong fixation of his own salary by the petitioner while he was working as the Drawing & Disbursing Officer for which an amount of Rs.3,23,756/- has been adjusted from the gratuity payable to the petitioner.

9. The contention is that keeping in view of the law laid by the Hon'ble Supreme Court in the case of **State of**

Punjab and Others Vs. Rafiq Masih (White Washer) and Others 2015 (4) SCC 334, no recovery is permissible from a retired employee and as such the order impugned dated 13.10.2023, so far as it pertains to recovering the amount of Rs.323756/-, merits to be quashed on this ground alone.

10. So far as the second recovery is concerned i.e. for an amount of Rs.229651.29/-, the contention of learned counsel for the petitioner is that the said recovery is towards the alleged loss which is said to have been caused by the petitioner to the Corporation and the order impugned for recovery having passed on 13.10.2023 and the petitioner having retired on 30.11.2021 and at the time of retirement of the petitioner there being no provision in the rules for making recovery from a retired employee, consequently, the amendment in rules, which has come into force subsequent to retirement of petitioner that is w.e.f. 10.10.2022, cannot be used by the respondents for making recovery from the petitioner.

11. On the other hand, Shri Rishabh Tripathi, learned counsel appearing for the respondent(s)-Corporation has argued that the amendment in Rule 39 of the Regulations, which has come into force w.e.f. 10.10.2022, would also cover all retired employees provided the irregularity committed by them comes to the knowledge of the department within a period of four years of their retirement. As the petitioner has retired on 30.11.2021, consequently, the order impugned dated 13.10.2023, having been passed within the aforesaid period of four years, has correctly been passed and there is no infirmity in the same so far as it pertains to recovering an amount of Rs.2,29,651.29/- towards the loss caused to the Corporation.

12. Shri Tripathi, learned counsel for the respondent(s)-Corporation states that considering that the Board of Management has approved the said amendment in Rule 39 of the Regulations on 10.10.2022, as such, the said amendment would come into force with effect from the said date.

13. So far as the amount of ₹Rs.3,23,756/- is concerned, Shri Tripathi has placed reliance on the judgment of Hon'ble Supreme Court in the case of **High Court of Punjab and Haryana and Others vs. Jagdev Singh 2016 (14) SCC 267** to contend that as the petitioner had given an undertaking at the time of his pay fixation, a copy of which has been filed as annexure C.A.2 to the short counter affidavit dated 22.03.2024, that in case of wrong fixation, the excess amount can be recovered from his dues, consequently the respondents are within their right of recovering the aforesaid amount and the principle of law laid down by the Hon'ble Supreme Court in the case of **Rafiq Masih (supra)** would not be applicable.

14. Heard the learned counsels for the parties and perused the record.

15. From the arguments as raised by learned counsels for the parties and a perusal of record, it emerges that the petitioner had retired on attaining the age of superannuation on 30.11.2021. Subsequent to his retirement, the order impugned dated 13.10.2023 has been passed for recovering of a certain amount from the petitioner.

16. The amount is sought to be recovered is in two parts namely (a) an amount of Rs.3,23,756/- is to be recovered on account of the incorrect pay fixation of his own salary which has been done by the

petitioner while working as the Drawing & Disbursing Officer in the department and (b) a recovery of Rs.2,29,651.29/- which is towards the loss which has been caused to the Corporation.

17. So far as the amount of Rs.3,23,756/- is concerned, as the order impugned dated 13.10.2023 has been passed subsequent to the retirement of the petitioner, consequently at the first blush, the principle of law laid down by the Hon'ble Supreme Court in the case of **Rafiq Masih (supra)** may be said to be applicable as the Hon'ble Supreme Court has said that no recovery can be made from a retired employee.

18. However, the controversy involved in the instant case is that the petitioner had given an undertaking, a copy of which has been filed as annexure CA-2 to the short counter affidavit, whereby he had authorised the Corporation to recover the amount from his dues in case any erroneous or wrong fixation is found in his pay fixation. Incidentally, there is no denial of the undertaking given by the petitioner as per the averment made in the rejoinder affidavit except indicating that the option was given in the year 2016-17 while recommending 7th pay scale while the recovery has been made on 17.11.2023.

19. Once an undertaking has been given by an employee, it is not the principle of law laid down by the Hon'ble Supreme Court in the case of **Rafiq Masih (supra)** which would be applicable rather it would be the principle of law as per judgment of the Hon'ble Supreme Court in the case of **Jagdev Singh (supra)** which would be applicable wherein the Hon'ble Supreme Court, after considering an undertaking that had been given by an employee authorising

the respondents to recover from his dues any erroneous fixation, has held as under:

"11. The principle enunciated in Proposition (ii) above cannot apply to a situation such as in the present case. In the present case, 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. The officer furnished an undertaking while opting for the revised pay scales. He is bound by the undertaking."

20. Accordingly, considering the law laid down by the Hon'ble Supreme Court in the case of **Jagdev Singh (supra)**, wherein the earlier judgment of **Rafiq Masih (supra)** had been considered and keeping in view of the undertaking that had been given by the petitioner authorising the respondents for recovering the amount from his dues in case any erroneous pay fixation was found and that the respondents in the order impugned having indicated that the amount of Rs.3,23,756/- is towards the erroneous pay fixation that had been done by the petitioner himself, consequently, no error is found in the order impugned dated 13.10.2023 so far as it pertains to recovering of an amount of Rs.3,23,756/- from the retiral dues of the petitioner.

21. At this stage, learned counsel for the petitioner states that the calculation sheet has not been provided to him.

22. It would be open for the respondents to supply the calculation sheet to the petitioner by which they have arrived at the figure of Rs.3,23,756/- and in case the petitioner is not satisfied with the same, he would be indicating the correct amount to be recovered which would also be

considered in accordance with law by the respondents.

23. So far as the recovery of Rs.2,29,651.29/- is concerned, as has been indicated in the order impugned dated 13.10.2023, the sheet anchor of the respondent(s)-Corporation for recovering the said amount is on the basis of the amendment which has been made in the Regulations more particularly in Rule 39.

24. The amendment in Rule 39 of the Regulations reads as under:

"बिन्दु 19- यदि विभागीय जाँच की कार्यवाही के लम्बित रहते हुए आरोपित सरकारी सेवक अपनी अधिवर्षता आयु प्राप्त कर सेवानिवृत्त हो जाता है तो लम्बित जाँच को सीएसआर के अनुच्छेद-351 ए के तहत पेंशन से कटौती के लिए जारी रखा जा सकता है, परन्तु सेवानिवृत्त सरकारी सेवक को कोई दण्ड नहीं दिया जा सकता है और न ही उक्त दण्ड के उद्देश्य से कार्यवाही प्रारम्भ की जारी रखी जा सकती है।

बिन्दु 20- यदि सेवानिवृत्ति के पश्चात् कोई तथ्य सामने आए तो सेवानिवृत्ति के पश्चात् भी सीएसआर के अनुच्छेद-351 ए के तहत कार्यवाही की जा सकती है, बशर्ते कि जिस घटना के सम्बन्ध में जाँच प्रारम्भ की जाय, जाँच प्रारम्भ करने की तिथि को उस घटना को चार वर्ष से अधिक समय न बीत चुका हो।

बिन्दु 21- सरकारी धन का गबन या दुर्विनियोजन आदि होने पर दोषी

सरकारी सेवक के विरुद्ध विभागीय कार्यवाही में शासकीय धन की क्षति की सम्पूर्ण वसूली किये जाने हेतु प्रथम चरण में ही सक्षम प्राधिकारी द्वारा यह सुनिश्चित कर लिया जाय कि सम्पूर्ण धन की क्षति की वसूली सम्भव है अथवा नहीं। यदि यह सम्भव न हो तो तत्परता से न्यायालय के माध्यम से उस सरकारी सेवक से सिविल लायबिलिटी के रूप में उक्त हानि की धनराशि वसूल करने हेतु कार्यवाही सुनिश्चित की जाय।"

25. The said amendment has been approved by the Board of Management in its meeting dated 10.10.2022 at Serial No.271(7) of the Resolution, a copy of which has been filed as part of annexure SCA-2 to the supplementary short counter affidavit.

26. Rule 48 of the Regulations reads as under:

"48- बोर्ड समय-समय पर इस नियमावली में संशोधन, परिवर्तन तथा परिवर्द्धन कर सकता है और ऐसे सभी संशोधन, परिवर्तन अथवा परिवर्द्धन उसमें उल्लिखित तिथि से प्रभावी होंगे।"

27. From a perusal of the Rule 48 of the Regulations, it emerges that the Board can make amendment, changes and modification in the Rules and such changes will come into force w.e.f. the date indicated in the same.

28. Once the amendment in Rule 39 is read with Rule 48 of the Regulations, it

clearly emerges that the said amendment of making recovery from a retired employee has only come into force w.e.f. 10.10.2022 and the instant case, the petitioner having retired at an earlier stretch of time i.e. 30.11.2021, would not be covered or governed by the said amendment whereby the Corporation has armed itself of making recovery after due proceedings from a retired employee.

29. Keeping in view of the aforesaid discussion, it is thus apparent that the order impugned dated 13.10.2023, so far as it recovers the amount of Rs.2, 29,651.29/- from the petitioner by exercising the power under the amended Rule 39 of the Regulations, has been exercised erroneously by the respondents which thus vitiates the order impugned dated 13.10.2023 to that extent.

30. Accordingly, the writ petition is **partly allowed**. The order impugned dated 13.10.2023, a copy of which is annexure 1 to the petition, so far as it directs for recovering of an amount of Rs.2,29,651.29/- from the petitioner, is **quashed**. The respondents are directed to refund the aforesaid amount, if already recovered, to the petitioner within a period of six weeks from the date of receipt of certified copy of this order.

(2025) 1 ILRA 421

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 31.01.2025

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 1416 of 2025

**Dr. Meenakshi Saxena
Versus**

...Petitioner

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Jai Bahadur Singh

Counsel for the Respondents:

C.S.C.

(A) Service Law - Medical Officers - Petition seeking grant of 'No Objection Certificate' for participation in NEET PG Examination-2024 - Provincial Medical Health Services (PMHS) – Government Order dated 15.03.2022 - Rural Posting - Determination of 'rural posting' based on distance from the district headquarters and inclusion in the Government Order - Requirement of three years of rural service for eligibility to obtain 30% weightage in NEET PG Examination-2024 - Once a Community Health Centre at a particular location is classified as a rural posting, another hospital in the same premises cannot be excluded from rural classification without valid justification. (Para - 4,6,9,13)

Petitioner (Medical Officer) was selected through Public Service Commission - posted at Community Health Centre in 2014- classified as a rural posting - Later, she was directed to work at the newly established 100 Bedded Combined Hospital in the same premises - petitioner sought a 'No Objection Certificate' to avail the rural service benefit for NEET PG Examination-2024 - denied on the ground that the hospital was not listed as a rural posting. **(Para -4,6)**

HELD: - Petitioner was duly entitled to be granted a 'No Objection Certificate' for having worked in the rural area for the period she had worked at Community Health Centre as well as the 100 Bedded Combined Hospital. Impugned order was set aside. Respondents were directed to grant a 'No Objection Certificate' forthwith to the petitioner, so that she could participate in the NEET PG Examination-2024. **(Para - 15,16,17)**

Petition allowed. (E-7)

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

1. On an urgency being mentioned on behalf of learned counsel for petitioner, the case has been listed today in the supplementary list of fresh cases and has been heard.

2. When the mention was made, learned Standing Counsel was at that stage was directed to seek instructions and accordingly, written instructions from the Chief Medical Superintendent, 100 Bedded Combined Hospital Sirauli Gauspur, Barabanki has been received and placed before this Court and the same is taken on record.

3. Heard Shri Jai Bahadur Singh, learned counsel for petitioner, learned Standing Counsel for the State and perused the material available on record.

4. It has been submitted by learned counsel for petitioner that the petitioner was selected on the post of Medical Officer in PMHS Cadre through Public Service Commission and posted as Allopathic Medical Officer by order dated 11.11.2014 and joined on the said post at Community Health Centre, Sirauli Gauspur, Barabanki on 17.12.2014. There is no dispute that the Community Health Centre, Sirauli, Gauspur, Barabanki is considered a rural posting and is also included in the list of rural posting, which has been issued by the respondents, according to which at serial number 172 of the Government Order dated 15.03.2022. The petitioner was orally asked by the Chief Medical Officer, Barabanki to join at 100 Bedded Combined Hospital, which has started functioning in the early 2017 and is situated in the same compound at Sirauli Gauspur, Barabanki and in compliance of the said direction

started working the said combined hospital. This aspect is also not disputed as the same fact find mentioned in the impugned order rejecting the representation of the petitioner for being granted a 'No Objection Certificate' to participate in the NEET PG Examination-2024 in order to obtain 30% weight-age in marks which are available to a Medical Officer of the Provincial Medical Health Services, who have worked at-least for three years in the rural area. The petitioner was under a belief that while working in the 100 Bedded Combined Hospital in Sirauli Gauspur, Barabanki, her services would be counted towards rural service, therefore, continued working and moved an application for obtaining a 'No Objection Certificate' in order to participate in the NEET PG Examination-2024.

5. Despite making an application giving all the details of the service, the 'No Objection Certificate' was not issued by the respondents and accordingly, it is in the aforesaid circumstances, the petitioner had approached this Court by filing a writ petition being Writ-A No. 748 of 2025, which was disposed of by this Court by means of order dated 21.01.2025 directing the respondents to decide the representation of the petitioner with expedition as provided in the order itself.

6. It is in compliance of the direction of this Court dated 21.01.2025 that the case of the petitioner has been considered for grant of 'No Objection Certificate' and the application made by the petitioner has been rejected. While rejecting the application of the petitioner, the only ground which has been considered is that there is a requirement of putting in three years of rural services, which is mandatory in nature and 'No Objection Certificate' is given only to those Medical Officers who fulfill the

aforesaid condition. According to the respondents, the petitioner has worked in the rural service only for one year, three months and thirteen days only in Sirauli Gauspur, Barabanki, and therefore, the certificate has been declined.

7. It has further been stated that the hundred Beded combined hospital Sirauli Gauspur, Barabanki does not fall into the list of the hospitals, which is considered as a rural service for granting 'No Objection Certificate' and consequently, the said 'No Objection Certificate' has not been granted to the petitioner.

8. Learned counsel for petitioner has submitted that the impugned order dated 12.01.2025 is illegal, arbitrary and inasmuch as, rural service is calculated as per the place of posting and the distance from the headquarter is a relevant consideration. He further submits that there is no doubt that the petitioner was posted at the Community Health Centre, Sirauli, Gauspur, Barabanki, which according to the respondents themselves is considered as a rural posting as also included in the Government Order dated 15.03.2022 wherein at serial number 172, the said Community Health Centre is mentioned as rural posting.

9. He submits that within the same campus a hundred beded combined hospital has come up and started functioning in 2016 but the same has so far not been included as rural posting, and therefore, case of the petitioner has been declined. He further submits that a perusal of the Government Order dated 15.03.2022 would indicate that the only relevant consideration for declaring a particular hospital or Community Health Centre being a rural posting is a distance from the headquarter.

The distance has been calculated as 25 km. and once the Community Health Centre in the same premises has been declared to be a rural posting and there is no reason as to why a hundred beded combined hospital has not been declared a rural posting

10. Learned Standing Counsel on the other hand has opposed the writ petition. He submits that whether a particular posting is a rural posting or not a rural posting is determined solely on the basis as to whether the said Community Health Centre is included by means of Government Order dated 15.03.2022 or not? Once a hundred beded combined hospital has not been included to a rural posting in the Government Order dated 15.03.2022 then the benefit of the same cannot be granted to the petitioner, therefore, has supported the impugned order and prayed for dismissal of the writ petition.

11. This Court has heard the rival submissions of learned counsel for parties and perused the record and also the Government Order dated 15.03.2022 along with the written instructions.

12. The narrow campus for examination in the present case is as to whether the period spent by the petitioner while discharging her duties in the hundred beded combined hospital in Sirauli Gauspur, Barabanki can be considered as a rural posting for the purposes of grant of a 'No Objection Certificate' for admission into the NEET PG Examination-2024? There is no dispute that the petitioner has joined at Community Health Centre Sirauli Gauspur, Barabanki on 17.11.2014 and continued to function on the said post for a period of more than one year till she was directed to join at the hundred beded

combined hospital which in the meanwhile had come up and its construction was complete and had become operational. The petitioner joined the hospital on 01.03.2016 and continued till 12.12.2024. The said hospital undoubtedly has come up in the same premises as Community Health Centre, Sirauli Gauspur, Barabanki.

13. This Court has also noticed that the Community Health Centre Sirauli Gauspur, Barabanki is included as a rural posting. The said entry has been made only on account of the fact that the said place is more than 25 km. away from the district headquarter as has been stated in the Government Order dated 15.03.2022. Once the Community Health Centre, Sirauli Gauspur, Barabanki has been held to be a rural posting, this Court does not find any reason why as to another hospital even though a hundred bedded hospital situated in the same premises would not be considered to be a rural posting for a limited purposes of grant of 'No Objection Certificate' for the entrance of NEET PG Examination-2024.

14. Accordingly, this Court finds that there is no reason forthcoming for denial of the benefit for having worked in the hundred bedded combined hospital at Sirauli Gauspur, Barabanki, which is also equally distance as the Community Health Centre, Sirauli Gauspur, Barabanki. Accordingly, this Court finds that the impugned order dated 21.01.2025 has been passed solely on a consideration that the Community Health Centre, Sirauli Gauspur, Barabanki has been mentioned as a rural posting in the Government Order dated 15.03.2022 while the entry with regard to a hundred bedded combined hospital is not included. Apart from the above, this Court does not find any consideration by the respondents with regard to as to whether Sirauli Gauspur, Barabanki would be considered as a rural posting or not? It is not the case of the respondents that the hundred bedded combined hospital Sirauli Gauspur, Barabanki would not

be included as a rural posting but only till date it has not declared to be a rural posting.

15. Accordingly, this Court find that the respondents have not adequately considered the grounds for grant of 'No Objection Certificate' to the petitioner, and even otherwise, this Court does not find any reason as to why the respondents could have denied the benefit to the petitioner for having worked at the hundred bedded combined hospital for more than eight years which is situated in the same compound as the Community Health Centre, which has been declared to be a rural posting. Accordingly, this Court finds that the petitioner is duly entitled to be granted a 'No Objection Certificate' for having worked in the rural area for the period she has worked at Community Health Centre, Sirauli Gauspur, Barabanki as well the hundred bedded combined hospital at Sirauli Gauspur, Barabanki.

16. In light of the above, the writ petition is allowed and the impugned order dated 21.01.2025 is set aside.

17. The respondents are directed to grant a 'No Objection Certificate' forthwith to the petitioner, so that she can participate in the NEET PG Examination-2024.

(2025) 1 ILRA 424

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 08.01.2025

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 4610 of 2024

With

Writ-A No. 7284 of 2024

**Ravi Kumar Shukla & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Petitioners:

Ripu Daman Shahi, Chhaya Tripathi, Vivek Kumar Verma

Counsel for the Respondents:

C.S.C., Shireesh Kumar, Utkarsh Kumar

A. Service Law-Constitution of India,1950-Article 226-U.P. Police Radio Adhinasht Sewa Niyamawali 2015-Clause 8(c)-Niyamawali 2015 prescribes diploma as the minimum qualification for the post of Head Operator(Mechanical) in U.P. Police Radio Cadre-The police recruitment board exceeded its jurisdiction by issuing a 2021 order equating a B.E./B.Tech degree to a diploma without State Government approval-Candidates who participated in the recruitment process based on 2021 board decision had a legitimate expectation of eligibility-The midway change in eligibility after the exam was conducted was illegal violating principles of fairness and non-arbitrariness-Recruitment rules. once set in an advertisement cannot be altered during the process-Held, the entire selection process is vitiated and set aside due to administrative mismanagement and lack of clarity on eligibility-The entire selection process is canceled, and a fresh recruitment drive must be initiated. (Para 1 to 33)

The writ petitions are partly allowed. (E-6)

List of cases cited:

1. Neil Aurelio Nunes(OBC Reservation) Vs U.O.I. (2022) 4 SCC 1
2. K. Manjusree Vs St. of A.P. (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841
3. Mah. SRTC Vs Rajendra Bhimrao Mandve (2001) 10 SCC 51: 2002 SCC (L&S) 720
4. Tej Prakash Pathak Vs Raj. HC (2013) 4 SCC 540: (2013)2 SCC (L&S) 353
5. Prerit Sharma Vs Bilu B.S. (2022) 2 SCC 751

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

1. Heard Sri Ripu Daman Shahi along with Ms. Chhaya Tripathi and Sri Pradeep Kumar Mishra for the petitioners, learned Additional Chief Standing counsel on behalf of State-respondent No.s 1 and 2 and Sri Shireesh Kumar and Sri Utkarsh Kumar for respondent No.s 3 and 4.

2. Sri Shireesh Kumar has moved an application for impleadment stating that the applicants are necessary party considering the fact that they have also participated in the selection for the post of Head Operator / Head Operator (Mechanical) in U.P. Police Radio Cadre and are diploma holders and has sought to be impleaded as a respondent.

3. The application for impleadment is not opposed by the learned Counsel for petitioners and on consideration of the application for impleadment, we find that the applicants are necessary parties and accordingly, the application for impleadment is allowed.

4. Learned counsel for the petitioners is directed to implead them as respondents.

5. Since common questions of facts and law are involved in both the writ petitions, as such, they are being heard and decided by this common judgment and order. All the parties have been heard at length including Sri Shireesh Kumar, counsel for the respondents and accordingly, with the consent of the parties, the Court is proceeding to dispose of the petition at the admission stage itself.

6. It has been submitted by counsel for the petitioners that an advertisement was issued on 06.01.2022 by the Additional

Secretary (Recruitment) Uttar Pradesh Police Recruitment and Promotion Board Lucknow inviting online applications for the post of Head Operator / Head Operator (Mechanic) in the Police Radio Department. It has been submitted that in Clause 3.2 of the said advertisement, the qualifications were prescribed as per the provisions contained in the Uttar Pradesh Police Radio Adhinasth Sewa Niyamawali, 2015 where in Clause 8(c) the qualifications required for the post of Head Operator / Head Operator (Mechanic) are that the candidate should have passed three years diploma course in Electronics / Telecommunication / Electrical / Computer Science / Information Technology / Instrumentation Technology / Mechanical Engineering by a board established by law in India or a qualification recognized by the Government as equivalent thereto.

7. The petitioners, who are degree holders in various branches of engineering considering themselves to be eligible had applied for participation in the said recruitment and they were also issued admit cards for appearing in the online examinations and the written examination was conducted on 31.01.2024. It has been submitted by counsel for the petitioners that prior to publication of the said advertisement, the Police Recruitment Board had taken a decision on 25.08.2021 where it was resolved that the candidates having four years as Bachelor of Engineering (BE) / Bachelor of Technology (B.Tech) in stream like Electrical, Mechanical, Electronics, information Technology, Computer Science and Telecommunication were also to be treated as eligible on account of them having higher qualifications. Accordingly, the reading of the advertisement dated 06.01.2022 along with the resolution of the

Police Recruitment Board, the petitioners were in a bonafide belief that they were fully eligible to participate in the said selection. After the written examination the answer key of the said result was also published by the respondents on 06.02.2024.

8. Before any further steps could be taken by the Police Recruitment Board, by means of order dated 23.04.2024, a decision of the Board was communicated to the effect that the previous order of the Board dated 25.08.2021 has been substantially modified and now it is provided that four years degree in Engineering of different streams have been held to be ineligible for recruitment to the post of Head Operator / Head Operator (Mechanic).

9. The petitioners, who are degree holders in various streams of Engineering, who had applied and participated in the said recruitment process have now been held to be ineligible and have approached this Court assailing the decision of the respondents and have submitted that once the respondents have held the petitioners to be eligible and on the basis of said resolution, they have participated in the said examination than in the middle of the recruitment process the terms and conditions of the recruitment cannot be changed and accordingly, have assailed the validity of the order dated 23.04.2024 and further sought a direction to the respondent to treat the petitioners as eligible on account of them having a degree of Bachelor of Engineering and permitted them to participate in the said recruitment process and appoint them on the various post in case, they are declared to be selected.

10. It has been submitted by counsel for the petitioners that according to the service rules, a person who possesses a diploma in various streams of Engineering or any other equivalent qualification would be eligible to participate in the said recruitment. With regard to the equivalence, the Police Recruitment Board by order dated 25.08.2021 had declared that the persons possessing a degree of Engineering in various streams would also be eligible considering the fact that the degree is a higher qualification than diploma. It is on account of the deliberate decision taken by the Police Recruitment Board that the petitioners participated in the recruitment process and have legitimate expectation with regard to their eligibility and accordingly, submits that the respondents could not have passed the impugned order treating them to be ineligible after permitting them to participate in the written examination and also publishing the answer key, accordingly prayed for a direction to the respondents to treat them as eligible in the said selection process and declare their results.

11. Learned Standing Counsel, appearing on behalf of the State as well as the Police Recruitment Board on the other hand has opposed the writ petition and it has been submitted that there is no doubt with regard to the fact that according to the service rules, the eligibility for the post of Head Operator / Head Operator (Mechanic) is a diploma in the various streams of Engineering or any other equivalent qualifications. With regard to the equivalence of the qualification, he has submitted that it is only the State Government which can determine the said equivalence and, the Police Recruitment Board was denuded of any power and had wrongly exercised its power while passing

the order dated 25.08.2021 declaring Engineering to be equivalent to a diploma and declaring that the Engineering degree to be higher qualification than Diploma and consequently, such persons holding engineering degree would be ineligible for participating in the said recruitment. Order dated 25/08/2021 amounts to declaration of equivalence which power is not vested in the Police Recruitment Board. Accordingly, the order dated 21.08.2021 was illegal and arbitrary and as soon as the said issue came to the notice of the respondents, they had proceeded to pass the impugned order annulling the same. He submits that the Board has sufficient power to resile from any order which has been passed by them, which is contrary to the rules and accordingly, they have inherent power of reviewing the order and hence in exercise of the power, they have substantially modified the order dated 25.08.2021 and restoring the status quo ante and declaring the persons like the petitioners, who are possessing qualification of degree in Engineering to be not qualified for participating in the said selection process or being appointed on the post of Head Operator / Head Operator (Mechanic)

12. Sri Shireesh Kumar, appearing on behalf of the candidates possessing a diploma, has submitted that in fact there is no dispute with regard to the eligibility of candidates, who are eligible to participate in the said recruitment process. He has submitted that the Uttar Pradesh Police Radio Subordinate Service Rules, 2015 are very clear in terms and Rule 8 clearly provides the qualifications to be possessed by a person, who can participate or be appointed on the said post. He submits that the equivalence, if any, would have been with the diploma qualifications. In any

view of the matter, a degree can never be equivalent to a diploma and therefore, from the very start the Board had illegally passed the order dated 25.08.2021 which they have sought to rectify by means of the impugned order dated 23.04.2024 and accordingly, has opposed the writ petition and prayed for dismissal of the same.

13. I have heard the rival contentions and perused the record.

14. Without reiterating the facts as discussed herein above, this Court proceeds to consider the rival contentions. The Police Recruitment Board proceeded to issue the order dated 25.08.2021 declaring that the degree is a higher qualification than diploma, and accordingly holding that candidates having degree in the respective fields would also be eligible for the post of Head Operator/Head Operator (Mechanic). The dispute has arisen on account of the subsequent order dated 23/04/2024 where the Police Recruitment Board had noticed certain judgments with regard to equivalence and has taken a decision that even during an ongoing selection process they could change the qualifications and hence proceeded to pass the impugned order dated 23/04/24.

15. This Court has taken into consideration the arguments of the respondents that the Police Recruitment Board had exceeded its jurisdictions where it proceeded to pass the order dated 25.08.2021 thereby making a degree to be equivalent to a diploma and accordingly, permitted all the persons possessing a degree in the streams of engineering eligible to participate in the examination for the Head Operator / Head Operator (Mechanic). It is on the strength of the order passed by the Police Recruitment

Board that the petitioners had applied and participated in the recruitment process. It has further been brought to the notice of this Court that the Police Recruitment Board further proceeded to ratify the order dated 25/08/2021 by order dated 01.04.2024. In the order dated 01.04.2024, they had reiterated the stand that the persons who possess four years degree in engineering, which is a higher degree than a diploma and accordingly, such candidate would also be permitted to participate in the said selection process.

16. Undoubtedly, considering the provisions of section 8 of the U.P police Subordinate Service Rules the Police Recruitment Board had exceeded its jurisdiction by interpreting the provisions of the eligibility conditions in the service rules pertaining to the eligibility of the candidates for appointment to the post of Head Operator / Head Operator (Mechanic), holding that degree would be equivalent to a diploma. It is the order dated 25.08.2021 that has permitted the petitioners and the other persons possessing degree in engineering to determine that they are eligible to participate in the said recruitment process. The rules as it stands out today clearly indicate that it is only the diploma holders who are eligible to be appointed to the post of Head Operator / Head Operator (Mechanic). The Board, in exercise of its power to process the selection is an executive body tasked only to carry out the machinery provisions of recruitment. They are not the appointing authority or the controlling authority of the persons who they seek to recruit. They must comply with various service rules which provide for eligibility conditions of the candidates who are to be recruited. They are bound by the conditions of service rule, and they are totally incompetent to

issue any clarification with regard to the eligibility of the candidates who are to participated in the recruitment process. Such an order passed by the relevant recruitment board was at the very start arbitrary, illegal and without jurisdiction. Subsequently, they proceeded to ratify the order by means of order dated 31.01.2024 and subsequently, in a few days they took a u-turn and by means of the impugned order dated 23.04.2024 stated that they substantially modified the previous order dated 25.08.2021 and further to declare that the candidates having qualification of four years' degree course of engineering would not be eligible to participate in the said recruitment examination. When the Police Recruitment Board was aware of the fact that they could not determine or modify or change the eligibility conditions then they should have refrained from making any statement/declaration with regard to the eligibility of persons possessing a degree in the impugned order dated 23.04.2024. It was only the State government who could have passed any order pertaining to the equivalence.

17. From the aforesaid facts, it is clear that merely because of the unauthorized and unlawful interference of the Police Recruitment Board by issuing the order dated 25.08.2021 and subsequently, issuing orders on 01.04.2024 and 23.04.2024 the entire selection process has been called in question and majority of the candidates are not aware as to whether they are eligible to participate or they are ineligible to participate in the said recruitment examination. We have been informed by the learned standing counsel that 75% of the candidates who have participated in the

selection process are engineering degree holders.

18. On the face of it, degree holders who may not have been eligible to participate in the said examination were held to be eligible and they were allowed to participate. It is not only the petitioners but other innocent candidates, who may be possessing degree in engineering but after reading the advertisement, may have rightly concluded that it is diploma holders who are only qualified to participate in the said examination would not have applied for participation in the said exam. Accordingly, the arbitrary orders passed by the Police Recruitment Board prior to commencement of the said examination as well as during the said examination pertaining to the eligibility have vitiated the entire examination. We further take notice of the fact that despite the passing of the order dated 25/08/2021, the advertisement which was issued subsequently on 06/01/2022 did not provide eligibility to the engineering graduates. There is no doubt that the law in this regard is very clear and it has been consistently held by the Supreme Court as well as by this Court that the terms and conditions as laid down in the advertisement for recruitment cannot be altered or changed during the course of the recruitment process. Once the advertisement is published, the recruitment agencies are required to scrupulously follow the guidelines and the qualifications prescribed therein and no variation or deviation is permitted in the same. The Supreme Court has considered this aspect in the case of *Neil Aurelio Nunes (OBC Reservation) v. Union of India, (2022) 4 SCC 1* and also considered various other Supreme Court decisions as under:-

“79. In **K. Manjusree v. State of A.P.** [*K. Manjusree v. State of A.P.*, (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841], the selection of candidates to ten vacant posts of District and Sessions Judges (Grade II) in the Andhra Pradesh State Higher Judicial Service was the subject-matter of the appeal. The selection and appointments to the post of District and Sessions Judges (Grade II) are governed by the Andhra Pradesh State Higher Judicial Service Rules, 1958. The Rules prescribe that one-third of the posts are to be filled by direct recruitment. However, the method of recruitment is not prescribed in the Rules. Therefore, the High Court determines the method of selection when the vacancies are notified. An advertisement was issued on 28-5-2004 calling for applications. The Administrative Committee by its resolution dated 30-11-2004 decided to conduct a written examination for seventy-five marks and an interview for twenty-five marks, and prescribed minimum category marks for the written examination. The exam was held on 30-1-2005. The results were declared on 24-2-2005. The merit list was prepared by aggregating the marks obtained in the written examination out of 100 and the interview for 25 marks. However, the Full Court did not agree with the selection list and another Committee of Judges was constituted to prepare the list. The Committee was of the view that the select list changed the proportion of marks of the written exam to the interview from 3 : 1 to 4 : 1 since the written exam marks (out of 100) were not converted to 75 marks. The Sub-Committee also directed that there must be minimum marks for the interview component, in the same cut-off percentage as applied to the written test component. Another selection list was prepared based on the revised selection criteria. Candidates whose names were featured in

the first select list but were absent in the second list, challenged the second selection list.

80. A three-Judge Bench of this Court in **K. Manjusree case** [*K. Manjusree v. State of A.P.*, (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841], held that the scaling down of marks in the written exam in proportion to the maximum of 75 marks was valid since it was in consonance with the resolution dated 30-11-2004. However, it was observed that introducing minimum marks in the interview component “after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible”. (SCC p. 524, para 27) The facts in *K. Manjusree* [*K. Manjusree v. State of A.P.*, (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841] differ from the factual matrix before us since the impugned notice notifying reservation in the AIQ was introduced even before the examination was held. Further, unlike the case before us, there was in that case, a change in the selection criteria.

81. In **Maharashtra SRTC v. Rajendra Bhimrao Mandve** [*Maharashtra SRTC v. Rajendra Bhimrao Mandve*, (2001) 10 SCC 51 : 2002 SCC (L&S) 720], the selection to the post of drivers and conductors was in question. The writ petitioners satisfied the qualifications and possessed the requisite experience. A total of 12.5% marks was initially allotted to the personal interview component. However, a change in the criteria for selection was introduced after the driving test was conducted. This Court then held that the new criteria was invalid since it proposed to change the rules of the game after the game had begun. In *Umrao Singh v. Punjabi University* [*Umrao Singh v. Punjabi University*, (2005) 13 SCC 365 :

2006 SCC (L&S) 1071] , this Court held that the selection norms for selection to the posts of lecturers could not have been relaxed after the last date for making the application and after the process for selection had started.

82. In **Tej Prakash Pathak v. Rajasthan High Court** [Tej Prakash Pathak v. Rajasthan High Court, (2013) 4 SCC 540 : (2013) 2 SCC (L&S) 353] , the Rajasthan High Court had called applications for the post of “translators”. According to the Rajasthan High Court Staff Service Rules, 2002, 100 marks was prescribed for the written exam and 50 marks for the personal interview. After the exam was conducted, 75% marks were prescribed as the qualifying marks in the written examination. Chelameswar, J. writing for a three-Judge Bench observed that changing the “rules of the game” midstream or after the game has been played is an “aspect of retrospective law-making power”. This Court held that the principle applied in *Manjusree* [K. Manjusree v. State of A.P., (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841] , without further scrutiny would not further public justice and efficient administration. This Court referred the question to a larger Bench in the following terms [The Bench noticed the judgment in *State of Haryana v. Subash Chander Marwaha*, (1974) 3 SCC 220 : 1973 SCC (L&S) 488 where the Supreme Court upheld the decision of the State to not appoint all candidates who had secured the minimum percentage of marks.] : (Tej Prakash Pathak case [Tej Prakash Pathak v. Rajasthan High Court, (2013) 4 SCC 540 : (2013) 2 SCC (L&S) 353] , SCC pp. 545-46, para 15)

“15. No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the “rules of the game” insofar as the prescription of

eligibility criteria is concerned as was done in *C. Channabasavaih v. State of Mysore* [C. Channabasavaih v. State of Mysore, AIR 1965 SC 1293] , etc. in order to avoid manipulation of the recruitment process and its results. Whether such a principle should be applied in the context of the “rules of the game” stipulating the procedure for selection more particularly when the change sought is to impose a more rigorous scrutiny for selection requires an authoritative pronouncement of a larger Bench of this Court. We, therefore, order that the matter be placed before the Hon'ble Chief Justice of India for appropriate orders in this regard.”

83. In **Prerit Sharma v. Bilu B.S.** [Prerit Sharma v. Bilu B.S., (2022) 2 SCC 751] , the Information Bulletin for NEET-SS 2020 was issued on 3-8-2020. The examination was held on 15-9-2020, and the results were declared on 25-9-2020. Clause 5.16 of the Information Bulletin that was released when the registration process had begun stipulated that there would be no reservation in the SS courses. The Medical Counselling Committee issued the counselling scheme for AIQ for NEET-SS course 2020-2021 in which it was mentioned that there would be no reservation for the SS courses by referring to the judgments of this Court in *Preeti Srivastava* [Preeti Srivastava v. State of M.P., (1999) 7 SCC 120 : 1 SCEC 742] and *Sandeep v. Union of India* [Sandeep v. Union of India, (2016) 2 SCC 328 : 7 SCEC 518] . The counselling for the SS course was postponed. The State of Tamil Nadu issued GOMS No. 462 dated 7-11-2020 stipulating that 50% of the SS seats in government medical colleges in the State of Tamil Nadu would be reserved for in-service candidates. This Court observed that when the process for admissions to the SS courses had begun, it was notified

through the Information Bulletin that there would be no reservation in the SS courses. Therefore, it was held that reservation for in-service doctors shall not be permitted for the current academic year."

19. In the present case, we find that after issuing of the advertisement, the Police Recruitment Board has passed the order varying the eligibility conditions of the candidates after publication of the advertisement, after conduct of the written examination and declaration of the answer key and such course of action during the recruitment process is totally impermissible.

20. The issue for consideration is whether the entire selection process stands vitiated in the facts of the present case, where doubt has been created regarding the eligibility of candidates to participate in the said selection process. It has been informed that about 75% of the total number of candidates who participated in the selection process possesses engineering degree. Undoubtedly, the fact that the advertisement did not list an engineering degree as an eligible qualification, yet allowing engineering graduates to participate, clearly demonstrates that the selection process was unfair and arbitrary from the very start.

21. Subsequently, by order dated 01.04.2024, the selection board reiterated its stand regarding the equivalence of an engineering degree with a diploma. The final nail in the coffin was the impugned order dated 23.04.2024, wherein the selection board concluded that only the State Government could issue orders concerning the equivalence of educational qualifications required for participation in the selection process. Consequently, the

board rescinded its earlier order dated 25.08.2021 and proceeded to hold that an engineering degree would not qualify as an educational qualification rendering a candidate ineligible to participate in the said selection process.

22. One of the hallmarks of any selection process is the fairness and transparency with which it is conducted. All eligible candidates have a right to be informed about the eligibility conditions of the examination prior to its commencement, and the advertisement must clearly specify the exact eligibility criteria required from applicants. These conditions must undoubtedly align with the service rules, which outline the prescribed eligibility requirements. Any deviation from the conditions stipulated in the rules would vitiate the entire selection process, rendering it illegal and arbitrary, and thereby subject to judicial interference in appropriate proceedings.

23. Recently a Bench of Seven Hon'ble Judges of the Supreme Court has answered the reference in the case of in the case of **Tej Prakash Pathak vs Rajasthan High Court** and others Civil Appeal No.2634 of 2013 where the terms of reference were:-

"1. A three-Judge Bench of this Court while accepting the salutary principle that once the recruitment process commences the State or its instrumentality cannot tinker with the "rules of the game" insofar as the prescription of eligibility criteria is concerned, wondered whether that should apply to the procedure for selection. In that context, doubting the correctness of a coordinate Bench decision in K. Manjusree² for not having noticed an earlier decision in Subash Chander

*Marwaha*³, vide order⁴ dated 20 March 2013, it was directed that the matter be placed before the Chief Justice for constituting a larger Bench for an authoritative pronouncement on the subject.

The reference was answered in the following terms after considering numerous judgements in this regard:-

42. We, therefore, answer the reference in the following terms:

(1) Recruitment process commences from the issuance of the advertisement calling for applications and ends with filling up of vacancies;

(2) Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit. Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness;

(3) The decision in *K. Manjusree* (supra) lays down good law and is not in conflict with the decision in *Subash Chander Marwaha* (supra). *Subash Chander Marwaha* (supra) deals with the right to be appointed from the Select List whereas *K. Manjusree* (supra) deals with the right to be placed in the Select List. The two cases therefore deal with altogether different issues;

(4) Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/ nonarbitrary and has a rational nexus to the object sought to be achieved.

(5) Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility. However, where the Rules are non-existent, or silent, administrative instructions may fill in the gaps;

(6) Placement in the select list gives no indefeasible right to appointment. The State or its instrumentality for bona fide reasons may choose not to fill up the vacancies. However, if vacancies exist, the State or its instrumentality cannot arbitrarily deny appointment to a person within the zone of consideration in the select list.”

24. In the present case, the petitioners would not have been eligible to participate in the selection process since an engineering degree was not prescribed as a requisite qualification. However, guided by the decision of the selection board dated 25.08.2021, they applied for and were permitted to participate in the written examination.

25. The decision of the selection board dated 25.08.2021 declaring engineering degree holders eligible was questionable, as any determination of equivalence between an engineering degree and a diploma should have been made solely by the State Government in accordance with Rule 8 of the said rules. Recognizing its mistake, the selection board attempted to rectify the error through the impugned order, declaring engineering degree holders ineligible to participate in the selection process.

26. Such an exercise, carried out during the selection process, strikes at the very root of its fairness and transparency. Determining or clarifying the eligibility of candidates after the commencement of the

selection process is inherently flawed, as such matters should have been resolved before the publication of the advertisement. This failure to finalize eligibility conditions in a timely manner vitiates the entire selection process.

27. Once a selection process is initiated, the foundational elements of the process cannot be changed or altered until its completion, as in the present case the service rules do not provide for any change being made during the selection process. Eligibility conditions, examination procedures, and marking patterns are foundational elements of any selection process and must be explicitly stated in the advertisement, which, in turn, should adhere to the relevant service rules. Any change or amendment to these fundamentals after the publication of the advertisement and before the declaration of results is impermissible.

28. The advertisement serves a crucial purpose: informing prospective applicants about the rules, conditions, and guidelines governing the selection process. It establishes a legitimate expectation for candidates regarding the method of selection. Based on the information provided in the advertisement, candidates may take decision about whether to participate in the process.

29. Similarly, the authorities are bound by the terms and conditions they have set forth in the advertisement. Therefore, it is imperative that the foundational elements laid out in the advertisement remain unchanged, as any alterations could unfairly disadvantage candidates. In the present case, the respondents' conflicting orders concerning the fundamental eligibility criteria undermine the integrity

of the selection process, rendering the entire exercise liable to be set aside.

30. After holding that the impugned order dated 24/04/2024 is illegal and arbitrary, the question which arises is as to whether the petitioners would be entitled to participate in the recruitment process on the strength of the order dated 25/08/2021?

31. This aspect of the matter has also been discussed above, and this Court is of the considered opinion that setting aside of the order dated 24/04/2024 would not have the effect of reviving the previous order dated 25/08/2021, which itself was illegal and arbitrary having been passed unauthorizedly by the Police Recruitment Board, and even otherwise is also dehors the provisions of the Rule 8 of the relevant service rules which only prescribes the eligible candidates to possess diploma in the relevant field of engineering. On plain reading of the service rules the degree holders would not be eligible, as only diploma holders in respect of stream of engineering would be eligible subject to any order passed by the State government regarding equivalence. Accordingly, no direction as sought by the petitioners can be passed in their favour for permitting them to participate further in the selection process in absence of any order of equivalence having been passed by the State government.

32. Accordingly, we find that the entire selections which has been conducted stands vitiated on account of the unwarranted interference and passing of orders by the Police Recruitment Board and also considering that a substantial percentage (about 75%) of the candidates are adversely affected by the illegal and arbitrary interference of the selection

board. Accordingly, the entire selection as such is **set aside**. The respondents are directed to finalize the eligibility conditions and amend the service rules, in case they so desire. Once they have taken a decision in this regard, they should publish a fresh advertisement clearly indicating the eligibility conditions for the qualification for the post of Head Operator / Head Operator (Mechanic) and after publishing of the said advertisement they should conduct the recruitment process and conclude the same at the earliest in accordance with law. Since two and half years have lapsed since the advertisement was issued and many of the candidates may have become overage, and considering it is only on account of the acts of omission/commission of the respondents that the present recruitment is being **set aside**, it would be in the interest of justice, to permit such candidates who possess requisite educational qualifications and have participated in the present recruitment process to participate in the next recruitment process, ignoring only their requirement of age.

33. In light of the above, both the writ petitions are partly **allowed**.

(2025) 1 ILRA 435
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.01.2025

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-A No. 8637 of 2024

Anil Kumar Gangwar **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Shireesh Kumar, Utkarsh Kumar

Counsel for the Respondents:

C.S.C., Anagh Shukla, Jyotinjay Verma,
 Ratnesh Chandra

A. Service Law-Constitution of India,1950-Article 226-Petitioner retired on 30.04.2021-initially his pension was fixed at Rs. 56,200-Later authorities reduced his pay and ordered recovery, leading to multiple writ petitions-High court quashed the recovery order and directed fresh proceedings after issuing a show cause notice-A new recovery order was challenged where the court stayed the recovery-Held, As per Supreme Court judgment in Rafiq Masih and Jagdish Singh Case, retrospective recovery from retirees is impermissible-The petitioner's undertaking was given post-retirement making Jagdev Singh inapplicable-Pay fixation cannot be done after a long time gap-The reduction in pension and recovery were quashed and the court ordered the restoration of Rs. 56,200 pension with all consequential benefits. (Para 1 to 42)

The writ petition is allowed. (E-6)

List of Cases cited:

1. In Re Anil Kr. Gangwar Vs St. of U.P. & ors., Writ A No. 1336 of 2024
2. In Re Anil Kr. Gangwar Vs St. of U.P. & ors., Writ A No. 4742 of 2024
3. St. of Punj. & ors.Vs Rafiq Masih(White washer) (2015) 4 SCC 334
4. Jagdish Prasad Singh Vs St. of Bih. & ors.(2024) SCC OnLine SC 1909
5. Syed Abdul Qadir Vs St. of Bih. (2009) 3 SCC 475
6. HC of P& H & ors.Vs Jagdev Singh (2016) 14 SCC 267

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

1. Heard.

2. Instant writ petition has been filed seeking following reliefs:-

"(a) issue a writ, order or direction in the nature of certiorari quashing the orders dated 31.07.2024 and 29.08.2024 as contained in Annexure no.11 & 10 respectively to this writ petition.

(b) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to not to reduce the basis monthly pension of the petitioner from Rs.56,200/- to Rs.52,950/- per month and restore the monthly basic pension of the petitioner at Rs.56,200/- per month and continue to pay him pension at that rate.

(c)...."

3. Bereft of unnecessary details the facts of the case as set forth by the petitioner are that the petitioner retired on attaining the age of superannuation on 30.04.2021. All the dues were paid to the petitioner on 22.05.2021. All of sudden, pay of the petitioner was reduced and a recovery ordered vide order dated 31.01.2024, a copy of which is Annexure-2 to the petition.

4. Being aggrieved the petitioner filed ***Writ A No.1336 of 2024 In Re Anil Kumar Gangwar vs State of U.P. & Ors.*** This Court vide order dated 19.03.2024, a copy of which is Annexure-3 to the petition, quashed the order dated 31.01.2024 and granted liberty to the respondents to pass a fresh order in accordance with law but after issuing show cause notice to the petitioner.

5. A Show Cause Notice dated 03.04.2024, a copy of which is Annexure-4 to the petition, was issued to the petitioner. The petitioner claims

to have submitted his reply on 08.04.2024 and 30.04.2024.

6. Vide order dated 10.05.2024, a copy of which is Annexure-7 to the petition, an order of recovery was again passed against the petitioner. Being aggrieved the petitioner filed ***Writ A No.4742 of 2024 In Re Anil Kumar Gangwar vs State of U.P. & Ors.*** This Court vide interim order dated 27.06.2024, a copy of which is Annexure-8 to the petition, stayed the recovery initiated against the petitioner in pursuance to the order dated 10.05.2024 until further orders. It is stated that the said writ petition is still pending before this Court for consideration.

7. Subsequent thereto the respondent No.2 passed the impugned order dated 31.07.2024, a copy of which is Annexure-11 to the petition, whereby the respondent No.3 has been informed that in pursuance to the order of the writ court dated 27.06.2024, no recovery is to be made from the pension of the petitioner but the revised pension payment order dated 31.07.2024 was being sent to the respondent No.3.

8. The revised pension payment order dated 31.07.2024, a copy of which is part of Annexure-11 to the petition (Page 83), would indicate that the pay of the petitioner has been reduced which according to the petitioner was earlier Rs.56,200/- which now stands reduced to Rs.52,950/- as indicated in the pension payment order. This also stands indicated in the order dated 29.08.2024, a copy of which is Annexure-10 to the petition, which has been issued by the Lucknow Development Authority, which indicates the earlier pay of the petitioner was Rs.56,200/- vis a vis Rs.52,950/- as finds place in the revised pension payment order.

9. On the basis of the order dated 31.07.2024 another order dated 29.08.2024, a copy of which is Annexure-10 to the

petition was issued which indicates reduction in the pay of the petitioner which the petitioner was drawing at the time of his retirement and the Lucknow Development Authority having written to the bank for deduction of amount of Rs.35,579/- per month from the pension of the petitioner. The order also contains a note for not deducting any amount till further orders.

10. Being aggrieved the instant writ petition has been filed.

11. Contention of the learned counsel for the petitioner is that despite the order of the writ court dated 19.03.2024 which had granted liberty to the respondents to pass a fresh order after due opportunity of hearing to the petitioner, the Show Cause Notice dated 03.04.2024 that has been issued to the petitioner does not indicate any notice pertaining to any action to be undertaken for the purpose of reduction of pension of the petitioner and for making any deduction from the pension of the petitioner and consequently the impugned order would be in the teeth of the judgment and order dated 29.03.2024 passed by the writ court which has attained finality as such the order impugned merits to be quashed on this ground alone.

12. Further, Shri Shireesh Kumar, learned counsel for the petitioner places reliance on the judgment of the Hon'ble Supreme Court in the case of ***State of Punjab & Ors vs. Rafiq Masih (White Washer): (2015) 4 SCC 334*** to contend that no recovery can be made from a retired employee. Further reliance has been placed on the recent judgment of the Hon'ble Supreme Court in the case of ***Jagdish Prasad Singh vs State of Bihar & Ors : 2024 SCC OnLine SC 1909*** wherein the

Hon'ble Supreme Court after placing reliance on its earlier judgment in the case of ***Syed Abdul Qadir vs State of Bihar : (2009) 3 SCC 475*** has held that a 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 long time gap to contend that once the respondents in the counter affidavit have specifically averred that the benefit that had been granted to the petitioner had been granted on the basis of his alleged option of retiring at the age of 58 years as such it is apparent that the said benefits have been given to the petitioner a long time back and consequently there cannot be any occasion for re-fixation or recovery.

13. Shri Shireesh Kumar, learned counsel for the petitioner also points out that a specific averment has been made in para 17 of the writ petition that at no stretch of time has he ever exercised an option for retirement at the age of 58 years which averment has not been denied by the respondents while giving the reply to the aforesaid para as would be apparent from perusal of the para 7 of the counter affidavit filed on behalf of the respondent No.2 meaning thereby that even the respondents do not deny that the petitioner at no stretch of time had given an option for retirement at the age of 58 years consequently the respondents on their own accord had extended the said benefit as a matter of course as such there cannot be any occasion of making any recovery from the petitioner.

14. Responding to the aforesaid arguments Shri Jyotinjay Verma, learned counsel appearing for respondent No.2 has argued on the basis of the averments contained in the counter affidavit that the

petitioner has received the benefits of higher pay fixation on account of he having given the option of retiring at the age of 58 years which entailed benefits in respect of increments and promotional pay scale to be granted after completion of 8 years, 14 years, 19 years and 24 years of service.

15. It is contended that as the petitioner retired at the age of 60 years, he was entitled to the benefits of increments and promotional pay scale after completion of 10 years, 16 years, 19 years and 24 years of service and thus it is apparent that the petitioner has been given enhanced benefits which were admissible to him had he retired on attaining the age of 58 years and as he has continued to 60 years consequently as he is not entitled to the enhanced benefit as such a conscious decision has been taken for reduction of his pay and for making recovery from the pension of the petitioner.

16. Shri Verma also argues that the petitioner had given an affidavit dated 20.05.2021, a copy of which is Annexure-1 to the counter affidavit, whereby the petitioner had undertaken that in case he has been given the benefits to which he was not entitled as per the rules consequently he would have no objection to the same being revised and also undertook to refund the excess amount, if any, that has been paid to him.

17. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of ***High Court of Punjab & Haryana & Others vs. Jagdev Singh*** reported in **2016 (14) SCC 267** the argument is that once the undertaking has been given by the petitioner authorizing the respondents to recover the excess amount or pay back the same consequently no error has been

committed by the respondents in issuing the impugned order.

18. Shri Verma has also placed reliance on the Rules applicable in the Department more particularly Rule 13(4) of the Uttar Pradesh Vikas Pradhikaran Kendriya Sewanivratti Labh Niyamavali, 2011 (hereinafter referred to as 'Rules, 2011') to contend that the said undertaking has been given by the petitioner in terms of the aforesaid rule and consequently the petitioner would be bound by the aforesaid undertaking that has been given by him. Consequently no error has been committed by the respondents while passing the order impugned.

19. Shri Anagh Shukla, learned counsel appearing for respondent No.3 states that the order impugned dated 29.08.2024 as has been issued by the respondent No.3, has been issued on the basis of letter dated 31.07.2024 that has been sent by the respondent No.2 and once re-fixation/reduction of the pay of the petitioner has been done consequently even the pension would stand reduced with a further direction for making recovery from the pension of the petitioner which recovery at the moment has been stopped consequently no error has been committed by the respondents while passing the order impugned. He also adopts the arguments of Shri Jyotinjay Verma, Advocate.

20. Heard learned counsels for the parties and perused the record.

21. From the arguments as raised by the learned counsels for the contesting parties and perusal of record, it emerges that the petitioner retired on attaining the age of superannuation on 30.04.2021. An order dated 31.01.2024 was issued by the

respondents reducing the pay of the petitioner and directing for a recovery. The said order was quashed by the writ court vide judgment and order dated 19.03.2024. The respondents were granted liberty to pass a fresh order. A Show Cause Notice dated 03.04.2024 was issued to which a reply was submitted by the petitioner but vide order dated 10.05.2024 an order of recovery was again passed against the petitioner. Said order was challenged in Writ A No.4742 of 2024 by the petitioner in which an interim order dated 27.06.2024 was passed and the recovery initiated against the petitioner was stayed until further orders which writ petition is still pending for consideration before this Court.

22. Subsequent thereto, the respondent No.2 passed the order impugned dated 31.07.2024 whereby the petitioner has been informed that in pursuance to the order of this Court dated 27.06.2024 no recovery is to be made from the pension of the petitioner but the revised pension payment order dated 31.07.2024 was being sent to respondent No.3. A perusal of the revised pension payment order would indicate that the pay of the petitioner has been reduced from Rs.56,200/- which he was drawing earlier to Rs.52,950/- as indicated in the pension payment order. This would also be clear from perusal of the order dated 29.08.2024 which has been passed by the respondent No.3.

23. On the basis of the order dated 31.07.2024 the order impugned dated 29.08.2024 was issued by the respondent No.3 indicating the reduction in the pay of the petitioner, which the petitioner was drawing at the time of his retirement vis a vis as indicated in the order dated 31.07.2024. The said order indicates of respondent No.3 having written to the bank for deduction of an

amount of Rs.35,579/- per month from the pension of the petitioner but the order also contains a note for not deducting any amount till further orders.

24. Being aggrieved by the orders dated 31.07.2024 and 29.08.2024, the instant petition has been filed.

25. Argument of the learned counsel for the petitioner is on the basis of judgment of Hon'ble Supreme Court in the case of **Rafiq Masih (supra)** wherein the Hon'ble Supreme Court has held that no recovery can be made from a retired employee.

26. The judgment of the Hon'ble Supreme Court in the case of **Jagdev Singh (supra)** over which reliance has been placed by the learned counsel for the respondents has been distinguished by the learned counsel for the petitioner on the ground that at the time of his initial pay fixation, no such undertaking was given by him rather the undertaking over which reliance has been placed by the respondents is an undertaking dated 25.05.2021 which is subsequent to the retirement of the petitioner and thus it is contended that the respondents are precluded from making any recovery from the petitioner.

27. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of **Jagdish Prasad Singh (supra)** the argument is that even re-fixation cannot be made as said pay fixation has been done long time back and the Hon'ble Supreme Court in the judgment of the **Jagdish Prasad Singh (supra)** has held that pay re-fixation cannot be done after long period of time.

28. On the other hand, learned counsel for the respondents has justified the

recovery from the pension of the petitioner by contending that as the petitioner had given an undertaking authorizing the respondents to recover excess amount from the petitioner consequently keeping in view the judgment of the Hon'ble Supreme Court in the case of **Jagdev Singh (supra)** they are within the rights of passing the orders impugned and for making recovery from the petitioner after refixation of pay.

29. Considering the aforesaid arguments, following questions are required to be considered by this Court, which are indicated below:-

(a) Whether any recovery can be made from a retired employee?

(b) In case an undertaking has been given by an employee authorizing the respondents to recover wrong fixation then whether the judgment of the Hon'ble Supreme Court in the case of **Rafiq Masih (supra)** would be attracted? and

(c) Whether refixation of pay can be done after long period of time?

30. As questions (a) and (b) are dependent on each other consequently they are being taken up together for being decided.

31. The matter pertaining to recovery from a retired employee has engaged the attention of the Hon'ble Supreme Court in the case of **Rafiq Masih (supra)** wherein the Hon'ble Supreme Court has held as under:-

"12. 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 employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*

(ii) *Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*

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

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

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

(emphasized by Court)

32. From perusal of the judgment of the Hon'ble Supreme Court in the case of **Rafiq Masih (supra)**, it is apparent that no recovery is permissible from a retired employee and consequently it is apparent that the respondents are precluded from making any recovery from the petitioner.

33. However, at the same time, the Court may not lose sight of the undertaking/affidavit dated 20.05.2021 which has been given by the petitioner undertaking before the respondents that in case he has been given the benefits to

which he was not entitled as per the rules, consequently, he would have no objection for the same being revised and also to refund the excess amount.

34. At the first blush, the said undertaking appears to fall within the ambit of the Hon'ble Supreme Court in the case of **Jagdev Singh (supra)**. However, the petitioner admittedly retired on 30.04.2021 while the undertaking /affidavit has been given on 20.05.2021 i.e. subsequent to the retirement of the petitioner.

35. In the aforesaid case, **Jagdev Singh (supra)** who was working as Civil Judge (Jr. Division), at the time of being given the senior scale of pay was required to submit an undertaking that excess amount which may be found to have been paid will be refunded to the Government. In pursuance thereof and while being paid the revised pay scale, Jagdev Singh undertook to refund any excess payment if it was so detected and demanded. Subsequently the revised pay scale was allowed to him. A few years later, a letter for recovery of an alleged excess amount was served upon Jagdev Singh. The said action for recovery was challenged before the High Court wherein the writ petition filed by Jagdev Singh was allowed. Upon challenge being raised to the judgement of the High Court by the Punjab and Chandigarh High Court before the Supreme Court, the Hon'ble Supreme Court after considering the judgment of **Rafiq Masih (supra)** held that the excess amount could be recovered **where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted.** In these circumstances, the judgment of **Rafiq Masih (supra)** was distinguished.

36. For the sake of convenience, the relevant observations of **Jagdev Singh (supra)** are reproduced as under:-

"2. The facts lie in a narrow compass. The Respondent was appointed as a Civil Judge (Junior Division) on 16 July 1987 and was promoted as Additional Civil Judge on 28 August 1997 in the judicial service of the State. By a notification dated 28 September 2001, a pay scale of Rs. 10000-325-15200 (senior scale) was allowed under the Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules 2001. Under the rules, each officer was required to submit an undertaking that any excess which may be found to have been paid will be refunded to the Government either by adjustment against future payments due or otherwise.

3. The Respondent furnished an undertaking and was granted the revised pay scale and selection grade of Rs. 14300-400-18000-300. While opting for the revised pay scale, the Respondent undertook to refund any excess payment if it was so detected and demanded subsequently. The revised pay scale in the selection grade was allowed to the Respondent on 7 January 2002.

4. The Respondent was placed under suspension on 19 August 2002 and eventually, was compulsorily retired from service on 12 February 2003.

5. In the meantime, this Court in Civil Writ (C) 1022 of 1989 accepted the recommendations of the First National Judicial Pay Commission (Shetty Commission). Thereupon, the Haryana Civil Services (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules 2003 were notified on 7 May 2003.

6. In view thereof the pay scales of judicial officers in Haryana were once again revised with effect from 1 January 1996. An exercise was undertaken for adjustment of excess payments made to judicial officers, following the notification of the revised pay rules. On 18 February 2004, a letter for the recovery of an amount of Rs. 1,22,003/- was served upon the Respondent pursuant to the direction of the Registrar of the High Court.

7. The Respondent challenged the action for recovery in writ proceedings Under Article 226. The petition was allowed by the impugned judgment of the High Court. The High Court found substance in the grievance of the Respondent that the excess payment made to him towards salary and allowance prior to his retirement could not be recovered at that stage, there being no fraud or misrepresentation on his part.

8. The order of the High Court has been challenged in these proceedings. From the record of the proceedings, it is evident that when the Respondent opted for the revised pay scale, he furnished an undertaking to the effect that he would be liable to refund any excess payment made to him. In the counter affidavit which has been filed by the Respondent in these proceedings, this position has been specifically admitted. Subsequently, when the Rules were revised and notified on 7 May 2003 it was found that a payment in excess had been made to the Respondent. On 18 February 2004, the excess payment was sought to be recovered in terms of the undertaking.

9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. **This, in our view, will**

have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.

10. In *State of Punjab and Ors. etc. v. Rafiq Masih (White Washer) etc.* this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:

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

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

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

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

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

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, 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. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking".

(emphasized by Court)

37. In the instant case, as per the respondents themselves, erroneous fixation of pay has occurred on account of the petitioner being given enhanced benefits by treating his retirement at 58 years vis a vis 60 years at which he admittedly retired which resulted in the petitioner being given increments and promotional pay scale after completion of 8 years, 14 years, 19 years and 24 years of service instead of on completing 10 years, 16 years, 19 years and 24 years of service. Obviously, the said benefits were given to the petitioner at the time when he was in service and thus the undertaking which has been given by the petitioner subsequent to his retirement on 30.04.2021 on 20.05.2021 would not authorize or empower the respondents from making any recovery from the dues/pension of the petitioner.

38. Accordingly, judgment of the Hon'ble Supreme Court in the case of **Jagdev Singh (supra)** would have no applicability to the facts of the instant case so as to authorize the respondents from recovering any amount from the petitioner in pursuance to the undertaking given by him. Both the questions stand decided accordingly.

39. So far as question (c) is concerned, Hon'ble Supreme Court in the case of

Jagdish Prasad Singh (supra) has held 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. "

40. From perusal of the judgment of the Hon'ble Supreme Court in the case of **Jagdish Prasad Singh (supra)**, it clearly emerges that the Hon'ble Supreme Court has held that an employee's pay scale cannot be reduced after a long time gap.

41. In the instant case, as per the respondents themselves the wrong fixation appears to have occurred on account of petitioner being granted the benefits of increment and promotional pay scale on completion of 8 years, 14 years, 19 years and 24 years of service vis a vis 10 years, 16 years, 19 years and 24 years of service to which he was actually entitled meaning thereby that the pay fixation, grant of increments and grant of promotional pay scale occurred a long time back. Thus keeping in view the judgment of the Hon'ble Supreme Court in the case of **Jagdish Prasad Singh (supra)** the respondents are clearly precluded in refixing the pay and consequently the pension of the petitioner. The said question also stands answered accordingly.

42. Keeping in view the aforesaid discussion, the writ petition is **allowed**. A writ of certiorari is issued quashing the order dated 31.07.2024 and 29.08.2024, copies of which are Annexure-11 and 10 respectively. A writ of mandamus is issued commanding the respondents to pay monthly pension to the petitioner on the

material linking the petitioner to the omission of para no. 11, the impugned order, which held him guilty of misconduct, lacked merit - because *mala fides* has not been urged against a definitive persons with sufficient pleadings or the man impleaded *eo nomine* – held, the impugned order cannot be sustained and must perish – petition succeeded and is allowed. (Para – 19, 24, 25, 26, 28)

Writ Petition Allowed. (E-11)

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

Writ-A No. 9166 of 2024

1. This writ petition is directed against an order passed by the State Government dated 24.05.2024, inflicting the petitioner with the penalty of censure after a show cause notice for an act of service misconduct.

2. The petitioner entered service of the Department of Irrigation and Water Resources as an Assistant Engineer way back on 10.02.1991. He was promoted to the post of an Executive Engineer on 19.04.2000 and then as a Superintending Engineer on 20.01.2009. Still later, on 01.06.2018, he was promoted as a Chief Engineer, Level-II. He got a further promotion to the position of Chief Engineer, Level-I on 30.06.2022. As appears from the record, one Chhatrapati Singh, Executive Engineer, Research and Planning Division-I, Sinchai Bhawan Annexe, Lucknow was directed to be given additional charge of the Executive Engineer, Irrigation Construction Division-II, Lalitpur by an order of the Engineer-in-Chief and Head of the Department, Irrigation and Water Resources Department, U.P. This charge was in addition to his duties at Lucknow and the arrangement was made for a period of six months until a regular incumbent was posted. The order was passed by the Engineer-in-Chief in the interest of

CIVIL LAW – Constitution of India, 1950 – Article 226, - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - Rule 10(2) - Uttar Pradesh Government Servant's Conduct Rules 1956- Writ Petition – The petitioner was involved in a dispute over the charge of Executive Engineer, Irrigation Construction Division-II, Lalitpur - The Engineer-in-Chief ordered that the charge be handed over to Chhatrapati Singh, but Bhagirathi Singh refused to comply, leading the petitioner to enforce the directive - subsequently, a manipulated complaint resulted in Chhatrapati Singh's suspension, prompting him to file a writ petition, which led to an interim order - While responding to the writ petition through a narrative para no. 11 remained unanswered - Among five responsible officers who vetted the narrative, only the petitioner was issued a show cause notice, alleging service misconduct - The petitioner argued that the charges were baseless and motivated by malice, while the respondents claimed misuse of power and collusion - The court found no substantive evidence proving that the petitioner deliberately ensured a deficient narrative - In the absence of

government work. When the Engineer-in-Chief passed his orders dated 15.03.2023, these were duly circulated from the Principal Secretary, Irrigation and Water Resources, Government of U.P., Lucknow down to the Executive Engineer, Computer Centre, Irrigation and Water Resources Department, Lucknow, including other officials concerned.

3. At the time, when the order dated 15.03.2023 was passed by the Engineer-in-Chief, one Bhagirathi Singh was posted as the Executive Engineer, Irrigation Construction Division-I, Lalitpur. He had been given additional charge as Executive Engineer, Irrigation Construction Division-II, Lalitpur. This was, to all seeming, done by the Superintending Engineer, Irrigation Construction Circle, Jhansi, who is said to be the controlling authority and the immediate superior of the Executive Engineer, Irrigation Construction Divisions-I and II at Lalitpur. When Chhatrapati Singh proceeded to take charge as Executive Engineer, Construction Division-II in compliance with the order of the Engineer-in-Chief and contacted Bhagirathi Singh, holding additional charge, Bhagirathi Singh refused to handover charge to Chhatrapati Singh. Chhatrapati Singh wrote to the petitioner on 16.03.2023 that charge of Irrigation Construction Division-II, Lalitpur be directed to be handed over to him in compliance with the Engineer-in-Chief's order.

4. It is also the petitioner's case that this matter was brought to the notice of the Engineer-in-Chief, who instructed the petitioner to ensure compliance of his order dated 15.03.2023. In the circumstances, the petitioner passed an order dated 16.03.2023, directing charge

of Irrigation Construction Division-II, Lalitpur to be handed over to Chhatrapati Singh in compliance with the Engineer-in-Chief's order. The petitioner has pleaded at this juncture that Bhagirathi Singh, the Executive Engineer, who was holding charge of Irrigation Construction Division-II was in collusion with Rajpal Singh, Chief Engineer, Level-II and the two, in order to ensure that Chhatrapati Singh was kept out of way, caused a manipulated complaint through six junior engineers and four assistant engineers to be made against Chhatrapati Singh on 17.07.2023. These facts have been asserted in paragraph No.8 of the writ petition and then there are further allegations of malice at work in paragraph No.9, where it is said that there existed all pervasive in-house politics against Chhatrapati Singh, which the petitioner noticed and wrote about in his favour on 28.07.2023, certifying his good work and the ill-doings of Bhagirathi Singh. The letter dated 28.07.2023 was addressed to the Engineer-in-Chief and Head of the Department, Irrigation and Water Resources, U.P.

5. Chhatrapati Singh was placed under suspension pending inquiry vide order dated 04.08.2023. He challenged the said order by means of Writ-A No.13224 of 2023. This Court vide order dated 29.08.2023 passed in the last mentioned writ petition stayed the suspension order dated 04.08.2023 and directed that Chhatrapati Singh will continue to serve on the post in the same manner as he did before the order impugned. The petitioner has pleaded by way of quotation in paragraph No.13 of the writ petition, paragraph No.11 of Writ-A No.13224 of 2023, instituted by Chhatrapati Singh against his suspension from service.

Paragraph No.11 of Chhatrapati Singh's writ petition quoted as aforesaid reads:

“11. That on 28.07.2023 head of the department in the hierarchy wrote letter in favour of petitioner on the strength of 3 months performance. Photo copy of letter dated 28.07.2023 of respondent no.3 is being filed herewith and marked as ANNEXURE NO.-6 to this writ petition.”

6. After the aforesaid stay order was granted by this Court on 29.08.2023, a notice was issued to the respondents, obliging them to file a counter affidavit. A narrative for the purpose had to be drawn up by the respondents' office. It was prepared by the respondents, but did not carry any reply to paragraph No.11 of Writ-A No.13224 of 2023, instituted by Chhatrapati Singh. The narrative as aforesaid was first signed by the Executive Engineer, then endorsed by the Superintending Engineer, next by the Chief Engineer, Level-II, thereafter the petitioner, and finally the Head of the Department, to wit, the Engineer-in-Chief.

7. It appears that on the basis of the order dated 16.03.2023 passed by the petitioner, whereby he directed Chhatrapati Singh to assume charge of Executive Engineer, Irrigation Construction Division-II, Lalitpur and the unanswered paragraph No.11 of Writ-A No.13224 of 2023 in the Department's narrative, a show cause notice was issued to the petitioner on 16.11.2023, proposing to proceed against him under Rule 10(2) of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (for short, 'the Rules of 1999'). The petitioner submitted a prompt reply to the show cause on 04.12.2023, explaining his position in worthy detail. Shortly afterwards, the State

Government passed the impugned order dated 24.05.2024, punishing the petitioner with the impugned censure.

8. Aggrieved by the order dated 24.05.2024, the present writ petition has been instituted.

9. In answer to the notice of motion issued on 08.07.2024, a counter affidavit has been filed on behalf of respondent Nos.1 and 2, to which the petitioner has filed a rejoinder.

10. When the petition came up on 23.07.2024, the parties having exchanged affidavits, it was admitted to hearing, which proceeded forthwith. Judgment was reserved.

11. Heard Mr. Prabhakar Awasthi, learned Counsel for the petitioner and Ms. Monika Arya, learned Additional Chief Standing Counsel, appearing on behalf of the respondents.

12. It is argued by Mr. Prabhakar Awasthi that there is absolutely no charge disclosed against the petitioner worth the name, on the foot of which he could be punished. He submits that there has to be some act, constituting misconduct, attributable to an employee, before he can be proceeded with against under the Rules of 1999 and then some tangible material or evidence in support of the charge of misconduct must exist, on the basis of which, the respondents may draw a possible inference about the employee's guilt. Mr. Awasthi urges that here is a case where the petitioner gave effect to the order dated 15.03.2023 passed by the Engineer-in-Chief and Head of the Department, Irrigation and Water Resources, U.P. to give additional charge of the position of

Executive Engineer, Irrigation Construction Division-II, Lalitpur. He has drawn the Court's attention to the order of the Engineer-in-Chief, annexed as Annexure No.2 to the writ petition.

13. The next charge is about a non-traverse of paragraph No.11 of Writ-A No.13224 of 2023, filed by Chhatrapati Singh. Mr. Awasthi submits that the respondents' narrative was drawn up by the office and first signed by the Executive Engineer, followed by the Superintending Engineer, then by the Chief Engineer, Level-II, after which the petitioner signed it, and, it was finally signed by the Engineer-in-Chief. None of the other official's conduct in signing that narrative, which did not answer paragraph No.11 of the writ petition, has been found blameworthy. The petitioner has been singled out to be foisted with the charge of not answering paragraph No.11 of the writ petition filed by Chhatrapati Singh. He submits that the non-traverse in a narrative signed by five officers, three junior to the petitioner and one senior, hardly constitutes any kind of a misconduct. He further urges that for these non-existing acts or omissions of misconduct attributed to him, there is no material or evidence in support to infer a possible guilt for the petitioner. He castigates the order impugned as one that is perverse, founded on non-existing charges/ allegations of misconduct and one that proceeds in the absence of any material or evidence to infer guilt for the petitioner. In addition, it is argued by the learned Counsel for the petitioner that the order impugned is actuated by mala fides. He submits, referring to details of the seniority list of officers in the cadre of Chief Engineer Level-I, that he is amongst three officers, now eligible to be promoted as Engineer-in-Chief, to wit, Akhilesh Kumar

Sachan, Sandeep Kumar and the petitioner himself. He urges that the impugned order has been passed deliberately in order to disqualify him from consideration for promotion, which he would otherwise surely earn. The petitioner is scheduled to retire on 31.03.2025 and the entire effort to castigate his conduct is actuated by mala fides.

14. Ms. Monika Arya, learned Additional Chief Standing Counsel has, on the other hand, argued that the charges against the petitioner are well-founded. She submits that Bhagirathi Singh, who was Executive Engineer, Irrigation Construction Division-I, Lalitpur, was given additional charge of Division-II as he was close at hand. This decision was taken by the Superintending Engineer, Irrigation Construction Circle, Jhansi, who is the Controlling Authority. She submits emphatically that Chhatrapati Singh neither contacted Bhagirathi Singh to take additional charge of the post of Executive Engineer, Irrigation Construction Division-II, Lalitpur in compliance with the Engineer-in-Chief's order dated 15.03.2023 nor apprised the Controlling Authority i.e. the Superintending Engineer, Irrigation Construction Circle, Jhansi. Instead, he approached the petitioner directly and made an application for handing over the additional charge to him. It is on the said application that the petitioner passed the order of 16th March, 2023, directing Chhatrapati Singh to assume additional charge of the Executive Engineer, Irrigation Construction Division-II, Lalitpur, without affording any opportunity to Bhagirathi Singh. She has invited the attention of the Court in this regard to paragraph No.5 of the counter affidavit, where this case is pleaded. She submits that the petitioner and Chhatrapati Singh were

in collusion, as the latter was never refused additional charge of Executive Engineer, Irrigation Construction Division-II, Lalitpur nor any undue delay was there in carrying out the Engineer-in-Chief's order. The petitioner misused his official power, jumped the line of authority, bypassing the Superintending Engineer and himself directed Chhatrapati Singh, by his order of 16th March, 2023, to take additional charge of the Executive Engineer, Irrigation Construction Division-II, Lalitpur. Chhatrapati Singh misconducted himself in office and harassed his subordinate engineers, demanding bribes from them and threatening to spoil their ACRs, if they did not yield to his demand. This led the subordinate engineers to complain against Chhatrapati Singh to the Chief Engineer, Project Betwa, Irrigation and Water Resources Department, Jhansi through their representation dated 03.07.2023. It is signed by a number of assistant and junior engineers, at least ten, as the learned Additional Chief Standing Counsel points out. This paved way for Chatrapati Singh's suspension from service.

15. Now, when Chhatrapati Singh challenged his order of suspension and a notice was issued by this Court, in the narrative that was prepared, the petitioner was said to be grossly negligent in discharging his duties. He did not take care to answer paragraph No.11 of the writ petition. In collusion with Chhatrapati Singh, he signed the narrative and sent it to the learned Chief Standing Counsel's office for drafting a counter affidavit. This shows carelessness on the petitioner's part, for which he has been punished, in addition to the other misdemeanour. Ms. Arya argues that after due consideration of the petitioner's reply, he has been punished. It is not the province of this Court to reassess

evidence and return a finding if the evidence was weighty enough to support the conclusions reached by the primary decision maker.

16. We have carefully considered the submissions advanced by learned Counsel for the parties and perused the record.

17. There are two charges, or so to speak, allegations, on the foot of which the petitioner has been punished. The petitioner says that these are non-allegations or acts or omissions that do not constitute any misconduct under the Uttar Pradesh Government Servant's Conduct Rules, 1956 (for short, 'the Rules of 1956') or any rule defining misconduct. The first charge or allegation, as already said in detail, is about the petitioner passing an order dated 16.03.2023, directing Chhatrapati Singh to take additional charge as the Executive Engineer, Irrigation Construction Division-II, Lalitpur. It is said that this is a misconduct, because the petitioner was not the Executive Engineer's Controlling Authority. It was the Superintending Engineer at Jhansi. The petitioner has been attributed some kind of a motive in jumping the line of authority or control and passing an order himself, directing Chhatrapati Singh to join in compliance with the Engineer-in-Chief's order dated 15.03.2023, ordering the additional charge of Executive Engineer, Irrigation Construction Division-II, Lalitpur to be given to Chhatrapati Singh.

18. There is no denial of the fact that the Engineer-in-Chief did pass an order, which is on record, dated 15.03.2023, directing the additional charge of the Executive Engineer, Irrigation Construction Division-II, Lalitpur to be given to Chhatrapati Singh, depriving Bhagirathi

Singh of that charge. It is said that Chhatrapati Singh did not approach Bhagirathi Singh or the Superintending Engineer, and instead, directly approached the petitioner, who passed the offending order dated 16.03.2023. Gauging the conduct of parties and their relative positions as officials of the Department, there is no earthly reason for Chhatrapati Singh not to have asked Bhagirathi Singh to handover charge. Even if he did not ask Bhagirathi Singh to handover charge in compliance with the Engineer-in-Chief's order or did not approach the Superintending Engineer in the first instance, but the petitioner, who enforced the Engineer-in-Chief's order by his order of 16th March, 2023, it is no blameworthy conduct constituting any kind of service misconduct that may invite punishment for the petitioner.

19. At best for the respondents, it could be said that it was some kind of indiscretion. That too sometimes is difficult to say, in the nature of things, that obtain when official functions are discharged. Many things may come to the notice of a superior officer, which impels him to act in a particular way, that may look from the outside to an objective and non-partisan eye to be indiscreet or odd. But, a decision taken by a superior official to act in a particular way or pass an order in the discharge of his official functions, that is per se not illegal, would be no kind of misconduct. It is the decision of an officer in the discharge of his functions, who would have knowledge of many things to effectively discharge his duties as a superior official. Even if there is a slight overstep under such circumstances, it is no more than the innate byproduct of human fallibilities, when placed in a position of authority and charged with responsibility

attached to the office. Every petty lapse or indiscretion done bona fide cannot be condemned as misconduct.

20. Perhaps, it is for the reason last mentioned that the respondents have urged that the order dated 16.03.2023 was passed by the petitioner in connivance with Chhatrapati Singh. There is, however, no material to show that there was any connivance. After all, the decision to give additional charge to Chhatrapati Singh was taken by the Engineer-in-Chief, whose conduct has not been found blameworthy at all. The order of the Engineer-in-Chief had to be implemented by one and all, including the Superintending Engineer at Jhansi or the Chief Engineer of the project. If the petitioner acted to enforce the said order, may be bypassing the Superintending Engineer, by the said fact alone, no inference of a collusion between Chhatrapati Singh and the petitioner can be drawn. The respondents' inference that there was some kind of a connivance between the petitioner and Chhatrapati Singh, indeed, appears to be based more on conjecture and some premeditation to penalize the petitioner.

21. There is another angle to understand, which the respondents have ignored, why the petitioner acted with seeming haste in enforcing the order of the Engineer-in-Chief dated 15.03.2023 himself. There is a specific case not only pleaded in paragraph No.22 of the writ, but also in the petitioner's reply to the show cause notice dated 04.12.2023. It reads:

"जब द्वैत कार्यभार हस्तांतरण से भी श्री भागीरथ अधिशासी अभियंता द्वारा स्पष्ट इनकार कर दिया गया तो यह

प्रकरण प्रमुख अभियन्ता (विभागाध्यक्ष) के संज्ञान में आया और उन्होंने मुझे निर्देशित किया कि मैं तत्काल उनके आदेश दिनांक-15.03.2023 का अनुपालन सुनिश्चित करूं। ऐसी स्थिति में मैंने नियमानुसार द्वाैत कार्यभार हस्तांतरण धारण (Assume) किए जाने हेतु आदेश कर दिए जो मेरा कर्तव्य था।"

22. This assertion by the petitioner in his reply to the show cause notice dated 04.12.2023, issued to him by the respondents, is quoted in paragraph No.22 of the writ petition, after setting forth its context. In paragraph No.8 of the counter affidavit, the assertion that the petitioner was directed by the Engineer-in-Chief to forthwith ensure enforcement of his order, when it came to the latter's notice that Bhagirathi Singh had refused to give Chhatrapati Singh additional charge of Executive Engineer, as ordered by the Engineer-in-Chief, has not been specifically denied by the respondents. This case of the petitioner set forth in his reply to the show cause notice has not been considered by the State Government while passing the impugned order. If, therefore, the petitioner really acted under directions of the Engineer-in-Chief to promptly enforce the latter's orders, there is not even an indiscretion about the petitioner, in any view of the matter, passing the order dated 16.03.2023, directing Chhatrapati Singh to take over charge of the Executive Engineer, Irrigation Construction Division-II, Lalitpur. The assertion that the petitioner was instructed/ directed by the Engineer-in-Chief to forthwith ensure enforcement of his order dated 15.03.2023, being neither denied by the respondents in their

pleadings or inquired into, considered and rejected while passing the impugned order, must be accepted as the correct state of things.

23. The first part of the charge or imputation against the petitioner, condemning his conduct in ordering Chhatrapati Singh directly to be given charge of Executive Engineer, Irrigation Construction Division-II, Lalitpur, can hardly be called an act of misconduct. The inference of the State Government that it was an act of misconduct is clearly perverse, based on conjecture and ignorance of what may legitimately constitute an act of misconduct. So far as the angle of there being any kind of connivance or conspiracy between the petitioner and Chhatrapati Singh is concerned, which led the petitioner to ensure handing over of charge of the Executive Engineer, Irrigation Construction Division-II, Lalitpur, there is not the slightest of material on record, from which that inference could be drawn. Therefore, that inference to the extent that figures in the order impugned is one based on no material.

24. This takes us to the other limb of the charge or the allegation. This is about the petitioner signing a narrative in a casual manner without examining facts, where paragraph No.11 of Writ-A No.13224 of 2023 filed by Chhatrapati Singh against his suspension from service was not answered at all. There is no case, at any stage, urged by the respondents that it was the petitioner, who authored or drew up the narrative. It was obviously drawn up by the office of the Executive Engineer or at some other level, but by the office dealing with legal matters. It was signed by the Executive Engineer, who was the junior-

most officer, followed by the Superintending Engineer, the Chief Engineer Level-II and then by the petitioner, before being finally signed by the Head of the Department, to wit, the Engineer-in-Chief. In this state of things, when none of the officer's conduct, besides that of the petitioner, was found blameworthy in missing out answering paragraph No.11 of Writ-A No.13224 of 2023 in the narrative jointly signed by them, the omission has to be viewed as an inadvertent mistake or lapse on the part of all the officers. Of whatever kind of lapse this omission is, it can certainly not be classed as any kind of a misconduct.

25. The other officers, who signed the narrative, have rightly not been proceeded with against for this lapse. As already remarked, in the thick of official business, if every slip or mistake by an officer were dubbed as misconduct, every member of the service would face the peril of disciplinary proceedings on the fall of pen at any official paper. A service misconduct certainly does not mean trivial lapses, mistakes, inadvertent omissions, incorrect decisions and the like done bona fide everyday by a government servant or official in the course of his duties. Now the impugned order says that in signing the narrative casually and without verifying facts, the petitioner has exhibited remissness and negligence. In the nature of things, that kind of a charge can hardly be laid against the petitioner.

26. There is no case and much less material to show that the petitioner deliberately managed to ensure that the narrative remains deficient. In the absence of that allegation supported by some material to show that it was the petitioner, who managed or caused paragraph No.11

of Chhatrapati Singh's writ petition to remain unanswered in the narrative, the impugned order, holding the petitioner guilty for the said lapse as an act of misconduct, is again perverse and one founded on no material. Though there is no tangible material as well to draw a conclusion of mala fides against the respondents, based on the fact that the impugned order was passed for the purpose of depriving the petitioner of his chance of promotion to the post of Engineer-in-Chief, the utter oddities, that we have noticed, have their lurking presence, which may create a suspicion of that kind. We say this because in the ordinary circumstances, acts that have been charged against the petitioner as misconduct, would have passed off without attention; just as they did in the case of four other officers, including the Engineer-in-Chief, who signed the narrative, like the petitioner. Nevertheless, since we do not necessarily have to go into that question to pronounce upon the validity of the impugned order, we refrain from expressing any opinion on the issue of mala fides urged by the learned Counsel for the petitioner. All the more so, because mala fides have not been urged against a definitive person with sufficient pleadings or the man impleaded *eo nomine*.

27. In view of what we have held above, the impugned order cannot be sustained and must perish.

28. In the result, this petition succeeds and is **allowed**. The impugned order dated 24.05.2024 passed by the State Government is hereby **quashed**.

29. There shall be no order as to costs.

30. Let a copy of this order be communicated to the Principal Secretary,

Department of Irrigation and Water Resources, Government of U.P., Lucknow by the Registrar (Compliance).

(2025) 1 ILRA 452

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 31.01.2025

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 9913 of 2023

With

Writ-A No. 4808 of 2024

Ashutosh Pandey & Ors. ...Petitioners
Versus

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

Counsel for the Petitioners:

Counsel for the Respondents:

(A) Service Law - Promotion and Seniority Dispute - Uttar Pradesh Government Servant Rules, 2013, Tehsildar Service Rules, 1966 - Rule 6 & 4 - The Uttar Pradesh Subordinate Revenue (Tehsildar) Service Rules, 1966 - Rule 6 , The U.P Government Servant Relaxation in Qualifying Service for Promotion Rules, 2006 (amended in 2013) - Rule 2 & 4, The Uttar Pradesh Government Servant Criteria for Recruitment by Promotion Rules, 1998 - Arbitrary Appointment - Breach of Seniority Principle - Promotion - Seniority List - Relaxation in Eligibility - Seniority must be maintained as per the select list issued by the Public Service Commission - Grant of relaxation in qualifying service is discretionary and cannot be claimed as a matter of right - Promotions should be considered based on final, not tentative seniority lists - Employee only has the right to be considered for promotion but there is no right to be promoted, if conditions are satisfied. (Para -23,24,27,35,36,39)

Petitioners were selected as Naib-Tehsildars in 2016 batch - were issued appointment letters at different times, leading to delays in joining - Board of Revenue prepared a seniority list in 2020 - did not initially include petitioners due to their delayed joining - subsequent relaxation in qualifying service was granted only to those who had joined before 31/12/2019, excluding the petitioners - petitioners challenged the promotion of junior candidates before their own consideration. **(Para - 2 to 27)**

HELD: - State must ensure that relaxation in eligibility does not violate the seniority principle; promotions should be made based on finalized seniority lists. State Government was directed to consider and decide the proposal dated 17/10/2024 expeditiously, with further direction to consider and make the promotions to the post of Tehsildar also expeditiously. Interim order restraining promotions vacated. **(Para - 29,38,41)**

Writ A No.9913 of 2023 disposed of.

writ A No.4808 of 2024 dismissed. (E-7)

List of Cases cited:

1. St. of U.P. Vs Vikash Kumar Singh, (2022) 1 SCC 347
2. U.O.I. Vs Manpreet Singh, (2022) 6 SCC 105

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

1. Heard Dr. Lalita Prasad Mishra, and Sri Jaideep Narain Mathur, Senior Advocate assisted by Sri Avinash Singh Vishen on behalf of the petitioners, Sri Kuldeep Pati Tripathi, learned Additional Advocate General for the State of U.P..

2. It has been submitted on behalf of petitioners that in pursuance of advertisement dated 11/01/2016 issued by the U.P Public Services Commission for appointment to various posts including the post of Naib-Tehsildar the petitioners had

applied and appeared in the recruitment exam and were declared selected. In the select list prepared by the Public Service Commission the names of the petitioners find mention at serial No. 33, 35, 108, 115, 152 and 186 respectively. It has been submitted that the appointment letters to the petitioners were issued on the various dates between 03/09/2019 and 04/03/2021. It was submitted that the anomaly was committed by the State as appointment letters were issued randomly to the candidates whose documents stood verified. This resulted in issuance of appointment letters randomly permitting persons much lower in the select list prepared by the U.P Public Service Commission to join much prior to other candidates whose verification was completed subsequently. The petitioners duly joined on the post of Naib Tehsildar with much delay and after completion of the period of probation petitioner No.s 1, 3, 4, 5 and 6 were confirmed by order dated 20/04/2022 which was corrected on 05/09/2023 while petitioner No. 2 was confirmed by order dated 19/06/2023.

3. The respondents proceeded to prepare a gradation list of all the selected candidates on 18/09/2020 which did not include petitioners as they had joined the service between 03/07/2020 and 07/04/2021. It is submitted that subsequently on representation having been made by the petitioners the names were included.

4. In the meanwhile, before the petitioners had joined the services, the Board of Revenue, on the basis of the Seniority list prepared on 18/09/2020, sent a proposal to the State Government for relaxation of 6 months in qualifying service of the incumbents who had joined the

service on or before 31/12/2019 as per the provisions of Rule 6 of Tehsildar Service Rules, 1966 (Second Amendment) 1999 and Rule 4 of Relaxation in Qualifying Service for Promotion Of Uttar Pradesh Government Servant Rules (1st Amendment) rules, 2013 and the State Government duly granted the relaxation by its order dated 14/08/2023. It is relevant to note that the State Government while granting relaxation had imposed certain conditions and the most relevant for the present case being condition No. 4 which provided that the Board of Revenue will ensure that under no circumstance person who is junior be granted the relaxation in eligibility condition ignoring the claim of any person who is senior in any manner whereby the senior may be deprived of his being excluded due to eligibility condition. The Board of Revenue proceeded to promote 141 Naib Tehsildar to the post of Tehsildar by order dated 16/08/2023.

5. It has further been submitted that the new provisional Seniority list has been issued by the Board of Revenue on 28/12/2023 where the name of the petitioners finds mention in accordance with the select list prepared by the U.P Public Service Commission. Another proposal dated 10/11/2023 has been sent by Board of Revenue to the State Government for promotion to the post of Tehsildar after granting relaxation to the persons who had joined the service till 01/07/2020. The petitioners have not been included said proposal as they have joined after 01/07/2020. The Board of Revenue have proceeded to include even the members of 2017 batch for promotion, who were junior to the petitioners having been recruited in the subsequent recruitment year, without considering the claim of the petitioners, and when this fact came to the knowledge of

the petitioners they have preferred the instant writ petition with the following prayers:-

“(a) to issue a writ, order or direction in nature of mandamus commanding the opposite parties to 1st consider and promote the petitioners as Tehsildar from the date from which persons placed below the petitioners in the select list/merit list of 2016 batch have been promoted as such with effect from 16/08/2023 before considering and promoting any other person belonging to Naib tehsildar selection 2016 having taken place below the petitioners in the select list/merit list of that selection below the petitioners and before considering and promoting any selective subsequent batch of batches after 2016 batch.

(b) To issue a writ, order or direction in nature of mandamus commanding the opposite parties to promote the petitioners and to treat them as Tehsildars with effect from 16/08/2023 with all consequential benefits.

(c) To issue a writ or direction in nature of mandamus commanding the opposite parties to grant relaxation in the 4 years of eligibility of service as Naib tehsildar for promotion to the post of tehsildar either of 250% or more than 50% as on one 723 if required at all.”

6. The apprehension of the petitioners is that the respondents will proceed to consider and promote persons of 2017 batch only because of the fortuitous circumstance that they had joined the service before the petitioners. It has further been vehemently submitted that the cut-off date for joining having been fixed by the Board of revenue is illegal and arbitrary in as much as it adversely discriminates the petitioners and is based on the decision for which the respondents

themselves were responsible. It was the action of the respondents in issuing delayed appointment letters in a staggered manner without adhering to the principle of seniority, and such appointment letters were issued with the gap of more than one half years for which the respondents themselves were responsible, and the such actions of the respondents the petitioners cannot be held be responsible and denied promotion on the basis of seniority.

7. In Writ A No.9913 of 2023 an interim order was passed on 23/01/2024 restraining the respondents from promoting anyone of 2016 batch who are below the petitioners in the select list as well anyone from subsequent selection on the post of Tehsildar. Against the interim order Special Appeal was preferred by petitioners of writ A No.4808 of 2024 (of 2017 batch) being Special Appeal Defective No. 388 of 2024. The special appeal was disposed of with the request of the writ Court to take up the matter, if possible, on the next day, if not then at the earliest say within one week to dispose of the application for impleadment and other applications which may have been filed by the appellants.

8. Against both the aforesaid orders a Special Leave Petition was preferred before the Hon'ble Supreme Court being Special Leave Petition (Civil) diary No. 44243/2024 which was disposed of on 14/10/2024 with a direction to this Court to consider the application for impleadment and other pending applications for variations/vacation/ modification of the interim order dated 23/01/2024 and take appropriate decision thereon for the continuance of the interim orders on the same terms.

9. Apart from the above a writ petition has also been filed by the 7 applicants' of

2017 batch being Writ A No.4808 of 2023 seeking the following prayer:-

“(a) mandamus directing the opposite party No. 1 to 4 to grant relaxation in qualifying service as per proposal dated 10/11/2023.

“(b) Mandamus directing the opposite party No. 1 to 4 to promote the petitioners and trade them as Tehsildars with effect from 01/01/2024 on the post of tehsildar.”

10. The petitioners of writ A No.4808 of 2024 also moved an application for impleadment in writ A No.9913 of 2023 and pressed the applications for vacation of the interim order. This Court on 02/08/2024 has recorded that the counsel for the applicant has submitted that they have themselves filed writ “A” No. 4808 of 2024 which is already connected with the present petition, and it is further stated that all the possible pleadings have already been made by the applicants not only in the application but also in the connected matter. Therefore, they have been heard extensively as petitioners of writ A No.4808 of 2024 and as intervenors in writ A No. 9913 of 2023 and both the writs are being decided finally by means of the present order.

11. Sri Jaideep Narain Mathur, Senior Advocate assisted by Sri Avinash Singh Vishen have been heard in support of the affidavits filed in writ A No. 9913 of 2023 as well as in writ A No.4808 of 2024. The main thrust of the arguments was that the respondents should be directed to proceed with the exercise for promotions to the post of Tehsildar by firstly granting relaxation I eligibility conditions as per the proposal of the respondents dated 10/11/2023 where the names of the petitioners were also included and further proceeded to consider

their name for promotion to the post of Tehsildar considering the fact that the petitioners are eligible in as much as they have completed the eligibility criteria laid down under the rules. It was vehemently prayed that the interim order restraining the respondents from proceeding with the promotion be vacated.

12. It was further contended that as per Rule 6 of the Uttar Pradesh Subordinate Revenue (Tehsildar) Service Rules, 1966 the eligibility for promotion to the post of Tehsildar would include such employees who have completed at least 5 years of service on the substantive post on 1st of July of the year in which the recruitment is taking place, but in case sufficient number of candidates are not available then such candidates who have been confirmed and they have completed 4 years of service can be considered.

13. The respondents have contended that there is acute shortage of Tehsildars in the State of U.P. in as much as against total sanctioned strength of 766 posts only 386 Tehsildars are working, and 380 posts are vacant due to the fact that candidates having minimum qualifying service of 4 years in the feeding cadre are not available.

14. To overcome the aforesaid difficulty, the respondents resorted to relax the period of qualifying service utilising the provisions of the U.P Government Servant Relaxation in Qualifying Service for Promotion Rules, 2006 as amended in 2013 (hereinafter referred to as the relaxation rules). According to Rule 2 of the said rules have effect notwithstanding anything contained in any other service rule made by the Governor, while rule 4 provided for relaxation in the minimum length of service up to 50% which can be done by the

concerned administrative department in consultation with the Personnel Department excluding the period of probation as laid down for the said lower post or posts.

15. Rule 4 was amended in 2013 and a proviso was added which provided that if in special circumstances the administrative department find that there is justification for granting more than 50% relaxation in the minimum length of service prescribed on the lower post or posts as the case may be for promotion, then in such situations a proper proposal shall be submitted by the administrative department through the personal department for approval before the committee consisting of Chief Secretary, Principal Secretary, Personnel department and Principal Secretary to the Government in the considered administrative department.

16. It has been contended on behalf of the petitioners that they have completed more than 3 years of service and now they would be eligible to be promoted to the post of Tehsildar in case suitable relaxation is granted in their favour. It was submitted that even the State Government while granting relaxation on the proposal sent by the Board of revenue by order dated 14/08/2023 had provided in paragraph 4 that the Board of revenue should ensure that no junior person is given relaxation ignoring the claim of a senior and ensure that no senior person in the seniority list is deprived of promotion only on this account.

17. Learned Additional Advocate General has submitted that the State Government is ready and willing to consider all the eligible candidates for promotion to the post of Tehsildar considering the fact that there are large number of vacancies in existence and there

is a urgent need to fill the post of Tehsildar considering the fact that there has to be at least one Tehsildar in each Tehsil and the work of the revenue would suffer immensely in case the promotions are not made expeditiously and therefore submitted that the interim order be vacated and the respondent be permitted to make the promotions. In the counter affidavit which was filed on 24/02/2024 it was stated that only because the petitioners have not completed 3 years of qualifying service their case could not be considered for promotion.

18. Learned Additional Advocate General has further informed this Court and placed before us and also supplied a copies to the other counsels, another proposal dated 17.10.2024 which has been sent by the Board of Revenue to the State Government with regard to the promotion to the post of Tehsildar from the cadre of Naib Tehsildar. It has been stated that according to Rule 6 either a person should have five years' experience on the post of Naib Tehsildar or should have worked on the said post for four years and in case such persons are not available for promotion then the requirement of eligibility condition can be relaxed so that adequate number of persons can be promoted to the post of Tehsildar. They have further noticed the provisions of relaxation rules as amended in 2013 wherein it is provided that 50 per cent eligibility can be relaxed by the Administrative Department and in case more than 50 per cent eligibility condition of service is required to be relaxed then the matter has to be considered by a committee headed by Chief Secretary. It is in aforesaid circumstances that they have proposed to relax the eligibility condition of minimum required length of service so as to include the persons who have joined on the post of

Naib Tehsildar till 31.12.2020 and accordingly 23 persons working on the post of Naib Tehsildar on the first date of the selection year 2024-25 and have completed three years and six months would be granted maximum of 50 per cent relaxation and persons who have joined between 31.12.2020 till 1.7.2021 who are 13 in number and have completed three years on the first date of the selection year 2024-25, would also be granted 50 per cent relaxation and accordingly the said proposal includes the names of 36 persons. It has been stated that in case the proposal is accepted by the Government then all the petitioners now would be duly considered for promotion to the post of Tehsildar. It was submitted that the grievance of the petitioners of writ A No. 9193 of 2023 would stand redressed and prayed for vacation of the interim order of dismissal of the writ petition.

19. We have heard the rival contentions and also perused the record.

20. The controversy in the present case has its roots in the manner in which the State Government had issued the appointment letters to the 2016 batch selected candidates after submission of the select list by the U.P. Public Service Commission. Undoubtedly, the State Government has to verify the criminal antecedents of the candidates, but such verification has to be conducted and concluded in a time bound manner, and in any case on completion of the said exercise appointment letters have to be issued as far as possible either together or as per the merit list. The respondents on the other hand have issued the appointment letters in a haphazard and staggered manner and according to them as and when the verification of the particular candidate was

complete, appointment letters were issued. This exercise was conducted totally ignoring the place of the candidate in the merit list. Not only this but this exercise took more than 1 ½ years. Apart from this, the problem was compounded by the fact that some persons who were employed in various government or semi-Government, departments or even in the private sector had to tender their resignations and seek their relieving before they could have joined, for which further time was consumed and hence the joining was also delayed.

21. It is in the meanwhile that the recruitment of 2017 batch was completed, and the selected candidates had joined service prior to some of the persons including the petitioners who belong to 2016 batch. Considering the number of vacancies in the cadre of Tehsildar, and also considering that the said post was to be filled totally by promotion from the cadre of Naib Tehsildar and Revenue Inspectors, and also that there were various directions of the High Court directing the State to fill - up the vacancies at the earliest and considering that Tehsildar is an important post in the Tehsil to decide various issues under the provisions of the U.P. Revenue Code, the respondents initiated the process for preparation of the seniority list even before all the appointment letters been issued and the procedure for appointment completed.

22. The major hindrance which was faced in making the said promotions (selection year 23-24) was that adequate number of persons were not available who had requisite eligibility as provided under Rule 6 of the Uttar Pradesh Subordinate Revenue (Tehsildar) Service Rules, 1966. They proceeded to finalise the seniority list

even before the entire exercise for appointment of 2016 batch was complete, and considered 141 persons working on the post of Naib Tehsildar who had joined the service till 31/12/2019 and due relaxation was granted vide Government Order dated 14/08/2023 subsequent to which the order of promotion was passed on 16/08/2023. As the petitioners had not joined service till 31/12/2019 they were not considered for the said promotions, while more than 50 persons who were junior to the petitioners in the Select List prepared by the U.P Public Services Commission were considered and promoted to the post of Tehsildar.

23. The promotion to the post of Tehsildar has to be made in accordance with the Uttar Pradesh Government Servant Criteria for Recruitment by Promotion Rules, 1998 which provide for the promotion to be made on the basis of seniority subject to rejection of the unfit. The manner in which the respondents have proceeded to make the promotions is clearly questionable. When the State had received a select list of candidates from the U.P Public Services Commission, we see no reason as to why appointment letters were issued between September, 2019 and March 2021 in a staggered manner not adhering to the merit list, leaving it open to the whims and fancies of the respondents to issue appointment letter to certain persons earlier than the remaining candidates who may be higher in the merit list. It is due to this arbitrary action that persons lower in the merit list were able to join the service much earlier and claim promotion to the next higher post on the basis of the length of service. This has resulted in the breach of the principle of seniority.

24. At this stage, it is necessary to keep in mind that Rule 6 of the Uttar

Pradesh Subordinate Revenue (Tehsildar) Service Rules, 1966 provides the eligibility conditions for promotion to the post of Tehsildar, which would be relevant to prepare the list for the prospective candidates which would be considered by the Departmental Promotion Committee. The criteria Rules of 1994 provide for the manner for consideration for promotion by the departmental promotion committee, which is seniority subject to rejection of unfit. Therefore, the fitness of each candidate before the departmental promotion committee must be considered on the basis of seniority subject to rejection of unfit, meaning thereby the person who is senior in the seniority list would have a right to be considered prior to the person who is lower in the seniority list.

25. According to Rule 9 of the Seniority Rules, the seniority list has to be prepared “as soon as may be after appointments are made to a service”, while in the present case before issuance of the appointment letter to all the selected candidates of 2016 batch, and before the recruitment process could be completed by issue of appointment letters to all the selected candidates, the respondents initiated the task of preparation of the seniority list. The said action resulted in exclusion of number of candidates who by that time had not been issued appointment letters and had not joined the service, even though they were much senior to the persons who had been issued appointment letters and had joined the service. Even though this aspect of the matter pertaining to the issuance of the appointment letters is not controlled or provided for in any rules, but as a matter of prudence and propriety the respondent should have issued the appointment letters serially in order of merit.

26. The State in matter of public employment cannot resort to the pick and choose policy but has to act in accordance with rules and well-established principles of equality. Our Constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequal's are not treated as equals. Thus, any public employment must be in terms of the Constitutional scheme. The process of fair selection is undertaken to secure the best and meritorious candidates in their respective category, which is communicated to the State Government by the recruiting agency or the Public Service Commission by means of a select list. The State Government, if it chooses to act upon the select list, has to adhere to the said list in the manner it has been forwarded and does not have any right to change or alter the said list.

27. Issuing appointment letters and permitting juniors to join before the persons who are senior in the select list, has resulted in junior persons having joined earlier and were in service for period of more than one year when the appointment letters were issued to the persons senior to them. The action of the respondents has resulted in a situation where persons who are junior have a longer length of service from the date of actual joining than the persons who are senior in the select list. This action has resulted in violation of the rule of seniority which is clearly arbitrary. The action in issuing the appointment letters arbitrarily has been further compounded when seniority list was prepared when the process of issuance of appointment letters to the selected candidates of 2016 batch was

underway, and of candidates had not been issued appointment letters. Further promotions were made to the post of Tehsildar from the seniority list which was prepared where the petitioners who are much senior to the persons who were permitted to join prior to them and were excluded from such consideration. In effect, the seniority which was to be maintained as per the select list came to be sacrificed at the altar of expediency and that to by statutory authority like the Board of Revenue.

28. There is no dispute with regard to the fact that subsequently a seniority list are being prepared where Naib-Tehsildars of 2016 batch has been placed higher in the seniority list than the Naib-Tehsildars of 2017 batch, and accordingly persons of 2016 batch have a right to be considered for promotion before the persons of 2017 batch.

29. Responding to the request Board of Revenue by means of order dated 14/08/2023 the State Government had issued directions to the effect that it has to be ensured that the concept of seniority has to be adhered inasmuch as the relaxation in service be not granted in such a way so as to exclude the seniors from the zone of consideration on the grounds of eligibility. The State Government not only laid down the policy to be followed by the Board of Revenue directing them to follow the principles of seniority while granting relaxation, but when it was brought to their notice that the said rule was violated and complaints were received from petitioners and other persons of 2016 batch, sought a response from the Board of Revenue by means of a letter dated 01/09/2023, but no such response is available on record.

30. Learned Additional Advocate General has produced a copy of letter dated 17/10/2024 written by the Commissioner

and Secretary Board of Revenue to the State Government containing a proposal to promote the persons who have joined on the post of Naib- Tehsildar by 31/12/2020 which according to them are 23 in number, and further 13 persons who joined subsequently by 01/07/2021 which is the 1st day of the selection year 24 – 25 years and have completed 3 years and 31/2 years respectively on the post of Naib- Tehsildar, have been sought be granted relaxation of minimum of service required for promotion. It has further been submitted that on the acceptance of said proposal the petitioners would be duly considered for being promoted to the post of Tehsildar and consequently their grievance stands redressed. Dr Lalta Prasad Mishra learned counsel for the petitioner after perusal of the said order dated 17/10/2024 submitted that he does not dispute the fact that in case the said proposal is accepted the petitioner also would be promoted to the post of Tehsildar but further submitted that a prayer has been made for promoting the petitioners from the date their juniors have been promoted needs to be considered.

31. The proposal dated 17/10/2024 has been forwarded to the State Government seeking relaxation in the service of the petitioners of writ A No. 9913 of 2023 and in case it is accepted, and the relaxation is granted the petitioners therein would be considered for promotion prior to the consideration for promotion of 2017 batch candidates, and to that extent their grievance would stands redressed. On the other hand, the claim of petitioners in writ A No. 4808 of 2024 is only to the extent of directing the respondents to proceed with the promotions, and their grievance would also stands redressed if the respondents are directed to proceed to consider and decide the issue pertaining to relaxation sought by the

Board of Revenue as per the proposal dated 17/10/2024 and to further consider the case of the eligible candidates for promotion.

32. Both the contesting parties, the petitioners of writ A No. 9913 of 2023 who are of 2016 batch and the petitioners of writ A No.4808 of 2024 who are of 2017 batch are claiming promotion prior to the other. Petitioners of writ A No.9913 of 2023 are claiming themselves to be senior having been appointed as Naib-Tehsildar in the previous selection year than candidates' of 2017 batch, as the criterion for promotion is the seniority subject to rejection of unfit. On the other hand, the petitioners of writ A No.4808 of 2024 claim that they have joined the service prior to the petitioners of writ A No. 9913 of 2023 and, therefore, on the basis of length of service they are eligible for promotion and the respondents should be directed to conduct the promotions immediately. They had sought the aforesaid direction keeping in mind the proposal of the Board of Revenue dated 10/11/2023 where the petitioners of writ A No.9913 of 2023 were excluded from being granted relaxation and further promotion while the petitioners of writ A No.4808 of 2024 belonging to the 2017 batch were included.

33. Sri Kuldeep Pati Tripathi, Learned Additional Advocate General has fairly submitted that the State Government would be proceeding to consider the proposal of the Board of Revenue dated 17/10/2024, and further relaxation would be granted, and further promotions would be done only in accordance with the said proposal ignoring the previous proposal dated 10 /11/2023.

34. Dr Lalta Prasad Mishra appearing on behalf of the petitioners of writ A No. 9913 of 2023 expressed his satisfaction after being informed that all the petitioners

now would be considered for grant of relaxation of the eligibility conditions and would be considered for promotion prior to the 2017 batch of the list attached with the letter dated 17/10/2024. Accordingly considering that the previous proposal dated 10/11/2023 which was the basis of the grievance of the petitioners of writ A No. 9913 of 2023 has lost its relevance and is no longer under active consideration of the State Government having been superseded by the proposal dated 17/10/2024, therefore, we need not adjudicate on merits upon the validity of the said proposal considering that the said proposal does not exist and accordingly the grievance of the petitioners of writ A No. 9913 of 2023 to that extent stands redressed. Accordingly no direction can be issued for the State to proceed to consider the proposal of the Board of Revenue dated 10/11/2023.

35. We have also taken into account the prayer made by petitioners of 2017 batch who had only moved an application for vacation of the interim order dated 23/01/2024, and accordingly in the aforesaid substantially changed circumstances, cases made out to vacate the interim order dated 23/01/2024 to enable the respondents to grant relaxation and further to proceed to consider the proposal dated 17/10/2024 for grant of relaxation of eligibility conditions and consider the promotion to the post of Tehsildar with expedition. In the counter affidavit filed by the State Government it has been stated a fresh and order list is under preparation and then tentative seniority list was circulated in objections had been received. Till filing of the said affidavit, it seems that the seniority list was not finalised. As per settled proposition of law the respondent shall proceed for promotion

only the basis of the final seniority list and not on basis of a tentative seniority list.

36. Hon'ble Supreme Court in the case of ***State of U.P. Vs. Vikash Kumar Singh (2022) 1 SCC 347*** has upheld that grant of relaxation in the minimum length of service is at the discretion of competent authority and cannot be claimed as a matter of rights. Relevant paragraphs of the same judgment is quotes as under:-

“7. At the outset, it is required to be noted that the learned Single Judge issued the writ of mandamus commanding the competent authority to grant the relaxation as per Rule 4 of the 2006 Relaxation Rules in qualifying service and consequently has quashed and set aside the eligibility lists dated 18-3-2019 and 10-5-2019. At the outset, it is required to be noted that as such as per Rule 5(iii) of the 1990 Rules, one of the conditions to be eligible is that the Superintending Engineer must have completed 25 years of service (including at least three years' service as Superintending Engineer). It is an admitted position that the original writ petitioners did not fulfil the eligibility criteria as they did not have the qualifying service of having completed 25 years of service. Thus, the eligibility lists were prepared by the department absolutely as per Rules 5(iii) and 8(iii) of the 1990 Rules. The names of the original writ petitioners were excluded from the eligibility list of Superintending Engineer for promotion to the post of Chief Engineer on the ground that they did not fulfil the eligibility criteria as per Rule 5(iii) of the 1990 Rules. Therefore, as such, the High Court ought not to have set aside the said eligibility lists, which as such were prepared absolutely in accordance with the 1990 Rules.

7.1. *The learned Single Judge thereafter while quashing and setting aside the eligibility lists dated 18-3-2019 and 10-5-2019 has issued the writ of mandamus commanding or directing the competent authority to grant relaxation in qualifying service, which as such was permissible under Rule 4 of the 2006 Relaxation Rules. The word used in Rule 4 of the 2006 Relaxation Rules is “may”. Therefore, the relaxation may be at the discretion of the competent authority. The relaxation cannot be prayed as a matter of right. If a conscious decision is taken not to grant the relaxation, merely because the Rule permits relaxation, no writ of mandamus can be issued directing the competent authority to grant relaxation in qualifying service. Therefore, the High Court has committed a grave error in issuing the writ of mandamus commanding the competent authority to grant relaxation in the qualifying service. Consequently, the High Court has also erred in quashing and setting aside the eligibility lists dated 18-3-2019 and 10-5-2019, which as such were prepared absolutely in consonance with the 1990 and 2006 Rules. The impugned judgments and orders passed by the learned Single Judge as well as the Division Bench of the High Court are not sustainable in law.*

8. *In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the Division Bench passed in State of U.P. v. Vikash Kumar Singh [State of U.P. v. Vikash Kumar Singh, 2020 SCC OnLine All 1600] and the judgment and order passed by the learned Single Judge dated 11-12-2019 passed in Vikash Kumar Singh v. State of U.P. [Vikash Kumar Singh v. State of U.P., 2019 SCC OnLine All 6930] are hereby quashed and set aside. Consequently, the writ*

petition filed by the original writ petitioners being Writ Petition No. 14962 (S/S) of 2019 stands dismissed. The present appeal is allowed accordingly, however, there shall be no order as to costs. Pending applications, if any, also stand disposed of.”

37. Considering that the prayer made by the petitioners of Writ A No.4808 of 2024 is for granting relaxation in qualifying service as per proposal dated 10/11/2023 and the said proposal has since been superseded by the fresh proposal dated 17/10/2024, no such directions as sought by the petitioners can be passed as the said proposal has been given up by the respondents themselves. The 2nd prayer is for a direction to promote the petitioners and treat them as Tehsildars with effect from 01/01/2024 on the post of Tehsildar also cannot be granted as it could not be demonstrated that any junior to the petitioners has been promoted with effect from that date, any other right is vested in the petitioners for being promoted with effect from 01/01/2024. Accordingly the said prayer is rejected.

38. Considering that in case the fresh proposal dated 17/10/2023 is accepted then all the petitioners of both the writ petitions would be duly considered for promotion to the post of Tehsildar and hence this Court is of the considered view that looking into the number of vacancies in the cadre of Tehsildar, and considering that persons who were duly qualified and eligible are not available and hence a decision has been taken by the respondents to relax the eligibility criteria and the proposal has already been forwarded to the State Government in this regard, and accordingly we direct the State Government to consider and decide the proposal dated 17/10/2024

expeditiously, with further direction to consider and make the promotions to the post of Tehsildar also expeditiously.

39. At this point it would be relevant to quote the rendition of Hon'ble Supreme Court in the case of **Union of India Vs. Manpreet Singh, (2022) 6 SCC 105** where it has been held that employee only has the right to be considered for promotion but there is no right to be promoted, if conditions are satisfied. The relevant portion of the said judgement is quoted as under:-

"18. A mere existence of vacancy per se will not create a right in favour of an employee for retrospective promotion when the vacancies in the promotional post are specifically prescribed under the rules, which also mandate the clearance through a selection process. It is also to be borne in mind that when we deal with a case of promotion, there can never be a parity between two separate sets of rules. In other words, a right to promotion and subsequent benefits and seniority would arise only with respect to the rules governing the said promotion, and not a different set of rules which might apply to a promoted post facilitating further promotion which is governed by a different set of rules.

19. In the present case, the authority acting within the rules has rightly granted promotion after clearance of DPC on 17-4-2012 with effect from 1-7-2011, when the actual vacancies arose, which in any case is a benefit granted to the respondent in Civil Appeal No. 518 of 2017. In our view, this exercise of power by the authority of granting retrospective promotion with effect from the date on which actual vacancies arose is based on objective considerations and a valid classification.

20. This Court in Union of India v. K.K. Vadera [Union of India v. K.K. Vadera, 1989 Supp (2) SCC 625 : 1990 SCC (L&S) 127] has clearly laid down that the promotion to a post should only be granted from the date of promotion and not from the date on which vacancy has arisen, and has observed that : (SCC p. 627, para 5)

"5. ... We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post after a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal."

21. Similarly, this Court in Ganga Vishan Gujrati v. State of Rajasthan [Ganga Vishan Gujrati v. State of Rajasthan, (2019) 16 SCC 28 : (2021) 1 SCC (L&S) 403] has held that : (SCC pp. 52-53, para 45)

45. A consistent line of precedent of this Court follows the principle that retrospective seniority cannot be granted to an employee from a date when the employee was not borne on a cadre. Seniority amongst members of the same grade has to be counted from the date of initial entry into the grade. This principle

emerges from the decision of the Constitution Bench of this Court in **Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra** [Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra, (1990) 2 SCC 715 : 1990 SCC (L&S) 339] . The principle was reiterated by this Court in **State of Bihar v. Akhouri Sachindra Nath** [State of Bihar v. Akhouri Sachindra Nath, 1991 Supp (1) SCC 334 : 1991 SCC (L&S) 1070] and **State of Uttaranchal v. Dinesh Kumar Sharma** [State of Uttaranchal v. Dinesh Kumar Sharma, (2007) 1 SCC 683 : (2007) 1 SCC (L&S) 594] . In **Pawan Pratap Singh v. Reevan Singh** [Pawan Pratap Singh v. Reevan Singh, (2011) 3 SCC 267 : (2011) 1 SCC (L&S) 481] , this Court revisited the precedents on the subject and observed : (Pawan Pratap Singh case [Lift Irrigation Corpn. Ltd. v. Pravat Kiran Mohanty, (1991) 2 SCC 295 : 1991 SCC (L&S) 472] , SCC pp. 281-82, para 45)

‘45. ... (i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.’

This view has been re-affirmed by a Bench of three Judges of this Court in **P. Sudhakar Rao v. U. Govinda Rao** [P. Sudhakar Rao v. U. Govinda Rao, (2013) 8 SCC 693 : (2014) 1 SCC (L&S) 690].”

40. Regarding the prayer made in Writ A No. 9913 of 2023 for promoting the petitioners from 16/08/2023, which is the date from which the juniors to the petitioner of 2016 batch were considered and promoted, we direct the respondents to consider the grievance of the petitioners in this regard during the consideration of their promotion to the post of Tehsildar, and pass appropriate orders in accordance with law.

41. The interim order of this Court dated 23/01/2024 is hereby vacated, and the writ A No.9913 of 2023 is accordingly **disposed of** with the directions passed hereinabove, while writ A No.4808 of 2024 is **dismissed**.

42. Cost made easy.

(2025) 1 ILRA 465
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2025

BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-A No. 11282 of 2018

Ramesh Chandra Bari & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:

Aparna Burman, Birendra Kumar Mishra,
 Diwan Saifullah Khan

Counsel for the Respondents:

Dileep Kumar Pandey, Rajnish Kumar Rai,
 Vivek Kumar Rai

A. Labour Law – Regular appointment - Once the objections regarding the eligibility of the writ petitioners stands decided by a judicial forum and the same has attained finality by dismissal of the writ petition preferred by the respondent-railways then the same cannot be used as a tool to deny the benefits to the writ petitioners.

The respondents are again raising same objections questioning the eligibility of writ petitioners while alleging that the writ petitioners do not possess 120 days of minimum required engagement, there had been no ex post facto approval of the General Manager, they are overage and the judgment in the case of *Uma Devi (infra)* would come in their way. Apparently, barring the said objections no new objections have been raised which goes into the root of the matter regarding the eligibility of the writ petitioners and the position being so the Tribunal was not justified in negating the claim of the writ petitioners. (Para 23, 25)

It is not open for the respondent-railways to question the suitability of the writ

petitioners on the grounds which had already been adjudicated. Might be, there appears to be certain relevant grounds regarding the objection to the suitability of a candidate which in the facts and circumstances of the case may occur due to various factors, however, in the present case, the same old objections are being raised questioning the eligibility of the writ petitioners. (Para 28)

In the present case there happens to be a positive finding in favour of the writ petitioners holding them to be eligible and the only task which was entrusted to the respondent-railways by virtue of the order of the Tribunal in the earlier spell of litigation was to declare their result, in case, they were successful, but by no stretch of imagination it can be said to have granted any leverage to the respondent-railways to reopen the issues which had already been decided. (Para 30)

The original applicant, has expired and rest of the writ petitioners as on date are beyond the prescribed age for being accorded temporary/regular status. Since the writ petitioners are out of employment for a long time, for several decades, thus, it would not be appropriate to issue direction for according regular status to them. The writ petitioners had been agitating their claims before the judicial forums and they possess positive order declaring them to be eligible coupled with an order for declaration of results and the fact that the objections raised by the respondent-railways regarding the entitlement of the writ petitioners are the same which stood adjudicated by the Court of law and there is no new and valid objections available on record so as to deny benefits to the writ petitioners, thus, as per the overall facts and circumstances of the case appropriate compensation in lieu of reinstatement is awarded. (Para 32)

The judgment and order dated 16.02.2018 passed in OA No. 330/00370 of 2015 is set aside. The relief for issuance of the appointment order to the writ petitioners against the regular vacancies in pursuance of the notification dated 17.12.2005 and the screening test held in the year 2007 is declined. (Para 33)

Writ petition partly allowed. (E-4)

Precedent followed:

1. Narpat Singh Vs Rajasthan Financial Corp., 2007 INSC 969; AIR 2008 SC 77 (Para 7)

2. U.O.I. Vs Shri Praveen Kumar & ors., Civil Misc. Writ Petition No. 22808 of 2003, decided on 22.05.2003 (Para 26)

Precedent distinguished:

U.O.I. & ors. Vs. Ashok Kumar & ors., Writ-A No. 1006 of 2016, decided on 04.02.2016

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Impugned in the present proceedings at the instance of Ramesh Chandra Bari (since deceased) through its legal heirs and 13 others (in short 'writ petitioners') is an order dated 16.02.2018 passed in Original Application No. 330/00370 of 2015 (Raj Bahadur Singh and 24 others vs. Union of India & 4 others) passed by Central Administrative Tribunal Allahabad Bench, Allahabad (in short 'Tribunal') whereby the original application preferred by the original applicants/writ petitioners questioning the Screening Test Result dated 18.04.2013 declaring them unsuccessful and for a direction to consider the case for regular appointment was rejected.

2. The facts of the case as discernible from the records are that the writ petitioners claim to have worked in broken spells as casual labour in Railways while completing more than 120 days of engagement making them eligible for assignment of regular status. According to the writ petitioners, the respondent-railways published a notification in widely circulated newspaper Amar Ujala on 17.12.2005 requiring the ex-casual labours to appear for screening for according regular appointments against clear

vacancies. As per the notification dated 17.12.2005 those ex-casual labours who were engaged in the Railways for the period of 120 days and at the time of their induction they were not more than 28 years of age were to be considered for regular appointment. The notification further provided that there was a relaxation in the upper age limit for General Category 40 years, OBC 43 years and SC/ST 45 years, the cut off date for determining eligibility was 01.01.2006 and the last date of submission of the application forms was 15.01.2006. The writ petitioners who claimed to be the ex-casual labours who were assigned works in different spells participated in the screening test which was conducted from 10.10.2007 to 16.11.2007 along with others totaling to 359 candidates. The results of the screening test was declared on 10.12.2007 wherein only one candidate namely Avinishi Prasad was declared successful. The writ petitioners being aggrieved against non declaration of their results preferred representations/request letters but the same remained undecided compelling them to prefer OA No. 738 of 2009 and OA No. 741 of 2009 seeking relief for declaration of the result of the screening test and for according regular status of the services, in case, they were successful.

3. The aforesaid original applications came to be disposed of granting liberty to the writ petitioners to prefer representation for redressal of the grievances. Subsequently on 10.09.2009 and 07.09.2009 the representations preferred by the writ petitioners came to be rejected.

4. Questioning the same, the writ petitioners preferred OA No. 1568 of 2009 (Ramesh Chandra Bari & 18 others Vs. Union of India) before the Tribunal which

was connected with OA No. 1233 of 2009 (Raj Bahadur Singh and 13 others vs. Union of India and another) which after exchange of the affidavits came to be decided on 12.05.2011, relevant extract thereof is being quoted hereinunder:-

6. It is an admitted fact that Railway Board issued several notification for absorption/regularization of the ex-casual labour; annexure-A-2 is the extract of relevant rules from R.E.M. Vol.II this is the copy of the notification/circular letters issued by the Railway Board for regularization/absorption of the ex-casual labour, it has been published in rules 2001-2007 of chapter XX of R.E.M. Vol.II. It is also material that the respondents have not disputed issuing of these circular letters by the Railway Board in para No.3 (iv) of the Counter Affidavit it has been admitted by the respondents that there is rule regarding absorption/re-engagement/regularization of ex-casual labour available in I.R.E.M. Vol.-II (1990 Edition) in para 2001 to 2007. Hence admittedly there was a scheme framed by the Railway Board in pursuance of the direction of the Hon'ble Apex Court in the case of Indra Pal Yadav that the ex-casual labour should be regularized providedly they are fulfilling the conditions. From perusal of the order passed by the respondents on the representation of the applicants and from perusal of the Counter Reply it is evident that the respondents have not denied from the fact that there is no scheme or policy issued by the Railway Board for regularization/absorption of the ex-casual labour, who are fulfilling the requisite qualifications. But the representation of the applicants' was rejected merely on the basis of the judgment of the Hon'ble Apex Court delivered in the case of Uma Devi. It has also been admitted by the respondents

that vide notification annexure-A-4 applications were invited by the respondent No.2 from the ex-casual labour for regularization/absorption providedly they are fulfilling the requisite qualifications. There is also extract of Newspaper (Amar Ujala) dated 17th December, 2005 inviting applications from the ex-casual labour for regularization/absorption those who had put in 120 days as ex-casual labour in broken spells and were at least 28 years of age at the time of initial appointment and certain relaxation of age shall also be admissible to the ex-casual labour. The maximum age of the ex-casual labour 40 years (General Category), 43years (O.B.C.) and 45years (S.C./S.T.). The last date of submission of application on the prescribed format was 15th January, 2006. It has not been alleged by the respondents and also it has been alleged in the order passed by the respondent No.2 that these applicants were eligible to participate in the screening test in pursuance of the notification issued in the Newspaper (Amar Ujala) and pasted on the notice board of the office. It has also not been alleged that these applicants are above the maximum age limit. But the representation of the applicants' was rejected merely on the ground that; a judgment was delivered by Hon'ble Apex Court in the case of Uma Devi and in view of the judgment of Hon'ble Apex Court applicants can not claim regularization/absorption as a matter of right, efforts have also been made by the respondents in order to allege that applicants' appointment was not in accordance with law and their appointments were irregular and they cannot be regularized and accordingly representation was rejected and the applicants were also not found fit for absorption. It is not a case of the respondents that the applicants were not

fulfilling the requisite qualification provided in the circular letters of the Railway Board for regularization of the ex-casual labour and also in the notification published and pasted on 17th December, 2005/21st December, 2005. It is also an admitted fact that the applicants participated in the screening test in the month of the October, 2007 it means that the applicants were fulfilling all the requisite qualifications as prescribed in the Railway Board's scheme and also notification issued by the respondent No. 2.

7. The perusal of the Counter Reply shows that the stand of the respondent is not clear and respondents are blowing hot and cold in the same breath that they admitted that Railway Board issued circular letters for regularization/absorption of the ex-casual labours. On different dates respondents have admitted that the applications were invited from the ex-casual labour by D.R.M., Allahabad. And the applicants' submitted application well within time and they faced the screening test. But at the same time the respondents alleged that the appointment of the applicants was irregular and hence they were not found fit for regularization, but how the appointment of the applicants as casual labour was irregular has not been shown. Because a judgment has been delivered by Hon'ble Apex Court prohibiting the service of the ad-hoc employees or the employees who have been appointed irregularly without sanction of the competent authority can not be regularized. But the respondents have not alleged that there was no policy of the Railway Board for regularization of the ex-casual labour who are fulfilling the requisite qualification. And the applications were invited from the ex-casual labour by the respondent No.2 but at the same rejected the

application/representation of the applicants on the law delivered by the Hon'ble Apex Court in the case of Uma Devi. Although, there is no case of the respondents that these applicants were overage or they were not fulfilling the requisite qualification on the date of the submission of application form in pursuance of the notification, hence I am of the opinion that the eligibility of the applicants was not disputed by the respondents.....

10. Admittedly, there was a policy and scheme of the Railway. It was framed in pursuance of the direction of the Hon'ble Apex Court in the case of Indra Pal Yadav and subsequently reiterated in different other judgments. Under these circumstances in my opinion the law laid down by the Hon'ble Apex Court in the case of Uma Devi is not applicable to ex-casual labour borne on casual live register, because for regularization/absorption of these casual labours there is a policy of the Railway Board and that applicants also submitted applications fulfilling requisite qualification on the date of submission of application form in pursuance of the notification issued by Respondent No.2. Only result is to be declared of the screening test and when the applicants were permitted to participate in the screening test hence presumption can be drawn that these applicants were fulfilling all the requisite qualification and entitled to be participated in the screening test, then result must be declared of the screening test and the respondents cannot be permitted to reject the application of the applicants for absorption/regularization submitted in pursuance of the notification issued by Respondent No.2 and the respondent No.2 also alleged that the applications are being invited in pursuance of the Railway Board's policy.

12. Hence perusal of the order shows that the representation of the applicant was rejected merely on the ground of law laid down by the Hon'ble Supreme Court in the case of Uma Devi and also in view of the judgment laid down by the Hon'ble High Court of Allahabad. But in the matter of regularization/absorption of the ex-casual labour who submitted their application in pursuance of the notification issued by Respondent No.2 in pursuance of the policy of the Railway Board their representation cannot be rejected merely on the ground of law and in my opinion result of the screening test must be declared.

13. For the reasons mentioned above I am of the opinion that the representation of the applicants was rejected only on the basis of the judgment of Hon'ble High and Hon'ble Apex Court in violation of the policy/scheme of the Railway Board for regularization of the ex-casual labour born on the live casual labour register. Because the representation was not rejected on the ground that the applicants were not fit or not eligible as per policy of the Railway Board to participate in the screening test rather the applicants were permitted to participate in the screening test and this fact itself shows that the applicants were found eligible to participate in the screening test hence the respondent No.2 had illegally rejected the representation of the applicant on the ground not available to him. The regularization/absorption had not been claimed as matter of right it is being claimed in pursuance of the policy/scheme of the Railway Board. It is immaterial that the applicants were not engaged as casual labour after conducting the proper selection. Because the Railway Board framed policy in pursuance of the direction of the Hon'ble Apex Court in the case of

Indra Pal Yadav for regularization of the ex-casual labours and the policy updated from time to time and the applications were invited from the ex-casual labours for screening test. O.A. deserves to be allowed and the order deserves to be quashed.

14. O.As. are allowed, order dated 17th September, 2009 (in O.A. No. 1568 of 2009) and impugned order dated 10th September, 2009 (in O.A. No. 1233 of 2009) passed by the respondent No.2 on the representation of the applicants Annexure-A-1 are quashed. The respondent is further directed to declare the result of the screening test held in the month of October, 2007 in pursuance of the notification dated 21 December, 2005 Annexure-A-5, and in case the applicants were found successful in the screening test then they must be regularized as per their service record and according to rules. The respondents are directed to declare the result of the screening test within a period of two months from the date when the copy of this order is produced before them, and within that period the applicants who are found successful they shall also be regularized and engaged. The applicants shall Produce the copy of this order before the respondent No.2 forthwith. No order as to costs."

5. It is also the case of the writ petitioners that the order of the Tribunal passed in OA Nos. 1568 of 2009 and 1233 of 2009 was not implemented by the respondent-Railways which constrained the writ petitioners to file execution application No. 12 of 2011 before the Tribunal. The respondents-railways being aggrieved against the judgment and order of the Tribunal dated 12.05.2011 passed in OA Nos. 1568 of 2009 and 1233 of 2009 approached the Hon'ble High Court by way of filing **Writ-A No. 49441 of 2011 (Union of India through G.M. N.C.R. &**

others Vs. Raj Bahadur Singh & others) wherein on 30.08.2011 the following orders were passed.-

“1. The respondents had worked with the Railways in the past. Subsequently they were called for the screening test to be held on 12.10.2010. The screening test was held but the result was not declared.

2. The respondents filed OA No. 741 of 2009 before the Central Administrative Tribunal, Allahabad. It was disposed of on 7.8.2009, granting liberty to them to file a representation. The respondents filed representation. It was dismissed on 10.9.2009. The respondents filed another OA No. 1568 of 2009. It was allowed on 12.5.2011. Hence the present writ petition.

3. We have heard the counsel for the parties.

4. It is not disputed that the screening test was held and it was not cancelled by the petitioner. The Tribunal has merely directed to declare the result and in case the respondents are successful in the test they may be given the benefit according to the rules. There is no illegality in the judgment.

5. The writ petition has no merit. It is dismissed.”

6. Another writ petition was also preferred by the respondent-railways, **Writ-A No. 48102 of 2011 (Union of India through G.M. N.C.R. & another Vs. Ramesh Chandra Bari)** in which on 24.08.2012, the following order was passed.-

“Sri A.K.Gaur, learned counsel for the petitioner submits that this petition has become infructuous and the same be dismissed as not pressed.

This petition is dismissed as not pressed.”

7. In the execution application No. 12 of 2011, series of orders were passed one of which was on 05.10.2012 for attaching the bank account for the purpose of execution of the order of the Tribunal passed on original side. The said order was subject to challenge at the instance of the respondent-railways while filing **Writ-A No. 6879 of 2013 (Union of India through G.M. N.C.R. and another Vs. Ramesh Chandra Bari & Others)** in which on 12.02.2013 the following orders were passed.-

“Heard learned counsel for the petitioners and have perused the record.

This case has a chequered history. In the year 2009, Original Applications No. 1233 and 1568 were filed by the respondents herein which were allowed on 12.5.2011 with the following directions:-

" OAs are allowed. Order dated 17th September 2009 (in OA No. 1568 of 2009) and impugned order dated 10th September 2009 (in OA No. 1233 of 2009) passed by the respondent no. 2 on the representation of the applicants Annexure A-1 are quashed. The respondent no.1 is further directed to declare the result of the screening test held in the month of October 2007 in pursuance of the notification dated 21st December 2005 Annexure A-5 and in case the applicants were found successful in the screening test then they must be regularized as per their service record and according to Rules. The respondents are directed to declare the result of the screening test within a period of two months from the date when the copy of this order is produced before them, and within that period the applicants who are found

successful they shall also be regularized and engaged. The applicants shall produce the copy of this order before the respondent No.23 forthwith. No order as to costs."

Challenging the said order the petitioner-Union of India filed Civil Misc. Writ Petition No. 49441 of 2011 which was dismissed by order dated 24.8.2012 at the admission stage itself with the following directions:-

"It is not disputed that the screening test was held and it was not cancelled by the petitioner. The Tribunal has merely directed to declare the result and in case the respondents are successful in the test they may be given the benefit according to the rules. There is no illegality in the judgment."

Once the petition was dismissed, it was obligatory on the part of the petitioners-herein to comply with the directions dated 12.5.2011 issued by the Tribunal. When the said directions were not complied with, the respondents filed Execution application No. 12 of 2011 which was decided on 5.10.2012. The petitioner had taken a stand in the execution case that on 24.2.2012 two persons were declared successful and by implication the others were unsuccessful. Sri A.K.Gaur, learned counsel for the petitioners, states that by declaration of the result of successful candidates the order dated 12.5.2011 had been complied with. Such submission of the learned counsel for the petitioners has been taken note of in the order dated 5.10.2012 passed in the execution case whereby, after considering all the pleas, the Tribunal observed that "the order dated 12.5.2011 has not yet been fully complied with in letter and spirit. The intention of the execution application is to concretize the relief that has been bestowed on the applicants by virtue of order dated 27.10.2007. Therefore, one last opportunity

is given to the respondents to disclose the result as are available with them consequent upon the screening held on 27.10.2007 with regard to all the candidates of O.A. Nos. 1568/09 and 1233/09 within a period of three months and thereafter taken action for their regularization in accordance with relevant Rules". Sri Gaur has specifically stated that the said order dated 5.10.2012 is not being challenged even though such a prayer has been made. What is under challenge in the present petition is the subsequent order dated 30.10.2012 passed by the Tribunal on a correction application filed by the respondents. By the said order the Tribunal has fixed a date for filing a compliance report. What is contended by the learned counsel for the petitioner is that once execution application had been disposed of, the Tribunal had become functus officio and could not have fixed a date for filing of the compliance report. In support of his submission learned counsel for the petitioner relies on the judgment of the Apex Court in the case of Narpat Singh vs. Rajasthan Financial Corporation AIR 2008 SC 77. We have gone through the aforesaid order of the Apex Court and are of the opinion that the facts of the said case are not applicable to the present case as in the present case all what has been directed by the Tribunal is that the compliance of their order be made within three months as had already directed by the order dated 5.10.2012. No further directions have been issued and only a report of compliance has been called for. Even otherwise, we would not be inclined to exercise our extra ordinary discretionary jurisdiction in favour of a petitioner who takes up a technical ground for not complying with the directions issued by the Tribunal and comes up with a plea for not complying with the directions on the ground that the

Tribunal did not have jurisdiction to pass any further order after 5.10.2012 even though the said order may be only for reporting compliance of the parent order i.e. 5.10.2012.

In such view of the matter, we dismiss this petition and direct the petitioners to declare the result forthwith. In case the compliance of the order dated 5.10.2012 is made within a period of two months from today, the same shall be treated as sufficient compliance of the said order."

8. In the execution application application No. 12 of 2011, the Tribunal after perusing the record so produced by the respondent-railways proceeded to pass an order dated 25.07.2013 which reads as under.-

"Shri T.S. Pandey, learned counsel for the applicant. Shri K.P. Singh, along with Shri B. Tiwari, learned counsel for the respondents.

As per the court's direction Shri Jata Shankar Tripathi, was present in court with original records.

On perusal of the original record, it is found that applicants herein in this original application, almost everybody is found suitable in the screening except two or three persons who were declared unsuitable.

The respondents are directed to file an affidavit before this court clarifying how the applicants herein have become ineligible after being found suitable, what was the basis of their being unsuitable after being found suitable in comparison of who are found eligible.

List on 29.08.2013. The respondents are directed to place the photocopy of the entire screening report before this court.

The counsel for the applicant Mr. T.S. Pandey objected about the verification of number of days. The applicants are directed to make photocopy of their Identity Card through which it can be proved that how long they are working.

Copy of the order be given Dasti to counsel for the respondents."

9. The respondent-railways filed their objection in the proceedings in execution application No. 12 of 2011 while coming up with the stand that the order passed in OA Nos. 1568 of 2009 and 1233 of 2009 stands complied with, since, in the screening test result declared on 18.04.2013 the writ petitioners were found to be unsuitable. Taking note of the said fact, the tribunal disposed of the execution application No. 12 of 2011 on 03.09.2014 observing that since a fresh cause of action has arisen so it is left open for the writ petitioners to take recourse to the law if so advised. The order dated 03.09.2014 passed in execution application No. 12 of 2011 is being quoted hereinunder.-

"This is an application made by the applicants who happened to be a section not only the most downtrodden members of our teeming society but also among those who have been consistently given raw deals by the powerful on the higher ladder despite the Railways formulating a benevolent piece of legislation in order to provide some succor to these persons who have to put in hardest labour in order to feed the hungry mouth of the members of their family.

2. On 12.5.2011 a detailed order was passed by this Tribunal allowing both the OAs wherein the applicants prayed before this Tribunal a direction towards the respondents to declare the result of the screening test held in the month of October,

2007 in pursuance of the notification dated 2.12.2005. They also claimed for giving a direction to the respondents to provide duty to the applicants in case they are found successful in the aforesaid screening test and further consider them for regularization of their services as per the existing rules.

The OAs were allowed with the following directions:-

"14. OAs are allowed, order dated 17th September 2009 (in OA No.1568 of 2009) and impugned order dated 10th September, 2009 (in OA No.1233 of 2009) passed by the respondent No.2 on the representation of the applicant Annexure A-1 are quashed. The respondent is further directed to declare the result of the screening test held in the month of October, 2007 in pursuance of the notification dated 21 December, 2005 Annexure A-5, and in case the applicants were found successful in the screening test then they must be regularized as per their service record and according to rules. The respondents are directed to declare the result of the screening test within a period of two months from the date when the copy of this order is produced before them, and within that period the applicants who are found successful they shall also be regularized and engaged. The applicants shall produce the copy of this order before the respondent no. 2 forthwith. No order as to costs."

3. I would now like to refer to the salient features of the judgment rendered by this Tribunal which in my considered opinion go to the root of the matter. The same are therefore set out here under:-

a) That this Tribunal has in certain terms held that the ex-casual labourer need not have been engaged or deployed after specific approval by the General Manager.

(b) That this Tribunal has specifically recorded a finding relating to non applicability of the Hon'ble Apex Court's ruling in the case of Uma Devi to the facts of the present case in the light of the fact that the applicants once claiming reliefs by virtue of a specific scheme framed by the Railway Board to provide succor to them in terms of regularization and consequential benefits there under.

c) That in the operative part of the order there is a categorical direction to the respondents (Railways) to regularize the applicants herein subject only to one condition i.e. their being found successful in the screening test and no more.

d) That in any case since all that the applicants are seeking is to have their decades old grievances ameliorated based on a development legislation passed by the Railway Board. In the face of repeated rulings of the Hon'ble Apex Court which say that a benevolent legislation should always be interpreted and construed liberally.

(e) That the Full Bench of this Tribunal in the case of Mahabir and Others Versus U.O.I. and Others has categorically rejected the contention of the Railways that the Casual Labourer engaged without the approval of the General Manager cannot claim to have their names kept in the casual Labour Register.

4. In the light of the aforesaid position in fact and law, the conclusion as emerges is that these labourers are entitled to regularization merely by virtue of their being found suitable in the screening, is inescapable.

5. Against this order the respondents filed two writ petitions before the Hon'ble High Court by Writ petition No.48102/2011 (U.O.I. and another Versus Ramesh Chandra Bari & others) and other W.P. No. 49441 of 2011 (U.O.I. and

another *Versus Raj Bahadur Singh and others*). The W.P. No. 49441/2011 was dismissed by the Hon'ble High Court. The respondents proposed to file SLP before the Hon'ble Apex Court but never filed it.

6. The Hon'ble High Court while dismissing the W.P. No. 49441/2011 states as under:-

"4. It is not disputed that the screening test was held and it was not cancelled by the petitioner. The Tribunal has merely directed to declare the result and in case the respondents are successful in the test they may be given the benefit according to the rules. There is no illegality in the judgment."

7. The Writ Petition No.48102/2011 was also dismissed on 24.8.2012 which was filed before the Hon'ble High Court. When the Writ petition No.49441/2011 was dismissed by the applicants filed this execution petition which was disposed of on 5.10.2012 with the below direction:-

"20. Therefore, I find that the order dated 12.5.2011 has not yet been fully complied with in letter and spirit. The intention of the execution application is to concretize the relief that has been bestowed on the applicants by virtue of order dated 27.10.2007. Therefore, one last opportunity is given to the respondents to disclose the result as are available with them consequent upon the screening held on 27.10.2007 with regard to all the candidates of O.A. Nos.1568/2009 and 1233/2009 within a period of three months and thereafter taken action for their regularization in accordance with relevant Rules.

21. The Execution Application is disposed of with the above observations/directions. No Costs."

8. The respondents again filed another writ petition No.6879/2013 before

the Hon'ble High Court of Allahabad. The Hon'ble High Court on 12.02.2013 dismissed the writ petition with the observation which is as under:-

"In such view of the matter, we dismiss this petition and direct the petitioners to declare the result forthwith. In case the compliance of the order dated 5.10.2012 is made within a period of two months from today, the same shall be treated as sufficient compliance of the said order."

9. The respondents have now declared the result and the result was produced before this Tribunal as per the order of this Court. The counsel for the appellants raised various issues about the screening and also about the result. He has tried to point out irregularities and contradiction of multiple affidavits filed on behalf of the respondents. But the operative portion of the order was only to declare the result of the screening test. I have perused the documents produced before me.

10. But as the result has been declared and the regularization of service is a condition precedent if they (applicants) are found successful hence in an execution application the court cannot go beyond the original order passed. The Hon'ble Apex Court has held in various judgments, if as per direction of the Tribunal an order has been passed/complied by the respondents then it cannot be looked into that it is not in conformity with a direction issued by the Tribunal, it gives rise to a fresh cause of action to the applicant. More so our powers are, however, also fettered by the Hon'ble High Court in its order dated 13.2.2013 by recording the last few lines as follows:-

"..... In case the compliance of the order dated 5.10.2012 is made within a period of two months from today, the

same shall be treated as sufficient compliance of the said order."

11. *The order/result passed/declared by the respondents unfortunately does not provide any succor to these unfortunate litigants. An erroneous order passed bona fide cannot be corrected either in execution proceedings or in contempt proceedings. It is, however, given rise to a fresh cause of action and the applicants may seek recourse of law if so advised. Accordingly, the execution application is disposed of. No-Costs."*

10. The writ petitioners thereafter preferred OA No. 330/00370 of 2015 seeking following reliefs.-

"i. to quash the screening result declared on 18.04.2013 [Ann- A- 2] in view of the submission and grounds taken above at least pertaining to the applicants of the present OA.

ii. to direct the respondents to consider the applicants for regular appointments in view of the original report/record of the screening which was produced before the Hon'ble Tribunal on 25.07.2013 by Sri Jata Shankar Tripathi and after perusal of the same Hon'ble Tribunal found that almost every body has been found suitable except two of three persons.

iii. to direct the respondents to issue appointment orders to the applicants against regular vacancies immediately in pursuant to the aforesaid and to allow them duty without any further delay.

Any other order or direction to which this Court may deem fit and proper in the facts and circumstances of the present case may also be passed."

11. The original application was contested by the respondent-railways by

filing their response to which rejoinder affidavit was also filed. The original application came up for consideration before the Tribunal on 09.02.2018 on which date the Tribunal reserved the judgment and ultimately by virtue of the judgment and order dated 16.02.2018 the original application was dismissed.

12. Questioning the said order, the writ petitioners have filed the present writ petition seeking following reliefs.-

"(a) Issue a writ, order or direction, in the nature of Certiorari to quash the impugned order dated 16.02.2018, passed by Central Administrative Tribunal Allahabad in original application no. 330/0370 of 2015, by means of which the original application of the petitioners has been dismissed.

(b) Issue a writ, order or direction in the nature of mandamus commanding the respondents to issue appointment order to the petitioners against regular vacancies immediately in pursuance of advertisement dated 17.12.2005 and the screening test held pursuant thereto i.e. October, 2007.

(c) Issue any other writ, order or direction which this Hon'ble court may deem fit and proper in the present fact and circumstances of the case.

(d) Award cost of the petition."

13. However, during the pendency of the present writ petition, the writ petitioner No. 1, Ramesh Chandra Bari expired, a substitution application came to be filed which was allowed and the legal heirs of the deceased were put on record. An amendment application also came to be filed by the writ petitioners seeking amendments in the facts, grounds and the prayer which also came to be allowed. The

amendment sought in the relief clause is being quoted hereinunder.-

“(e) Order direction to summon the original records of Screening Test Result of total 359 Candidates-Applicants, which has been produced by Sri Jata Shanker Tripathi, the then Personal Inspector (S & W1-II/Policy) [Staff Welfare Inspector], before Hon’ble Court of Hon’ble Ms. Jasmine Ahmed (Member (J)), Central Administrative Tribunal, Bench at Allahabad, on dated 25.07.2013, [In Execution Application No. 12 of 2011, filed by the applicants-Petitioners in O.A. No. 1568 of 2009, with O.A. No. 1233 of 2009], in view of learned Tribunals direction/order dated 10.07.2013, in Execution Case No. 12 of 2011, as mentioned above.”

“(f) Direct the respondents, to pay compensation to poor applicants-petitioners, for their redressal and support for minising their financial stringencies, mercifully, in the light several judgments of Hon’ble Apex Court, to meet the ends of justice.”

14. The matter was heard at length on several dates and on 13.08.2024, the respondents were required to prepare a tabular chart disclosing the reasons for unsuitability of the writ petitioners as indicated in the schedule appended to the writ petition. Pursuant to the directions of the Writ Court, the respondents have filed a tabular chart.

15. A joint statement has been made by the counsel appearing for the rival parties that the pleadings are complete and they do not propose 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.

16. Ms. Aparna Burman, learned counsel for the writ petitioners 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 once in the previous spell of litigation in OA Nos. 1568 of 2009 and 1233 of 2009 decided on 12.05.2011, the claim of the writ petitioners stood endorsed with a specific finding that the writ petitioners were fully eligible and qualified to participate in the screening as they had to their credit more than 120 days of working as casual labour and at that time of their induction as casual labours they were within 28 years of age and then there happens to be no reason for the respondents to have negated the claim of the writ petitioners while holding that the writ petitioners were not eligible or qualified as there was no ex facto approval regarding their engagement.

17. Submission is that once a Coordinate Bench of the Tribunal in an earlier spell of litigation has accorded relief to the writ petitioners and a clear cut categorical finding has been recorded in favour of the writ petitioners which on challenge before the High Court in **Writ-A No. 49441 of 2011** and **Writ-A No. 48102 of 2011** resulted in dismissal at the instance of the respondent-railways then on the same objections so sought to be raised by the respondent-railways, the Tribunal was not justified to negate the claim of the writ petitioners. Argument is that even in execution proceedings in execution

application No. 12 of 2011, orders were passed on 05.10.2012 requiring the respondent-railways to declare the result within the specified period and once the said order on challenge at the instance of the respondent-railways in **Writ A No. 6879 of 2013** came to be affirmed on 12.02.2013 and it was not carried in appeal before any higher judicial forum then what was required to be done was only to declare the result, treating the writ petitioners to be fully qualified and eligible particularly when the eligibility of the writ petitioners stood tested in the earlier spell of litigation in OA Nos. 1568 of 2009 and 1233 of 2009. In a nutshell, the submission is that in a subsequent proceeding it is not open for the respondent to change their stand and to take a U-turn while declaring the writ petitioners to be unsuccessful principally on those grounds which are not available as they stood decided in favour of the writ petitioners. It is, thus, prayed that the order of the Tribunal be set aside and direction be issued to accord reliefs in toto.

18. Countering the submission of the learned counsel for the writ petitioners, Sri Dilip Kumar Pandey, learned counsel who appears for the respondent-railways has submitted that the judgment and order of the Tribunal needs no interference in the present proceedings. According to him, the writ petitioners are not eligible and qualified and they have been rightly held to be unsuitable pursuant to declaration of the result of the screening dated 18.04.2013. Submission is that the only direction contained in the order dated 12.05.2011 passed in OA Nos. 1568 of 2009 and 1233 of 2009 was for declaration of the results and, in case, the writ petitioners were found successful, they shall be engaged and regularized. He submits that once the writ petitioners were found to be unsuccessful

in the screening test result declared on 18.04.2013 then they are not entitled to any relief as it was never the intention of the Tribunal to accord benefit to the writ petitioners despite the fact that they were unsuccessful. Argument is that the writ petitioners are only ex-casual labours who had worked in different spells and some of the writ petitioners' engagement is either below 120 days which is mandatorily required and in other case there has been no ex post facto approval which is required under the provisions contained in Indian Railway Establishment Code. Contention is that the right of the writ petitioners cannot be said to be akin to a regular employee as merely because they had worked for a certain spell as an ex-casual labour would at best, in case, they are suitable, transform their status as temporary employees but in no way they can be said to be entitled to regularization as the same is subject to suitability and also availability of vacancy.

19. Reference has also been made to the counter affidavit as well as the supplementary counter affidavit filed by them showing the fact that the writ petitioners had not completed 120 days of engagement as an ex-casual employee and their engagement had made without ex facto approval and further they are overage and, thus, they cannot be considered for either grant of temporary status or be made regular. Reliance has been placed upon the decision in **Writ- A No. 1006 of 2016 (Union of India & 4 others Vs. Ashok Kumar & 9 others)** decided on 04.02.2016 so as to contend that in view of the decision in **Secretary, State of Karnataka Vs. Uma Devi 2006 (4) SCC 1** as well as the provisions of Para 2511(c) of Chapter 25 (I.R.E.M.) and Rule 102 (13) R-1 casual labours are not to be treated as Railway Servants. Further with regard to the same

notification dated 17.12.2005 similar challenge was raised for grant of temporary status and regularization by similarly situated incumbents which came to be turned down by this Court holding that casual labours do not possess the status akin to regular employee.

20. We have given thoughtful consideration to the submissions advanced across the bar and perused the record carefully.

21. The facts are not in issue. It is not in dispute that the writ petitioners are ex-casual labours who were at certain point of time engaged with the respondent-railways. It is also not in dispute that a notification came to be published on 17.12.2005 requiring the ex-casual labours who had completed 120 days of engagement as casual labours either in one spell or in different spells to appear for screening subject to the eligibility that at the time of their initial induction as casual labour they were not over and above 28 years and with respect to consideration of the upper age limit, the same should not be over 40 years in case of General 43, OBC and 45 SC/ST on the cut off date, 01.01.2006 and the last date of submission of the application form was 15.01.2006. It is also admitted to the parties that the writ petitioners participated in the screening test along with others totalling 359 candidates which was held between 10.10.2007 and 06.11.2007. The result of the screening was declared on 10.12.2007 of only one candidate, Avinishi Prasad, who was declared successful. The OA Nos. 738 of 2009 and 741 of 2009 was preferred by the writ petitioners for declaration of the result and for regularization of the services, in case, they were successful which came to be disposed of requiring the respondent-railways to

decide the representation preferred by the writ petitioners, which came to be rejected on 10.09.2009/17.09.2009. Original application Nos. 1568 of 2009 and 1233 of 2009 were preferred by the writ petitioners along with others questioning the said order which was consolidated and came to be allowed on 12.05.2011. The salient features of the order dated 12.05.2011 passed in OA Nos. 1568 of 2009 and 1233 of 2009 are recapitulated as under:-

“(a) Ex-casual labours need not be engaged or deployed after specific approval by General Manager;

(b) applicants(writ petitioners) have completed 120 days of working;

(c) they are not overage.

(b) non-applicability of the judgment in the case of Uma Devi (supra);

(c) the direction to the respondent-railways to regularize the writ petitioners subject to one condition of their being found successful in the screening test and no more.”

22. The said order came to be challenged by way of writ petitions, **Writ-A No. 49441 of 2011** and **Writ-A No. 48102 of 2011** by the respondent-railways which came to be dismissed on 30.08.2011 and 24.08.2012. In execution application No. 12 of 2011 orders were passed for execution of the orders passed on the original side on 05.10.2012 which came to be challenged by the respondent-railways in **Writ-A No. 6879 of 2013** which resulted in dismissal on 12.02.2013 requiring the respondent-railways to declare the result forthwith. Order dated 25.07.2013 of the Tribunal in execution application No. 12 of 2011 also goes to show that the Tribunal after perusing the record so produced by the respondent-railways came to the conclusion that everybody was found

suitable except two or three candidates who were unsuitable. Thereafter, the respondents filed their response to the execution application coming up with the stand that the writ petitioners were unsuccessful in the screening test result declared on 18.04.2013. The Tribunal vide order dated 03.09.2014 passed in execution application No. 12 of 2011 disposed of the execution application granting liberty to the writ petitioners to approach the Tribunal on original side which emanated in the passing of the impugned order which is subject matter of challenge in the present writ petition.

23. The first and foremost question which arises for determination before us is whether the Tribunal was justified in endorsing the stand of the respondent-railways that the writ petitioners were unsuitable on the face of the fact that there happened to be a positive finding in favour of the writ petitioners in the earlier spell of litigation which remains intact while holding that the writ petitioners are suitable.

24. To test the said issue, what is required to be seen is the stand of the Railways in the earlier spell of litigation in OA Nos. 1568 of 2009 and 1233 of 2009. Pertinently, there were four objections of the respondent-railways firstly, the writ petitioners were the ex-casual labours who had not completed 120 days of working, secondly, they were overage, thirdly, in absence of any ex post facto approval of the General Manager, the engagement of the writ petitioners was illegal and fourthly, the judgment in the case of **Uma Devi (supra)** will come in the way of the writ petitioners for according relief. The Tribunal in its judgment dated 12.05.2011 in OA Nos. 1368 of 2009 and 1233 of 2009

decided the said objections against the respondent-railways while holding that the writ petitioners are eligible as they had to their credit more than 120 days of working as ex-casual labours, they were not overage, there is no requirement of taking ex post facto approval, the judgment in the case of **Uma Devi (supra)** will not come in the way of the writ petitioners and there exists a scheme which accords benefits for screening and regular employment.

25. Interestingly, the said finding of fact though were put to challenge by the respondent-railways before the High Court by way of **Writ- A No. 49441 of 2011** and **Writ-A No. 48102 of 2011** which resulted in dismissal by virtue of order dated 30.08.2011 and 24.08.2012. The position might have been different, in case, there was a direction simpliciter for declaration of the result of the screening test without determination on the merits regarding the entitlement of the writ petitioners, but the position is otherwise as in the present case, the Tribunal has adjudicated upon the eligibility of the writ petitioners and directed for declaration of the result. However, the respondents are again raising the same objections questioning the eligibility of writ petitioners while alleging that the writ petitioners do not possess 120 days of minimum required engagement, there had been no ex post facto approval of the General Manager, they are overage and the judgment in the case of **Uma Devi (supra)** would come in their way. In the opinion of the Court, once the said objections regarding the eligibility of the writ petitioners stands decided by a judicial forum and the same has attained finality by dismissal of the writ petition preferred by the respondent-railways then the same cannot be used as a tool to deny the benefits to the writ petitioners. Apparently,

we find that barring the said objections, no new objections have been raised which goes into the root of the matter regarding the eligibility of the writ petitioners and the position being so the Tribunal was not justified in negating the claim of the writ petitioners.

26. A Division Bench of this Court in **Civil Misc. Writ Petition No. 22808 of 2003 (Union of India vs. Shri Praveen Kumar and others)** decided on 22.05.2003 had the occasion to consider the facts which are similar to of in the present case and it was observed as under:-

*“Thus in view of the above, whatever may be the merits and correctness of the findings of fact recorded by the Tribunal earlier in its judgment and order dated 2.4.2002 it was not open to the petitioner Union of India to reopen the issue sitting as an appellate authority over and above the Tribunal. It had been assigned a limited role of execution/implementation of the order passed by the Tribunal and by no stretch of imagination it could have the competence to sit in appeal against the said judgment, and thus, the order dated 7.5.2002 passed by the petitioner Union of India has rightly been set aside by the judgment and order dated 31.3.2003. We find no force in the submissions made by Shri B.N.Singh placing reliance upon the judgment in **Rajiv Yadav (supra)** as the facts of the said case are quite distinguishable and the ratio of the said judgment has no application in the instant case. Once it is held that one vacancy available for insider candidate in U.P. was meant for the candidate of the general category that could not be filled up by the reserved category candidate. The respondent no. 1 had legitimate expectation for allocation against the said vacancy.*

Thus in view of the above, we are of the considered opinion that the petitioner Union of India while passing the order dated 7.5.2002 had acted without competence/jurisdiction as it had never been assigned the role to function as an appellate authority over the judgment and order of the Tribunal. It has been assigned a limited role of the execution of the judgment and order dated 2.4.2002. The order has rightly been set aside by the Tribunal vide judgment and order dated 31.3.2002. The case does not present any special feature warranting interference by this Court in a limited jurisdiction of judicial review.

The petition is, therefore, dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.”

27. The judgment in the case of **Praveen Kumar (supra)** was subject matter of challenge in **Special Leave to Appeal (Civil) No 3004 of 2004 (Union of India Vs. Praveen Kumar and another)** which came to be dismissed on 29.11.2004.

28. Applying the principles of law as culled out in the above noted decisions in the facts of the case, an irresistible, conclusion stands drawn that it is not open for the respondent-railways to question the suitability of the writ petitioners on the grounds which had already been adjudicated. Might be, there appears to be certain relevant grounds regarding the objection to the suitability of a candidate which in the facts and circumstances of the case may occur due to various factors, however, in the present case we find that the same old objections are being raised questioning the eligibility of the writ petitioners who had already been

adjudicated and laid to rest on a challenge to the higher forum.

29. As regards the judgment of the Coordinate Bench in the case of **Ashok Kumar (supra)** is concerned, there is no quarrel to the proposition that an ex-casual employee/labour has no legal indefeasible right to be accorded temporary status or to be made regular and the same is subject to compliance of the rules so framed therein and also fulfillment of legal requirement as the employer may by rule provide. However, in the present case there lies a slight distinction that in the case in hand, the eligibility of the writ petitioners for screening had been adjudicated by a Court of law holding them to be eligible while negating the objections so raised by the respondent-railways and the only direction was to declare the result of the screening, in case, the writ petitioners are to be successful, but, the respondents have not taken any new objection regarding entitlement other than what was already decided. In **Ashok Kumar (supra)**, the Division Bench was confronted with the situation wherein the casual labours had not put in 120 days of working and further the Division Bench had proceeded to hold that merely on asking an ex-casual labour status cannot be transformed to regular employee of the Railways.

30. Apparently, in the present case there happens to be a positive finding in favour of the writ petitioners holding them to be eligible and the only task which was entrusted to the respondent-railways by virtue of the order of the Tribunal in the earlier spell of litigation was to declare their result, in case, they were successful, but by no stretch of imagination it can be said to have granted any leverage to the

respondent-railways to reopen the issues which had already been decided.

31. Now a question arises as to what relief is to be accorded to the writ petitioners. A counter affidavit has been filed on behalf of the respondent-railways sworn by Divisional Personnel Officer, North Central Railway, Prayagraj Division dated 31.03.2023 in which a chart has been recapitulated showing the age at the time of consideration with relation to the screening as on 01.01.2006. The same for the reference is being quoted hereinunder.-

S r. No.	Na me of can did ate	Scr een ing Sr. No.	C as te	Da te of Bir th	Date of App oint ment	Educ ation al Qual ificat ion	Age at the time of consi derati on i.e. on 01.01 .2006 (YY/ MM/ DD)
1	2	3	4	5	6	7	8
1	Ra me sh Ch and ra Bar i	162	O B C	19. 03. 64	16.0 4.82	12th	41/09 /11
2	Pra kas h Ku ma r	113	O B C	08. 08. 65	10.0 8.86	12th	41/04 /10
3	Vij ai Sin gh	149	O B C	13. 05. 67	08.0 4.86	9th	38/07 /16
4	Up end ra	324	S C	06. 11. 66	09.1 1.85	8th	39/01 /23

	Ku ma r						
5	Ra m Ab hila sh Sin gh	128	O B C	05. 01. 66	24.0 4.84	10th	39/01 /24
6	Ch eta n Raj	15	O B C	05. 02. 64	30.0 6.82	10th	41/10 /25
7	Rai s Ah ma d	165	O B C	08. 07. 64	16.0 4.84	8th	41/05 /22
8	Za hid Ali	52	O B C	06. 07. 68	09.0 7.86	10th	37/04 /24
9	Ra m Go pal	81	O B C	03. 01. 64	16.0 7.86	12th	41/08 /27
1 0	Ra kes h Ku ma r	123	O B C	06. 12. 64	11.0 5.85	12th/ ITI	41/00 /24
1 1	Ani l Ku ma r	41	S C	17. 06. 62	01.0 1.81	8th	43/06 /12
1 2	Sur esh Ch and	70	G e nl .	13. 07. 67	17.0 4.85	10th	38/09 /16
1 3	Ra m Ch and ra	125	O B C	15. 08. 63	29.0 5.84	8th	42/04 /14
1 4	Bh ola Nat h	26	S C	04. 07. 63	27.0 5.93	10th	42/05 /25

32. So far as Ramesh Chandra Bari the original applicant, he has expired and as regards the rest of the writ petitioners

they as on date are beyond the prescribed age for being accorded temporary/regular status. Since the writ petitioners are out of employment for a long time, for several decades, thus, it would not be appropriate for this Court to issue direction for according regular status to them. The Court is also mindful of the fact that the writ petitioners had been agitating their claims before the judicial forums and they possess positive order declaring them to be eligible coupled with an order for declaration of results and bearing in mind the fact that the objections raised by the respondent-railways regarding the entitlement of the writ petitioners are the same which stood adjudicated by the Court of law and there is no new and valid objections available on record so as to deny benefits to the writ petitioners, thus, keeping in mind the overall facts and circumstances of the case it would be appropriate to award compensation in lieu of reinstatement.

33. Accordingly, the writ petition is **partly allowed**. The judgment and order dated 16.02.2018 passed in OA No. 330/00370 of 2015 is set aside. The relief for issuance of the appointment order to the writ petitioners against the regular vacancies in pursuance of the notification dated 17.12.2005 and the screening test held in the year 2007 is declined. A mandamus is issued to the respondent-Railway to pay compensation to each of the writ petitioners/their legal heirs to the tune of Rs. 5 lacs within a period of two months from the date of production of certified copy of the order.

(2025) 1 ILRA 483
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2025

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ- B No. 13084 of 1983
With
Writ-B No. 13085 of 1983

Mst. Purshottami ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:

Sidheshwari Prasad, Haridwar Singh, Ram
Chandra Yadav

Counsel for the Respondents:

S.C., B.K. Tripathi, Rameshwar Prasad
Shukla, S. Rai, Sudhanshu Pratap Singh,
V.K. Singh

Civil Law - U.P. Consolidation of Holdings Act, 1953 — Section 49 — Bar of jurisdiction — Declaratory suit under Section 229-B of U.P.Z.A. & L.R. Act filed by persons declared Sirdar in consolidation proceedings — Board of Revenue set aside concurrent findings of Trial and Appellate Courts — Held, when right of tenure-holder adjudicated under Section 9A(2) during consolidation and recorded in Misilband register, bar under Section 49 does not apply — Board of Revenue erred in reversing findings without framing substantial question of law — Order set aside. (Paras 13, 14, 17, 18, and 20)

HELD:

This Court in the case reported in 2016 (133) RD 800, Adalat Yadav vs. D.M./ D.D.C. & Others has held that if question relating to genuineness of any record has to be decided then its entry in misilband has to be examined..... (Para 13)

Since, the order passed during consolidation operation could not be incorporated in the

revenue record, accordingly, suit under Section 229-B of U.P.Z.A. & L.R. Act was filed on behalf of the petitioners to declare them as Sirdar of the plot in question and trial Court has not decreed the plaintiff's suit only on the basis of order passed by the Consolidation Court rather on the basis of oral and documentary evidence adduced by the plaintiffs as well as defendants. On behalf of the St. Lekhpal concern was examined and on behalf of gaon sabha Pradhan was examined. The entry in C.H. Form 2A, 41 & 45 were taken into consideration by trial Court in holding that plaintiffs are Sirdar of the plot in suit. The finding of fact has also been recorded by trial Court that suit is not barred by Section 49 of U.P.C.H. Act as there was adjudication by consolidation Court in favour of petitioners/ plaintiffs. The first appellate Court has maintained the judgement and decree of the trial Court by dismissing the first appeal filed by the St.. Board of Revenue while allowing the second appeal filed by the St. has set aside the judgement and decree of trial Court as well as appellate Court without reversing the finding of fact recorded by the trial Court in proper manner. It is also material to mention that no substantial question of law / point of determination have been framed by the Board of Revenue while passing the judgment allowing the second appeal setting aside the judgement and decreed passed by the trial Court as well as first appellate Court and dismissing the plaintiff's suit. (Para 14)

On the point of Section 49 of U.P.C.H. Act, Hon'ble Supreme Court in the case reported in 2024 (163) RD 691, Prashant Singh & Others Vs. Meena & ors. has considered the scope of Section 49 of U.P.C.H. Act. In the aforementioned case, Hon'ble Supreme Court has considered the judgement of Karbalai Begum Vs. Mohd. Sayeed (1980) 4 SCC 396 as well as judgment of Sita Ram vs. Chhota Bondey & Others 1991 Supplement (1) 556. (Para 17)

Considering the ratio of law laid down by Hon'ble Supreme Court from the case of Karbalai Begum (supra) up to Prashant Singh (supra), it is very much clear that claim of co-tenancy will not be barred under Section 49 of U.P.C.H. Act but other claim will be barred under Section 49 of U.P.C.H. Act. (Para 18)

The order passed by the Board of Revenue allowing the second appeal and dismissing the plaintiff suit for declaration by passing cryptic judgment cannot be sustained in the eye of law. The manner in which impugned judgment has been passed by the Board of Revenue, can be a judgment of dismissal of second appeal, affirming judgment of courts below but this cannot be a judgment of reversal by which the second appeal has been allowed and the suit under Section 229 B of U.P.Z.A. & L.R. Act has been dismissed in the exercise of second appellate jurisdiction. (Para 20)

Petition allowed. (E-14)

List of Cases cited:

1. Adalat Yadav Vs D.M./D.D.C., 2016 (133) RD 800
2. Prashant Singh Vs Meena, 2024 (163) RD 691
3. Karbalai Begum Vs Mohd. Sayeed, (1980) 4 SCC 396
4. Sharda Devi Vs Board of Revenue, 1985 RD 93

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Rejoinder affidavit filed by learned counsel for the petitioner in Writ-B No.13084 of 1983 as well as Misilband Register placed before the Court by learned counsel for the petitioner are taken on record.

2. Heard Mr. Ram Chandra Yadav, learned counsel for the petitioners, Mr. Abhishek Kumar Srivastava, learned Additional Chief Standing Counsel for the State-respondents and Mr. Rameshwar Prasad Shukla, learned counsel for the respondent-Gaon Sabha.

3. Since common issues are involved in both the petition hence both the writ

petition are heard together and are being decided by a common order.

4. Brief facts of the cases are that the suit under Section 229-B of U.P. Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as "U.P.Z.A. & L.R. Act") was filed by Purshottami as well as Chauthi impleading the State and Gaon Sabha as defendants. The suit filed by Purshottami was registered as Suit No.150/235/75 and the suit filed by Chauthi was registered as Suit No.151/1977 pleading that plaintiffs are Sirdar of the plot in question and they are in possession of the plot in question for last 30 years. They further pleaded that in the proceeding under Section 9 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "U.P.C.H. Act") an order dated 23.2.1967 was passed by the Consolidation Officer declaring the Purshottami and Chauthi as Sirdar of the plot in question but the entries were not corrected accordingly, hence the suit. Written statement was filed by the State as well as Gaon Sabha denying the plaint allegations. Seven issues were framed before the trial Court and parties have adduced oral and documentary evidence in support of their case. Trial Court vide judgement and decree dated 28.1.1978 decreed the aforementioned suit filed by the petitioners (Purshottami and Chauthi). Against the judgement and decree of trial Court dated 28.1.1978, two appeals were filed before the Commissioner by State of U.P. only. The appeal filed by State was registered as Appeal No.669-A-1978 and 668-A-1978. Additional Commissioner, Gorakhpur Division, Gorakhpur clubbed as well as heard the aforementioned appeal together and vide judgement dated 26.10.1979 dismissed the appeal filed by State of U.P. recording finding of fact that

the plea raised by the State is bared by Section 49 of U.P.C.H. Act. Against the judgment and decree of first appellate Court / Additional Commissioner dated 26.10.1979, two second appeals were filed before the Board of Revenue, U.P., Allahabad, which were registered as Appeal Nos.36 & 37 of 1979-1980. The aforementioned appeals were clubbed and heard together by learned Member of Board of Revenue and vide judgment dated 14.9.1983, the aforementioned second appeals were allowed and the judgement and decree passed by trial Court and first appellate Court have been set aside as well as the plaintiff suit were dismissed, hence Writ Petition No.13084 of 1983 & 13085 of 1983 for the following reliefs:

Writ-B No.13084 of 1983

(A) to issue a writ, order or direction in the nature of certiorari calling for the record of the case for the purpose of quashing the impugned order dated September 14, 1983 (Annexure 3) and to quash the same;

(B) to issue a writ, order or direction in the nature of Mandamus commanding the respondents not to give effect to the impugned order during the pendency of the writ petition;

Writ-B No.13085 of 1983

"(A) to issue a writ, order or direction in the nature of certiorari calling for the record of the case for the purpose of quashing the impugned order dated September 14, 1983 (Annexure 3) and to quash the same;

(B) to issue a writ, order or direction in the nature of mandamus commanding the respondents not to give effect to the impugned order during the pendency of the writ petition;"

5. The aforementioned writ petitions were admitted on 25.10.1983 and operation of the order passed by the Board of Revenue was stayed. In pursuance of the aforementioned order dated 25.10.1983, Gaon Sabha has filed counter affidavit but no counter affidavit has been filed on behalf of the State.

6. Learned counsel or the petitioners submitted that during consolidation proceeding under Section 9A (2) of U.P.C.H. Act, an order dated 23.2.1967 was passed for recording the name of petitioners of both the writ petitions as Sirdar over the plot in question but the order was not given effect in the revenue records and village has been de-notified under Section 52 of U.P.C.H. Act. He further submitted that the suit under Section 229-B of U.P.Z.A. & L.R. Act was filed on behalf of the petitioners declaring them as Sirdar of the plot in question considering the orders passed during consolidation proceeding. He further placed the certified copy of the Misilband Register of 1967-1968 in order to demonstrate that the order dated 23.2.1967 was passed by the Consolidation Officer in the proceeding under Section 9-A (2) of U.P.C.H. Act. He further submitted that the trial Court has framed the issues in the suit under Section 229-B of U.P.Z.A. & L.R. Act and afforded full opportunity to State as well as Gaon Sabha to lead evidence in accordance with law. He next submitted that both parties have lead evidence and trial Court has decided the issues relating to Section 49 of U.P.C.H. Act as well as other issues in proper manner declaring the petitioners-plaintiff as Sirdar of the plot in question. He further submitted that the first appeal filed by State of U.P. only was dismissed considering the case of both parties in accordance with law. He further submitted

that the second appeal filed by the State of U.P. has been allowed in arbitrary manner without considering the finding of fact recorded by the trial Court as well as first appellate Court in proper manner. He further submitted that the second appeal has been allowed without framing any subsequent question of law / point of determination and by the impugned order the decree of the trial Court as well as of first appellate Court have been set aside and the suit has been dismissed in arbitrary manner. He further submitted that judgment and decree passed by the Board of Revenue is liable to be set aside and the judgment of the trial Court should be maintained.

7. Mr. Abhishek Kumar Srivastava, learned Additional Chief Standing Counsel for the State-respondents and Mr. Rameshwar Prasad Shukla, learned counsel for the respondent-Gaon Sabha submitted that the copy of the order of Consolidation Officer has not been filed along with writ petition, as such, argument advanced by learned counsel for the petitioners about the order dated 23.2.1967 passed by the Consolidation Officer cannot be entertained. They further submitted that the name of the petitioners were not recorded in C.H. Form 23 and 45, as such, petitioners should initiate proper proceedings during consolidation operation by filing objection / appeal / revision. They further submitted that the second appeal filed by the State before the Board of Revenue has rightly been allowed setting aside the judgement / decree passed by the trial Court and first appellate Court. They further submitted that in view of the finding recorded by the Board of Revenue no interference is required against the order passed by the Board of Revenue in second appeal. They further submitted that the suit

under Section 229-B of U.P.Z.A. & L.R. Act filed by the petitioners is barred in view of the provisions contained under Section 49 of U.P.C.H. Act. He further submitted that the land comes under the category 132 of U.P.Z.A. & L.R. Act, as such, no right will accrue in favour of the petitioner / defendant and the Board of Revenue has rightly allowed the second appeal filed by the State.

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 two suit under Section 229-B of U.P.Z.A. & L.R. Act filed by the petitioners were decreed by the trial Court holding that the petitioners are Sirdar of the plot in question. There is also no dispute about the fact that the first appeal filed by State of U.P. was dismissed by the Additional Commissioner but second appeal filed by the State has been allowed setting aside the judgement/decreed of trial Court as well as first appellate Court and the plaintiff's suit have been dismissed.

10. In order to appreciate the controversy involved in the matter, perusal of the provisions contained under Section 229-B of U.P.Z.A. & L.R. Act & Section 49 of U.P.C.H. Act will be relevant, which are as follows:

Section 229B of U.P. Zamindari Abolition and Land Reforms Act, 1950

229B. Declaratory suit by person claiming to be an asami of a holding or part thereof.

[(1) Any person claiming to be an asami of a holding or any part thereof, whether exclusively or jointly with any other person, may sue the landholder for a

declaration of his rights as asami in such holding or part, as the case may be].

(2) In any suit under sub-section (1) any other person claiming to hold as asami under the land-holder shall be impleaded as defendant.

(3) The provisions of sub-sections (1) and (2) shall mutatis mutandis apply to a suit by a person claiming to be a [bhumidhar] with the amendment that for the word "landholder" the words "the State Government and the [Gaon Sabha] are substituted therein.

Section 49 of the U.P. Consolidation of Holdings Act, 1953

"Section 49. Bar to Civil Court jurisdiction- Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of rights of tenure-holders in respect of land by the lying in an area, for which a notification has been issued [under sub-section (2) or Section 4], or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act:

Provided that nothing in this section shall preclude that Assistant Collector from initiating proceedings under section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 in respect of any land, possession over which has been delivered or deemed to be delivered to a Gaon Sabha under or in accordance with the provisions of this Act."

11. Perusal of the Misilband Register of 1967 & 1968 in respect to Case No.1621/ 162, under Section 9-A (2) of U.P.C.H. Act will also be relevant, which is as under:

"मिसिलबन्द रजिस्टर चकबन्दी सन् 1967-68 बावत् न्यायालय चकबन्दी अधिकारी क्षेत्र नं० लालगंज जिला आजमगढ़। मुन्० 1621/162 धारा 9(क)2जो०च० अधि० पुरषोत्तमी वनाम तिलकधारी व चौथी वनाम तिलकधारी ता०फै० 23.2.67 की छाया प्रति फोलियो के साथ संलग्न है।

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			.463/ 2मि० 463/3 पर वादी की सीरदा री होनी चाहिए ।			बेवा सेव क के ना म ब तौर सीर दार दर्ज हो। खा ता नं० 33 या म इन वल के न म्ब रान पर गां व स भा का इ न्द्रा ज खा रि ज हो कर चौ थी पुत्र वर न के ना म ब तौर सीर									दार दर्ज हो।				

12. Perusal of the certified copy of the Misilband Register, which is taken on record as well as quoted above fully demonstrate that the case were filed during consolidation operation and the same were decided vide order dated 23.2.1967 in Case No.1621 / 162 declaring the petitioners as Sirdar of the plot in question.

13. This Court in the case reported in **2016 (133) RD 800, Adalat Yadav vs. D.M./ D.D.C. & Others** has held that if question relating to genuineness of any record has to be decided then its entry in misilband has to be examined. Paragraph no.8 of the judgement rendered in **Adalat Yadav (supra)** will be relevant for perusal, which is as under:

“8. So far as allowing the appeal and setting aside order of Consolidation Officer dated 31.03.1981, is concerned, there is serious dispute between the parties, relating to genuineness of order dated 31.03.1981 passed by Consolidation Officer in Case No. 139 of 1980. This order was not given effect to in consolidation/revenue record for about 12 years, due to which, predecessors of the petitioner has to file another suit i.e. Suit No. 193 of 1993, in 1993 and during this period, name of Jager Nath and thereafter Bunela Yadav and Pataroo Yadav remained recorded in revenue record. The genuineness of the order dated 31.03.1981 has been challenged by the respondents. Thus heavy burden of proof was upon the petitioner to prove its genuineness. The petitioner has filed photostat copy of certified copy of the order dated 31.03.1981 (issued on 06.08.1981) and

certified copy of goswara register issued on 04.04.2002. Under Rule 25 (e) (ii) and (f) Assistant Consolidation Officer has been required to register Cases of two categories (Section 9-A and Section 9-B) in separate misilband register. In view of Rule 30, the Cases under Section 12 are also required to be registered. Now a days it has become very easy to make forgery in goswara register (a register maintained by Revenue Record Room, Collectorate to register the papers consigned to it). If question relating to genuineness of any record has to be decided then, its entry in misilband register has to be examined. In the present case, from the court of Deputy Director of Consolidation, requisitions were sent for producing misilband register to concerned Consolidation Officer and Incharge Revenue Record Room, Collectorate Deoria. Reader of Consolidation Officer informed that there is nothing to show that misilband register of the year 1980-1981 was consigned to record room. Incharge Revenue Record Room, Collectorate Deoria informed that misilband register is not endorsed in goswara register. The petitioner also in his application dated 14.9.2013 has mentioned that misilband register is not traceable. Before this Court, certified copy of misilband register relating to cases under Section 12 of the Act, from 19.12.1979 to 27.10.1980 was filed by the respondents, in which at serial number 139, Case of Om Prakash Vs. Ram Shree and others was registered. As such it was fully proved that there was no misilband register of the year 1980-1981. Findings of respondent-1 that order dated 31.03.1981 passed in Case No. 139 of 1980 was suspicious/fabricated order does not suffer from any illegality. If the case is not duly registered in misilband register, then trail of fabricated case will not be permitted to be conducted by

consolidation officer, particularly after notification under Section 52 of the Act. However, due to the remand order, the petitioner has still an opportunity to satisfy Consolidation Officer regarding registration of his case in misilband register. As such no interference is required by this Court. However Consolidation Officer shall decide this issue afresh without being influenced by any of the observation of this Court.”

14. Since, the order passed during consolidation operation could not be incorporated in the revenue record, accordingly, suit under Section 229-B of U.P.Z.A. & L.R. Act was filed on behalf of the petitioners to declare them as Sirdar of the plot in question and trial Court has not decreed the plaintiff's suit only on the basis of order passed by the Consolidation Court rather on the basis of oral and documentary evidence adduced by the plaintiffs as well as defendants. On behalf of the State Lekhpal concern was examined and on behalf of gaon sabha Pradhan was examined. The entry in C.H. Form 2A, 41 & 45 were taken into consideration by trial Court in holding that plaintiffs are Sirdar of the plot in suit. The finding of fact has also been recorded by trial Court that suit is not barred by Section 49 of U.P.C.H. Act as there was adjudication by consolidation Court in favour of petitioners/ plaintiffs. The first appellate Court has maintained the judgement and decree of the trial Court by dismissing the first appeal filed by the State. Board of Revenue while allowing the second appeal filed by the State has set aside the judgement and decree of trial Court as well as appellate Court without reversing the finding of fact recorded by the trial Court in proper manner. It is also material to mention that no substantial question of law / point of determination

have been framed by the Board of Revenue while passing the judgment allowing the second appeal setting aside the judgement and decreed passed by the trial Court as well as first appellate Court and dismissing the plaintiff's suit.

15. No counter affidavit has been filed on behalf of the State before this Court since 1983 although gaon sabha has filed counter affidavit without annexing any document in support of the allegation made in the counter affidavit.

16. The instant writ petitions are pending before this Court for last more than 41 years, as such, the dispute is to be adjudicated on merit rather to remand the matter for fresh adjudication which will prolong the dispute for another 50 years.

17. On the point of Section 49 of U.P.C.H. Act, Hon'ble Supreme Court in the case reported in **2024 (163) RD 691, Prashant Singh & Others Vs. Meena and Others** has considered the scope of Section 49 of U.P.C.H. Act. In the aforementioned case, Hon'ble Supreme Court has considered the judgement of **Karbalai Begum Vs. Mohd. Sayeed (1980) 4 SCC 396** as well as judgment of **Sita Ram vs. Chhota Bondey & Others 1991 Supplement (1) 556**.

18. Considering the ratio of law laid down by Hon'ble Supreme Court from the case of **Karbalai Begum (supra)** up to **Prashant Singh (supra)**, it is very much clear that claim of co-tenancy will not be barred under Section 49 of U.P.C.H. Act but other claim will be barred under Section 49 of U.P.C.H. Act.

19. There is no proper exercise by the Board of Revenue while deciding the

second appeal. This Court in the case reported in **1985 R.D. 93, Sharda Devi Vs. Board of Revenue Allahabad & Others** on the point of second appellate jurisdiction of Board of Revenue has held as under:

"24. In the aforesaid provision the emphasis by the Legislature is on all the interest which the transferor is then capable of passing in the property. In other words it is only the interest of the transferor which he is capable of conveying in the property that would pass to the vendee and in case he is not capable of passing any interest in the property, nothing would pass to the vendee. In the instant case the vendors were left with no rights as they lost all rights, title and interest in the plots in dispute in the aforesaid compromise and these plots were given in favour of the petitioner and in lieu thereof some corresponding plots were given to the vendors. Hence the vendors had no interest left so as to convey the same to the transferors. It is thus crystal clear that the vendees had not derived any right, title or interest in the sale deed executed by the vendors in their favour. In view of the discussion hereinbefore, I am of the view that the Board of Revenue has clearly exceeded jurisdiction under Section 100 C.P.C. read with Section 331(4) of the Act. There was no scope of the second appellate Court to set aside the findings of fact recorded by the Additional Commissioner about the fraudulent or collusive nature of the decree. The findings of fact were also based on evidence and howsoever grossly erroneous they may appear to be, when in fact they were not erroneous, much less grossly erroneous, the second appellate Court had no jurisdiction to interfere with the same. The vendors, respondent Nos. 7 and 8 had no right, title or interest left in the plots in*

dispute after admitting the claim of the petitioner in the compromise decree, so as to be able to transfer any interest by the sale deed dated 11.7.1966 in favour of vendees. Hence the vendees did not derive any title out of the sale deed.

25. In the result the writ petition succeeds and is allowed and the judgment and order of the Board of Revenue dated 30.7.1976 is hereby quashed. The petitioner would also be entitled to her cost."

20. The order passed by the Board of Revenue allowing the second appeal and dismissing the plaintiff suit for declaration by passing cryptic judgment cannot be sustained in the eye of law. The manner in which impugned judgment has been passed by the Board of Revenue, can be a judgment of dismissal of second appeal, affirming judgment of courts below but this cannot be a judgment of reversal by which the second appeal has been allowed and the suit under Section 229 B of U.P.Z.A. & L.R. Act has been dismissed in the exercise of second appellate jurisdiction.

21. Considering the entire facts and circumstances of the case as well as ratio of law laid down by Hon'ble Apex Court on Section 49 of U.P.C.H. Act, finding of fact recorded by trial Court, entry in misilband register, the impugned judgment passed by the Board of Revenue dated 14.9.1983 in Second Appeal No.36 & 37 of 1979-80 cannot be sustained in the eye of law and the same are hereby set aside.

22. The writ petitions are *allowed* and the judgement and decree passed by trial Court dated 28.1.1978 in both the suit under Section 229-B of U.P.Z.A. & L.R. Act are affirmed.

23. No order as to costs.

(2025) 1 ILRA 491

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.01.2025

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ- B No. 39710 of 2003

Hari Chand & Anr.

...Petitioners

Versus

The Board of Revenue & Ors.

...Respondents

Counsel for the Petitioners:

Ajay Srivastava, Ayub Khan, Rahul Verma, Rajesh Tripathi, S.K. Dubey

Counsel for the Respondents:

C.S.C., A.C. Srivastava, Anil Kumar, Bhola Nath Yadav, Chandan Sharma, Hira Lal Singh (Kushwaha), Kamal Singh, R P Singh, Ram Surat Saroj, Rohan Gupta, S.D. Kautilya, S.K. Nigam, S.K. Rao, S.K. Pathak, Satish Chandra Mishra, Shri Krishna Mishra, Somesh Khare, V.K. Singh

Civil Law – Constitution of India – Article 226 – Civil Procedure Code, 1908 – order 41 Rules 27 - U.P. Zamindari Abolition and Land Reforms Act, 1950 – Sections 195, 197, 198(4), 333 & 333(2) - U.P. Zamindari Abolition and Land Reforms Rules, 1952 – Sections 173(kha), 174 & 175:-

Writ Petition – questioning the impugned orders passed by Board of Revenue whereunder Board allowed the Revision and rejecting the recall application – Allotment of land by the village LMC in favour of 164 ineligible persons - approved by SDO – being aggrieved petitioners filed a Complaint Case - allowed – Revision – dismissed, holding that the allotment in question had been made against the relevant provisions of Rule, 1952 – second revision, before the Board – dismissed, holding that second revision is not maintainable by same persons – recall

application - rejected – Writ Petition – opposed on the ground that petitioners are not persons aggrieved or falling within the category “of a person aggrieved” – court finds that, allotment of land was in complete violation of the Rules of allotment prescribed, and the respondents obtained allotment in their favour by misstatement of facts – this court cannot shut its eye to the aforesaid facts – held, a writ petition by a member of Gaon Sabha raising allegations against the action of the Gaon Sabha in allotting the land in violation of the norms can be assailed – there is a public element involved and hence, the complaint as also the instant writ petition is maintainable – petition allowed, accordingly.

(Para – 19, 20, 21)

Writ petition Allowed. (E-11)

List of Cases cited:

1. 1996 RD 190,
2. 1999 RD 699,
3. 2008 (105) RD 1,
4. 2004 (1) JCLR (ALL) 25,
5. WRIT – C NO. 36068/2004,
6. Kanhai & ors. Vs St. of U.P. & other- WP No. 44338/2006 - Decided on 02.03.2012,
7. Awadhesh Kumar Vs St. of U.P. – Writ – C No. 32252/2022 - Decided on 15.02.2023,
8. Ram Kumar Vs St. of UP & ors. – Misc. Single No. 27989/2016 – Decided on 25.11.2016,
9. Hari Shanker Kushwaha & ors. Vs St. of UP & ors.– Writ Petition No. 64061/2016 decided on 24.11.2017,
10. Brahm Singh Vs Board of Revenue UP Allahabad & ors.– 2008 (105) RD 1,
11. Ram Kumar Vs St. of U.P. (MANU/UP/3147/2016),
12. Ram Ziyawan & ors. Vs Additional Commissioner (J), Vindhyachal Mandal, Mirzapur & ors.– 2014 (124) RD 219,

13. Nathai Lal Dube Vs District Magistrate, Sant Ravidad Nagar – 2000 (4) AWC 2752.

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

1. Heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Anubhav Sinha and Sri Ayub Khan, learned counsels for the petitioners, Sri Somesh Khare along with Sri S. K. Kumar and Sri Prem Chand Saroj, learned counsel for the contesting respondents, learned Standing Counsel representing the State Respondents and Sri Bhola Nath Yadav, learned counsel for the Respondent No. 3, the Land Management Committee concerned.

2. The writ petition has been filed questioning the orders dated 03.11.2000 and 08.05.2003 (Annexure Nos. 3 & 5) to the writ petition respectively passed by the Board of Revenue, U. P. at Allahabad in Revision No. 64(2) of 1997-98 under Section 333 of the UPZA & LR Act whereby and whereunder allowing the Revision vide order dated 03.11.2000 and rejecting the recall application registered as Case No. 49 of 2001-02 as not maintainable vide order dated 08.05.2003.

3. The dispute relates to the allotment of land by the Land Management Committee of Village Gulawati, Pargana Dankaur, District Bulandshahar, now Gautam Buddh Nagar, Respondent No. 3 in favour of 164 persons of the Village vide allotment order dated 15.12.1989. The allotment is stated to have been approved by the Sub Divisional Officer, Sadar, Gautam Buddh Nagar, Respondent No. 2 on 10.05.1990.

4. The writ petitioners, who are the villagers of the village concerned aggrieved

by the allotment of the land in favour of the Respondent No. 4 to 164 along with other aggrieved persons filed a complaint on 01.06.1990 which was registered as Case No. 72 of 1991 before the Additional Collector, Bulandshahar seeking cancellation of the said allotment on the ground that the allotments were irregular, not in accordance with the rules and had been made in favour of the ineligible persons. The complaint case registered as Case No. 72 of 1991 was allowed vide order dated 04.06.1994 passed by the Additional Collector, Bulandshahar.

5. Against the order dated 04.06.1994, the Respondent No. 4 to 150 preferred a Revision before the Additional Commissioner, Meerut Division, Meerut registered as Revision No. 88 of 1994-95 (Balvir Vs. Satvir and others) which came to be dismissed vide order dated 25.06.1998, holding that the allotment had been made against the provisions of Rule 173 (Kha), 174 and 175 of the UPZA & LR Rules 1952. Aggrieved by the rejection of their Revision vide order dated 25.06.1998 the Respondent Nos. 4 to 150 preferred a Second Revision before the Board of Revenue which was registered as Revision No. 64(2) of 1997-98 (Bali Ram and others Vs. Satyabir and others). The Board of Revenue in a most arbitrary and illegal manner without considering the aspect that a second Revision by the same persons was not maintainable, proceeded to entertain the second Revision and allowed the same vide order dated 03.11.2000. The Recall Application filed by the petitioner seeking recall of the order dated 03.11.2000 was also rejected by the Board of Revenue vide its order dated 19.01.2001. The Review Application dated 22.08.2002 registered as Case No. 49 of 2001-02 was also rejected vide order dated 08.05.2003.

6. Sri Shashi Nandan, learned Senior Counsel for the petitioners submits that the Board of Revenue at Allahabad committed manifest illegality in passing the impugned orders. He submits that :-

(i) The Board of Revenue erred in law in entertaining the Second Revision in exercise of powers under Section 333 of the UPZA & LR Act, 1950 in view of the express bar contained in sub Section 2 of Section 333 thereof.

(ii) The allotment in favour of the Respondent No. 4 to 150 had been made in utter violation of the provisions of Rule 173 (Kha), 174 and 175 of the UPZA & LR Rules 1952 and had rightly been cancelled by the Additional Collector, Bulandshahar. The Board of Revenue, U. P. at Allahabad entertained the Revision and allowed the same on the ground that the Additional Collector had no jurisdiction to cancel the allotment and such power vested only in the Collector in view of the law laid down by this Court in **1996 RD 190** and **1999 RD 699** in complete ignorance of the law laid down by the Full Bench of this Court reported in **2008 (105) RD 1**.

(iii) The Board of Revenue manifestly erred in granting indulgence to the Respondent/Allottees on the ground that the petitioners failed to demonstrate how they were aggrieved by the allotment ignoring the settled principle that the allotments were made by playing fraud and that the petitioners being the residents of the village could very well raise objections against the illegal and irregular allotments of the Goan Sabha Land by the Land Management Committee.

(iv) The Board of Revenue erred in rejecting the recall and review applications.

7. It is, accordingly, submitted that the orders impugned are patently illegal and deserve to be set aside. The writ petition is liable to be allowed as prayed.

8. Per contra, Sri Somesh Khare, learned counsel for the Respondent Nos. 4 to 150 i.e. the allottees has vehemently opposed the writ petition and supported the order passed by the Board of Revenue setting aside the order of the Additional Collector cancelling the allotment as also the order of the Additional Commissioner upholding the same in Revision. Sri Somesh Khare has laid much emphasis on the ground that the petitioners cannot be said to be persons aggrieved within the meaning of Section 198(4) of the UPZA & LR Act to have maintain the complaint against the allotment made in favour of the answering respondents giving rise to the present proceedings.

9. It is contended that the petitioners are not persons aggrieved/or falling within the category "of a person aggrieved" as stipulated by the rigors of Section 198 (4) of the UPZA & LR Act, 1950. The Petitioner No. 1 has been shown to have substantial land holdings in his name bearing Khata No. 540 and is recorded as its Sankramaniya Bhumidhar. The writ petitioners are not landless persons and do not qualify in the order of preference in admitting persons to land under Sections 195 and 197 enabling them to become a "person aggrieved" within the meaning of Section 198 (4) of the UPZA & LR Act. They have made no averment either at the time of filing the complaint or the instant writ petition that they are entitled for allotment of patta by the Gaon Sabha.

10. Reliance has been placed upon the Division Bench decision of this Court

reported in **2004 (1) JCLR 25 (All.)**, decision in **Writ-C No. 36068 of 2004**, decision in **Writ Petition No. 44338 of 2006 (Kanhai (now deceased) and others Vs. State of U. P. and others**, decided on 02.03.2012, decision in **Writ-C No. 32252 of 2022 (Awadhesh Kumar versus State of U. P.)** decided on 15.02.2023, decision in **Misc. Single No. 27989 of 2016 (Ram Kumar Vs. State of U. P. and others)** decided on 25.11.2016 as also the decision in **Writ Petition No. 64061 of 2016 (Hari Shanker Kushwaha and others Vs. State of U. P. through Secretary, Revenue Department, Lucknow and others)** decided on November 24, 2017 to buttress the point that the writ petitioners cannot be termed as "persons aggrieved" so as to maintain the complaint and consequently the present writ petition, having not suffered from any legal injury. It is accordingly submitted that the order of the Board of Revenue is just and proper and calls for no interference by this Court under Article 226 of the Constitution of India and the writ petition as framed deserves to be dismissed.

11. I have heard learned counsels for the parties and have perused the records. From the submissions advanced by the learned respective counsels for the parties the following questions arise for consideration in this writ petition:-

(a) whether the allotment in favour of the allottees i.e. respondent no. 4 to 150 suffers from the vice of being contrary to the provisions of Rule 173 (Kha), 174 and 175 of the U.P.Z.A. & LR Rules, 1952 and had been rightly cancelled by the Additional Collector, Bulandshahar.

(b) whether the Additional Collector, Bulandshahar was within his powers to cancel the allotment in favour of

the allottees in exercise of powers u/s 198(4) of the UPZA & LR Act, 1950.

(c) whether the Second Revision u/s 333(1) of the UPZA & LR Act before the Board of Revenue UP at Allahabad was maintainable.

(d) whether the complaint at the instance of the writ petitioners against the allotment made by the Land Management Committee in favour of the allottees i.e. respondent no. 1 to 150 as also the instant writ petition is maintainable on the ground of locus-standi.

12. The parties are on common ground as regards the fact that the Land Management Committee of village Gulawali, Pargana Dankaur, Bulandshahr, vide its resolution dated 15.12.1989 allotted land in favour of 164 persons and such allotment was got approved by the Sub Divisional Magistrate concerned vide order dated 10.05.1990 approving the allotment in favour of the Respondent Nos. 4 to 150. A complaint against the allotment was filed on 01.06.1990 against the allotment, which was registered as Case No. 72 of 1991. The Additional Collector, Bulandshahr, vide its order dated 4.6.1994 allowed the complaint and set aside the allotment. A perusal of the order of the Additional Collector reveals that several anomalies were found in the proceedings of the allotment and it was concluded that the entire proceedings were illegal and irregular. The relevant portion of the order of the Additional Collector dated 4.6.1994 is being quoted here under:-

"मैंने पत्रावली पर उपलब्ध साक्ष्य एवं विद्वान अधिवक्ताओं के तर्कों को सनने के बाद इस निष्कर्ष पर पहुँचा हूँ सर्व प्रथम तो आवंटन पत्रावली देखने से यह

स्पष्ट है कि आकार पत्र 57-01 पर परगनाधिकारी की स्वीकृति नहीं है। इस प्रकार नियम 172, 173 एवं 174 की अवहेलना की गयी है जो कि मैनेडेटरी है। इस प्रकार आवंटन अनियमित एवं अवैधानिक हो जाना है। 74 प्रतिवादी (आवंटी) बाहर के बताये हैं। इसके संबंध में ऐसा कोई साक्ष्य नहीं है कि जिससे यह स्पष्ट हो कि वह गांव के निवासी हैं मात्र यह कह देने से कि वोटर लिस्ट में नाम न होने से गांव का निवासी नहीं रह जाता है, गलत है। ओम प्रकाश व धर्मवीर प्रधान के सगे लड़के व मनोज कपील व प्रवीण पुत्रगण ओमप्रकाश व अजब सिंह मनोज, मोरध्वज व कवर सिंह पुत्रगण धर्मवीर प्रधान के सगे पौत्र हैं जिन्हें आवंटन किया गया है। इसी प्रकार अन्य बहुत से व्यक्ति सदस्यों के पुत्र पिता व भाई हैं जिनकी कोई इजाजत आवंटन हेतु जिलाधिकारी से नहीं ली गयी है। रणजीत पुत्र मनसुख तो ग्रामसभा गुलिस्ता का प्रधान है जिसे स्वयं बाबू सिंह प्रधान ने स्वीकार कर अपने जवाब में किया है। ज्यादातर आवंटी जनपद गाजियाबाद के हैं। और प्रधान से संबंधी है तहसीलदार ने अपनी आख्या में यह भी स्पष्ट लिखा है कि पवन व भीषण पुत्रगण देवराज नावालिगो के संबंध में जो विवरण किया गया है उसके संबंध में कोई ऐसा ठोस साक्ष्य प्रतिवादीगण द्वारा नहीं दिया गया है जिससे यह स्पष्ट हो कि वह नावालिग नहीं है। प्रधान ने जिसने यह

आवंटन किया है स्वयं माना है कि कुछ पात्र व्यक्ति आवंटन से शेष रह गये हैं कुछ गांव से अन्य गांव निवासियों को पट्टा हो गया है तथा कुछ नावालिगो को भी आवंटन हो गया है। इस प्रकार इस आवंटन में मनमाने ढंग से कार्यवाही करके अनियमित एवं अवैधानिक तरीके से अपात्र व्यक्तियों को आवंटन दिया गया है। इसी कारण परगनाधिकारी ने जांच के बाद अध्यक्ष भूमि प्रबन्धक समिति को निलिम्बित किया था कार्यवाही रजिस्टर पर अन्य के साथ राधेश्याम सदस्य, चन्दर सदस्य भारत सिंह, तेजी व ज्ञानी व मितरो सदस्यों के हस्ताक्षर / नि०अ० दिखाये गये हैं जबकि उन्होंने शपथ पत्र प्रस्तुत किया है उन्होंने 12.12.89 को किसी प्रस्ताव पर हस्ताक्षर /अंगूठा निवासी नहीं किया है और ना ही उनकी उपस्थिति में यह कार्यवाही हुई है। जिसके संबंध में की प्रतिशपथ पत्र भी दाखिल नहीं किया गया है। इस प्रकार इनके शपथ पत्रों पर विश्वास न किया जाने का कोई आधार नहीं है। शपथ पत्र के समर्थन में चन्दर एवं तेजी सदस्यों के सशपथ बयान भी हुये हैं। इस प्रकार इस आवंटन पूर्णतया अवैधानिक है। ग्रामसभा में कुल सदस्यों की संख्या मीटिंग में मय प्रधान के 111 दर्शायी है जिसमें से 6 सदस्यों ने शपथ पत्र दाखिल कर कहा है कि उन्हें इस कार्यवाही की कोई जानकारी नहीं है इस प्रकार कोरम ही पूरा नहीं होता है इस प्रकार समस्त कार्यवाही अवैध एवं

अनियमित हो जाती है और कार्यवाही बाला ही बाला हो सिद्ध है।"

13. The above findings clearly show that the allotment proceedings in favour of the respondent no. 4 to 150 were in violation of the Rules 173 (Kha), 174 and 175 of the UPZA & LR Rules, 1952. The said findings were upheld in Revision u/s 333(1) filed by the allottees Respondent Nos. 4 to 150 before the Additional Commissioner, Meerut, Division Meerut. The findings call for no interference by this Court. The question no. (a) is answered accordingly.

14. Learned counsel for the answering Respondent Nos. 4 to 150 has vehemently argued that the Additional Collector, Bulandshahar was not competent to exercise his jurisdiction u/s 198(4) and it was the Collector, Bulandshahar alone, who was competent to cancel the allotment. It is urged that in such view of the matter, the order of the Additional Collector cannot sustain. This Court is not impressed by the argument of learned counsel for the contesting Respondent Nos. 4 to 150. The issue is no longer res-integra and stands settled by the Full Bench decision of this Court in the case of **Brahm Singh Vs. Board of Revenue, U.P. Allahabad and Others** reported in **2008 (105) RD 1**, wherein it has been categorically held that powers and functions of Collector including exercise of powers u/s 198(4) of the U.P.Z.A. & L.R. Act can be exercised by the Additional Collector. The question no. (b) also stands decided accordingly.

15. Now coming to the question no. (c) regarding maintainability of the Second Revision by the Respondent-Allottees Nos. 4 to 150 before the Board of Revenue is

concerned, in the opinion of the Court the Second Revision was barred in view of the express bar contained in section 333(2) of the U.P.Z.A. & L.R. Act, 1950. Admittedly, the 1st Revision being Revision No. 88 of 1994-95 filed at the instance of the Respondent Nos. 4 to 150 had been rejected vide order dated 25/6/1998. The Second Revision No. 64 (2) of 1997-98 before the Board of Revenue was clearly not maintainable. Question No. (c) answered accordingly.

16. Now coming to the Question No. (d), Sri Somesh Khare, learned counsel for the answering respondent i.e. allottees Nos. 4 to 150 has laid much stress upon the fact that the petitioners cannot be said to be persons aggrieved within the meaning of Section 198(4). Placing reliance upon the decisions referred to herein before it has been urged that the complaint at the instance of the petitioners and other aggrieved persons was not maintainable and consequently the present proceedings are also not maintainable and the Board of Revenue was completely justified in allowing the Revision and the said order does not call for any interference by this Court.

17. Sri Somesh Khare, learned counsel for the contesting-respondent Nos. 4 to 150 placing reliance upon the case of Kanhai (now deceased) and others versus State of U.P. and others, Civil Misc. Writ Petition No. 44338 of 2006, decided on 2.3.2012 submits that A person who seeks to question the allotment has to show that he had preferential right for the said allotment. Seeking cancellation of allotment order without showing preference cannot be questioned except on the intervention of the Gaon Sabha. Petitioner claims that the land has been wrongly allotted to the respondents without claiming that they have

right to seek allotment of the said land under the Act. Rules with regard to locus-standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legal protected interest by the impugned action of the State or a public authority. Aggrieved person must show that he had suffered a legal grievance against whom a decision which has been pronounced which has wrongfully refused him of something, which he had a right to demand. It is within this precincts that the aggrieved person can seek redressal of his grievance under Article 226 of the Constitution of India.

18. Relying upon the case of **Ram Kumar versus State of U.P.** reported in MANU/UP/3147/2016, he further submits as under:

“12. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved person.

And person means only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary

jurisdiction that, the relief prayed for must be one to enforce a legal right.

13. In fact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same.

14. Further, a "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised."

19. Sri Shashi Nandan, learned Senior Counsel controverting the arguments of Shri Somesh Khare submits that the complaint as also the instant writ petition is maintainable as in respect of the public property of Gaon Sabha any one can initiate the proceedings or challenge the order settling such land of the Gaon Sabha with private persons. Regards may be had to the co-ordinate Bench decision in the case of **Ram Ziyawan and Others Vs. Additional Commissioner (Judicial), Vindhyachal Mandal, Mirzapur and Others** reported in **2014 (124) RD 219**. Further in **Nathai Lal Dube Vs. District Magistrate, Sant Ravidas Nagar** reported in **2000 (4) AWC 2752** it has been held that a writ petition by a member of a Gaon Sabha raising allegations against the action of the Gaon Sabha in allotting land in violation of the norms can be assailed before a writ Court.

20. In the opinion of the Court, under normal circumstances a complainant may not be entitled to maintain a writ petition under Article 226 of the Constitution of India as he cannot be

judged as a person aggrieved. However, the locus of a person to maintain a writ petition before the High Court has to be judged in the context of the statutory provisions and the facts of the case. There cannot be any hard and fast rule that in all cases a complainant cannot maintain a writ petition. In the case at hand, the Court finds that the allotment of the land by the Land Management Committee in favour of the Respondent Nos. 4 to 150 was in complete violation of the Rules of allotment prescribed. The Respondent Nos. 4 to 150 obtained allotment in their favour by misstatement of facts. This Court cannot shut its eye to the aforesaid facts. In the opinion of the Court there is a public element involved and the complaint as also the instant writ petition is maintainable. The Question No. (d) is decided accordingly.

21. In view of the above, the impugned orders dated 03.11.2000 and 08.05.2003 (Annexure Nos. 3 & 5) respectively, passed by the Board of Revenue, U.P. at Allahabad, are set aside.

22. The writ petition stands **allowed**.

(2025) 1 ILRA 498
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2025

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ- B No. 47925 of 2014

With

Writ-B No. 8596 of 2015

Rajeshwari Devi		...Petitioner
	Versus	
Dy. Director of		Consolidation,
Shahjahanpur & Ors.		...Respondents

Counsel for the Petitioner:

R.C. Singh

Counsel for the Respondents:

Amit Kumar Singh, Hmb Sinha, Jitendra Kumar Chakraborty, Ram Kishore Pandey, Umesh Vats

Civil Law — Consolidation proceedings — Effect of denotification of village under Section 52 of U.P. Consolidation of Holdings Act, 1953 — Objection under Section 20 of the Act filed after denotification — Held, not maintainable unless filed with prayer for condonation of delay and shown to be recorded in Misilband — Mere delay in registering or misplacement of objection not fatal where filed prior to denotification and substantiated through evidence — Record showed respondent's plot adjacent to National Highway had commercial value — Declaration of such plot as C.H. 18 found valid — No interference warranted in exercise of writ jurisdiction. (Paras 11 to 16)

HELD:

There is no dispute about the fact that village in question was brought under the Consolidation and notification under Section 20 of U.P. C.H. Act was published on 24.03.2023, notification under Section 20 of U.P.C.H. Act was published on 27.03.2003, notification under Section 52 of U.P.C.H. Act published on 27.06.2007. There is also no dispute about the fact that Consolidation Officer vide order dated 26.02.2009 granted benefit of Section 5 of Limitation Act in the proceeding under Section 21 of U.P.C.H Act and vide order dated 27.05.2009 declared plot No.454/525 area 0.049 hectare as C.H. 18. There is also no dispute about the fact that in revision No.42 filed by respondent no.4 (Lata Devi) plot No.455 was also declared C.H.18. (para 11)

It is material to mention that plot N.454/525, 455 are situated adjacent to N.H. 24 and objection was filed on behalf of respondent no.4 (Lata Devi) along with prayer for condonation of delay before denotification of the village as such there is no illegality in the order passed by the Consolidation authorities for declaring the plot No.454/525 area 0.049 hectare as well as plot No.455 area 0.543 hectare as C.H. 18. The entry in Misil Band also demonstrate that

objection was filed by Lata Devi before denotification of the village. The Deputy Director of Consolidation while deciding every revision has rightly considered the claim of the parties and dismissed the revisions filed by respective parties except revision NO.48 filed by Lata Devi. (Para 12)

This Court in the case reported in 1985 RD 71 Paras Nath Singh versus Deputy Director of Consolidation & ors. has held that an order which is illegal cannot be quashed or set aside in Writ jurisdiction if quashing of it results in bringing on record another illegal order. (Para 15)

Petition dismissed. (E-14)

List of Cases cited:

1. (2003) 8 Supreme Court Cases 319 [Civil Appeal No.8216 of 2003 with Civil Appeal No.8217 of 2003 (Ram Chandra Singh vs. Savitri Devi & ors.)]

2. (2000) 3 Supreme Court Cases 581 [Civil Appeal No.2087 of 2000 (United India Insurance Co.Ltd. Vs Rajendra Singh & ors.)] with [Civil Appeal No.2088 of 2000 (United India Insurance Co.Ltd. Vs. Sanjay Singh & ors.)]

3. 1985 RD 71 Paras Nath Singh versus Deputy Director of Consolidation & ors.

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri R.C. Singh, learned Senior Counsel assisted by Sri Narayan Dutt Shukla, learned counsel for the petitioner, Sri H.N. Singh, learned Senior Counsel assisted by Sri V.P. Shukla, learned counsel for the contesting respondent no. 4 and Sri Hasan Abbas, learned Standing Counsel for the State in Writ B No.47925 of 2014.

Heard Sri H.N. Singh, learned Senior Counsel assisted by Sri R.K. Pandey, learned counsel for the petitioner,

Sri R.C. Singh, learned Senior Counsel assisted by Sri Narayan Dutt Shukla, learned counsel for the contesting respondent no. 5 and Sri Hasan Abbas, learned Standing Counsel for the State in Writ B No.8596 of 2015.

2. Since Common issues are involved in both the writ petitions hence both the writ petitions are clubbed and heard together and writ petition No.47925 of 2014 shall be treated as a leading petition.

3. Brief facts of the case are that Village-Bhedpur Pergana-Jamaur, Tehsil-Sadar, District-Shahjahanpur came under operation of U.P. Consolidation of Holdings Act, 1953 hereinafter referred to as "the U.P.C.H. Act"). Statement of principles prepared under Section 8 (A) of the U.P. C.H. Act was published in the year 2004. According to respondent No.4 (Lata Devi) an objection under Section 20 of the U.P.C.H. Act was filed in the year 2005, which was registered as case No.9/299 in which several dates were fixed till 2007, but after 2007, file of aforesaid case was misplaced accordingly respondent No.4 filed second objection on 24.11.2008. Consolidation Officer vide order dated 27.05.2009 declared plot No.454/525 as C.H.18 (out side Consolidation operation) but no order was passed in respect to the plot No.455. According to respondent No.4 (Lata Devi) she purchased plot No.455 area 0.543 hectare and 454/525 area 0.049 total area 0.592 hectare from Smt. Vibbo Devi and others. Aforesaid plot No.455 and 454/525 were situated to the adjacent of N.H.24 Bareilly-Shahjahanpur road. According to respondent No.4 (Lata Devi) her name was mutated in the revenue record on the basis of sale deed executed in her favour in respect to aforementioned plots. Respondent no.4 (Lata Devi) is chak

holder No.274. The plot No.454/425 was proposed in the chak of the petitioner (Rajeshwari Devi), accordingly respondent No.4 (Lata Devi) has filed her chak objection in the year 2005, but petitioner (Rajeshwari Devi) denying the fact of filing chak objection in the year 2005. According to petitioner (Rajeshwari Devi) upon publication of notification, no objection was filed by respondent no.4 (Lata Devi) under Section-9 (B) of U.P. C.H. Act, as such in view of the provisions contained under Section 11 (A) of U.P.C.H. Act, the claim of respondent no.4 (Lata Devi) is barred. Petitioner (Rajeshwari Devi) is chak holder No.277. According to petitioner (Rajeshwari Devi) provisional consolidation Scheme prepared by Assistant Consolidation Officer was confirmed by Settlement Officer Consolidation and chak holders of the village in question were put into possession over their respective chaks. The final records under Section 27 of the U.P.C.H. Act were prepared and the village was denotified under Section 52 of U.P.C.H. Act on 27.06.2007. According to petitioner (Rajeshwari Devi) no objection was registered and fought between the parties under Section 9 (B) of 20 of U.P.C.H. Act as such no claim can be raised after denotification of the village in question on 27.06.2007. Against the order dated 27.05.2009 petitioner (Rajeshwari Devi) filed two separate appeals one against the order dated 27.05.2009 under Section 21 (2) of U.P.C.H. Act and another against the order dated 24.06.2009 passed under Rule 109-A of the U.P.Consolidation of Holdings Rules, 1954 (hereinafter referred to as "the U.P.C.H. Rules"). The aforementioned appeals were registered as appeal No.3/113 and 27. The Settlement Officer of Consolidation vide order dated 04.07.2011 dismissed the appeal No.3/113,

but appeal No.27 was allowed setting side the order dated 24.06.2009. Against the order of Settlement Officer of Consolidation dated 04.07.2011 passed in Appeal No.3/ 113. Petitioner (Rajeshwari Devi) filed a revision under Section 48 of U.P.C.H. Act before Deputy Director of Consolidation which was registered as revision No. 83 of 2011. Against the order of Settlement officer of Consolidation dated 04.07.2011 passed in appeal No.27, petitioner (Rajeshwari Devi) filed revision under Section 48 of U .P.C.H. Act which was registered as revision No.86. Respondent No. 4 (Lata Devi) had also filed two revisions against the order of Settlement Officer of Consolidation dated 04.07.2011, which was registered as revision No.42 and 18 under Section 48 of U.P.C.H Act. All the aforementioned four revisions were consolidated and heard together. The Deputy Director of Consolidation vide order dated 08.08.2014 decided all four revisions by which revision No.42 filed by respondent No.4(Lata Devi) was allowed and remaining revisions were dismissed, hence Writ B No.47925 of 2014 has been filed on behalf of the petitioner (Rajeshwari Devi) for following relief:

"(i) issue a writ, order or direction in the nature of certiorari calling for record and quash the orders dated 08.08.2014 (Annexure No) passed by Respondent No.1 order dated 04.07.2011 (Annexure no.11) passe by Respondent No.2 in appeal No.27, order dated 04.07.2011 (Annexure No.10) passed by Respondent No.2 appeal No.3/313 and order of Consolidation Officer dated 27.05.2009 (Annexure no.7)."

4. On behalf of respondent No.4 (Lata Devi) and one Ram Kishore Writ B No.8596 of 2015 has been filed for the following relief:

"(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 04.07.2011 passed by the respondent no.3 in appeal No.27 (Smt. Rajeswari Vs.Smt. Lata Devi) under Rule 109 of C.H. Act and order dated 08.08.2014 passed by the respondent No.2 in revision No.18 (Smt. Lata Devi Vs. Smt. Rajeshwari) Annexure Nos.13 & 17) to the writ petition) only.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondent No.1 to take necessary action against the persons who have committed forgery/manipulation in the revenue record, as per report of consolidation commissioner (Annexure No.8) to the writ petition)."

5. This Court entertained the Writ B No.47925 of 2014 vide order dated 19.09.2014/25.09.2014 and restrained the parties from changing the nature of property in question.

6. This Court entertained the Writ B No.8596 of 2015 vide order dated 12.02.2015 and connected the same with Writ B No.47925 of 2014 as well as restrained the parties from changing the nature of property in dispute or creating any third party interest.

7. In pursuance of the aforementioned orders, the parties have exchanged their affidavits.

8. Mr. R.C. Singh, learned Senior counsel appearing in Writ B No.47925 of 2014 submitted that entire proceeding consequent to the application/ objection dated 24.11.2008 are illegal as village in question was denotified under Section 52 of U.P.C.H. Act on 27.06.2007. He further submitted that no objection under Section

9-B of the U.P.C.H. Act was filed by the Lata Devi as such in the proceeding under section 20 of U.P.C.H. Act objection regarding valuation cannot be entertained in view of provisions contained under Section 11 (A) of U.P.C.H. Act. He further submitted that report of Consolidator dated 20.12.2008 fully demonstrate that no case under Section 20 of U.P.C.H. Act was registered in the matter. He further submitted that limitation of filing the objection under Section 20 of U.P.C.H. Act is 15 days and the publication under Section 20 was made on 24.03.2005, as such the objection under Section 20 cannot be entertained unless there is prayer for condonation of delay. He further submitted that every case is registered in Misil band (C.H. Form-6) when the case is forwarded to the consolidation officer, but in the instant matter there is no proof that case was registered in Misil band, as such the entire proceeding is barred by Section 11 (A) of the U.P.C.H. Act. He submitted that provisional Consolidation Scheme was confirmed and parties were put into possession as well as final record under Section 27 of U.P.C.H. Act was prepared accordingly as such the impugned orders passed by the Consolidation authorities cannot be sustained in the eye of law. He further submitted that impugned orders are liable to be set aside and the writ petition is liable to be allowed.

9. On the other hand, Mr. H.N. Singh, learned Senior Counsel appearing for respondent no.4 (Lata Devi) submitted that on the basis of the registered sale deed dated 28.08.2004 executed in favour of respondent No.4 (Lata Devi) in respect to the plot in question (455 and 454/525) respondent no.4 (Lata Devi) was recorded in the revenue records. He further submitted that aforementioned plots are

adjacent to the national highway (N.H. 24) and having commercial value. He submitted that plot No.454/525 was proposed in the chak of the petitioner (Rajeshwari Devi) accordingly, respondent No.4 (Lata Devi) filed one objection in June, 2005 much before denotification of the village in question. He submitted that first objection filed by petitioner was misplaced accordingly second objection was filed, which was entertained and allowed in respect to plot no.454/525. He further submitted that during consolidation proceeding a manipulation has been done and plot No.514/532 area 0.057 hectare was mentioned in the map without any basis as there was no existence of plot no.514/532. He further submitted that petitioner purchased plot No.514 area 0.057 hectare from Verpal, Sonpal sons of Dulare, Jauhari, Shiv Ram, Newaram sons of Munna Lal by means of registered sale deed on 26.10.1998 as well as another sale deed appears to have been executed by Smt. Kalawati on 17.01.2014 in favour of petitioner. He submitted that respondent No.4 (Lata Devi) filed objection/ complaint before authorities for initiating enquiry in the matter in which it has been found that 16 members had committed forgery and large number of irregularities have been committed by the authorities. He submitted that Consolidation Officer vide order dated 27.05.2009 rightly declared plot No.454/525 outside the consolidation, but no order was passed in respect to the plot no.455, accordingly, appeal and revisions were filed. He submitted that in revision No.42, Deputy Director of Consolidation has rightly declared that plot No.455 outside the Consolidation. He submitted that Lata Devi & another have challenged the revisional order passed in the revision No.18 by way of Writ B No.8596 of 2015. He submitted that petitioner's revision

no.18 should also be allowed and Writ B No.8596 of 2015 should also be accordingly allowed. In support of his arguments, he placed reliance upon the judgments passed by Hon'ble Apex Court:-

1. (2003) 8 Supreme Court Cases 319 [Civil Appeal No.8216 of 2003 with Civil Appeal No.8217 of 2003 (Ram Chandrra Singh vs. Savitri Devi and others)]

2. (2000) 3 Supreme Court Cases 581 [Civil Appeal No.2087 of 2000 (United India Insurance Co.Ltd. vs. Rajendra Singh and others)] with [Civil Appeal No.2088 of 2000 (United India Insurance Co.Ltd. Vs. Sanjay Singh and others)]

10. I have considered the arguments advanced by the learned counsel for the parties and perused the record.

11. There is no dispute about the fact that village in question was brought under the Consolidation and notification under Section 20 of U.P. C.H. Act was published on 24.03.2023, notification under Section 20 of U.P.C.H. Act was published on 27.03.2003, notification under Section 52 of U.P.C.H. Act published on 27.06.2007. There is also no dispute about the fact that Consolidation Officer vide order dated 26.02.2009 granted benefit of Section 5 of Limitation Act in the proceeding under Section 21 of U.P.C.H Act and vide order dated 27.05.2009 declared plot No.454/525 area 0.049 hectare as C.H. 18. There is also no dispute about the fact that in revision No.42 filed by respondent no.4 (Lata Devi) plot No.455 was also declared C.H.18.

12. In order to appreciate the controversy involved in the matter, perusal

of the report of the consolidator dated 18.12.2008 will be relevant for perusal, which is as under:-

"न्यायालय बन्दोस्त चकबन्दी अधिकारी,

शाहजहांपुर

अपील सं० 03/113

धारा 21(2) जो०च०अ०

श्रीमती राजेश्वरी देवी

बनाम

लता देवी

ग्राम भेदपुर परगना जमौर तहसील सदर

रिपोर्ट चकबन्दीकर्ता 18.12.08

स०च०अ०- न्यायालय च०अ०

सदर वाद नं० 194 धारा 21(1) जो०च०अ०

ग्राम भेदपुर परगना जमौर तहसील सदर के गा० सं० 454/525, 455 के सम्बन्ध में लता देवी पत्नी रामकिशोर निवासी मोहल्ला रोशनगंज नगर व जिला शाहजहांपुर ने कालबाधित प्रार्थना पत्र प्रस्तुत करके मांग की है कि उसका प्रस्तावित चक मूल जोत के गाटो पर सड़क के किनारे दिया जाय तथा सड़क के किनारे चौड़ी बढ़ाई जाय।

आपत्ती कर्ता का यह भी कथन है कि उसने दिनांक 30.6.05 में आपत्ति प्रस्तुत की थी जो वर्ष 2007 तक सुनवाई में रही तत्पश्चात पत्रावली गायब हो गयी फलस्वरूप यह आपत्ति पुनः करने पड़ी इसीलिए आपत्ति कालबन्धन से मुक्त रखी जाय।

ग्राम के अभिलेखों के अनुसार चक सं० 274 आपत्तिकर्ता के नाम अदा

बैनामा अंकित किया गया है। इस चक में मूल जोत के गाटा सं० 455/543, 455/ 525/ 0.049 पूर्व अंश दर्शाये गये हैं। तथा यह चक गा० सं० 453मि०/ 0.010, प454मि/ 524/ 0.017, 454मि०/ 0.010, 455मि/ 0.515, 456/ 569/ 0.016 कुल 0.568 पर प्रदिष्ट किया गया है। इस चक पर च०अ० वाद सं० 9/ 299/ 24ए अमलदरामद की अधूरी पंक्ति अंकित हो तथा चक पर किसी प्रकार का कोई आदेश अंकित नहीं है। स०च०अ० स्तर का चक यथावत है। प्रस्तावित चक में संशोधन नहीं किया गया है।

जो. च०अ० पत्र-45 में खाता सं० 315 पर गा०सं० 572/0.568 आपत्तिकर्ती के नाम अंकित किया गया है।

ग्राम का धारा-20क प्रकाशन 24.3.05 तथा 52(1) प्रस्ताव मार्च 2007 में प्रेषित किया जा चुका है।

आख्या उचित कार्यावाही हेतु सेवा में सादर प्रेषित है।

ह०अ० 18.12.08 आर०एच०/कृ० पक्षों को नोटिस जारी

च०अ० सदर करते हुए दिनांक 18.1.08 को पेश

महोदय करें ह०अ० एसी० ओ० 24.12.08

चकबन्दी की विस्तृत आख्या सादर प्रेषित है। ह०अ० 20.12.08"

13. The perusal of the aforementioned report of Consolidator dated 18.12.2008 as well as pleadings set up by both the parties in their writ petition fully demonstrate that village Bhedpur, Pargana-Jamaur, Tehsil-

Sadar, Shahjahanpur came under Consolidation operation by way of notification under Section 4 of U.P.C.H. Act issued on 09.05.1997, publication under Section-9 of U.P.C.H. Act was made on 18.12.1998, publication under Section 20 of U.P.C.H. Act was made on 24.03.2005, publication under Section 52 of U.P.C.H. Act was made on 26.06.2001. Perusal of the report of consolidator also demonstrates that chak objection was filed along with prayer for condonation of delay. The Consolidation Officer while deciding the chak objection filed by respondent No.4 (Lata Devi) has considered the fact that plot No.454/525 is situated adjacent to the N.H.24 (Bareilly-Saharanpur road) as such in view of the provisions contained under the Consolidation Manual the road side plots are to be declared C.H.18. The record as well as the pleading set up in the instant petitions as well as in Writ B No.363 of 2022 fully demonstrate that earlier objection filed by the petitioner was recorded in the Misil band register also. The certified copy of the same is produced before the Court at the time of argument and true copy of the same is annexed as annexure No.C-A.2 to the counter affidavit filed in Writ B No.363 of 2022. The relevant extract of the same will be relevant for perusal which is as under:

"नकल- मिसिलबन्द - न्यायालय चकबन्दी अधिकारी (प्रथम) शाहजहाँपुर

धारा० 21(1) जो०च० अधिनियम वर्ष- 2005-2006

लता देवी गाटा सं०.
455,454,565,
484/425 के
सम्बन्ध में

9/299 भेदपुरा
जमौर

30/6/05

Vs.
सरकार

14. It is material to mention that plot N.454/525, 455 are situated adjacent to N.H. 24 and objection was filed on behalf of respondent no.4 (Lata Devi) along with prayer for condonation of delay before denotification of the village as such there is no illegality in the order passed by the Consolidation authorities for declaring the plot No.454/525 area 0.049 hectare as well as plot No.455 area 0.543 hectare as C.H. 18. The entry in Misil Band also demonstrate that objection was filed by Lata Devi before denotification of the village. The Deputy Director of Consolidation while deciding the every revisions has rightly considered the claim of the parties and dismissed the revisions filed by respective parties except revision NO.48 filed by Lata Devi.

15. This Court in the case reported in **1985 RD 71 Paras Nath Singh versus Deputy Director of Consolidation and others** has held that an order which is illegal cannot be quashed or set aside in Writ jurisdiction if quashing of it results in bringing on record another illegal order. Paragraph No.21 of the judgment rendered in **Paras Nath Singh (Supra)** will be relevant for perusal which is as under:-

"21. It is, no doubt, correct to say that any order passed without jurisdiction is a nullity and deserves to be quashed. But if as a result of quashing that order another wrong and illegal order would be restored, this Court would refuse to interfere with the impugned order which appears to be quite proper equitable

and just order. As mentioned above, the power under Article 226 of the Constitution is devised to advance justice and not to thwart it. To me it appears to be well settled that an order which is illegal cannot be quashed or set aside in writ jurisdiction if quashing of it results in bringing on record another illegal order."

16. Considering the entire facts and circumstances of the case, there is no scope of interference by this Court in exercise of jurisdiction under Article 226 of the constitution of India against the impugned orders passed by Consolidation authorities.

17. The Writ Petition No.47925 of 2014 filed by Rajeshwari Devi is dismissed and the Writ Petition No.8596 of 2015 filed by Smt.Lata Devi is disposed of in view of the order dated 29.08.2024 passed by Deputy Director of Consolidation in reference proceeding under Section 48 (3) of U.P.C.H. Act.

18. No order as to costs.

(2025) 1 ILRA 505
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.01.2025

BEFORE

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

Writ C No. 953 of 2025

Smt. Rachana Soni ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rinku Verma, Ajeet Kumar

Counsel for the Respondents:

C.S.C., Zafar Aziz

A. Civil Law - Constitution of India,1950-Article 226-Indian Contract Act,1872-Mukhyamantri Kishan Evam Sarvhit Beema Yojna-Delay in claim-The petitioner's claim under Mukhyamantri Kishan Evam Sarvhit Beema Yojna was rejected by the District Level Committee on the ground of delay, as it was filed beyond the prescribed period of two months from the date of death-The petitioner relied on The Oriental Insurance Co. Ltd. Vs Sanjesh & Anr where the Supreme Court held that such time restrictions in insurance schemes are void under section 28 of the Act,1872-Held, the District Level Committee's rejection on grounds of delay is unsustainable as the condition of lodging claim within a period of one month, extendable by another one month is contrary to section 28 of the Act-The claim must be reconsidered on merits within three months.(Para 1 to 9)

The writ petition is allowed. (E-6)

List of Cases cited:

1. The Oriental Ins. Co. Ltd. Vs Sanjesh & anr. , SLP © No. 3978 of 2022
2. The Oriental Ins. Co. Ltd. , Muzaffar Nagar Vs Smt. Sanjesh & anr. , Writ C No. 19071 of 2020
3. The National Ins. Co. Ltd. Vs Gauam Yadav & ors. , SLP © No. 7647 of 2021

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

1. Heard.

2. The claim of petitioner under the Mukhyamantri Kishan Evam Sarvhit Beema Yojna has been declined by the District Level Committee on the ground of delay. As per the Committee the claim should have been raised within a period of

one month from the date of death which could be further extended for another one month, meaning thereby, within a maximum period of two months, instead the claim was raised on 16.11.2018 though the death took place on 14.05.2018, thus, it was raised beyond the aforesaid period of two months.

3. However, learned counsel for the petitioner relies upon a judgment of Hon'ble the Supreme Court rendered on 11.03.2022 in *SLP (C) No. 3978 of 2022 (The Oriental Insurance company Limited vs. Sanjesh & Anr.)* to contend that such a condition in the scheme is hit by Section 28 of the Indian Contract Act, 1872 as has been held by Hon'ble the Supreme Court in the said case. The said judgement has been rendered in respect of the same scheme albeit involving another Insurance Company i.e. The Oriental Insurance Company Limited, as, it is the law of land, therefore, in view of this judgment, the decision of the District Level Committee cannot be sustained.

4. On being confronted, counsel for the New India Insurance Company Limited, Mr. Zafar Aziz could not dispute the fact that now there is a judgment of Hon'ble the Supreme Court as quoted hereinabove which covers the issue involved herein nor could the learned standing counsel.

5. We have perused the judgment of this Court at Allahabad dated 22.09.2021 rendered in *Writ C No. 19071 of 2020 (The Oriental Insurance Company Limited, Muzaffarnagar vs. Smt. Sanjesh & Anr.)* by which the writ petition of the Insurance Company challenging the order of the Permanent Lok Adalat on the ground of the claim being delayed was dismissed, against

which the Oriental Insurance Company Limited filed the aforesaid SLP which has also been dismissed. The said judgment of Hon'ble the Supreme Court dated 11.03.2022 (supra) reads as under:

"The sole arguments raised by learned counsel for the petitioner is that the claim was not filed within a period of one month or extending condonable period of one month.

We do not find any merit in the said arguments in view of Section 28 of the Indian Contract Act, 1872 (for short, 'the Act') which reads as under:-

"28. Agreements in restraint of legal proceedings, void.? [Every agreement,?

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal 2 proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.]"

In view of the aforesaid Section, the condition of lodging claim within a period of one month, extendable by another one month is contrary to Section 28 of the Act and thus void.

In view of the said fact, we do not find any ground to interfere with the order passed by the High Court.

The special leave petition is, accordingly, dismissed.

Pending application(s), if any, also stand disposed of."

6. Although the judgment has been rendered at the SLP stage, but, it is a reasoned

judgment, therefore, it contains a binding ratio.

7. In view of the above quoted judgment, the reason given for rejecting the claim of the petitioner i.e. delay, is not acceptable. The impugned decision is accordingly quashed. The District Level Committee is directed to reconsider the claim of the petitioner keeping in mind the judgment quoted hereinabove, on merits. The decision shall be taken with expedition, say, within a period of three months of receipt of certified copy of this order.

8. The writ petition is ***allowed***.

9. Similar petitions have been kept pending by this Court in view of pendency of similar matters before Hon'ble the Supreme Court of India in ***Special Leave Petition (C) No.7647 of 2021, The National Insurance Company Limited Vs. Gauam Yadav and others***, however, now there is a judgment of Hon'ble the Supreme Court on record, therefore, the Registry is directed to list all such similar matters which are pending at the earliest. Counsel for the petitioner in such petitions are at liberty to move application for listing of their cases.

(2025) 1 ILRA 507
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2025

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.

Writ C No. 2228 of 2025

Anil Pathak & Anr.	...Petitioners
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioners:

Brijesh Kumar Kesharwani, Mamta Singh

Counsel for the Respondents:

A.S.G.I., Anoop Tiwari, C.S.C., Krishna Mohan Asthana

A. Banking and Recovery Law – Payment of balance amount of purchase price – SARFAESI Act, 2002 - Section 13(4) - Security Interest (enforcement) Rules, 2002 - Rule 9 (4) - Even the plenary powers of the Supreme Court u/Article 142 of the Constitution could not be invoked to supplant the substantive law, ignoring the express statutory provisions dealing with the subject and thereby to achieve something indirectly, which could not be achieved directly. The balance amount of the purchase price has to be paid by the auction purchaser to the Authorized Officer on or before the 15th day of confirmation of sale or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months. (Para 27)

Provisions contained in Sub-rules (4) and (5) of Rule 9 of the Rules, 2002 - A discretion is available to the Authorized Officer of the secured creditor for extension of time for depositing the balance consideration, but not exceeding the prescribed limit of ninety days. The objective and necessity of enactment of the powers of forfeiture of deposited amount of the secured creditor u/sub-rule (5) further clarifies that the legislature had visualized that there was a need to arrest cases of deceptive manipulation of prices at the instance of unscrupulous borrowers by thwarting sale processes. The purpose of the provision was aimed at instilling a sense of discipline in the intending purchasers while they proceed to participate in the auction-sale process. (Para 28)

In the present case, there is no material on record, which may persuade this Court to come to a conclusion that there has been any manifest arbitrariness or unreasonableness on the part of the respondent-Bank in not acceding the repeated requests of the petitioners for

depositing of the balance 75% amount of the bid amount beyond the time period stipulated u/Rule 9(4) of the Rules, 2002. The maximum permissible limit of three months, as provided under the relevant statutory rules, having already been granted by the secured creditor, there is no plausible reason which may warrant issuance of any direction for further extension of time period, as sought by the petitioners. (Para 30, 31)

B. When a statute requires a particular thing to be done in a particular manner, it must be done in that manner or not at all, and other methods of performance are necessarily forbidden. (Para 32)

Rule 9 (4) of the Rules, 2002, as amended with effect from 4.11.2016, contains an ordainment that on mutual agreement, the time for making deposit of the balance amount of sale price can be extended for a period not exceeding ninety days; however, extension beyond ninety days would not be permissible in any case. (Para 33)

The secured creditor is entitled in law to enforce the security interest and in the process, to initiate all such steps and take all such measures for the protection of public interest by recovering public money lent to a borrower, who has defaulted in its repayment. (Para 35)

Writ petition dismissed. (E-4)

Precedent followed:

1. Mardia Chemical Ltd. Vs U.O.I., (2004) 4 SCC 311 (Para 15)
2. United Bank of India Vs Satyawati Tandon, (2010) 8 SCC 110 (Para 4)
3. Union Bank of India Vs Rajat Infrastructure (P) Ltd., (2023) 10 SCC 232 (Para 27)
4. Authorized Officer, St. Bank of India Vs C. Natarajan, (2024) 2 SCC 637 (Para 28)
5. Taylor Vs Taylor, (1875) LR 1 Ch D 426 (Para 32)
6. Nazir Ahmad Vs King Emperor, AIR 1936 PC 253 (2) (Para 32)

7. Rao Shiv Bahadur Singh Vs St. of Vindhya Pradesh, (1954) 1 SCC 296 (Para 32)

8. St. of UP Vs Singhara Singh, AIR 1964 SC 358 (Para 32)

9. Babu Verghese Vs Bar Council of Kerala, (1990) 3 SCC 422, (Para 32)

10. Municipal Corp. of Greater Mumbai Vs Abhilash Lal, (2020) 13 SCC 234 (Para 32)

11. Nareshbhai Bhagubhai Vs U.O.I., (2019) 15 SCC 1 (Para 32)

Precedent distinguished:

1. Gaurav Garg Vs Syndicate Bank & ors., Writ-C No. 2196 of 2019 (Para 8)

2. G.M., Sri Siddeshwara Cooperative Bank Ltd. & anr. Vs Sri Ikbali & ors.(2013) 10 SCC 83 (Para 8)

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Instructions provided by Sri Prakhar Shukla, learned Advocate, holding brief of Sri Ramesh Kumar Shukla, learned counsel for the respondent-Bank, be kept on record.

2. Heard Sri Brijesh Kumar Kesharwani, learned counsel for the petitioners, Sri Prakhar Shukla, holding brief of Sri Ramesh Kumar Shukla, learned counsel for the respondent-Bank and learned Standing Counsel for the State-respondents.

3. The facts as pleaded in the writ petition indicate that House No.24, Awas Vikas Colony Betiyahata, Gorakhpur, owned by Ujjwal Banka and Tushar Banka, was mortgaged against a loan amount of Rs.1 Crore plus Rs.20 Lakhs over draft.

4. The above mentioned loan amount, having not been repaid, respondent no.3-

Bank issued a notice under Section 13 (2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Thereafter, a possession notice under Section 13 (4) of the SARFAESI Act, 2002 was issued, and a newspaper publication for auction of the above mentioned property was also made. The auction date was fixed on 23.10.2024 and the petitioners, being the only bidders were declared successful.

5. The petitioners deposited 25% of the auction money, amounting to Rs.55,93,750/-, within the prescribed time period of 15 days. For depositing the balance 75% of the auction money, the petitioners applied for a loan from the respondent-Bank. The said application was rejected by the respondent-Bank on 3.1.2025. It is stated that although the petitioners have made a request for grant of three months' further time for depositing the balance 75% of the auction money, but the respondent-Bank is going to auction the property on 22.1.2025.

6. The petitioners have, accordingly, preferred the present writ petition, seeking a direction to respondent no.3-Bank for granting three months' further time for depositing the balance 75% of the auction money, or to refund 25% amount deposited earlier, within a stipulated time period.

7. Learned counsel for the petitioners has referred to the afore-stated facts, to contend that the delay in depositing 75% of the auction money is mainly due to rejection of the loan application of the petitioners by the respondent-Bank, and accordingly, they have sought further three months' time for the purpose. It is submitted that the Bank is seeking to re-

auction the property which would gravely prejudice their interests.

8. Learned counsel for the petitioner has placed reliance upon a decision of this Court in Writ-C No.2196 of 2019 (**Gaurav Garg vs. Syndicate Bank and others**), which was disposed of, following the judgment in the case of **GM, Sri Siddeshwara Cooperative Bank Ltd. and another vs. Sri Ikbal and others**.

9. Learned counsel appearing for the respondent-Bank has submitted that as per his instructions, the petitioners, who were declared highest bidders in the online auction held on 23.10.2024, upon having deposited 25% of the bid amount, were advised to deposit the remaining 75% of the bid amount by 7.11.2024. However, considering their request vide letter dated 5.11.2024, the Bank granted extension of time till 6.12.2024. Thereafter, by means of another representation dated 2.12.2024, the petitioners sought further extension of time till 7.1.2025, stating their difficulty in arranging the funds. Considering the said request, the Bank further allowed extension of time for depositing of the remaining sale amount till 27.12.2024. It is stated that instead of depositing the balance sale amount within the extended time period, the petitioners submitted another representation on 22.12.2024, seeking further extension of time upto 7.2.2025.

10. It has been submitted that as per the request received from the petitioners vide representation dated 22.12.2024, the competent authority of the Bank had granted further extension of time till 23.1.2025, as final opportunity for depositing the remaining balance. It has been pointed out that the Bank has duly sent a communication dated 18.1.2025 to

the petitioners, with an advise to deposit the remaining sale amount of Rs.1,67,81,250.00, not later than 23.1.2025 failing which, the initial deposit of Rs.55,93,750.00 shall be forfeited to the Bank and the said property shall be re-sold.

11. Learned counsel for the Bank has submitted that the auction sale has been conducted as per the provisions of the SARFAESI Act, 2002 and Rules made thereunder, and in terms thereof, it is to be a time bound process and no extension can be granted to the auction purchaser beyond the time period stipulated under the relevant statutory rules. Further, in default of payment of entire sale amount within the stipulated time period, the deposit made by the auction purchaser is to be forfeited to the secured creditor-Bank.

12. In order to examine the rival contentions, the relevant statutory provisions would be required to be referred.

13. The SARFAESI Act, 2002 was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and to provide for a central database of security interests created on property rights, and for matters connected therewith or incidental thereto.

14. The Statement of Objects and Reasons of the Act reads as under:

“STATEMENT OF OBJECTS AND REASONS

The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and

accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of

securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction."

15. The history and the legislative backdrop that led to the enactment of the SARFAESI Act was examined in the case of **Mardia Chemical Ltd. vs. Union of India**, and it was observed as follows:

"34. Some facts which need to be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that

it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.”

16. In this context, certain observations made in the decision in the case of **United Bank of India vs. Satyawati Tandon**, may also be referred to. The said observations are as follows:

“1. ... With a view to give impetus to the industrial development of the country, the Central and State Governments encouraged the banks and other financial institutions to formulate liberal policies for grant of loans and other financial facilities to those who wanted to set up new industrial units or expand the existing units. Many hundred thousand took advantage of easy financing by the banks and other financial institutions but a large number of them did not repay the amount of loan, etc. Not only this, they

instituted frivolous cases and succeeded in persuading the civil courts to pass orders of injunction against the steps taken by banks and financial institutions to recover their dues. Due to lack of adequate infrastructure and non-availability of manpower, the regular courts could not accomplish the task of expeditiously adjudicating the cases instituted by banks and other financial institutions for recovery of their dues. As a result, several hundred crores of public money got blocked in unproductive ventures.”

17. Section 13 of the SARFAESI Act contains the provisions relating to the enforcement of the security interest and the manner in which the same may be done by the secured creditor without the intervention of the court or tribunal in accordance with its provisions.

18. The procedural formalities to be followed for the sale of immovable secured assets as per Section 13 of the SARFAESI Act is provided under Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002.

19. The controversy involved in the present case would relate to sub-rule (4) of Rule 9 which provides for a time period within which, the balance amount of the purchase price payable by the auction purchaser is to be paid. For ease of reference, Rule 9 of the Rules, 2002 is extracted below:

“9. Time of sale, issue of Sale Certificate and delivery of possession, etc. – (1) No sale of immovable property under these rules, in first instance shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in

the proviso to sub-rule (6) of rule 8 or notice of sale has been served to the borrower:

Provided further that if sale of immovable property by any one of the methods specified by sub rule (5) of rule 8 fails and sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorized officer and shall be subject to confirmation by the secured creditor:

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 8:

Provided further that if the authorized officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty five per cent. of the amount of the sale price, which is inclusive of earnest money deposited, if any, to the authorized officer conducting the sale and in default of such deposit, the property shall be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorized officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorized officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him:

Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalisation of the sale.

(8) On such deposit of money for discharge of the encumbrances, the authorised officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.”

20. Rule 9 of the Rules, 2002 relates to the time of sale, issue of sale certificate and delivery of possession etc. Public notice of sale is to be published in the newspaper and only after thirty days thereafter, the sale of immovable property can take place. Under Rule 9 (2) of the 2002 Rules, the sale is required to be confirmed in favour of the purchaser who has offered the highest sale price to the authorised officer and shall be subject to confirmation by the secured creditor. The proviso makes it clear that sale under the said Rule would be confirmed if the amount offered and the whole price is not less than the reserved price as specified in Rule 9 (5).

21. Rule 9 (3) makes it clear that on every sale of immovable property, the purchaser on the same day or not later than next working day, has to make a deposit of twenty-five per cent of the amount of the sale price, which is inclusive of earnest money deposited if any. Rule 9 (4) makes it clear that balance amount of the purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of “confirmation of sale of the immovable property” or such extended period as may be agreed upon in writing between the purchaser and the secured creditor.

22. The liability of a successful auction purchaser to deposit the requisite amount begins from the date when the sale is confirmed by the secured creditor and communicated to the auction purchaser and as per sub-rule (3) of Rule 9 of the Rules,

2002, twenty five per cent amount of auction price has to be deposited, as earnest money, no later than next working day from the date of confirmation of sale and the balance amount within 15 days from the said date.

23. As per terms of sub-rule (3) of Rule 9 of the Rules, 2002, as it originally existed, 15 days time period for depositing of the balance 75% of the purchase price was extendable for a period, as may be agreed upon in writing between the parties. For ease of reference, sub-rule (4) of Rule 9 of the Rules, 2002, as it originally existed, is reproduced below:

“(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.”

24. Sub-rule (4) of Rule 9 of the Rules, 2002 was subsequently amended vide GOI Notification No.GSR 1046 (E) dated 3.11.2026 and clause (iv) of Rule 7 of the Security Interest (Enforcement) (Amendment) Rules, 2002 reads as under:

“(iv) in sub-rule (4), for the words “as may be agreed upon in writing between the parties”, the words, “as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months” shall be substituted.”

25. Subsequent to the aforesaid amendment, sub-rule (4) of Rule 9 of the Rules, 2002, now reads as under:

“(4) The balance amount of purchase price payable shall be paid by the

purchaser to the authorized officer on or before the fifteenth day of confirmation of sale of the immovable property **or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.”**

(emphasis supplied)

26. The effect of the amendment to sub-rule (4) of Rule 9 of the Rules, 2002 is that the fifteen days time period for depositing of the balance amount of the purchase price by the purchaser would be extendable upon agreement in writing between the purchaser and the secured creditor, for a period not exceeding three months in any case.

27. Rule 9 (4) of the Rules, 2002 was examined in the decision in **Union Bank of India vs. Rajat Infrastructure (P) Ltd.**, wherein it was clarified that the balance amount of the purchase price has to be paid by the auction purchaser to the Authorized Officer on or before the fifteenth day of confirmation of sale or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months. It was observed that even the plenary powers of the Supreme Court under Article 142 of the Constitution could not be invoked to supplant the substantive law, ignoring the express statutory provisions dealing with the subject and thereby to achieve something indirectly, which could not be achieved directly. It was observed as follows:

27. As discernible from the aforesaid sub-rule (4) of Rule 9, the balance amount of purchase price payable by the purchaser to the authorised officer has to be paid on or before the fifteenth day

of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months. Sub-rule (5) thereof states that in default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor and the property shall be resold, and that defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold. As per sub-rule (6) thereof, on the confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale would issue a certificate of sale of the immovable property in favour of the purchaser in the form prescribed under the Rules.

28. The provisions contained in sub-rules (4) and (5) of Rule 9 of the Rules, 2002, came up for consideration in the decision in the case of **Authorized Officer, State Bank of India vs. C. Natarajan**, wherein it was observed that a discretion is available to the Authorized Officer of the secured creditor for extension of time for depositing the balance consideration, but not exceeding the prescribed limit of ninety days. The objective and necessity of enactment of the powers of forfeiture of deposited amount of the secured creditor under sub-rule (5) was also explained by pointing out that the legislature had visualized that there was a need to arrest cases of deceptive manipulation of prices at the instance of unscrupulous borrowers by thwarting sale processes. It was observed that the purpose of the provision was aimed at instilling a sense of discipline in the intending purchasers while they proceed to participate in the auction-sale process.

Relevant observations made in the judgment in this regard are as follows:

27. In the current era of globalisation, the entire philosophy of society, mainly on the economic front is making rapid strides towards changes. Unscrupulous people have been inventing newer modes and mechanisms for defrauding and looting the nation. It is in such a scenario that provisions of enactments, particularly those provisions which have a direct bearing on the economy of the nation, must receive such interpretation so that it not only fosters economic growth but is also in tune with the intention of the law-makers in introducing a provision such as sub-rule (5) of Rule 9, which though harsh in its operation, is intended to suppress the mischief and advance the remedy. If indeed Section 73 and Section 74, which are part of the general law of contract, were sufficient to cater to the remedy, the need to make sub-rule (5) of Rule 9 as part of the Rules might not have arisen. Additionally, insertion of sub-rule (5) with such specificity regarding forfeiture must not have been thought of only for reiterating what is already there. It was visualised by the law-makers that there was a need to arrest cases of deceptive manipulation of prices at the instance of unscrupulous borrowers by thwarting sale processes and this was the trigger for insertion of such a provision with wide words conferring extensive powers of forfeiture. The purpose of such insertion must have also been aimed at instilling a sense of discipline in the intending purchasers while they proceed to participate in the auction-sale process.

28. At the cost of repetition, it must not be forgotten that the Sarfaesi Act was enacted because the general laws were

not found to be workable and efficient enough to ensure liquidity of finances and flow of money essential for any healthy and growth-oriented economy. The decision of this Court in *Mardia Chemicals Ltd. v. Union of India* [*Mardia Chemicals Ltd. v. Union of India*, (2004) 4 SCC 311], while outlawing only a part of the Sarfaesi Act and upholding the rest, has traced the history of this legislation and the objects that Parliament had in mind in sufficient detail. Apart from the law laid down in such decision, these are the other relevant considerations which ought to be borne in mind while examining a challenge to a forfeiture order.

29. There is one other aspect which is, more often than not, glossed over. In terms of sub-rule (5) of Rule 9, generally, forfeiture would be followed by an exercise to resell the immovable property. On the date an order of forfeiture is in contemplation of the authorised officer of the secured creditor for breach committed by the bidder, factually, the position is quite uncertain for the former in that there is neither any guarantee of his receiving bids pursuant to a future sale, much to the satisfaction of the secured creditor, nor is there any gauge to measure the likely loss to be suffered by it (secured creditor) if no bidders were interested to purchase the immovable property. Since the extent of loss cannot be immediately foreseen or calculated, such officers may not have any option but to order forfeiture of the amount deposited by the defaulting bidder in an attempt to recover as much money as possible so as to reduce the secured debt. That the immovable property is later sold at the same price or at a price higher than the one which was offered by the party suffering the forfeiture is not an eventuality that occurs in each and every case. Sections 73 and 74 of the Contract

Act would not, therefore, be sufficient to take care of the interest of the secured creditor in such a case and that also seems to be another reason for bringing in the provision for forfeiture in Rule 9. Ordinarily, therefore, validity of an order of forfeiture must be judged considering the circumstances that were prevailing on the date it was made and not based on supervening events.

33. The upshot of the aforesaid discussion is that whenever a challenge is laid to an order of forfeiture made by an authorised officer under sub-rule (5) of Rule 9 of the Rules by a bidder, who has failed to deposit the entire sale price within ninety days, the tribunals/courts ought to be extremely reluctant to interfere unless, of course, a very exceptional case for interference is set up. What would constitute a very exceptional case, however, must be determined by the tribunals/courts on the facts of each case and by recording cogent reasons for the conclusion reached.

34. Insofar as challenge to an order of forfeiture that is made upon rejection of an application for extension of time prior to expiry of ninety days and within the stipulated period is concerned, the scrutiny could be a bit more intrusive for ascertaining whether any patent arbitrariness or unreasonableness in the decision-making process has had the effect of vitiating the order under challenge. However, in course of such scrutiny, the tribunals/courts must be careful and cautious and direct their attention to examine each case in some depth to locate whether there is likelihood of any hidden interest of the bidder to stall the sale to benefit the defaulting borrower and must, as of necessity, weed out claims of bidders who instead of genuine interest to participate in the auctions do so to rig

prices with an agenda to withdraw from the fray post conclusion of the bidding process. In course of such determination, the tribunals/courts ought not to be swayed only by supervening events like a subsequent sale at a higher price or at the same price offered by the defaulting bidder or that the secured creditor has not in the bargain suffered any loss or by sentiments and should stay at a distance since extending sympathy, grace or compassion are outside the scope of the relevant legislation.

35. In any event, the underlying principle of least intervention by tribunals/courts and the overarching objective of the Sarfaesi Act duly complemented by the Rules, which are geared towards efficient and speedy recovery of debts, together with the interpretation of the relevant laws by this Court should not be lost sight of. Losing sight thereof may not be in the larger interest of the nation and susceptible to interference.

29. The objective and the background under which stringent consequences for default have been provided were taken note of in the decision in the case of **Authorized Officer, State Bank of India** (supra), and it was observed as follows:

“24. ...Drawing from our experience on the Bench, it can safely be observed that in many a case the borrowers themselves, seeking to frustrate auction sales, use their own henchmen as intending purchasers to participate in the auction but thereafter they do not choose to carry forward the transactions citing issues which are hardly tenable. This leads to auctions being aborted and issuance of fresh notices. Repetition of such a process of participation-withdrawal for a couple of

times or more has the undesirable effect of rigging of the valuation of the immovable property. In such cases, the only perceivable loss suffered by a secured creditor would seem to be the extent of expenses incurred by it in putting up the immovable property for sale. However, what does generally escape notice in the process is that it is the mischievous borrower who steals a march over the secured creditor by managing to have a highly valuable property purchased by one of its henchmen for a song, thus getting such property freed from the clutches of mortgage and by diluting the security cover which the secured creditor had for its loan exposure. Bearing in mind such stark reality, sub-rule (5) of rule 9 cannot but be interpreted pragmatically to serve twin purposes - first, to facilitate due enforcement of security interest by the secured creditor (one of the objects of the SARFAESI Act); and second, to prohibit wrong doers from being benefitted by a liberal construction thereof.”

30. In the case, at hand, the petitioners having participated in the auction held on 23.10.2024, and having deposited 25% of the bid amount on the said date, were required to deposit the remaining 75% of the purchase price before the fifteenth day of the sale confirmation, i.e. by 7.11.2024. However, upon request being made by the petitioners on 5.11.2024, the Bank granted extension of time till 6.12.2024. Another representation dated 2.12.2024 was submitted by the petitioners, seeking extension of time till 7.1.2025, stating their difficulty in arrangement of funds. The said request was also acceded to by the Bank and further extension of time was allowed to deposit the balance sale price till 27.12.2024. The petitioner made yet another representation dated 22.12.2024,

seeking further extension of time upto 7.2.2025, which was turned down by the Bank on the ground that no extension could be granted to the auction purchaser beyond the time period stipulated under the statutory rules.

31. There is no material on record, which may persuade this Court to come to a conclusion that there has been any manifest arbitrariness or unreasonableness on the part of the respondent-Bank in not acceding the repeated requests of the petitioners for depositing of the balance 75% amount of the bid amount beyond the time period stipulated under sub-rule (4) of Rule 9 of the Rules, 2002. The maximum permissible limit of three months, as provided under the relevant statutory rules, having already been granted by the secured creditor, there is no plausible reason which may warrant issuance of any direction for further extension of time period, as sought by the petitioners.

32. It may be reiterated as a settled principle of law that when a statute requires a particular thing to be done in a particular manner, it must be done in that manner or not at all, and other methods of performance are necessarily forbidden. (See: *Taylor v. Taylor*, (1875) LR 1 Ch D 426; *Nazir Ahmad vs. King Emperor*, AIR 1936 PC 253 (2); *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh*, (1954) 1 SCC 296; *State of UP v. Singhara Singh*, AIR 1964 SC 358; *Babu Verghese v. Bar Council of Kerala*, (1990) 3 SCC 422; *Municipal Corporation of Greater Mumbai vs. Abhilash Lal* (2020) 13 SCC 234 and *Nareshbhai Bhagubhai vs. Union of India*, (2019) 15 SCC 1.

33. Rule 9 (4) of the Rules, 2002, as amended with effect from 4.11.2016,

contains an ordainment that on mutual agreement, the time for making deposit of the balance amount of sale price can be extended for a period not exceeding ninety days; however, extension beyond ninety days would not be permissible in any case.

34. The decision in the case of **GM, Sri Siddeshwara Cooperative Bank Ltd.** (supra), followed in the subsequent decision of **Gaurav Garg** (supra), which are sought to be relied on behalf of the petitioners, were rendered in the context of the unamended Rule 9 (4) of the Rules, 2002, wherein there was no outer limit provided for extension of the time period for depositing of the balance amount of 75% of the purchase price. The said authorities cannot be relied upon by the petitioners to claim further extension of time beyond the outer limit prescribed under sub-rule (4) of Rule 9 of the Rules, 2002, as it now exists.

35. The secured creditor is entitled in law to enforce the security interest and in the process, to initiate all such steps and take all such measures for the protection of public interest by recovering public money lent to a borrower, who has defaulted in its repayment. The petitioners (auction purchasers), having participated in the auction, would be presumed to be fully aware of the requirements under the law with regard to deposit of the purchase price and also that in case of any default or failure on their part to make the payment of the sale price within the permissible time period under the relevant statutory rules, would entail forfeiture of the deposit already made by them.

36. Looking to the objectives for which, the SARFAESI Act, 2002 has been enacted, Courts have taken a consistent

view that in such a situation, where a bidder has failed to deposit the entire sale price within the stipulated period of ninety days, the tribunal/court would be extremely reluctant to interfere, unless of course, a very exceptional case for interference is made out. The underlying principle of least intervention by the tribunal/courts and the overriding objective of the SARFAESI Act and the Rules made thereunder, which are for speedy recovery of debt, cannot be lost sight of.

37. We do not see any patent arbitrariness or unreasonableness on the part of the respondent-Bank, which may persuade us to entertain the writ petition in respect of the reliefs sought.

38. The writ petition lacks merit and is, accordingly, **dismissed**.

(2025) 1 ILRA 519
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.01.2025

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ CNo. 3700 of 2019

Rakesh Tekariwal ...Petitioner
Versus
Addl. Commissioner Admin-I Devipatan
Division Gonda & Ors. ...Respondents

Counsel for the Petitioner:
Mayank Sinha, Girish Chandra Sinha

Counsel for the Respondents:
C.S.C.

Civil Law-The Indian Stamp Act, 1899-Sections 2(10), 2(14), 14 & 15 - Article 18 r/w Article 23 of The Schedule 1(B) - Clause 18 & 34(A) of The Appendix 1(B)-

For a deed to be termed as a deed of conveyance, the same should indicate provisions in terms of a sale as indicated in Section 54 of the Transfer of Property Act as per which a sale is transfer of ownership in exchange for price paid or promised or part paid and part promised--- That for a deed to come within definition of conveyance, transfer of rights and liabilities and interest upon the property indicated in the instrument is necessary--- That only effect of the deed is deletion or ignoring the gata No. 215/1289 against the plot defined in the sale deed---Evident from the wordings of the deed that there is no concomitant change either in the area of property or even in the boundaries---The deed dated 17th October, 2015 by any stretch of imagination can not be construed to be a second instrument chargeable with duty upon a piece of stamped paper on which duty has already been written since it is primarily a corrigendum issued for correcting a mistake indicated in the first deed of conveyance--- Opp. parties to ensure payment of 8% per annum simple interest to petitioner on the amount of deposit made by petitioner in pursuance of impugned orders from the date of deposit till the date of refund. (Para 15, 16, 17, 18 & 20)

Petition allowed. (E-15)

List of Cases cited:

1. M/s Kailash Mansarover Build Con. Pvt. Ltd. Vs St. of U.P. reported in AIR Online 2018 Allahabad 5175
2. Meenu Pathak Vs Revisional Authority/Dy. Commissioner, Stamp & ors. reported in AIR 2017 Allahabad 132

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

1. Head Mr. G.C. Sinha learned counsel for petitioner and learned State Counsel for opposite parties.

2. Petition has been filed challenging order dated 5th August, 2016 passed under Section 33 of the Indian Stamp Act 1899 indicating deficiency in stamp duty and

imposing penalty alongwith interest thereupon. Also under challenge is the revisional order dated 15th January, 2019 rejecting revision preferred by the petitioners.

3. Learned counsel for petitioner submits that the property in question alongwith three other properties were purchased by petitioner in an auction held by Allahabad Bank on 4th July, 2015 whereunder petitioner's bid being highest, was accepted whereafter a single sale deed dated 13th July, 2015 was executed in respect of all the four properties indicating the location, boundaries and area of all the four properties. It is submitted that with regard to property No.4, the sale deed indicated it as being located in gata No. 215/1289. It is also submitted that subsequent to execution of the aforesaid sale deed, the Allahabad Bank issued a notice dated 9th October, 2015 to the petitioner specifically indicating that due to a clerical mistake, the gata number was inadvertently indicated with regard to plot No.4 in the sale deed for which correction would be required. It is submitted that in pursuance of the aforesaid, a correction deed dated 17th October, 2015 was thereafter executed between the bank and the petitioner, which however is being taken by the opposite parties as a fresh sale deed instead of correction deed and has therefore been made chargeable to stamp duty as a fresh deed of conveyance.

4. Learned counsel submits that even in the memorandum of revision, a specific ground had been taken that since the subsequent deed dated 17th October, 2015 merely sought to delete the plot number without any amendment in the area or boundaries of the plot in question, the said deed would clearly come within definition

of correction of a clerical mistake and can not be treated to be a fresh deed of conveyance and therefore deficiency in stamp duty has been wrongly imposed upon petitioner. Learned counsel has adverted judgments rendered by Co-ordinate Benches of this Court in the cases of **M/s Kailash Mansarover Build Con. Pvt. Ltd. versus State of U.P.** reported in AIR Online 2018 Allahabad 5175 and **Meenu Pathak versus Revisional Authority/Dy. Commissioner, Stamp and others** reported in AIR 2017 Allahabad 132.

5. Learned State Counsel has refuted submissions advanced by learned counsel for petitioner with submission that it would be evident from a perusal of the impugned orders that the deed dated 17th October, 2015 has correctly been indicated as a fresh deed of conveyance on which insufficient stamp duty has been indicated and therefore imposed. It is submitted that with regard to plot No.4 indicated in the sale deed dated 13th July, 2015, the gata number has been specifically indicated in the sale deed not for the first time but the same was also indicated in the auction notice and the sale certificate issued in favour of petitioner. It is further submitted that a complete deletion of the gata number in the earlier sale deed can not be deemed to be a mere correction since it would indicate rights having been created over the property in question due to deletion of such gata number, particularly when the aforesaid gata number had earlier also been indicated not only in the auction notice but also in the sale certificate duly signed and issued by the Allahabad Bank. It has been submitted that due to the said fact, the execution of subsequent deed terming it to be a correction deed is against provisions of Section 14 and 15 of the Stamp Act as well

as Clause 18 of the Appendix 1(B) of the Schedule to the Act and therefore also it would not come within category of a corrigendum under Clause 34(A) of the Appendix 1(B) of the Act.

6. It has also been submitted that the aforesaid gata No. 215/1289 is in fact in the name of guarantor Mr. Samay Prasad Mishra who is the progeny of the mortgagors towards the guarantee of loan and therefore it is submitted that by virtue of deletion of the gata number, the property would in fact revert to the guarantors, which therefore would indicate fresh transfer of interest on the property and therefore has been rightly adjudicated as fresh deed of conveyance and not deed of correction.

7. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record the following question requires adjudication:-

Whether the deed dated 17th October, 2015 can be considered to be a corrigendum or a fresh deed of conveyance?

8. With regard to aforesaid question, it is evident from the record that after execution of the sale deed dated 13th July, 2015 in pursuance of public auction in favour of petitioner, the bank issued a letter dated 9th October, 2015 to the petitioner indicating the fact that with regard to plot No.4, the gata No. 215/1289 against the said plot was inadvertently indicated and requires correction. In pursuance of the aforesaid letter, the deed dated 17th October, 2015 has been executed between the bank and the petitioner indicating it to be a corrigendum. The said deed specifically states that with regard to plot

No.4 as indicated in the sale deed dated 13th July, 2015, the gata number has been inadvertently mentioned and would require to be ignored. The deed further states that the corrigendum would not have any effect on the valuation of property since the area and boundaries of the plot have been correctly indicated in the sale deed dated 13th July, 2015.

9. A perusal of the impugned orders would make it evident that subsequent deed dated 17th October, 2015 has been considered as a fresh deed of conveyance on the ground that deletion of a gata number can not be construed as a mistake particularly when the aforesaid gata number was clearly mentioned in the sale certificate issued by the bank earlier. The orders impugned also indicate the fact that there is no provision under the Indian Stamp Act for deletion or addition of gata numbers of plots which are the basis of the instrument of transfer and furthermore that by means of the deed dated 17th October, 2015, the effect thereof would be that the aforesaid gata number indicated in various documents would also required to be ignored, which is against provisions of Indian Stamp Act.

10. Apart from the reasons indicated in the impugned order, the counter affidavit filed by opposite parties have also adverted to provisions of Sections 14 and 15 of the Act as well as Clause 18 of the Appendix 1-B of the Act.

11. With regard to aforesaid, it is evident that the term conveyance has been defined in Section 2(10) of the Act in the following manner:-

"2(10) "Conveyance".- "*conveyance*" includes a conveyance on sale

and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for [by Schedule I, Schedule I-A or Schedule I-B], [as the case may be];"

12. Furthermore the term instrument has been defined under Section 2(14) of the Act in the following manner:-

"2(14) *Instrument*.- "*instrument*" includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded;"

13. A conjoint appreciation of the aforesaid two provisions would clearly give the meaning of word 'an instrument of conveyance' and would include all such deeds which purport to create, transfer, limit, extend or extinguish any right or liability over the property whether movable or immovable and which is not otherwise specifically provided for.

14. Article 18 read with Article 23 of the Schedule 1(B) of the Act indicates certificate of sale and conveyance and proper stamp duty imposable thereupon. The aforesaid Articles are clearly relatable to Sections 2(10) and 2(14) of the Act.

15. Upon appreciation of the aforesaid provisions, it can clearly be culled out that□ for a deed to be termed as a deed of conveyance, the same should indicate provisions in terms of a sale as indicated in Section 54 of the Transfer of Property Act as per which a sale is transfer of ownership

in exchange for price paid or promised or part paid and part promised.

16. The aforesaid conspectus of provisions of the Transfer of Property Act read with relevant provisions of Stamp Act would make it evident that for a deed to come within definition of conveyance, transfer of rights and liabilities and interest upon the property indicated in the instrument is necessary.

17. Upon applicability of aforesaid provisions of the two Acts, it is evident from a perusal of the deed dated 17th October, 2015 that only effect of the deed is deletion or ignoring the gata No. 215/1289 against the plot No.4 defined in the sale deed dated 13th July, 2015.

18. It is also evident from the wordings of the deed that there is no concomitant change either in the area of property or even in the boundaries thereof. In such circumstances, it can not be held that the deed dated 17th October, 2015 would create any fresh interest or liability upon a new plot of land which would be separate from the earlier deed dated 13th July, 2015.

19. The provisions of Sections 14 and 15 of the Stamp Act pertain to the aspect that no second instrument chargeable with duty shall be written upon a piece of stamp paper upon which an instrument chargeable with duty has already been written and every such instrument written in contravention of Sections 13 and 14 of the Act would be deemed to be unstamped.

20. Section 14 of the Act by its very definition is inapplicable in the present facts and circumstances since the deed dated 17th October, 2015 by any stretch of

imagination can not be construed to be a second instrument chargeable with duty upon a piece of stamped paper on which duty has already been written since it is primarily a corrigendum issued for correcting a mistake indicated in the first deed of conveyance.

21. In view of aforesaid facts and circumstances and provisions of the Act, it is quite evident that the deed dated 17th October, 2015 can not be construed to be a fresh deed of conveyance since it does not change either the description, boundaries or area of the plot in question nor does it create a fresh right, interest or liability over new plot.

22. The aforesaid aspects have also been considered by a Division Bench of this Court in Basdeo Singh versus State of U.P. and others 2004 All.L.J. 831 in which following has been held:-

"We are further of the view that an arithmetical mistake has to be taken to be a mistake of calculation and a clerical mistake has to be taken to be a mistake in writing or typing. A mistake requiring elaborate arguments on question of fact or law cannot be categorized as clerical or arithmetical mistake. The petitioner has sought to claim a right asserting that there was an error of decision. Such grievance could be raised only in a proceeding challenging the award after getting reference made as contemplated under section 18 of the Act and not in the proceedings under Section 13-A of the Act. The question of enhancement of the compensation as sought for in the present case has to be determined in the appropriate proceeding after the reference is made as contemplated under section 18 of the Land Acquisition Act."

23. Similarly in the case of **Meenu Pathak (supra)** a Co-ordinate Bench of this Court has placed reliance on another judgment rendered this Court in the case of Vineeta Agarwal versus Additional Commissioner (Administration) in the following manner:-

"7. The mistake in mentioning the plot number in the lease deed is purely a clerical error which has arisen due to inadvertence of the parties, specially the office of the Allahabad Development Authority. The said correction deed does not create any new rights in favour of the petitioner. The petitioner by the said two documents read together only gets right in plot no.D-393 and, therefore, is liable for payment of stamp duty only once.

XXXXXXXXXXXXXX

9. In view of the above, the aforesaid deed dated 7.2.2006 is a deed of correction and since it was necessitated on account of clerical mistake it would be chargeable to stamp duty under Article 34-A of Schedule 1-B of the Indian Stamp Act, 1899 and stamp duty of Rs.10/- alone shall be payable on it. The petitioner has already paid a stamp duty of Rs.100/- on the said deed."

It has thereafter been held that since the deed in question in the aforesaid writ petition did not create any new right, it was therefore construed to be a correction deed chargeable under Article 34-A of Schedule 1-B of the Act and therefore stamp duty of Rs.10/- only would be payable.

24. This Court is in respectful agreement with aforesaid proposition of law as enunciated.

25. So far as the aspect that the gata number had earlier also been indicated in

the auction and sale certificate and therefore can not be construed as a mistake is concerned, the said aspect also has been delineated in the deed dated 17th October, 2015 in which it has been specifically indicated that even in the e-auction notice, there was no mention of gata number with regard to the plot in question. This aspect takes care of the reasoning indicated in the impugned orders which clearly are against material on records.

26. In view of aforesaid, the impugned orders dated 5th August, 2016 and 15th January, 2019 being against the provisions of law are hereby quashed by issuance a writ in the nature of Certiorari. Further a writ in the nature of Mandamus is issued commanding the opposite parties to refund any amount deposited by petitioner in pursuance of impugned orders forthwith to the petitioner.

27. Learned counsel for petitioner has emphasized that since an illegal recovery has been made from petitioner, he is entitled to interest thereupon. He has placed reliance on judgment of Co-ordinate Bench of this Court in the case of M/s Kailash Mansarovar Build Con. Pvt. Ltd.(supra).

28. Upon perusal of the aforesaid judgment, it is evident that Co-ordinate Bench of this Court has issued a general Mandamus to the State Government and all concerned authorities to pay simple interest at the rate of 8% per annum on all amounts of refund □ of stamp duty etc. under the Act to the concerned person for the period from the date of deposit till the date of refund. A copy of the order was also sent to the Chief Secretary, Principal Secretary, Law and Principal Secretary, Tax and Registration for compliance. The relevant portion is as follows:-

"28. Hon'ble Supreme Court has also held in the case of Sandvic Asia Ltd. (Supra) that such a situation is discriminatory in nature and causes great prejudice to the lacs and lacs of the assessees. In the case of Tata Chemicals Ltd. (Supra) Hon'ble Supreme Court observed that the Government, there being no express statutory provision for payment of interest on the refund of excess amount/ tax collected by the revenue; cannot shrug off its apparent obligation to reimburse the deductors lawful money with accrued interest for the period of undue retention of such monies. The State having received the money without right and having retained and used it, is bound to make the party good, just as an individual would be under the like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. In the case of Hari Chandra (Supra), this Court held in similar circumstances in stamp matter that payment of interest on the money retained by the State Government is necessary when the money is to be returned under the orders of the appellate or the revisional authority. It has not been shown by the respondents that the law laid down in this judgement has been reversed or modified. In this judgement, this Court directed for payment of interest @ 8 per cent per annum from the date of deposit of money till the date of actual payment.

29. In view of the above discussions, a general mandamus is also issued to the State Government and all concerned authorities to pay within three months simple interest @ 8 per cent annum on all amounts of refund of stamp duty etc. under the Act to the concerned person, for the period from the date of deposit till the date of refund.

30. In result, writ petition succeeds and is allowed as indicated above.

31. Let a copy of this order be sent by the Registrar General of this Court to the Chief Secretary, Principal Secretary Law and Principal Secretary, Tax and Registration for compliance. "

29. In view of aforesaid judgment, a further writ in the nature of Mandamus is issued commanding the opposite parties to ensure payment of 8% per annum simple interest to petitioner on the amount of deposit made by petitioner in pursuance of impugned orders from the date of deposit till the date of refund. Such payment of interest and refund shall be ensured within a period of three months from the date a certified copy of this order is served upon the said authorities.

30. Resultantly the petition succeeds and is allowed. Parties to bear their own cost.

(2025) 1 ILRA 525
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2025

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Writ C No. 22636 of 2024

Surendra Mani	...Petitioner
	Versus
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:
 Anil Kumar Tiwari

Counsel for the Respondents:
 C.S.C.

A. Land Law – Condonation of delay – Limitation Act, 1963 - Sections 3 & 5 - Uttar Pradesh Land Revenue Act, 1901 - Sections 200 & 201 - Delay in filing an application can be condoned if the sufficient ground exists, in the opinion of the Court, which prevented the party to approach the Court within time, even on an oral prayer made by the party. Not necessarily in every case, a written application has to be insisted upon. (Para 30)

In view of Section 201 of the Act, 1901, an ex-parte order can be recalled on sufficient cause being shown by either the plaintiffs or the defendants for their non-appearance. The provisions of Section 201 are similar to those of Section 5 of the Limitation Act except for the party has to satisfy that there has been failure of justice.

In the present case, the proceedings were decided against respondent Nos. 4 to 6 ex-parte in exercise of powers u/s 200 of the Act, 1901. Section 201 of the Act, 1901 provides that if a plaintiff, within 15 days from the date of order, and if a defendant, within 15 days after the order has been communicated to him, or after any process for enforcing the judgment has been executed or at any earlier period shows good cause for his non-appearance, and satisfies the officer making the order that there has been a failure of justice, such officer may, upon such terms as to costs or otherwise as he thinks proper, revive the case and alter or rescind the order according to the justice of the case. In the present case, the power has been exercised u/s 201 of the Act, 1901. (Para 31)

There is no denial of the facts as St.d by the contesting respondents in their application for restoration and the courts below have committed no illegality in recalling the ex-parte order dated 08.06.2017 and condoning the delay in filing the restoration application. (Para 33, 34)

Writ petition dismissed. (E-4)

Precedent followed:

1. Markland Pvt. Ltd. & ors. Vs St. of Guj., AIR 1989 Guj 44 (Para 13)
2. Patel Purshottamdas Motilal Vs Patel Chhotabhai Motibhai, 1979 (1) GLR 918 (Para 14)
3. Kulsoomun Nissa & ors. Vs Noor Mohammad & ors., AIR 1936 All 666 (Para 15)
4. Shakuntala Devi Vs Banwari Lal & ors., AIR 1977 All 551 (Para 16)
5. Rajiv Lochan Pandey Vs Madan Gopal Sharma & ors., AIR 1989 All 45 (Para 17)
6. Virendra Kumar Singhai Vs Murari Lal Singhal & ors., 1993 AWC 782 All (Para 18)
7. Savitri Devi Vs D.D.C. & ors., 2014 (122) RD 205 (Para 20)
8. Bhagmal & ors. Vs Kunwari Lal & ors., (2010) 12 SCC 159 (Para 21)
9. Dwarika Prasad (D) Thr. LRs. Vs Prithvi Raj Singh, 2024 INSC 1030 decided on 20.12.2024 (Para 22)
10. Firm Kaura Mai Bishan Dass Vs Firma Mathra Dass Atama Ram & ors., AIR 1959 Punj 646 (Para 23)
11. Mehar Singh Vs Dhurender Singh & ors., AIR 1993 P&H 23; (Para 23)
12. Meghraj Vs Jesraj Kasturjee, AIR 1975 Madras 137; (Para 23)
13. Nand Singh Vs ESt. Officer & anr., AIR 1993 Delhi 38; (Para 23)
14. Suresh Kumar & ors. Vs Firm Kurban Hussain Taiyab Ali & ors., AIR 1996 MP 151 (Para 23)
15. Kashinath Mondal Vs St. of W.B., 2007 SCC on-line Calcutta 739 (Para 23)
16. St. of M.P. & anr. Vs Pradeep Kumar & anr., (2000) 7 SCC 372 (Para 28)

17. Jai Pratap Singh & ors. Vs Board of Revenue & ors., 2006 (10) ADJ 196 (Para 32)

Precedent distinguished:

1. Ram Prakash Vs Deputy Director of Consolidation, 2022 (3) ADJ 1 (Para 4)

2. Chander Bhan Vs Bal Mukund & ors., AIR 1972 SC 2125 (Para 4)

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

1. Heard Sri Anil Kumar Tiwari, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. This writ petition has been filed for the following reliefs:-

“(A). Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 2.6.2023 and 31.1.2024 passed by Court of Naib Tehsildar Sadar in Case No. 9426 of 2020 Deoria as well as order dated 28.2.2024 passed by Court of Commissioner Gorakhpur Region Gorakhpur in Revision No. 926/23, which is annexed as Annexure No. 1, 2 and 3 to this writ petition.

“(B). Issue a writ, order or direction in the nature of Mandamus commanding the respondent and directing them (respondent No. 3) to direct the parties for maintain status quo on the spot, during the pendancy of the case.”

3. Brief facts of the case are that a dispute arose as to succession of one Janaki Devi, widow of Hari Nandan. Smt. Janaki Devi executed a Will dated 29.10.1993 in favour of the petitioner. The predecessor in interest of respondent Nos. 4 to 6 claimed

the property in dispute on the basis of Will executed by Hari Nandan, husband of Janaki Devi. In this regard, Mutation Case No. 427 of 1994 was filed by the predecessor in interest of respondent Nos. 4 to 6. The aforementioned case was dismissed in default by order dated 08.06.2017 passed by Naib Tehsildar, Tehsil- Sadar, District Deoria-respondent No. 3. During the pendency of the aforesaid mutation case Damadi- predecessor in interest of respondent Nos. 4 to 6 died and respondent Nos. 4 to 6 were substituted in his place. Respondent Nos. 4 to 6 moved an application dated 26.02.2020 before respondent No. 3 for recalling the order dated 08.06.2017 passed by respondent No. 3 dismissing the case in default. Copy of the application is annexed as Annexure No. 7 to the writ petition. The petitioner filed his objections on 03.03.2022 to the restoration/ recall application filed by respondent Nos. 4 to 6 pleading inter alia that the said application is not maintainable as there was no application filed by respondent Nos. 4 to 6 under Section 5 of the Limitation Act for condonation of delay in filing the restoration application. The objections filed by the petitioner are annexed as Annexure No. 8 to the writ petition. Respondent No. 3 vide its order dated 02.06.2023 after considering the objections filed by the petitioner, condoned the delay in filing the restoration application. Copy of the order dated 02.06.2023 is annexed as Annexure No. 1 to the writ petition. Against the order dated 02.06.2023, the petitioner filed a revision before the Commissioner, Gorakhpur Region, Gorakhpur-respondent No. 2 which has been dismissed by order dated 28.02.2024. Copy of the order has been annexed as Annexure No. 3 to the writ petition. In the meantime, restoration application filed by respondent Nos. 4 to 6

was also allowed by order dated 31.01.2024. Copy of the order dated 31.01.2024 is annexed as Annexure No. 2 to the writ petition. Hence the present writ petition.

4. Counsel for the petitioner contended that there was no separate application filed by the petitioner under Section 5 of the Limitation Act for condoning the delay in filing the restoration application for recalling the order dated 08.06.2017 and therefore, respondent No. 3 has erroneously condoned the delay in filing the application after considering the objections of the petitioner and the said order is without jurisdiction, in view of Section 3 of the Limitation Act. It has been further contended by counsel for the petitioner that under the U.P. Land Revenue Act, 1901 (hereinafter referred as “ the Act, 1901”), there is no provision by which the provisions of Limitation Act were made applicable to the proceedings under the Act, 1901 and therefore, also the delay could not have been condoned by respondent No. 3. Admittedly, the proceedings were under the provisions of the Act, 1901. In support of his submissions learned counsel for the petitioner relied upon the judgment of the Division Bench of this Court in case of **Ram Prakash Vs. Deputy Director of Consolidation, Hardoi and others**; reported in **2022 (3) ADJ 1** and also the judgment of the Hon’ble Supreme Court in case **Chander Bhan Vs. Bal Mukund and anothers**; reported in **AIR 1972 SC 2125**.

5. *Per contra*, learned Standing Counsel submitted that Section 5 of the Limitation Act gives power to the court to condone the delay, if any, and extend the limitation. There is no requirement of filing a separate application for condoning the

delay and the same can even be condoned on an oral prayer made by a party. It has also been contended by learned Standing Counsel that even assuming that provisions of Limitation Act are not applicable to the proceedings under the Act, 1901, since the order dated 08.06.2017 was an ex-parte order, the same could have been recalled under Section 201 of the Act, 1901.

6. Before considering the rival submissions, it would be appropriate to look into the relevant provisions of law.

7. Section 3 of the Limitation Act provides bar of limitation. Section 3 of the Limitation Act, 1963 is quoted as under:-

“3. Bar of limitation.—
(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.”

8. Section 5 of the Limitation Act provides for extension of prescribed period in certain cases and the same is quoted as under:-

“5. Extension of prescribed period in certain cases.—*Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*

Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High

Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

9. Section 200 of U.P. Land Revenue Act, 1901 provides for hearing in absence of party. Section 200 of the Act, 1901 is quoted as under:-

“200. Hearing in absence of party. - *Whenever any party to such proceeding neglects to attend on the day specified in the summons or on any day to which the case may have been postponed, the Court may dismiss the case for default or may hear and determine it ex parte.”*

10. Section 201 of U.P. Land Revenue Act, 1901 provides for re-hearing on proof of good cause for non-appearance and the same is quoted as under:-

“201. No appeal from orders passed ex parte or by default. - *No appeal shall lie from an order passed under Section 200 ex parte or by default.*

Re-hearing on proof of good cause for non-appearance. - *But in all such cases, if the party against whom judgment has been given appears either in person or by agent (if a plaintiff, within fifteen days from the date of such order, and if a defendant, within fifteen days after such order has been communicated to him, or after any process for enforcing the judgment has been executed or at any earlier period), and shows good cause for his non-appearance, and satisfies the officer making the order that there has been a failure of justice, such officer may, upon such terms as to costs or otherwise as he thinks proper, revive the case and alter or rescind the order according to the justice of the case:*

Order not to be altered without summons to adverse party. - *Provided that no such order shall be reversed or altered without previously summoning the party in whose favour judgment has been given to appear and be heard in support of it.”*

11. Section 5 of Limitation Act provides that an appeal or an application may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. Section 5 in fact has been incorporated to save those innocent litigants who either under misapprehension or miscalculation, under bona fide belief or because of the inevitable circumstances could not bring the proceedings before the Court within limitation. It is the power which is given to the Court to condone delay and extend the limitation. It is for the Court to satisfy itself that the sufficient cause exists or not to condone the delay. If the Court on the facts presented before it comes to the conclusion that the delay deserves to be condoned then the Court is duty bound to save the party from unnecessary sufferance's and would permit the appellant to go into the arena of their legal rights of the matter after removing the hurdle of limitation.

12. The question whether Section 3 of Indian Limitation Act would control and govern the powers given to the Court under Section 5 of Limitation Act would not be of importance. Section 3 merely provides that if the proceedings are not instituted within limitation, the same are liable to be dismissed even if the limitation has not been set up as a defence. But Section 5 gives the powers to the Court to extend the period of limitation if there is a sufficient cause for not drawing the proceedings well

within limitation. In fact Section 5 is in nature of proviso to Section 3 and would dilute the rigour of Section 3.

13. In case of **Markland Pvt. Ltd. and Ors. Vs. State of Gujarat**; reported in **AIR 1989 Guj 44**, the Gujarat High Court held that Section 5 of the Limitation Act only requires the appellant or the applicant to satisfy the court that he had sufficient cause for not preferring the appeal or filing the revision within the prescribed period. This section does not require that there should be a written application for condonation of delay. Paragraph No. 9 of the judgment in case of Markland Pvt. Ltd. and Ors. Vs. State of Gujarat (supra) is quoted as under:-

“9. The learned counsel for the petitioners submitted that the revision application as provided under S. 9 of the Act is required to be filed within a period of sixty days from the date of the order under challenge. In this case the revision application is filed after a period of about ten months from the prescribed date of limitation. As submitted by the learned counsel for the petitioners the Tribunal may condone the delay, but in the instant case there was no application for condonation of delay. Hence, in absence of application for condonation of delay, the delay could not have been condoned the contention is misconceived. There is no dispute with regard to the fact that provisions of section 5 of the Limitation Act do apply to these proceedings. Section 5 of the Limitation Act only requires the appellant or the applicant to satisfy the Court that he had sufficient cause for not preferring the appeal or making the revision application within such period. The section does not require that There should be a written application for

condonation of delay. In fact this is the view which has been taken by this Court in the case of Naran Anneppa Shethi v. Jayantilal Chenille Shah, MANU/GJ/0067/1987: AIR 1987 Guj 205 and in the case of Patel Purshottamdas Motilal v. Patel Chhotabhai Motibhai, (1979) 20 GLR 918. Therefore, the contention that the Tribunal ought not to have condoned the delay in absence of written application for condonation of delay has no merit and the same is required to be rejected.”

14. In case of **Patel Purshottamdas Motilal v. Patel Chhotabhai Motibhai**, reported in **1979 (1) GLR 918**, in paragraph No. 6, the Gujarat High Court has held as under:-

“6. It has been argued by Mr. Majmudar that no application for condoning delay was made by the plaintiff. Ordinarily, a party who wants to avail himself of the benefit of Section 5 of the Limitation Act makes an application setting out grounds which, in his opinion, constitute 'sufficient cause' and praying for condonation of delay and for admitting to hearing an appeal or application which is otherwise time barred. In the instant case, the plaintiff did not make such an application. Was that omission on the part of the plaintiff fatal to his case? In our opinion, though an application for condoning delay is ordinarily necessary, it is not a mandatory requirement of law. In a given case, even on an oral application, the Court has got the jurisdiction to condone delay if the facts and circumstances of the case so warrant. In the instant case, several orders which the -learned trial Judge made granting time to the plaintiff to file his objections themselves constituted a 'sufficient cause' and, therefore, it could not be said that the oral application made by

the plaintiff to take his objections on record which otherwise appeared to be time-barred was not maintainable or suffered from a fatal omission to state the 'sufficient cause'. The learned trial Judge was, therefore, in error in dismissing the plaintiff's application in limine on the ground that it was barred by time. He ought to have admitted it to file and heard it on merits and decided it."

15. This Court in case of **Kulsoomun Nissa and Ors. Vs. Noor Mohammad and Ors.**; reported in **AIR 1936 All 666**, held as under:-

"The first ground on which the appeal has been dismissed by the lower appellate Court is that the plaintiffs had not made any formal application for an extension of time under Section 5, Limitation Act, and that, therefore, their appeal against Hakim Shyam Sundar Lal was beyond time. In our opinion the Court below has erred in exercising its discretion in this matter. The reason why Hakim Shyam Sundar Lal's name was omitted from the names of the respondents obviously was that his name did not find a place in the decree. He was impleaded later on within 30 days of the substitution of his name. We think that the lower Court should have allowed the defendant to get round the technical objection of the absence of a formal application for extension of time." (Paragraph No. 1)

16. In case of **Shakuntala Devi Vs. Banwari Lal and Ors.**, reported in **AIR 1977 All 551**, this Court has taken a view that formal application under Section 5 of the Limitation Act is not necessary to enable the Court to decide whether delay deserves to be condoned or not. Paragraph No. 5 of the judgment in case of Shakuntala

Devi Vs. Banwari Lal and Ors. (supra) is quoted as under:-

"5. Learned counsel appearing on behalf of the applicant further contended that merely because the application dated 18th March, 1964 praying for setting aside the abatement did not contain a formal prayer for condoning the delay did not bear the court from treating it as an application under Section 5, Limitation Act and from taking into account the relevant material on record for the purpose of deciding as to whether the applicant had sufficient cause for condonation of delay in making the application for substitution and for applying for setting aside the abatement of the appeal. In support of the contention that a formal application under Section 5 of the Limitation Act is not necessary to enable the court to decide whether delay deserves to be condoned or not learned counsel appearing on behalf of the applicant has relied on the decision of the Punjab High Court in Firm Kaura Mal Bishan Das v. Firm Mathra Dass Atma Ram, Ahmedabad MANU/PH/0205/1959 wherein it was held (at p. 646)--

"Merely because there was no written application filed by the appellant is hardly a sufficient ground for refusing him the relief, if he is otherwise entitled to it. Procedure is meant for advancing and not for obstructing the cause of justice; and if the entire material is on the record, it cannot promote the ends of justice, if that material is ignored and the relief refused to the appellant, merely because he had not claimed it by means of a formal application in writing or that a formal affidavit was not filed. The language of Section 5 also does not provide that an application in writing must be filed before relief under the said provision can be granted."

In the above-mentioned decision, reliance was placed on the Division Bench decision of this Court in Mt. Kulsoomun Nissa v. Noor Mohammad MANU/UP/0237/1936 :AIR 1936 All 666. The submission made is supported by two decisions cited above and must consequently prevail.”

17. In case of **Rajiv Lochan Pandey Vs. Madan Gopal Sharma and Ors;** reported in **AIR 1989 All 45**, this Court held that for condonation of delay, not in all cases, it is always necessary to move an application under Section 5 of the Limitation Act. Paragraph No. 26 of the judgment in case of Rajiv Lochan Pandey Vs. Madan Gopal Sharma(supra) is quoted as under:-

“26. Sri S. S. Tyagi urged that since the petitioner had knowledge, and there was no application for condonation of delay, therefore, the trial Court did not commit any mistake in rejecting the application under Order IX, Rule 13 of the Code. The petitioner had stated clearly in the affidavit, whether that was relied or not that he did not have the knowledge of the date of hearing of the suit and if that is ultimately found established. the application filed by him under Order IX, Rule 13 of the Code could not be held to be time barred. Similarly, for condonation of delay, not in all the cases, it is always necessary to move an application under Section 5 of the Limitation Act. But if from the affidavit of a particular case, the delay is found explained fully, the Court has ample power to condone the same.”

18. In case of **Virendra Kumar Singhai Vs. Murari Lal Singhal and Ors;** reported in **1993 AWC 782 All**, this Court in Paragraph No. 5 has held as under:-

“5. So far as the first submission of the learned counsel for the applicant is concerned, I have perused the application dated 29-1-1990 and the supporting affidavit filed be the Plaintiff-opposite party for substituting the widow and the two daughters of the deceased defendant. The Plaintiff had given reasons for not filing the application within the statutory period. It has been stated in paragraph 7 of the affidavit that the courts were closed from 28-7-1989 to 10-12-1989 due to lawyers strike and since the Plaintiff was not aware of the addresses of the daughters of the deceased Defendant prior to 27-1-1920 the application could not be filed before 29-1-1990 which was the date fixed in the case after the strike was over. In paragraph 8 of the affidavit it was prayed that the delay in filing the application deserved to be condoned. It is apparent, therefore, that the prayer for condoning the delay was there in the application for substitution filed on 29-1-90, I am of the view that in the facts and circumstances of the case no separate application under Section 5 of the Limitation Act was required.....”

19. In the present case also in the restoration application, which is annexed as Annexure No. 7 to the writ application, in paragraph No. 5, the respondents have claimed benefit of Section 5 of the Limitation Act.

20. Again in case of **Savitri Devi Vs. D.D.C. and others;** reported in **2014 (122) RD 205**, this Court was of the view that the delay can be condoned on oral request made by a party. Paragraph No. 5 of the judgment in case of Savitri Devi Vs. D.D.C. and others (supra) is quoted as under:-

“5. So far as the arguments of the counsel for the petitioner that the delay has

been wrongly condoned is concerned, in this respect it is stated that the Settlement Officer, Consolidation in his order dated 6.9.2010 has specifically condoned the delay. The delay could be condoned even on the oral request as held by the Supreme Court in L/Naik Mahabir Singh Vs. Chief of Army Staff, (Suppl.) SCC 89. In the circumstances that respondent No. 3 had not been issued any notice and she did not enter into the compromise before the Assistant Consolidation Officer, the order being ex parte, the delay has rightly been condoned. In any case it is not expected from the Court having supervisory jurisdiction to interfere with the discretion of the Court below in condoning the delay."

21. The Hon'ble Supreme Court in case of **Bhagmal and others Vs. Kunwar Lal and others**; reported in (2010) 12 SCC 159, after considering the facts of the case held that High Court should not have been taken a hyper-technical view that no separate application was filed under Section 5 of the Limitation Act and it should not have set aside the order passed by the appellate court. Paragraph Nos. 10, 11, 12 and 13 of the judgment in case of Bhagmal and others Vs. Kunwar Lal and others (supra) are quoted as under:-

"10. This well considered order of the appellate Court came to be interfered with by the High Court solely on the ground that there was no application for condonation of delay made by the appellant-defendants before the trial court in support of their application under Order 9 Rule 13 CPC. The High Court observed that the appellate court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not

and went on to decide the application on merits and, therefore, it had exceeded its jurisdiction. The High Court also commented on the fact that the ex-parte decree was decided on 19-4-1985, while the application for setting aside the ex parte decree was filed on 8-7-1988 and that no application for condonation of delay under Section 5 of the Limitation Act was filed. Relying on Article 123 of the Limitation Act, the High Court took the view that the application ought to have been filed within 30 days from the date of passing of the decree and since it was not so filed, at least a condonation of delay application should have been made under Section 5 of the Limitation Act and, therefore, in the absence of prayer for condonation of delay, the appellate court could not have allowed the application under Order 9 Rule 13.

11. In our opinion, the High Court was not justified in taking a hypertechnical view. We have seen all the orders. It is quite clear from the trial court's order that the trial court entertained the application on merits. The trial court undoubtedly has referred to the reply of the respondents to the effect that the application for setting aside the ex-parte decree was beyond the limitation. However, the view taken by the trial court was based more on the merits. In fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable. The trial court has more or the less based its findings regarding delay on the basis of the order sheets. That was not right as the order sheets nowhere bore the signatures of the parties. They were mechanically written mentioning "parties as before". Therefore, the trial court did not throw the application under Order 9 Rule 13 merely on the basis

of the fact that no application for condonation of delay was made. It went on to consider the delay aspect as well as the merits and even allowed the parties to lead evidence.

12. It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellants-defendants had clearly pleaded that they did not earlier come to the Court on account of the fact that they did not know about the order passed by the Court proceeding ex-parte and also the ex-parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellant-defendants for making the Order 9 Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order 9 Rule 13 application was, in our opinion, rightly considered by the appellate Court on merits and the appellate Court was absolutely right in coming to the conclusion that appellant-defendants were fully justified in filing the application under Order 9 Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex-parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the hypertechnical view that no separate application was filed under Section 5.

13. The application under Order 9 Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice.....”

22. Very recently, the Hon’ble Supreme Court in case of **Dwarika Prasad (D) Thr. LRs. Vs. Prithvi Raj Singh**; reported in **2024 INSC 1030** decided on 20.12.2024 relied upon the judgment of Supreme Court in case Bhagmal and others Vs. Kunwar Lal and others (supra) and held in paragraph No. 12 as under:-

“12. From the above cases, it is clear that there was no need to file a separate application for condonation of delay in the present case as well. The High Court has erred in taking a hyper technical view and concluding that there was violation of mandatory provision of law. Endorsing such a view would effectively mean ignoring the purpose of judicial procedure. The procedure cannot stand in the way of achieving just and fair outcome. In the present case, the Appellant acted bona fide and diligently. His conduct does not violate any rule of law.”

23. Similar view has been taken by learned Judges of Punjab and Haryana High Court, Madras High Court, Delhi High Court, Madhya Pradesh High Court and Calcutta High Court in cases of **Firm Kaura Mai Bishan Dass Vs. Firma Mathra Dass Atama Ram and others** reported in **AIR 1959 Punj 646**; **Mehar Singh Vs. Dhurender Singh and others** reported in **AIR 1993 P&H 23**; **Meghraj Vs. Jesraj Kasturjee** reported in **AIR 1975 Madras 137**; **Nand Singh Vs. Estate Officer and another** reported in **AIR 1993 Delhi 38**; **Suresh Kumar and others Vs. Firm Kurban Hussain Taiyab Ali and others** reported in **AIR 1996 MP 151** and **Kashinath Mondal Vs. State of West Bengal** reported in **2007 SCC on-line Calcutta 739**.

24. In view of the law laid down by Hon’ble Supreme Court, this Court and

various other High Courts, I am also of the opinion that for condonation of delay under Section 5 of the Limitation Act, a formal application would not be required, if the facts presented before the court satisfies the judicial consciousness of the Court that the applicant before it was prevented for sufficient cause in bringing the proceedings well within limitation. In case, instead of moving a formal application for condonation of delay, averments has been made by a party relating to sufficient cause for not initiating the proceedings well within time in the application or memo of appeal or revision supported by an affidavit with a prayer made therein for condonation of delay will not be fatal for want of separate application for condonation of delay. If the Court is of the opinion that in absence of formal application, the delay cannot be condoned then, it is always the duty of the Court to give an opportunity to the appellant before it to move an application explaining the cause for delay and seek condonation under Section 5 of the Limitation Act. The applicant must get proper opportunity to explain the circumstances which prevented it from drawing proceedings well within time. In this view, I am also supported by judgment of Madras High Court in case of, **Meghraj Vs. Jesraj Kasturjee (supra)** where the learned Singh Judge of that Court has observed in paragraph No. 4 of the judgment as under:-

“4.....The consensus, therefore, appears to be this. If under explainable circumstances an appeal or an application is filed in court, but without a formal application or a written application for excusing the delay in the presentation of the same, then the court should circumvent technicality and afford a reasonable opportunity to the aggrieved party to mend

matters. Otherwise, it would lead to miscarriage of justice.”

25. In the present case, from the perusal of the restoration application, it is apparent that a prayer has been made in paragraph No. 5 for condonation of delay and the reasons have been explained in paragraph Nos. 4 and 5 of the aforesaid application and therefore, the contention of learned counsel for the petitioner that respondent No. 3 could not have condoned the delay in absence of a formal application for condoning the delay made by the contesting respondents under Section 5 of the Limitation Act, is misconceived. So far as judgment relied upon by counsel for the petitioner in case of **Ram Prakash Vs. Deputy Director of Consolidation, Hardoi and others (supra)** is concerned, in the said judgment following question was referred to the Division Bench **“if an order has been challenged before the consolidation authority is barred by the period of limitation as provided under the statute (in the present case before the appellate authority/ Settlement Officer, Consolidation- 1, Hardoi) along with an application for condonation of delay then in that circumstances whether the application for condonation of delay under Section 5 of the Limitation Act should be decided first or the same can be decided along with merit of the case?”** The Court was not called upon to consider the question as to whether the delay cannot be condoned unless, there is a formal application moved by the party under Section 5 of the Limitation Act for condoning the delay rather the Court was considering the question as to whether the application moved under Section 5 of the Limitation Act should be considered first and thereafter, the case may be heard on merits or both the things can be done

simultaneously. The Division Bench of this Court answered the questions referred above in paragraph No. 22 of judgement of Ram Prakash Vs. Deputy Director of Consolidation, Hardoi and others (supra), which is quoted as under:-

“22. In view of the aforesaid discussion, we answer the question referred to the Division Bench that an application seeking condonation of delay has to be decided first before the appeal is taken up for hearing on merits. However, it can be on the same day and there is no requirement of adjourning the hearing of appeal on merits after acceptance of the application seeking condonation of delay.”

26. In case of **Chander Bhan Vs. Bal Mukund (supra)**, the Lordships of the Supreme Court have not declared the law to the effect that oral prayer regarding condonation of delay under Section 5 of the Limitation Act cannot be entertained by a Court in the absence of a written application. Thus, the case law relied upon by the learned counsel for the petitioner did not support the contention of the petitioner that delay cannot be condoned except for a separate written application moved under Section 5 of the Limitation Act for condoning the same. Section 5 of the Limitation Act do not in other words requires that a written application be moved for condoning the delay on sufficient cause being shown by the applicant.

27. Order 41 Rule 3-A of the Code of Civil Procedure as amended in 1976 provides as under:-

“3A. Application for condonation of delay. (1) When an appeal is presented

after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1) the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal.”

28. The Supreme Court in Case of **State of Madhya Pradesh and another Vs. Pradeep Kumar and another**; reported in **(2000) 7 SCC 372** while interpreting the provisions of sub-Rule 1 of Rule 3-A of Order 41 C.P.C. held that filing of memorandum of appeal without application for condonation of delay will not be fatal. Unintentional lapse of a litigant should not result in closing of doors of the Court permanently. The word “shall” in Rule 3-A (1) does not foreclose the chance to rectify a mistake and Court is within jurisdiction in returning the memorandum of appeal to the party concerned as defective. Such party can then cure the defect and present the appeal again. The paragraph Nos. 10, 11, 12, 15, 16, 17, 18, 19 of the judgment in case of State of Madhya Pradesh Vs. Pradeep Kumar (supra) are quoted as under:-

“10. What is the consequence if such an appeal is not accompanied by an

application mentioned in sub-rule (1) of Rule 3-A? It must be noted that the Code indicates in the immediately preceding rule that the consequence of not complying with the requirements in Rule 1 would include rejection of the memorandum of appeal. Even so, another option is given to the court by the said rule and that is to return the memorandum of appeal to the appellant for amending it within a specified time or then and there. It is to be noted that there is no such rule prescribing for rejection of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. If the memorandum of appeal is filed in such appeal without accompanying the application to condone delay the consequence cannot be fatal. The court can regard in such a case that there was no valid presentation of the appeal. In turn, it means that if the appellant subsequently files an application to condone the delay before the appeal is rejected the same should be taken up along with the already filed memorandum of appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and present the appeal without further delay.

11. No doubt sub-rule (1) of Rule 3-A has used the word "shall". It was contended that employment of the word "shall" would clearly indicate that the requirement is peremptory in tone. But such peremptoriness does not foreclose a chance for the appellant to rectify the mistake, either on his own or being pointed out by the court. The word "shall" in the context need be interpreted as an obligation cast on the appellant. Why

should a more restrictive interpretation be placed on the sub-rule? The rule cannot be interpreted very harshly and make the non-compliance punitive to an appellant. It can happen that due to some mistake or lapse an appellant may omit to file the application (explaining the delay) along with the appeal.

12. It is true that the pristine maxim "*Vigilantibus Non Dormientiobus Jura Subveniunt*" (Law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judiciary permanently closed before him. The effort of the Court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.

15. In *Jagat Dhish Bhargva v. Jawahar Lal Bhargava and Ors.*, AIR (1961) SC 832 this Court while considering the procedure to be followed by the Court on receipt of defectively filed appeals made the following observations :

"It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under Order 41, Rule 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects." (AIR para 14)

16. Rule 3-A was inserted in the Code thereafter and hence the question had to be considered afresh. During the early period, following the insertion of Rule 3-A in Order 41 of the Code, some High Courts have taken a very rigid interpretation and non-compliance of it even at the initial stage was held fatal. A learned Single Judge of the Kerala High Court (Khalid, J. as he then was) held the view in *Padmavathi v. Kalu*, AIR (1980) Kerala 173 that "where the petition for condonation of delay in filing of appeal has been filed subsequent to the filing of the appeal the petition is liable to be dismissed." A Single Judge of the Karnataka High Court followed the said decision in *Madhukar Daso Deshpande v. Ananil Nilkantha Deshpande & Ors.*, AIR (1984) Karnataka 40 and held that "in view of the mandatory provision of Order 41 Rule 3-A CPC the application for condonation of delay shall be accompanied with the appeal memo, if the appeal is presented beyond time. There is no occasion for the court to say that the application for condonation of delay might be entertained later and there is no occasion for the appellant to request that such an application should be received even at this stage in the interest of justice."

17. A Division Bench of the Kerala High Court has subsequently overruled the dictum laid down by the Single Judge in the above case, (*vide Maya Devi v. M.K. Krishna Bhattathiri and Anr.*, AIR (1981) Kerala 240). The same fate had fallen on the view adopted by the Single Judge of the Karnataka High Court in *Madhukar's* case when a Division Bench has subsequently overruled it, (*State of Karnataka v. Nagappa*, AIR (1986). *N. Venkatachala and S.A. Hakeem, JJ* (as they then were) dealt with the background of introducing Rule 3-A in Order 41 of the

Code and after discussion held that sub-rule (1) of Rule 3-A is mandatory. However, learned Judges pointed out that sub-rules (2) and (3) have been employed by the legislature for highlighting the purpose of introducing such a new rule. The following passage from the judgment of the Division Bench of the Karnataka High Court can usefully be quoted in this context :

"A combined reading of sub-rules (1) and (2) of Rule 3A makes it manifest that the purpose of requiring the filing of an application for condonation of delay under sub-rule (1) along with a time barred appeal, is mandatory, in the sense that the appellant cannot, without such application being decided, insist upon the Court to hear his time barred appeal. That was the very purpose sought to be achieved by insertion of sub-rules (1) and (2) of Rule 3A becomes clear from the legislative history of new Rule 3 A to which we have already adverted."

18. We may also point out that a Division Bench of the Patna High Court has adopted the same view even earlier in *State of Bihar & Ors. v. Ray Chandi Nath Sahay and Ors.*, AIR (1983) Patna 189.

19. The object of enacting Rule 3-A in Order 41 of the Code seems to be two-fold. First is, to inform the appellant himself who filed a time barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the rule that it is intended to operate as unremediably or irredeemably fatal against

the appellant if the memorandum is not accompanied by any such application at the first instance. In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A of Order 41 of the Code.”

29. Thus, while interpreting the provisions of sub-Rule 1 of Rule 3-A of Order 41 C.P.C. where the statute required for filing an application for condonation of delay, the Supreme Court has interpreted the same not to be fatal, in case separate application is not filed whereas there is no such provision either under the Act, 1901 or under Section 5 of the Limitation Act requiring for a separate application.

30. In view of case laws discussed above, I am of the view that delay in filing an application can be condoned if the sufficient ground exists, in the opinion of the Court, which prevented the party to approach the Court within time, even on an oral prayer made by the party. Not necessarily in every case, a written application has to be insisted upon.

31. So far as submission of counsel for the petitioner that since there is no provision under the U.P. Land Revenue Act, 1901 making the provisions of Limitation Act applicable to the proceedings taken under the Act, 1901 therefore, the delay cannot be condoned taking aid of Section 5 of the Limitation Act is concerned, argument of the counsel for the petitioner is misconceived as in the present case, the proceedings were decided against respondent Nos. 4 to 6 ex-parte in exercise of powers under Section 200 of the Act, 1901. Section 201 of the Act, 1901 provides that if a plaintiff, within fifteen

days from the date of order, and if a defendant, within fifteen days after the order has been communicated to him, or after any process for enforcing the judgment has been executed or at any earlier period shows good cause for his non-appearance, and satisfies the officer making the order that there has been a failure of justice, such officer may, upon such terms as to costs or otherwise as he thinks proper, revive the case and alter or rescind the order according to the justice of the case. Thus, in view of Section 201 of the Act, 1901, an ex-parte order can be recalled on sufficient cause being shown by either the plaintiffs or the defendants for their non-appearance. The provisions of Section 201 are similar to those of Section 5 of the Limitation Act except for the party has to satisfy that there has been failure of justice. In the present case, the power has been exercised under Section 201 of the Act, 1901.

32. In case of **Jai Pratap Singh and Ors. Vs. Board of Revenue and Ors;** reported in **2006 (10) ADJ 196**, this Court has taken a view that the provisions of Section 5 of the Limitation Act are applicable to the proceedings under the the U.P. Land Revenue Act, 1901. Paragraph Nos. 5, 6, 7 and 8 of the judgment in case of Jai Pratap Singh and Ors. Vs. Board of Reenue and Ors (supra) are quoted as under:-

“5. The contention of Shri Radhey Shyam is that in view of language of Section 214 of the U.P. Land Revenue Act, 1901 the applicability of provisions of Section 5 of the Limitation Act is excluded That provision reads as under:

214. No appeal shall be brought after the expiration of 30 days from the

date of the order complained of, unless otherwise expressly provided in this Act.

6. It is also submitted that the U.P. Land Revenue Act is an exhaustive self-contained code and there being no provision applying Sections 4 to 24 of the Limitation Act these provisions cannot be applied by invoking Section 29(2) of the Limitation Act. In support of his contention he has placed reliance upon the decision of the Apex Court in *Hukumdev Narain Yadav v. Lalit Narain Mishra* MANU/SC/0247/1973 : (1974) 3 SCR 31. The question in that case was whether provisions of Section 5 of the Limitation Act are applicable to an election petition filed under the Representation of the People Act. The Apex Court took the view that even in 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 the provisions of the special law or the nature of the subject matter and scheme of the special law exclude their operation. The Apex Court held that provisions of Section 29(2) of the Limitation Act were not applicable to an election petition filed under the Representation of the People Act. In holding so the Apex Court placed reliance upon Sections 81 and 86 of the Representation of the People Act. Section 81, provides for a period of limitation of 30 days and in case the election petition is not brought in accordance with that Section the consequence is provided under Section 86 of the Act, which requires the High Court to dismiss the petition. In my view the decision of the Supreme Court in *Hukumdev's* case is not applicable to an appeal under the U.P. Land Revenue Act. Section 215 of the U.P. Land Revenue Act provides that no appeal shall lie against an

order admitting an appeal on the grounds specified in Section 5 of the Indian Limitation Act, 1908. It is implicit in this provision that an appeal can be admitted giving the benefit of grounds given in Section 5 of the Limitation Act. If the submission of the counsel for the petitioners is accepted, Section 215 of the U.P. Land Revenue Act, 1901 would be made redundant. Indeed Sri Radhey Shyam contended that the provision of Section 215 of the U.P. Land Revenue Act is redundant in view of deletion of the provisions for second appeal and third appeal for the areas to which U.P. Zamindari Abolition & Land Reforms Act is applicable. Even if that be so the provision would not be redundant as it would apply to other areas. Moreover in this petition we are concerned with a first appeal. It is well settled that an interpretation, which leads to make redundant a provision of the Statute is to be avoided and there is nothing in the U.P. Land Revenue Act, which may compel the court to adopt that interpretation. That apart it does not appear that the U.P. Land Revenue Act is an exhaustive code of the provisions relating to limitation. The only provision relating to limitation in the Act is Section 214, which provides a period of 30 days limitation for an appeal unless otherwise expressly provided in the Act. The Act does not deal with any of the situations covered under Sections 4 to 24 of the Limitation Act. For example if more than 30 days time is spent in obtaining copy of the order against which the appeal is preferred, there shall be no exclusion of the time spent in obtaining copy of the order if recourse to Section 12 of the Limitation Act is excluded. Litigation under the U.P. Land Revenue Act pertains to the rural areas where people are illiterate and have little knowledge of the rules and the laws of limitation and if the view is taken

that Section 5 is not applicable it would cause much hardship. I am not inclined to accept the submission that the scheme of the U.P. Land Revenue Act excludes the application of Section 29(2) of the Indian Limitation Act.

7. It was then submitted that the Sub Divisional Officer while deciding an appeal in a mutation case is not a Court but is a Record Officer and for this reason Section 5 of the Limitation Act is not applicable. It is really not necessary to go into this contention because as already noticed it is implicit in Section 215 of the U.P. Land Revenue Act that the benefit of Section 5 of the Limitation Act can be given. However, the contention even therewise does not appear to be correct. An appeal against an order passed in any proceeding under the U.P. Land Revenue Act, unless the order has been made final lies under Section 211 to a court authorized to hear appeals under Section 210. Thus an appeal against an order of mutation also lies under Section 211. The heading of Section 210 of the U.P. Land Revenue Act is "Courts to which appeals lie". Section 211 also provides for a First Appeal to the Court authorized under Section 210. A revenue court has been defined under Section 4(8) of the Act. It includes amongst other authorities Assistant Record Officer, Tehsildar, Assistant Collectors, Additional Collectors and Collector. An Assistant Collector in charge of a sub division is a Sub Divisional Officer. Revenue Courts under the Land Revenue Act have been given power to decide the dispute between the parties. They have also the power to take evidence in view of Section 193 of the U.P. Land Revenue Act. Section 199 of the U.P. Land Revenue Act provides procedure for procuring attendance of witness and reads as follows:

199. Procedure for procuring attendance of witnesses - If in any proceeding of a judicial nature pending before any Revenue Court, either party desires the attendance of witnesses, he shall follow the procedure prescribed by the Order XVI, Rules 2 to 4 of the Code of Civil Procedure, 1908.

8. For all these- reasons given above it appears that the Sub Divisional Officer while deciding an appeal is a court and the contention of the petitioner that Section 5 of the Limitation Act is not applicable to the appeals under the U.P. Land Revenue Act does not appear to be correct."

I am in total agreement with the law laid by this Court in Jai Pratap Singh and Ors. Vs. Board of Revenue and Ors (supra).

33. In the present case, the proceedings were dismissed for non-prosecution in absence of both the parties and the plaintiff-applicants has filed the application for recalling the said order. Both the parties are claiming on the basis of Will executed in their favour. The delay condonation application has already been allowed by the Court by order dated 02.06.2023. In the application filed by the contesting respondents, it has been stated that the case was fixed for evidence of the plaintiff after the disposal of pending transfer application before the Board of Revenue. During this period, the plaintiff-Damadi died on 18.09.2010, the application for substitution was filed by heirs but the same was not taken cognizance by the Court and the dates were fixed in the matter without allowing the substitution application. On 08.06.2017, the case was dismissed for want of prosecution in absence of both the parties and the order was against a dead person. It has also been

stated by the applicants/respondent nos. 4 to 6, they are the sons and heirs of deceased Damadi and as they had gone frequently outside the village in connection with their employment and they have instructed the case to their counsel and during the pendency of the case, the counsel also died. It is further stated that their name was recorded in the revenue records but when the petitioner started creating disturbance, they examined the revenue records and came to know about the order and thereafter, the restoration application was filed and it was also pleaded that delay in filing the application be condoned. In the objections filed by the petitioner only three objections were taken firstly, that restoration application is highly belated, secondly, no application for condonation of delay under Section 5 of Limitation Act has been given by the restoration applicants and thirdly, since the order dated 08.06.2017 has been passed in absence of both the parties, which is apparent from the record, the Court has no jurisdiction to recall the said order. The objections filed by the petitioner are annexed as Annexure No. 8 to the writ petition.

34. There is no denial of the facts as stated by the contesting respondents in their application for restoration and as such in my view, the courts below have committed no illegality in recalling the ex-parte order dated 08.06.2017 and condoning the delay in filing the restoration application.

35. Consequently, the writ petition fails and is dismissed. No order as to costs.

(2025) 1 ILRA 542

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 07.01.2025

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ C No. 30440 of 2024

Rajveer Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Ajay Mishra, Shri Krishna Mishra

Counsel for the Respondents:

C.S.C., Kaushalendra Nath Singh, Shivam Yadav

A. Civil Law - Constitution of India,1950- Article 226-Land Acquisition Act,1894- Section 28A-Re-determination of Compensation-Maintainability of Application based on High court's award-The petitioners' land was acquired under a notification dated 30.04.1976 by the New Okhla Industrial Development Authority- Compensation was awarded on 15.02.1977, which the petitioners' ancestors accepted without challenging it under section 18 of the Act,1894- Some other land owners whose land was acquired under the same notification, challenged the award-The reference u/s 18 was initially rejected but was later enhanced by the High court, based on this, the petitioners filed an application u/s 28A of the Act,1894 seeking re-determination of their compensation-Held, a landowner who did not seek reference u/s 18 of the Land Acquisition Act, 1894, can apply for re-determination of compensation u/s 28A based on an award passed by the High Court in a First Appeal, provided the application is filed within prescribed three month limitation period- The court relied on Banwari Vs Haryana State Industrial & Infrastructure Development Corp. Ltd where the Apex Court ruled that if the reference court denies enhancement but the High Court grants it on appeal, similarly placed landowners can file for re-determination u/s 28A-Hence, the rejection order dated

29.07.2022 was set aside-The collector must re-determine the compensation at Rs. 28.12 per square yard, as awarded in First Appeal.(Para 1 to 23)

B. Section 28A applies even when compensation is enhanced by a High Court in an appeal, not just by a reference court-An appeal is a continuation of the original proceedings, therefore a High Court's decision enhancing compensation is equivalent to an award u/s 28A-The provision must be read in favor of affected landowners to remove disparities in compensation-Landowners who missed filing a reference u/s 18 can still claim parity if compensation is later increased by the High Court.(Para20 to 22)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Pradeep Kumar Vs St. of U.P. & anr., First appeal no. 522 of 2009
2. UOI & anr. Vs Pradeep Kumari & ors.(1995) 2 SCC 736
3. Satyapal Singh & ors. Vs St. of U.P. & ors.,WRIT C NO. 38674 OF 2017
4. Jose Antonio Cruz Dos R. Rodriguese & ors. Vs Land Acq. Collr.& ors.(1996) 6 SCC 746
5. Bhagti Vs St. of Har. (1997) 4 SCC 473
6. St. of Ori. & ors.Vs Chitrasen Bhoi(2009) 17 SCC 74
7. Babua Ram Vs St. of U.P. (1995) 2 SCC 689
8. UOI Vs Karnail Singh (1995) 2 SCC 728
9. Banwari & ors. Vs Haryana St. Industrial & Infra. Dev. Corp. Ltd. & anr., Civil Appeal No.13348 of 2024 arising out of SLP © No. 12221 of 2022
10. Ramsinghbhai (Ramsanghbhai) Jerambhai Vs St. of Guj. & anr.(2018) 16 SCC 445

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Shri Krishna Mishra, learned counsel for the petitioners, Sri Rajiv Kumar Gupta, learned Additional Chief Standing Counsel for the State respondent and Sri Kaushalendra Nath Singh, learned counsel appearing on behalf of respondent no. 2-Noida.

2. The instant writ petition has been filed by the petitioners being aggrieved by the impugned order dated 29.07.2022, which was served on the petitioners on 05.07.2024, whereby the application filed by the petitioners under Section 28A of the Land Acquisition Act, 1894 (hereinafter referred as 'the Act, 1894'), has been rejected, as not maintainable, as the said application has been filed claiming re-determination of compensation by the Collector under Section 28A of the Act, 1894 on the basis of judgement and order dated 18.04.2022 passed by this Court in First Appeal No. 458 of 1982 (Malkhan vs. State of U.P.) filed by the land owners, who are covered by the same notification.

3. The brief facts of the case are that the ancestors of the petitioners were the owners of the land in Khasra No. 51 area 0-7-0 Hectares, Khasra No. 52 area 1-2-0 Hectares, Khasra No. 53 area 0-19-0 Hectares, 54 area 1-7-0 Hectares and Khasra No. 26/1 area 0-7-0 Hectares situated at Village Naya Bans, District Gautam Buddha Nagar. The aforesaid land of the petitioners was acquired in favour of the respondent no. 2- New Okhla Industrial Development Authority vide notification dated 30.04.1976 issued under Section 4(1)/17 of the Act, 1894. After the notification the award was declared on 15.02.1977 and the entire compensation in

terms of the aforesaid award was received by the grandfather of the petitioner no. 7 herein and also by the ancestors of the other petitioners. Admittedly, the petitioners herein did not make any reference under Section 18 of the Act, 1894. However, some other land owners whose land were also acquired by the same notification, had challenged the said award by making reference to the court under Section 18 of the Act 1894, which was rejected by the Additional District Judge, Ghaziabad vide judgement and decree dated 25.11.1981. Being aggrieved by the rejection of the reference under Section 18 of the Act, 1894, an appeal under Section 54 of the Act, 1894 was filed by the said land owners being First Appeal No. 458 of 1982 (Malkhan vs. State of U.P.). The said First Appeal No. 458 of 1982 was decided by this Court vide order dated 18.04.2022, relying upon the judgement and order dated 08.07.2019 passed by this Court in First Appeal No. 593 of 1982, whereby the compensation was awarded at the rate of Rs. 28.12 per square yard along with 30% solatium and other benefits as per the provisions of the Act.

4. In terms of the aforesaid award made in the First Appeal vide order dated 18.04.2022, the petitioners herein had filed an application under Section 28A of the Act, 1894 on 23.05.2022. Since, no order was passed on the said application under Section 28A of the Act, 1894 by the respondents, the petitioners herein filed Writ C No. 21023 of 2022, which was decided by this Court vide order dated 09.04.2024, whereby a direction was issued to the respondent to decide the said application expeditiously preferably within six weeks from the date of communication of the said order.

5. Learned counsel for the petitioners submits that after the order dated

09.04.2024 was communicated to the respondents, the impugned order dated 29.07.2022 has been served on the petitioners on 05.07.2024 whereby the application under Section 28A of the Act, 1894 filed by the petitioners have been rejected as not maintainable as the same has been filed on the basis of the decision passed in the first appeal and not on the basis of an order passed by the reference court under Section 18 of the Act, 1894. Learned counsel for the petitioners submits that in the instant case the reference filed by one said Malkhan under Section 18 of the Act, 1894, being the Land Acquisition Reference No. 95 of 1977 was rejected by the Second Additional District Judge vide judgment and order dated 25.11.1981. He further submits that the appeal is in continuation of the suit or the original proceedings initiated under Section 18 of the Act, 1894 by Malkhan, therefore, the said order passed in the first appeal becomes the award within the meaning of Section 28A of the Act, 1894, for the purpose of filing the application under Section 28A of the Act, 1894 by the petitioners. Thus, the same was maintainable and the impugned order passed by respondent no. 3 is illegal and is liable to be quashed.

6. In support of his submissions learned counsel for the petitioners relied upon the judgement of the Division Bench of this Court dated 21.04.2016 in ***First Appeal No. 522 of 2009 (Pradeep Kumar vs. State of U.P. and Another)***, wherein the Division Bench of this Court held that the court as referred under Section 28A of the Act, 1894 would necessarily include the First Appellate Court, namely the High Court as the Appeal under Section 54 of the Act, 1894 is only a continuation of original proceedings and the order passed by the

Court including the First Appellate court i.e., the High Court, in the matter of determination of rate of compensation in respect of land covered by a particular notification, would be a relevant consideration for determining as to what would be just compensation for identically situated tenure-holders, whose land has been acquired under the same notification.

7. Learned counsel for the petitioners has further relied upon the judgment of the Apex Court in ***Union of India and Another Vs. Pradeep Kumari and others : (1995) 2 SCC 736***, wherein Three Judges' Bench of the Apex Court has categorically held after considering the objects and reasons underlying the enactment of Section 28A of the Act, 1894 which is beneficent provision intended to give equal relief to the inarticulate poor people, who are not able to take advantage under Section 18 of the Act, 1894 that right to make application under Section 28A of the Act, 1894 would arise from the award of the court on the basis of which a person may make the application seeking re-determination of the compensation. Thus, he submits that since in the instant case reference court has declined the enhancement of compensation and the compensation has been first time enhanced by the High Court in the first appeal vide judgement and order dated 18.04.2022, the application filed by the petitioners under Section 28A of the Act 1894 claiming the compensation as has been determined by this Court in First Appeal No. 458 of 1982, was well within limitation and was maintainable. Thus, the impugned order dated 29.07.2022 deserves to be quashed and the petitioners are entitled for compensation at the rate of Rs. 28.12 per square yard, as has been determined by this court in First Appeal No. 458 of 1982, vide judgment and order dated 18.04.2022.

8. *Per contra*, learned counsel for the State as well as for the Development Authority submits that the provisions of Section 28A of the Act, 1894 provides for application under Section 28A of the Act, 1894 to be moved by the similarly situated persons whose land was acquired by the same notification to claim parity with the award passed under Section 18 of the Act, 1894 by the reference court within a period of three months from the date of such award by the reference court and such application under Section 28A of the Act, 1894, cannot be filed claiming compensation which was awarded in the subsequent stages in the First Appeal under Section 54 of the Act, 1894 or the appeal preferred before the Supreme Court.

9. In this regard, learned Chief Standing Counsel has relied upon the judgement of Division Bench of this Court dated 21.09.2017 in ***Writ C No. 38674 of 2017 (Satyapal Singh and 21 Other vs. State of U.P and 3 Others)*** wherein it has been categorically held that the application under Section 28A of the Act, 1894 seeking re-determination of the compensation can be filed only against the award of the reference court and not by the High Court in first appeal or the Supreme Court in further appeal. Learned Additional Chief Standing Counsel for the State has also relied upon the judgement of Apex Court in ***Jose Antonio Cruz Dos R. Rodriguese & Others vs. Land Acquisition Collector & Other : 1996 (6) SCC 746***, wherein the Apex Court has held that the period of limitation for filing the application under Section 28A of the Act, 1894 would start to run from the date of the reference court's order on the basis whereof the redetermination of compensation is sought. He has further relied upon the judgement of the Apex Court in ***Bhagti v. State of***

Haryana (1997) 4 SCC 473 and State of Orissa & Ors. vs. Chitrasen Bhoi, (2009) 17 SCC 74, wherein the Apex Court has held that the claim can be redetermined on the basis of award of the reference court and not by the judgement of the High Court. Thus, there is no illegality in the impugned order passed by respondent no.3, therefore, the application deserves to be dismissed.

10. Having heard the rival submissions made by learned counsel for the parties we have carefully gone through the record of the case. For determination of the controversy involved in the case it would be relevant to take note of provisions of Section 28A of the Act, 1894 and also the objects and reasons while incorporating the said provisions, which reads as under:

Section 28A

“28-A. Redetermination of the amount of compensation on the basis of the award of the Court.— (1) Where in an award under this Part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, the persons interested in all the other land covered by the same notification under Section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under Section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be redetermined on the basis of the amount of compensation awarded by the Court:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which

the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard and made an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of Sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under Section 18.”

Statement of Objects and Reasons

“(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 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 redetermination of compensation, once anyone of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act.”

11. Thus, by plain reading of the aforesaid objects and reasons and provisions of Section 28 A of the Act, 1894 it is apparent that the said provisions have been incorporated in the Act, 1894 to facilitate inarticulate and poor people, who

could not challenge the award before the reference court under Section 18A of the Act, 1894 as compared to the other affluent land owners, which causes inequality in the payment of compensation for the same or similar quality of land to different individual parties. Therefore, the provisions of Section 28A of the Act, 1894 have been incorporated to provide an opportunity to all aggrieved parties whose land is covered under the same notification to seek re-determination of compensation once any of the land owners had obtained orders for payment of higher compensation from the reference court under Section 18 of the Act, 1894.

12. The object of the aforesaid incorporation of the aforesaid provision of Section 28A of the Act, 1894 is to remove the disparity in award of compensation to the land owners whose land has been acquired by the same notification between the two persons, one who had challenged the award by filing the reference and the persons who could not file the reference due to poverty or the less awareness. From the plain reading of Section 28A of the Act, 1894 it is apparent that the cause of action for filing the application under Section 28A of the Act, 1894 would arise on the date when an award under this part has been made by the court in excess of the amount awarded by the Collector under Section 11 of the Act, 1894 and the persons aggrieved is also covered by the same notification under Section 4 sub-section (1) of the Act, 1894 and such persons had not filed any application for reference under Section 18 of the Act. Such persons may file the application under Section 28A of the Act, 1894 within a period of three months from the date of award of the court.

13. In the earlier judgements in ***Babua Ram v. State of U.P., (1995) 2 SCC 689***

and Union of India v. Karnail Singh, (1995) 2 SCC 728, the Two Judges' Bench of the Apex Court has held that limitation for filing the application under Section 28A of the Act, 1894 would arise from the first award and not on the basis of the subsequent awards. However, the aforesaid view has been overruled by the Three Judges' Bench of the Apex Court in ***Pradeep Kumari (supra)*** and it has been categorically held that limitation for filing the application under Section 28A of the Act, 1894 would start from the date of the award with which the parity is being claimed by the applicant. Thus, there can be number of awards under Section 18 of the Act, 1894 by the reference court. The application under Section 28A of the Act can be filed on the basis of the latest award within a period of three months or from the award with which the applicant is claiming parity. The aforesaid view taken by the Three Judges' Bench of the Apex Court still holds the field and has never been overruled and has been reiterated by the Apex Court in a recent judgement dated 10.12.2024 in ***Banwari and Other vs. Haryana State Industrial and Infrastructure Development Corporation Ltd. And Another (Civil Appeal No. 13348 of 2024 arising out of SLP © No. 12221 of 2022)***. The purpose of filing of the application under Section 28A of the Act, 1894 is that the said application can be allowed by the Collector relying upon the award so made by the Court, whereby the higher compensation has been determined. Thus, the Collector is not required to undergo the deep scrutiny about the entitlement of the compensation but has to simply rely upon such award made by the reference court. It is settled position of law that an appeal is nothing but continuation of the original suit or the proceedings as has been categorically held by the Division

Bench of this Court in ***Pradeep Kumar (supra)*** that the Court, as referred under Section 28A of the Act, 1894 would necessarily include the First Appellate Court, namely the High Court, as the appeal under Section 54 of Act, 1894 is only continuation of the original proceedings. The observations of the Division Bench of this court in ***Pradeep Kumar (supra)*** are as under:

"35. At the very outset, it may be recorded that we are not holding that Section 28A of Act 1894 is attracted in the facts of the case. What we are recording is that from a reading of Section 28A of Act 1894 what flows is that even in absence of exemplars and other evidence, higher compensation can be allowed to a tenure holder only on the plea that the 'Court' has enhanced the compensation for others whose land was acquired under the same notification.

36. 'Court' as referred under Section 28-A of Act 1894, would necessarily include the first appellate court, namely, the High Court as the appeal under Section 54 of Act 1894 is only a continuation of original proceedings. 'Court' has been defined under Section 3 (d) of the Land Acquisition Act, 1894 as follows:-

"3(d) the expression "Court" means a principal Civil Court of original jurisdiction, unless the [appropriate Government] has appointed (as it is hereby empowered to do) a special judicial officer within any specified local limits to perform functions of the Court under this Act,"

37. In our opinion, therefore what follows is that the orders passed by the Court including the first appellate court i.e. High Court, in the matter of determination of rate of compensation in respect of land covered by a particular

notification, would be a relevant consideration to be taken into account for determining as to what would be the fair and just compensation for similarly situated tenure holders, whose lands has been acquired under the same notifications or notifications issued thereafter qua the same village/area."

14. In the judgement of ***Pradeep Kumari (supra)***, the Apex Court has also held as under:

"8. We may, at the outset, state that having regard to the Statement of Objects and Reasons, referred to earlier, the object underlying the enactment of Section 28-A is to remove inequality in the payment of compensation for same or similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the Act. This is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek re-determination once any of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act. Section 28-A is, therefore, in the nature of a beneficent provision intended to remove inequality and to give relief to the inarticulate and poor people who are not able to take advantage of right of reference to the civil court under Section 18 of the Act. In relation to beneficent legislation, the law is well-settled that while construing the provisions of such a legislation the court should adopt a construction which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it. The

provisions of Section 28-A should, therefore, be construed keeping in view the object underlying the said provision.

9. A perusal of the provisions contained in sub-section (1) of Section 28-A of the Act would show that after an award is made under Part III whereby the court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, a right accrues to a person interested in the other land covered by the same notification under sub-section (1) of Section 4 who is also aggrieved by the award of the Collector but who had not made an application to the Collector under Section 18, to move an application before the Collector for redetermination of the amount of compensation payable to him on the basis of the amount of compensation awarded by the court. This application for redetermination of the compensation is required to be made within three months from the date of the award of the court. The right to make the application under Section 28-A arises from the award of the court on the basis of which the person making the application is seeking redetermination of the compensation. There is nothing in sub-section (1) of Section 28-A to indicate that this right is confined in respect of the earliest award that is made by the court after the coming into force of Section 28-A. By construing the expression "where in an award under this Part" in sub-section (1) of Section 28-A to mean "where in the first award made by the court under this Part", the word 'first', which is not found in sub-section (1) of Section 28-A, is being read therein and thereby the amplitude of the said provision is being curtailed so as to restrict the benefit conferred by it. In the matter of construction of a beneficent provision it is not permissible by judicial interpretation to read words which are not

there and thereby restrict the scope of the said provision. (See : *Jnan Ranjan Sen Gupta v. Arun Kumar Bose* [(1975) 2 SCC 526, 530] .)

10. It is possible to visualise a situation where in the first award that is made by the court after the coming into force of Section 28-A the enhancement in the amount of compensation by the said award is not very significant for the reason that the person who sought the reference was not able to produce adequate evidence in support of his claim and in another reference where the award was made by the court subsequently such evidence is produced before the court and a much higher amount is awarded as compensation in the said award. By restricting the benefit of Section 28-A to the first award that is made by the court after the coming into force of Section 28-A the benefit of higher amount of compensation on the basis of the subsequent award made by the court would be denied to the persons invoking Section 28-A and the benefit of the said provision would be confined to redetermination of compensation on the basis of lesser amount of compensation awarded under the first award that is made after the coming into force of Section 28-A. There is nothing in the wordings of Section 28-A to indicate that the legislature intended to confer such a limited benefit under Section 28-A. Similarly, there may be a situation, as in the present case, where the notification under Section 4(1) of the Act covers lands falling in different villages and a number of references at the instance of persons having lands in different villages were pending in the court on the date of coming into force of Section 28-A and awards in those references are made by the court on different dates. A person who is entitled to apply under Section 28-A belonging to a particular village may come to know of the

first award that is made by the court after the coming into force of Section 28-A in a reference at the instance of a person belonging to another village, after the expiry of the period of three months from the date of the said award but he may come to know of the subsequent award that is made by the court in the reference at the instance of a person belonging to the same village before the expiry of the period of three months from the date of the said award. This is more likely to happen in the cases of inarticulate and poor people who cannot be expected to keep track of all the references that were pending in court on the date of coming into force of Section 28-A and may not be in a position to know, in time, about the first award that is made by the court after the coming into force of Section 28-A. By holding that the award referred to in Section 28-A(1) is the first award made after the coming into force of Section 28-A, such persons would be deprived of the benefit extended by Section 28-A. Such a construction would thus result in perpetuating the inequality in the payment of compensation which the legislature wanted to remove by enacting Section 28-A. The object underlying Section 28-A would be better achieved by giving the expression "an award" in Section 28-A its natural meaning as meaning the award that is made by the court in Part III of the Act after the coming into force of Section 28-A. If the said expression in Section 28-A(1) is thus construed, a person would be able to seek redetermination of the amount of compensation payable to him provided the following conditions are satisfied:

(i) An award has been made by the court under Part III after the coming into force of Section 28-A;

(ii) By the said award the amount of compensation in excess of the amount

awarded by the Collector under Section 11 has been allowed to the applicant in that reference;

(iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;

(iv) The person moving the application did not make an application to the Collector under Section 18;

(v) The application is moved within three months from the date of the award on the basis of which the redetermination of amount of compensation is sought; and

(vi) Only one application can be moved under Section 28-A for redetermination of compensation by an applicant.

11. Since the cause of action for moving the application for redetermination of compensation under Section 28-A arises from the award on the basis of which redetermination of compensation is sought, the principle that "once the limitation begins to run, it runs in its full course until its running is interdicted by an order of the court" can have no application because the limitation for moving the application under Section 28-A will begin to run only from the date of the award on the basis of which redetermination of compensation is sought.

12. We are, therefore, unable to agree with the view expressed in *Babua Ram* [(1995) 2 SCC 689 : JT (1994) 7 SC 377] and *Karnail Singh* [(1995) 2 SCC 728 : (1995) 1 Scale 21] that application under Section 28-A for redetermination of compensation can only be made on the basis of the first award that is made after the coming into force of Section 28-A. In our opinion, **the benefit of redetermination**

of amount of compensation under Section 28-A can be availed of on the basis of any one of the awards that has been made by the court after the coming into force of Section 28-A provided the applicant seeking such benefit makes the application under Section 28-A within the prescribed period of three months from the making of the award on the basis of which redetermination is sought. The first contention urged by Shri Goswamy in support of the review petitions is, therefore, rejected."

15. In the judgement of **Satyapal Singh (supra)**, a Coordinate Bench of this Court has held that the application under Section 28A of the Act, 1894 cannot be filed for re-determination of the compensation on the basis of decree of the High Court in first appeal or by the Supreme Court in further appeal, is in the teeth of the earlier judgements of the Co-ordinate Bench of this Court in **Pradeep Kumar (supra)** and while holding so the Co-ordinate Bench of this Court in **Satyapal Singh (supra)** has not considered the judgement of Co-ordinate Bench in **Pradeep Kumari (supra)**. Relevant observations of the Co-ordinate Bench of this Court in **Satyapal Singh (supra)**, reads as under:

"SECOND ISSUE: *Whether an application can be filed under section 28-A of the Act seeking re-determination of the compensation on the basis of the award made by the Reference Court under section 18 of the Act or the decree of the High Court or the Supreme Court under section 54 of the Act.*

Section 28-A of the Act provides that where in an award under Part-III (containing Sections 18 to 28-A of the Act), the Court allows to the applicant any

amount of compensation in excess of the amount awarded by the Collector under Section 11, the persons interested in all the land covered by the same notification under Section 4(1) of the Act and who are also aggrieved by the award of the Collector may, by written application to the Collector within three months from the date of the award of the Court, require that the amount of compensation payable to them may be redetermined on the basis of the amount of compensation awarded by the Court. 'Court' has been defined in Section 3(d) of the Act to mean a Principal Civil Court of original jurisdiction. It is, therefore, clear that the award that is referable to under Section 28-A(1) of the Act is the award made by the Reference Court alone. This is also clear because Section 28-A of the Act begins with "where in an award in this Part, the Court allows to the applicant" and ends with "may be redetermined on the basis of the amount of compensation awarded by the Court".

An application under Section 28-A of the Act cannot, therefore, be filed for redetermination of the compensation on the basis of a decree of the High Court in the First Appeal filed under Section 54 of the Act contained in Part VIII or by the Supreme Court in further Appeal.

This is what has been held by the Supreme Court in Babua Ram and the observations are :

"19. The next question is as to when the period of limitation of three months begins to run under Section 28-A and whether successive awards made by Civil Court at different times in respect of the land covered by the same Notification furnish separate causes of action for making applications under Section 28A. Let us consider the meaning of the words "an award under this part" referred to in Section 28-A(1) which is Part III of the Act.

The heading to that part begins by reference to court and its procedure. The "court" means a principal civil court of original jurisdiction or a special judicial officer appointed to perform the functions of the court under the Act as becomes clear as is noticed already. What are the matters to be considered in determining the compensation on a reference made to it under Section 18, is detailed in Section 23 while matters to be neglected in determining such compensation are indicated in Section 24. By operation of Sub-section (2) of Section 26, the award made determining the amount of compensation shall be deemed to be a decree while the statement of the grounds of every such award is deemed to be the judgment, for the purpose of Code of Civil Procedure. The above perspectives from Part III make it clear that the award of the court is that of the civil court of original jurisdiction in that part. It is a decree for the purpose of an appeal under Section 54 which falls in part VIII of the Act (Miscellaneous). The decree as defined in Section 2(2) C.P.C. is the decree of the High Court, which shall be appealable to the Supreme Court under Articles 132, 133 and 136 read with Order 45 C.P.C. Hence, the award of the court referred to in Sub-section (1) of Section 28-A is only the award of the civil court of original jurisdiction or of judicial officer performing the functions of such court under the Act on reference received by it under Section 18 and an award and decree pronounced under Section 26 of the Act. Since, the judgment and decree of the High Court under Section 54 or of this Court do not come in Part III of the Act, they stand excluded from an award envisaged under sub-section (1) of Section 28-A. The aggrieved interested person, therefore, is entitled to the right and remedy of making

an application under Section 28A for redetermination of compensation for his acquired land only on the basis of the award of the civil court or judicial officer which is a judgment and decree under Section 26 when such award grants compensation in excess of the amount awarded by the Collector under section 11. When such an application is made in writing by the aggrieved person, notwithstanding the fact of his having received compensation under Section 31 without protest and of not availing the right and remedy of the reference under Section 18, the redetermination of the compensation under Section 28A(1) is required to be done."

(emphasis supplied)

It needs to be stated that in Pradeep Kumari, the Supreme Court disagreed only with the view taken in Babua Ram that the period of limitation for making an application under Section 28-A of the Act is not restricted to the earliest award that is made by the Court after coming into force of Section 28-A of the Act.

The view that the award referred to in Section 28-A(1) of the Act is the award of the Reference Court was reiterated by the Supreme Court in Bhagti and the observations are :

"6. Equally, the right and remedy of redetermination would be available only when the reference Court under Section 18 has enhanced the compensation in an award and decree under section 26. Within three months from the date of the reference court excluding the time taken under proviso, the applicant whose land was acquired under the same notification but who failed to avail the remedy under Section 18, would be entitled to avail the right and remedy under Section 28A. The order and judgment of the High

Court does not give such right. Thus, this Court held that Section 28-A does not apply to an order made by the High Court for redetermination of the compensation. Thus, we hold that the question of reference to the Constitution Bench does not arise. The claimants are not entitled to make an application for redetermination of compensation under Section 28-A(1) after the judgment of the High Court; nor are the claimants entitled to avail of that award which is more beneficial to the claimants, i.e., the High Court judgment."

(emphasis supplied)

It is, therefore, clear that the award referred to in section 28-A(1) of the Act is the award of the Reference Court and not a decree of the High Court in First Appeal or a decree of the Supreme Court in further appeal. It is also clear that the award of the Reference Court can be any of the awards and not necessarily the first award.

THIRD ISSUE: *Whether the time limit for filing the application under Section 28-A of the Act is three months from the date of award of the Reference Court.*

*While examining the second issue, the Court has concluded that an application can be filed under Section 28-A(1) of the Act seeking redetermination of the compensation **only against the award of the Reference Court and not from a decree of the High Court in First Appeal or the Supreme Court in further Appeal. It, therefore, follows that the time period for filing an application under Section 28-A(1) of the Act has to be counted from the date of award of the Reference Court and not from the date of a decree of the High Court in First Appeal or that of the Supreme Court in further Appeal. "***

16. While concluding that the application under Section 28A of the Act, 1894 is not maintainable against the award passed in the first appeal by the High Court or further appeal by the Apex Court, the reliance has been placed by the Division Bench in ***Bhagti (supra)***, which has been followed in a subsequent judgement in ***State of Orissa & Ors. vs. Chitrasen Bhoi***, wherein the following observations were made by the Apex Court:

"11. In Bhagti v. State of Haryana [(1997) 4 SCC 473] this Court held that a claimant can seek redetermination of compensation on the basis of the award of the Reference Court and not the judgment of the High Court and further held that only those claimants who had failed to apply for a reference under Section 18 of the Act are conferred with the right to apply for redetermination under Section 28-A(1) of the Act. The same view has been reiterated in Union of India v. Bant Ram [(1996) 4 SCC 537]."

17. In ***Ramsinghbhai (Ramsanghbhai) Jerambhai vs. State of Gujarat and Another : (2018) 16 SCC 445***, the Apex Court has held that application under Section 28A of the Act, 1894 can only be filed within three months from any judgement of the reference court under Section 18 of the Act, 1894, arising from the same acquisition but not from the date of judgement of the High Court or the Apex Court.

18. In ***Writ Nos. 31447 of 1992, 31448 of 1992, 31449 of 1992 and 31450 of 1992***, where after an award was made and the application under Section 28A of the Act 1894, were filed and were allowed despite the appeals had already been filed against the award, this Court vide common

judgement and order dated 27.03.2003 had observed that once the first appeals are filed against the award of the reference court, then, the application filed under Section 28A of the Act, 1894 ought to have been kept pending till the disposal of the appeal and the said application could have been allowed on the basis of the final outcome of the first appeal.

19. In a recent judgement in **Banwari (supra)**, where the identical facts were there as the reference under 18 was dismissed against which the land owners filed the regular first appeal, which was allowed and the amount of compensation was enhanced by the High Court of Punjab and Haryana, claiming parity with such enhanced amount by the High Court an application 28A of the Act, 1894 was filed by the land owners, which was allowed by the Collector against which writ petition was filed, which was allowed by the High Court, placing reliance upon the judgement of **Ramsinghbhai (Ramsanghbhai) Jerambhai (supra)**, wherein the Apex Court has held that the application under Section 28A of the Act, 1894 can only be filed within a period of three months from any judgement of the reference court under Section 18 of the Act, 1894 arising from the same acquisition but not from the judgement of the High Court or the Apex Court against which the appeal was filed before the Apex Court wherein the Apex Court has allowed the appeal and set-aside the judgement of the High Court holding that Section 28-A of the Act, 1894 being a beneficent legislation enacted in order to give relief to the inarticulate and poor people, the principle of interpretation which would be required to be adopted is the one which advanced the policy of the legislation to extend the benefit rather than a construction which has the effect of

curtailing the benefit conferred by it. While holding so the Apex Court has relied upon the Full Bench Judgement of **Pradeep Kumari (supra)**, the following observations have been made by the Apex Court:-

“11. It can thus be seen that this Court has held that the object underlying the enactment of Section 28-A of the 1894 Act is to remove inequality in the payment of compensation for same or similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the 1894 Act. It was held that this is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the Reference Court under Section 18 of the 1894 Act. It was held that while construing the provisions of such a legislation, the Court should adopt a construction which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it.

12. It has further been held by this Court that under Section 28-A of the 1894 Act, a right accrues to a person interested in the other land covered by the same notification under sub-section (1) of Section 4, where the Court allows a higher compensation to the similarly circumstanced persons who are covered by the said notification. It has been held that the application for redetermination of the compensation is required to be made within three months from the date of the award by the Court. It has been held that the right to make an application under Section 28-A of the 1894 Act arises from the award of the Court on the basis of which the person

making the application is seeking redetermination of the compensation. The Court further held that there is nothing in sub-section (1) of Section 28-A of the 1894 Act to indicate that this right is confined in respect of the earliest award that is made by the Court after coming into force of Section 28-A of the 1894 Act. This Court held that Section 28-A of the 1894 Act if read in such a manner, it will be contrary to the principles of construction of a beneficial provision. It is further held that by judicial interpretation, the Court could not read the words which are not there and thereby restrict the scope of a provision.

13. In paragraph 10 of the said case, this Court had referred to various eventualities that may occur if such a restrictive interpretation is given to the provision of Section 28-A of the 1894 Act. The Court observed that it has to be seen from the point of view of inarticulate and poor people. The Court held that the object underlying Section 28-A of the 1894 Act would be better achieved by giving the expression “an award” in Section 28-A of the 1894 Act, its natural meaning as meaning the award that is made by the Court in Part III of the 1894 Act after coming into force of Section 28-A.

14. This Court has laid down the conditions which are required to be satisfied for invoking the provisions of Section 28-A(1) of the 1894 Act as follows:

(i) An award has been made by the Court under Part III of the Act after coming into force of Section 28-A;

(ii) By the said Award, the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;

(iii) The person moving the application under Section 28-A is interested in other land covered by the

same notification under Section 4(1) to which the said award relates;

(iv) The person moving the application did not move the application under Section 18;

(v) The application is moved within three months from the date of the award on the basis of which redetermination of amount of compensation is sought; and

(vi) Only one such application can be moved under Section 28-A for redetermination of the compensation by the applicant.

24. As already discussed hereinabove, the provisions of Section 28-A(1) of the 1894 Act have been elaborately considered by a three Judges Bench of this Court in the case of Pradeep Kumari and Others (*supra*). In the said case, it has been held that the Statement of Objects and Reasons of Section 28-A would reveal that the object underlying the enactment of the said provision is to remove inequality in the payment of compensation for same or similar quality of land. It has been held that the said provision is for giving benefit to inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the Act. It has been held that this is sought to be achieved by providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act. The same benefit would be available to the other landholders under Section 28-A. It has been held that Section 28-A being a beneficent legislation enacted in order to give relief to the inarticulate and poor people, the principle of interpretation which would be required to be adopted is

the one which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it.

25. *We are, therefore, inclined to allow the appeal. The impugned judgment and order of the High Court dated 25th November 2021 is quashed and set aside and the order of the LAC dated 15th September 2020 is upheld."*

20. Thus, we are of the considered opinion that the provisions of Section 28 A of the Act, 1894 are the beneficent provisions and have been incorporated to remove the disparity in disbursement of compensation to the persons whose land has been acquired by the same notification and once the reference court has declined to enhance the compensation under Section 18 of the Act, 1894 and on an appeal filed under Section 54 of the Act, 1894 if compensation is enhanced by the High Court, the other similarly situated persons will have right to file application under Section 28A of the Act, 1894 within limitation of three months from the date of order passed in appeal. Any other view would frustrate the enactment of Section 28A of the Act, 1894.

21. The view expressed in ***Chitrasen Bhoi (supra)***, ***Satyapal Singh (supra)***, ***Ramsinghbhai (Ramsanghbhai)***, ***Jerambhai (supra)***, are not applicable in the instant case as those judgements are based on presupposed enhancement by a reference court under Section 18 of the Act, 1894. However, in the instant case there was no enhancement by the reference Court and the enhancement of compensation was first time made by this court in first appeal. Therefore, the aforesaid judgement would not be applicable in the instant case and if the view taken in the aforesaid judgement is applied, then the same would frustrate

the very object of Section 28A of the Act, 1894.

22. In the instant case, the application under Section 28A of the Act, 1894 was filed by the petitioners claiming parity and redetermination of compensation on the basis of the judgement and order passed by this Court in First Appeal No. 458 of 1982. Undoubtedly, the application under Section 28A of the Act, 1894 was filed by the petitioners within the limitation period of three months from the date of aforesaid order in appeal. Thus, the application was maintainable and rejection of the application by the Collector by the impugned order is uncalled for. The case in hand is fully covered by the judgement in ***Banwari (supra)*** wherein the Apex Court in identical facts has allowed the appeal of the land owners and held that once the enhancement has been made by the High Court after rejection of the reference under Section 18 of the Act, 1894, therefore, the land owners who were not party to the reference or the First Appeal can claim parity under Section 28A of the Act, 1894. Therefore, the impugned order dated 29.07.2022, which was allegedly served on the petitioner on 05.07.2024 is hereby ***quashed*** and the respondent no.3- Additional District Magistrate (Land Acquisition), Noida District Gautam, Buddh Nagar, is directed to consider the application of the petitioners for redetermination of compensation under Section 28A of the Act, 1894 and pass a fresh order treating the same as maintainable and determine the compensation in terms of the order dated 18.04.2022 passed by this Court in First Appeal No. 458 of 1982.

23. With the aforesaid observations, the instant petition is ***allowed***.

(2025) 1 ILRA 557
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2025

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ C No. 35310 of 2024
 With
 Writ-C No. 32047 of 2024

V-Marc India Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Counsel for the Respondents:

**A. Civil Law - Constitution of India,1950-
 Article 226-V-Marc India Ltd. challenged
 an order dated 10.10.2024 issued by the
 Superintending Engineer(Material
 Mgmt-I) Vidhyut Vitran Nigam Ltd.
 which blacklisted the company and
 imposed other penalties, including
 contract termination-order was passed
 without providing a copy of the three-
 member committee report which formed
 the basis of the decision-Held, The three
 -member committee report should have
 been provided to the petitioner, and an
 opportunity to respond should have
 been given before issuing the
 blacklisting order-failure to do so
 violated the principles of natural justice-
 blacklisting is a harsh and stringent
 penalty that should be imposed only in
 exceptional cases, authorities should not
 misuse it for extraneous reasons-Hence,
 the impugned order dated 10.10.2024
 was quashed-The authority must
 conduct a fresh hearing within two
 months and pass a reasoned order-Until
 then, the petitioner will not be**

**considered blacklisted and can
 participate in government tenders.**

The writ petitions are disposed of. (E-6)

(Delivered by Hon'ble Shekhar B. Saraf, J.
 &
 Hon'ble Vipin Chandra Dixit, J.)

1. Heard Mr. Anoop Trivedi and Mr. Saket Singh, learned Senior Advocates assisted by Mr. Mrinal Bharti, Mr. Ravikant Sharma, Mr. Manish Shekhari, Ms. Anisha Mahajan and Mr. Krishna Gopal, learned Advocates appearing on behalf of the petitioner, learned Standing Counsel appearing on behalf of the State and Mr. Kartikeya Saran, learned counsel appearing on behalf of the Vidhyut Vitran Nigam Limited.

2. These are the writ petitions under Article 226 of the Constitution of India wherein the writ petitioner is aggrieved by the order dated October 10, 2024 passed by the respondent No.4/Superintending Engineer (Material Management-I), Vidhyut Vitran Nigam Limited, Urja, Victoria Park, Meerut.

3. Upon hearing counsel appearing on behalf of both the parties, we find that a three member committee, after granting an opportunity of hearing to the petitioner, gave a recommendation to the authority concerned that passed the impugned order. The authority concerned without providing a copy of report of the three member committee passed the final order of blacklisting and other penalties including the termination of the contract.

4. We are of the view that the report of the three member committee should have been provided to the petitioner and another opportunity of hearing should have been

granted to the petitioner after being confronted with the three member committee report. As the same was not done, we are of the view that the principles of natural justice have been violated.

5. In light of the same, without going into the merits of the case, we quash and set aside the impugned order dated October 10, 2024 with a direction upon the authority concerned to grant an opportunity of hearing to the petitioner, and thereafter, pass a reasoned order. The entire process should be completed within a period of two months from date. We make it clear that no adjournment shall be granted to the petitioner.

6. In the meantime, since the impugned order has been quashed and set aside, the petitioner shall not be considered to be blacklisted and it may participate in Government's tender, in accordance with law.

7. A note of caution is also required to be provided herein. The judgements of the Supreme Court and this Court have laid down the law that the punishment of blacklisting is required to be imposed upon a person only in rare cases, as the same is extremely harsh and stringent that deprives a person of his right to carry on business. Many a time, it appears that the authorities are using the tool of blacklisting as a mechanism for extraneous reasons. Such practices are deprecated by this Court. It is to be further noted that the period of blacklisting has to be proportionate to the fault committed by the person upon whom the blacklisting is being done.

8. The above comments in the foregoing paragraph are only in the nature of *obiter dicta* and should act as guiding

principles to the authorities before passing the order of blacklisting.

9. With the aforesaid observations and directions, both the writ petitions are disposed of.

10. As we have not gone into the merits of the case, all the issues shall be left open before the authority concerned.

(2025) 1 ILRA 558

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.01.2025

BEFORE

**THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.**

Writ C No. 38488 of 2024

With

Writ-C No. 38495 of 2024 & 38521 of 2024

Mrs. Manju Rakesh

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Ravi Kant, Vatsala

Counsel for the Respondents:

Ankit Prakash, Ashok Kumar Srivastava,
C.S.C., Mohd. Afzal

**A. Civil Law - Constitution of India,1950-
Article 226-The petitioners , homebuyers
in the Knights Court project by Jaiprakash
associates Ltd. filed petitions due to delay
in possession of their flats-The UPRERA
had earlier directed the builder to either
hand over possession within 45 days or
refund the amount with interest-Due to
non-compliance, recovery certificates
were issued-Subsequently the builder
entered insolvency proceedings under the
Insolvency and Bankruptcy Code(IBC),**

and a Resolution Professionals(RP) was appointed-The petitioners, now creditors in the Corporate Insolvency Resolution Process(CIRP) challenged decisions made by the Committee of Creditors(COC) arguing their claims for possession were not properly considered-Held, The UPRERA orders were valid, and the petitioner had previously consented to a rehabilitation plan-Interference in Insolvency proceedings under Article 226 was not justified as the resolutions plan was still under consideration-The Petitioners should seek relief within the CIRP framework.(Para 1 to 19)

The writ petitions are disposed of. (E-6)

List of Cases cited:

1. Mohammed Enterprised (Tanzania) Ltd. Vs Farooq Ali Khan & ors.(2025) SCC Online SC 23
2. Committee of Creditors of KSK Mahanadi Power Co. Ltd. VS UPPCL & ors. (2024) SCC OnLine SC4013

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Ms Vatsala, learned counsel for the petitioners, Sri Ankit Prakash, learned counsel for respondent no.2, Sri Rohan Gupta, learned counsel for respondent no.3 and learned Standing Counsel for the State.

2. Learned counsel for the parties have agreed that all the writ petitions are based on similar set of facts and have sought similar reliefs, and that they may be heard and decided together.

3. The petitioners/home buyers claim to have been allotted residential flats in project 'Knights Court' - Jaypee Greens Wish Town, Sector-128, Noida, Uttar Pradesh developed by Builder-Respondent no.3/Jaiprakash Associates Ltd. Aggrieved by the delay in

completion of the project and handing over of possession of the flats in question, the petitioners in Writ-C No.38488 and Writ-C No.38521 of 2024, filed complaints before the Uttar Pradesh Real Estate Regulatory Authority¹, which were allowed in terms of the orders dated 6.5.2019, with a direction to respondent no.3 to handover possession within a period of 45 days from the date of the order, and in case it was unable to do so, to refund the amount deposited together with interest.

4. It is stated that respondent no.3-Builder neither handed over possession of the residential flats in question, nor refunded the amount, hence, in regard to the petitioners in Writ-C No.38488 and Writ-C No.38521 of 2024, recovery certificates, bearing dates 18.12.2020 and 10.1.2020 were issued by the UPRERA. An agreement dated 22.1.2021 was entered into between respondent no.3-Builder and the Association of Home Buyers of the Project, for completion of project and handing over possession to all the home buyers under the provisions of the UPRERA. Thereafter, an order of rehabilitation under Section 8 of the Real Estate (Regulation and Development) Act, 2016² was passed by the UPRERA, directing completion of project and delivery of possession, within a specified time period. It has been asserted in Writ-C No.38488 of 2024 that upon consent being accorded by the petitioners, on 31.3.2021, an order was passed by the UPRERA, directing that recovery certificate issued pursuant to the order dated 6.5.2019 be kept in abeyance. The petitioners in Writ-C No.38521 of 2024 have also stated that they accorded their consent for completion of project and taking of possession consequent to the agreement dated 22.1.2021.

5. The petitioners in Writ-C No.38495 of 2024, also filed a complaint before the

UPRERA, which was decided by means of an order dated 27.7.2021 wherein, keeping in view the order of rehabilitation which had been passed earlier, a direction was issued for refund of the amount on completion of the project after 30.4.2022. It is stated that due to non-compliance of the order by respondent no.3, the UPRERA issued a recovery certificate dated 22.5.2024, which has remained un-executed.

6. In due course of time, insolvency proceedings were initiated against respondent no.3-Builder on a petition filed by the Banks/Financial Institutions and a Resolution Professional³ was appointed by the National Company Law Tribunal⁴ to manage the affairs of respondent no.3-Builder.

7. The petitioners in Writ-C No.38488 and Writ-C No.38521 of 2024 submitted their claims on 15.6.2024 and 21.6.2024 respectively under the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016⁵. The petitioners in Writ-C No.38495 of 2024 are stated to have sent an e-mail to the RP on 3.11.2024 for 'conversion of request from refund to possession' of their allotted residential flats. The claims of the petitioners along with other home buyers of the project are stated to have been taken up by the Authorized Representative⁶ of the home buyers in the meeting of the Committee of Creditors⁷. A grievance is sought to be raised that despite the claim of the petitioners and other home buyers having been taken up by the AR in the meeting of COC, in the presence of the RP, their claims with regard to handing over possession of the residential flats have not been accorded due consideration.

8. The petitioners in Writ-C No.38488 and Writ-C No.38521 of 2024 have sought quashing of the orders dated 6.5.2019 passed by the Respondent no.2/UPRERA to the extent it directs refund of the amount which, according to the petitioners, were never sought by them. The petitioners in Writ-C No.38495 of 2024, have similarly prayed for quashing of the order dated 27.7.2021 passed by the UPRERA, on their complaint, to the extent a direction for refund of the amount had been issued. Further prayer has been made in all the three writ petitions for quashing and setting aside decisions dated 30.08.2024, 27.09.2024, 25.10.2024 and Note on offer of possession issued by the Resolution Professional of Respondent no.3/Builder. Also a similar prayer has been made in all the three writ petitions to direct Respondent no.3/Builder through its Resolution Professional to immediately offer possession of the respective residential units to the Petitioners.

9. Learned counsel for the petitioners has sought to argue that the orders dated 6.5.2019 and 27.7.2021 passed by the UPRERA to the extent it directs refund of the amount, are erroneous since the relief with regard to the refund was never sought by the petitioners. It has been further contended that the decisions dated 30.8.2014, 27.9.2024 and 25.10.2024, taken at the meetings of the COC, are liable to be set aside, since in terms thereof, the RP has refused to offer possession of the residential unit which had been allotted by the Builder to the petitioners.

10. Learned counsel appearing for the respondents has pointed out that the order dated 6.5.2019 passed by the UPRERA, on the complaint of the petitioners, in terms of which a direction was issued to handover

possession of the residential flats, within a specified time period, and in case of failure to do so, to refund the amount is, in fact, in favour of the petitioners. It is submitted that the challenge, which is sought to be raised against the aforesaid order to the extent it relates to refund of the amount, which was a direction issued in case the Builder failed to handover possession within a stipulated time period, cannot be entertained at this belated stage particularly, in view of the agreement entered into between the home buyers and the builder subsequently. It is also submitted that the aforesaid order passed by the UPRERA would be subject to the statutory remedy of appeal and a relief in regard to the same cannot be sought by means of the present writ petitions.

11. As regards the other reliefs sought in the present writ petitions, it is submitted that the decisions taken at the meetings of the COC, held on 30.8.2024, 27.9.2024 and 25.10.2024, cannot be challenged at this stage since no final conclusions have been arrived at and the resolution plan is yet to be finalized and approved. It is submitted that the direction which is being sought to respondent no.3-Builder through RP to offer possession of the residential units, cannot be entertained at this stage since the resolution plan is yet to be finalized.

12. It is not in dispute that the order dated 6.5.2019 passed by the UPRERA was on the complaint made by the petitioners and in terms of the said order, a direction was issued to handover possession of the residential units within a stipulated period of time, and in case of failure to do so, to refund the amount. The recovery certificate was issued consequent to the aforesaid order and it was in view of the consent accorded by the petitioners in furtherance

of the agreement entered into between the Builder and the Association of Home Buyers that the recovery certificate was directed to be kept in abeyance. The challenge which is now sought to be raised against the order dated 6.5.2019, that the order directs the refund of the amount, appears to be an after thought and cannot be entertained at this belated stage in a writ petition, bypassing the statutory alternative remedy of an appeal under the Act, 2016.

13. Insofar as the other prayers, including the relief sought for setting aside the decisions dated 30.8.2024, 27.9.2024 and 25.10.2024, which are essentially the minutes of the meetings of COC, also cannot be entertained at this stage. This would be particularly for the reason that the record of the meetings are indicative of the deliberations between the parties with no final decision having been arrived with regard to the resolution plan, which would be required to be approved by the Adjudicating Authority. Moreover, it is not disputed that the home buyers including the petitioners, are duly represented by their authorized representative in the meetings of COC with the RP, and the claims put forward on behalf of the home buyers are being considered and final conclusion is yet to be arrived at. It is also not disputed that the petitioners along with other home buyers, as financial creditors, have duly submitted their claims before the RP, in the ongoing Corporate Insolvency Resolution Process⁸.

14. The importance of concluding CIRP proceedings has been emphasised by the Supreme Court in **Mohammed Enterprised (Tanzania) Ltd vs. Farooq Ali Khan and others** wherein, while entertaining appeals against a judgment of the High Court exercising power of judicial

review interdicting Corporate Insolvency Process, it was observed that an unjustified interference with the proceedings initiated under the Insolvency and Bankruptcy Code-201610, breaches the discipline of law. It was further stated that the IBC, being a complete Code in itself, exercise of supervisory and judicial review powers by the High Court would demand a rigorous scrutiny of judicious application.

15. A similar view had been taken in an earlier decision in **Committee of Creditors of KSK Mahanadi Power Co. Ltd. vs. Uttar Pradesh Power Corporation Ltd. and others**, where the Supreme Court underlined the importance of concluding the CIRP and took exception to the High Court deferring a CIRP in exercise of powers under Article 226 of the Constitution.

16. In view of the aforesaid legal position, we are of the opinion that the Insolvency and Bankruptcy Code, being a complete Code in itself, with sufficient checks and balances remedial avenues and appeals, any interference by the High Court in exercise of its extraordinary powers under Article 226 of the Constitution, which may have the effect interdicting the CIRP, would not be permissible as a matter of course.

17. Having regard to the aforesaid and in particular, taking note of the fact that the petitioners have already filed their claims in the pending CIRP proceedings, we are not inclined to entertain the writ petitions, in respect of the reliefs sought, at this stage.

18. It would be open to the petitioners to seek appropriate legal remedies as may be available under the law.

19. The writ petitions are, accordingly, **disposed of.**

(2025) 1 ILRA 562

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.01.2025

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Writ C No. 40479 of 2018

Ram Sajiwan Kori ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Ram Kinkar Shukla, Sunil Kumar Srivastava,
Vijay Kumar Pandey

Counsel for the Respondents:

C.S.C., Diwakar Singh, Govind Kumar
Saxena, Himanshu Shekhar

(A) Administrative Law - Cancellation of Fair Price Shop licence - Principle of Natural Justice - An order of cancellation of a fair price shop licence must be passed after giving an opportunity of hearing and must be based on independent findings rather than reiteration of previous conclusions. (Para - 2,4,6,12,13,14)

Petitioner's fair price shop licence was suspended on 25.3.2006 - appeal against suspension was pending - licence was cancelled on 25.5.2006 - No opportunity of hearing was granted to petitioner - Subsequent appeals were dismissed - matter was ultimately remanded by Supreme Court for fresh consideration by SDM - SDM reiterated the earlier cancellation order without independent findings - hence petition. **(Para - 2 to 5)**

HELD: - Since the order of the Supreme Court was not complied with by the SDM and the appellate authority, the orders passed by both authorities were set aside. Matter was remanded to the SDM for taking decision afresh

in light of the Supreme Court's order dated 4.12.2017 with proper opportunity of hearing to all the parties concerned. **(Para -14,15)**

Petition allowed. (E-7)

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

1. Heard Sri Vijay Kumar Pandey and Sri Ram Kinkar Shukla, learned counsels for the petitioner, Sri Himanshu Shekhar, learned counsel for respondent no.6 and learned Standing Counsel for the State respondents.

2. It is submitted by learned counsel for the petitioner that originally the petitioner was the holder of a fair price shop licence. The fair price shop licence was suspended on 25.3.2006 by the order of the Sub-Divisional Magistrate, Lalganj, Pratapgarh. Against the order dated 25.3.2006, the petitioner had preferred an appeal before the appellate authority challenging the suspension order. While the aforesaid appeal is pending consideration, the petitioner has also filed his reply before the Sub-Divisional Magistrate concerned on 31.3.2006. In the meantime, the cancellation order was passed on 25.5.2006 against the petitioner by the Sub-Divisional Magistrate. According to learned counsel for the petitioner at the stage of cancellation of fair price shop licence by order dated 25.5.2006 no opportunity of hearing was granted nor the petitioner was granted any opportunity to file its reply before the Sub-Divisional Magistrate at this stage. Subsequently, the appeal against the suspension order was decided by order dated 29.8.2006 directing the decision by the Sub-Divisional Magistrate at the earliest. In pursuance to the aforesaid order, the petitioner filed a representation dated 24.5.2011 before the Sub-Divisional

Magistrate, which was rejected by order dated 8.7.2011 disclosing that the petitioner's fair price shop licence has been cancelled on 25.5.2006 and as such at this stage no order can be passed. Against the aforesaid order, the petitioner had preferred an appeal before the appellate authority, which was rejected by order dated 12.6.2012.

3. Against the impugned order dated 12.6.2012 and 25.5.2006, the petitioner had filed writ petition being Writ-C No.46991 of 2012 before this Court, which was allowed by order dated 29.5.2015. The respondent no.6, being aggrieved by the judgment dated 29.5.2015 preferred Civil Appeal No.20849 of 2017, Uma Shankar Singh Vs. State of U.P. and others before the Supreme Court. The aforesaid civil appeal was finally decided by the Supreme Court by order dated 4.12.2017 remanding the matter for decision a fresh before the SDM concerned. The relevant paragraph of the aforesaid judgment is quoted hereunder:-

"We are of the view that the entire matter needs to be looked into afresh by the SDM, Lalganj, Pratapgarh particularly keeping in mind that there is no finding recorded by the Licensing Authority or even by the Appellate Authority that respondent No.7 was not running the fair price shop in accordance with the terms of the licence/allotment.

In this view of the matter, we set aside the order passed by the High Court and remand the matter to the SDM, Lalganj, Pratapgarh for fresh consideration of the entire issue. The parties will be entitled to be heard by the SDM, Lalganj, Pratapgarh before a final decision is taken. Until the decision is taken by the SDM, Lalganj, Pratapgarh,

respondent no.7 will continue to run the fair price shop."

4. In pursuance to the aforesaid order dated 4.12.2017 passed by the Supreme Court, the Sub-Divisional Magistrate after giving opportunity of hearing to the parties has passed an order on 24.1.2018 upholding its earlier decision of cancellation of the fair price shop licence of the petitioner. Thereafter, the petitioner has again filed an appeal before the appellate authority, which has been rejected by order dated 13.9.2018. After the order of the Supreme Court dated 4.12.2017 remanding the matter for taking decision afresh before the Sub-Divisional Magistrate concerned, the Sub-Divisional Magistrate has not decided the issue afresh and has in fact reiterated the earlier order. No finding on the arguments and the evidence produced before the Sub-Divisional Magistrate were ever considered.

5. Learned counsel for the petitioner has drawn attention of this Court to page 54 of the writ petition to submit that the Sub-Divisional Magistrate has observed that when the order dated 29.5.2015 passed by this Court was set aside by Supreme Court, earlier order dated 25.5.2006, cancelling the fair price shop licence and the appellate order dated 12.6.2012 revived and as such the petitioner's fair price shop licence was cancelled and no new facts have been brought which could dislodge the earlier cancellation order. A perusal of the order of the Supreme Court would demonstrate that the Supreme Court while remanding the matter has specifically directed the Sub-Divisional Magistrate to decide the matter afresh keeping in mind that there is no finding recorded by the licensing authority or even even by the appellate authority that the petitioner was not running the fair price

shop in accordance with the terms of licence.

6. It is submitted by learned counsel for petitioner that aforesaid direction of Supreme Court is indicative of the fact that the dispute was required to be looked afresh and the previous finding recorded by authorities would not be required to be taken into consideration. However, in the present case, the previous findings have only been reiterated and in fact a new complaint dated 2.1.2018 has also been taken note of. The complaint dated 2.1.2018 of the Gram Pradhan was not the subject matter before the Supreme Court and as such the same could not have been taken into consideration by the Sub-Divisional Magistrate without giving a fresh notice and the documents relied upon in this respect. Without the notice of the fresh allegations of the year 2018 to the petitioner, the impugned order dated 24.1.2018 by the Sub-Divisional Magistrate could not have been passed.

7. It is further submitted by learned counsel for the petitioner that even the Appellate authority has not recorded any finding with regard to the arguments raised by the petitioner against the order dated 24.1.2018. The order of the appellate authority has been passed in a mechanical manner and has only taken note of that fact that the petitioner has not been able to prove his innocence in respect of the earlier allegations against the petitioner without considering the stand of the petitioner and without recording any finding with regard to the documents and the arguments submitted by the petitioner. The appellate authority has further taken note of the allegations of the year 2018, although the same were not part of the remand order of the Supreme Court and as such the order of

the appellate authority is laconic and not sustainable in the eyes of law.

8. Learned Standing Counsel has opposed the writ petition and submits that the petitioner was given an opportunity to prove his innocence however, the same was not found favour by the Sub-Divisional Magistrate and the appellate authority and as such the impugned orders are sustainable in the eyes of law.

9. On a query being made to learned Standing Counsel as to whether the Sub-Divisional Magistrate and the appellate authority has recorded any fresh finding in pursuance to the order of the Supreme Court dated 4.12.2017, learned Standing Counsel submits that only the earlier finding has been reiterated by stating that the petitioner has not been able to prove his innocence. Learned Standing Counsel has also not disputed the fact that the Appellate Authority has also not recorded any finding on the arguments raised by the petitioner before the Appellate Authority.

10. Sri Himanshu Shekhar, learned counsel appearing on behalf of respondent no.6 also could not dispute the fact that no finding has been recorded afresh in pursuance to the order of the Supreme Court dated 4.12.2017 by the Sub-Divisional Magistrate concerned or the appellate authority.

11. Both the learned Standing Counsel as well as learned counsel for respondent no.6 could not dispute the fact that the allegations with regard to the letter dated 2.1.2018 was not part of the directions in the remand order of the Supreme Court.

12. It is to be seen that in the present case in earlier round of litigation the

cancellation order and the appellate order were set aside by this Court by order dated 29.5.2015 against which the private respondent no.6 has preferred a civil appeal before the Supreme Court and the order dated 29.5.2015 of this Court was set aside and the matter was remanded back to the Sub-Divisional Magistrate concerned for decision afresh with the specific direction that while deciding the issue afresh, the Sub-Divisional Magistrate concerned would keep in mind that there is no finding recorded by the licensing authority or even the Appellate Authority that the petitioner was not running the fair price shop in accordance with the terms of licence allotment. The effect of the aforesaid direction of the Supreme Court was that the matter was liable to be decided afresh without looking into the previous finding and a fresh finding after considering the evidence of both the parties were required to be recorded by the Sub-Divisional Magistrate concerned. The Sub-Divisional Magistrate concerned in its order dated 24.1.2018 passed in pursuance to the remand order passed by the Supreme Court has not recorded any new finding in respect of the remanded matter. The Sub-Divisional Magistrate concerned has taken notice that the petitioner has not been able to produce any material which would dislodge the earlier proved allegation against the petitioner. The aforesaid finding of the Sub-Divisional Magistrate concerned is wholly unsustainable in the eyes of law as the SDM concerned was required to decide the matter afresh after remand by the Supreme Court without looking into the previous finding recorded and the Sub-Divisional Magistrate concerned committed a grave error by upholding the previous proved allegations.

13. A perusal of the order of the Sub-Divisional Magistrate concerned would further demonstrates that none of the

documents produced by the petitioner or the department have been taken into consideration. Only the previous allegations have been taken to have been proved and the same has been reiterated which cannot be the scope of the remand order passed by the Supreme Court as such the order of the Sub-Divisional Magistrate concerned is not sustainable in the eyes of law. Similarly, the appellate authority has passed the order dated 13.9.2018 in a very cursory manner without recording any finding with regard to the arguments raised by the petitioner against the order dated 24.1.2018. The duty of the Appellate Authority is to examine the issue and to see whether the grounds raised in the appeal can be sustained to dislodge the order passed by the original authority. In the present case, no such exercise has been made as is admitted by learned Standing Counsel as well as learned counsel for respondent no.6.

14. Since the order of the Supreme Court has not been complied with by the Sub-Divisional Magistrate concerned and the appellate authority has also not decided the issued in the proper perspective, the order dated 24.1.2018 passed by the Sub-Divisional Magistrate concerned and the order of the Appellate Authority dated 13.9.2018 are hereby set aside. The writ petition is allowed and the matter is remanded back to the respondent no.3-Sub-Divisional Magistrate, Lalganj, Pratapgarh for taking decision afresh in light of the order of the Supreme Court dated 4.12.2017. The Sub-Divisional Magistrate concerned while deciding the matter afresh shall not look into any of the findings recorded on the previous occasion and shall take up the matter afresh and the arguments which have been advanced by the parties shall be considered.

15. Since the order after the remand of the Supreme Court are set aside, the position as existing in pursuance to the order of the Supreme Court dated 4.12.2017 is hereby restored. The Sub-Divisional Magistrate concerned is directed to decide the matter afresh within a period of three months from the date of production of a certified copy of this order after giving opportunity of hearing to all the parties concerned.

(2025) 1 ILRA 566
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2025

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ - C No. 1000717 of 1997

Shyam Lal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Shyam Mohan

Counsel for the Respondents:
 C.S.C., Anoop Kumar Srivastava, H.P. Srivastav, Surya Prakash Singh, Surya Prakash Singh

Civil Law - The U.P. Tenancy Act, 1939 - Sections 59 & 275 - U.P Consolidation of Holdings Act, 1953 - Section 49 - Land was recorded in name of father of petitioner Nos.1 and 2 in 1366 fasli settlement year - Survey made in 1964 - 65 of notified area, where plots are situated and petitioners father name found to be recorded - Plots are non-zamindari abolition land and on 7th July, 1949 , plots included in notified area under provisions of United Provinces Municipalities Act, 1916 and provisions of U.P. Zamindari Abolition & Land Reforms

Act not made applicable - Proved by Khasra and settlement of khatauni. (Para 4, 6)

Respondent No.5 interfered with possession of petitioners by alleging he was owner of land, petitioners filed suit, claimed their title - Respondent contended that land was his self acquired property and in possession prior to zamindari abolition and few plots fall within scope of U.P. Zamindari Abolition & Land Reforms Act - Further admitted only one plot was beyond purview of said Act and consolidation held in 1973 and suit barred by provisions of Consolidation of Holdings Act and not maintainable. (Para 8)

Petitioner filed interim injunction application, Sub Divisional Officer granted, maintaining status quo and order was not vacated after hearing stay vacation application. (Para 9)

The Sub Divisional Officer after hearing preliminary issues and preliminary objections with respect to maintainability of suit, concluded suit was maintainable and decided in favour of petitioners - Respondent preferred Revision before Additional Commissioner (Judicial) and reference made to Board of Revenue, allowed - Impugned order. (Para 10)

Held, on perusal of last column of khasra, it has been incorporated that land and gata numbers does not come under ambit of U.P. Zamindari Abolition & Land Reforms Act - Documents were before Board of Revenue but not considered - Due to non-consideration of documents and case of Nagar Palika, order was devoid of merit and liable to be set aside. (Para 15, 16)

Writ petition allowed. (E-13)

(Delivered by Hon'ble Irshad Ali, J.)

1. Supplementary affidavit filed today in Court is taken on record.

2. Heard Sri Shyam Mohan, learned counsel for the petitioners, Sri Shatrughan Chaudhary, learned Additional Chief Standing Counsel for respondent Nos.1,3 and 4, Sri S.P. Singh, learned counsel for respondent No.2 and Sri Anoop Kumar, learned counsel for respondent No.5.

3. By means of the present writ petition, the petitioners are challenging an order dated 7.10.1996, passed by the Board of Revenue and Reference No.4 of 1995-96 dated 3.8.1995, passed by the Additional Commissioner (Judicial), Faizabad Division Faizabad (Ayodhya).

4. Brief facts of the case are that old plot Nos. 3453/0.037, 347/0.07, 3458/0.08, 3459/0.02, 3460/0.08, 3461/0.10 of Mauza Nanpara Khas, Nagar Palika Nanpara, District Bahraich were numbered as 6939/0.085, 6940/0.080, 6941/0.320, 6942/0.125, 6943/0.020 and 6944/0.113 were recorded in the name of Lalta Prasad, father of petitioner Nos.1 and 2 in 1356 fasli settlement year duration of 20 years.

5. Earlier the land was recorded in the name of Ram Autar, the father of Lalta Prasad in 1336 fasli and after Ram Autar the same was recorded in the name of the father of petitioner Nos. 1 and 2 namely Lalta Prasad, resident of Mohalla Kayastha Tola, Nanpara, District Bahraich and the settlement was made in 1366 fasli year and in the said settlement year in khasra the name of the father of petitioner Nos.1 and 2 namely Lalta Prasad was recorded. In regard to this, the petitioners have annexed copy of the settlement khasra of 1366 fasli and khatauni mohal of 1366 fasli, wherein it was recorded that provision of U.P. Zamindari Abolition & Land Reforms Act is not applicable.

6. A survey was made in 1964-65 of the notified area, Nanpara where the plots in question are situated and name of the father of the petitioners was found to be recorded. Copy of the khatauni of the notified area has been annexed as Annexure-2. The above said plots in question are non zamindari abolition land and were situated within the notified area Nanpara and on and on 7th day of July, 1949 the said plots were included in the notified area Nanpara under the provisions of the United Provinces Municipalities Act, 1916 and as such the provisions of U.P. Zamindari Abolition & Land Reforms Act was not made applicable and the said plots in question remained as a non-zamindari abolition area. The said fact is evident from the khasra and settlement of khatauni of 1366 fasli proving that the plots in question are non-zamindari abolition area and provisions of U.P. Zamindari Abolition & Land Reforms Act are not applicable.

7. After the death of the father of petitioner Nos.1 and 2 namely Lalta Prasad, the petitioner Nos.1 and 2 and Jwala Prasad, father of petitioner No.3 inherited the property being sons of Lalta Prasad. After the death of Jwala Prasad, the petitioner No.3 being son of Jwala Prasad became the owner of the property alongwith the petitioner Nos.1 and 2 and all of them remained in physical and cultivatory possession.

8. In January, 1992, the respondent No.5 tried to interfere with the possession of the petitioners on the allegations that he was the owner of the land and therefore, the petitioners filed a suit under Section 59 of the U.P. Tenancy Act alleging therein the above noted facts of their title and sought the relief of declaration of their ownership.. The respondent No.5 filed written

statement in which he had stated that the land in question was his self acquired property and that he was in possession since the time of prior to zamindari abolition and the plot Nos. 6930, 6940, 6941, 6942 and 6943 fall within the ambit and scope of U.P. Zamindari Abolition & Land Reforms Act. The respondent No.5 admitted that only one plot No.6944 was beyond the purview of U.P. Zamindari Abolition & Land Reforms Act and the consolidation held of plot in question in 1973 and as such the suit was barred by the provisions of Section 49 of Consolidation of Holdings Act and was not maintainable.

9. The petitioner filed an application for interim injunction for restraining the respondent No.5 from interfering with the possession and the Sub Divisional Officer, Nanpara granted an interim injunction on 24.4.1992, maintaining the status quo and the said order was not vacated after hearing the stay vacation application.

10. Issues were framed and the issue Nos.3, 4, 10, 12, 16, 18, 20 and 22 were declared as preliminary issues and were decided as preliminary issues pertaining to the maintainability of the suit. The Sub Divisional Officer, Nanpara after hearing the preliminary issues and preliminary objections raised by the respondent No.5 with respect to the maintainability of the suit after considering the documents came to the conclusion that the suit was maintainable and decided the preliminary issues in favour of the petitioners vide his order dated 23.11.1992 and fixed date for evidence of the plaintiffs/ petitioners on 18.12.1992. Against the said interlocutory order, the respondent No.5 preferred Revision No.1061 under Section 275 of U.P. Tenancy Act before the Additional Commissioner (Judicial), Faizabad

Division Faizabad (Ayodhya) and the Additional Commissioner was of the view that from a perusal of C.H. forms No.41 and 45, it appeared to him five plots out of six plots of which the consolidation took place and zamindari has been abolished with respect to five plots and the suit has been filed on 16.1.1992 relevant year 1399 fasli as such the suit was not maintainable and referred the matter by making a reference to the Board of Revenue at Allahabad vide order dated 3.8.1995. The Board of Revenue vide order dated 7.10.1995 agreed with the said reference.

11. Feeling aggrieved by allowing the reference, submission of learned counsel for the petitioners is that documents were before the Board of Revenue in the shape of Annexures-1 and 2 to the writ petition, which were not taken into consideration. It is submitted that provision of U.P. Zamindari Abolition & Land Reforms Act is not applicable. It is also submitted that the land in dispute is notified in the notified area Nanpara, therefore, the provisions of U.P. Zamindari Abolition & Land Reforms Act are not applicable. The Board of Revenue while considering the matter, has not taken into consideration, all these material facts while deciding the reference made by the Additional Commissioner.

12. A short counter affidavit has been filed by respondent No.2, stating therein that the land in dispute has been notified under the United Provinces Municipalities Act, 1916 and it has been stated that on perusal of the nakal khatauni of the non-zamindari abolition lands, situated within the limits of Nagar Palika Nanpara, Bahraich, are excluded from the zamindari abolition. He has also enclosed copy of the nakal khatauni as Annexure SCA-4

13. Sri Anoop Kumar, learned counsel for the respondent No.5 submits that the land in dispute comes under the U.P. Zamindari Abolition & Land Reforms Act, therefore, the impugned order passed by the Board of Revenue does not suffer from any infirmity or illegality and is a just and valid order. He invited attention in reply to the contents of paragraph 13 of the short counter affidavit, reply to the same was filed denying the contents of the affidavit filed by the respondent No.2.

14. After having heard the rival submission of learned counsel for the parties, I perused the material on record.

15. On perusal of Annexure-1 to the writ petition, it is evident that the last column of the khasra of 1366 fasli, it has been incorporated that the land in dispute does not come under the ambit of U.P. Zamindari Abolition & Land Reforms Act. Annexure-2 of the writ petition also reveals that the gata numbers referred hereinabove does not come under the ambit of U.P. Zamindari Abolition & Land Reforms Act. All these materials were before the Board of Revenue in the shape of record referred by the Additional Commissioner, Faizabad Division Faizabad but none of the documents were taken into consideration while passing the order in reference.

16. Due to non consideration of all these documents and the case of Nagar Palika, the order is devoid of merit and is liable to be set aside. In paragraph-13 of the counter affidavit filed by the Nagar Palika, it is evident that the land in question is recorded in non-zamindari abolition Act, therefore, non consideration of this aspect of the matter suffers the impugned order from infirmity and illegality passed by the Board of Revenue.

20. It is however made clear that the record of the trial court, if not before the Board of Revenue, it shall be summoned from the trial court for perusal of the record.

Counsel for the Respondents:

HELD: - Trial court erred in summoning the applicants as additional accused without strong and cogent evidence. Impugned order suffers from grave illegality and impropriety and warrants interference by Court. Petition succeeds. Impugned order set aside.

Application under Section 319 Cr.P.C. dismissed.
(Para - 15,16)

Petition allowed. (E-7)

List of Cases cited:

1. Hardeep Singh Vs St. of Punj. & ors. , (2014) 3 SCC 92
2. Labhuji Amratji Thakor & ors. Vs St. of Guj. & anr. , (2019) 12 SCC 644

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicants-Accused are aggrieved against the order dated 14th September, 2007 passed by Additional Sessions Judge, Court No. 1, Lakhimpur Kheri in Sessions Trial No. 659 of 2004; titled *State vs. Ram Narain alias Sukhdeo and others*, arising out of Case Crime No. C-3 of 2001, under Sections 147, 302, 406 IPC, Police Station Gola, District Lakhimpur Kheri, whereby the trial court has summoned them as an additional accused by exercising jurisdiction under Section 319 Code of Criminal Procedure.

2. Briefly the facts of the case are that on the basis of a complaint by Kanshi Ram (PW-1), the above noticed Case Crime No. C-3 of 2001 was registered pursuant to the order passed by the Magistrate under Section 156(3) Code of Criminal Procedure, and as per allegations by complainant, his son Shyam Prakash left the house on 12th July, 2000 to visit his brother-in-law Rambilas Mishra. The complainant's son was wearing three gold rings, a chain, and was also carrying cash of Rs. 1,55,000/- as well as a mobile phone. The complainant's son was residing with his second wife Rekha, who in order to grab his house at Lucknow was illegally occupying it. The complainant further alleged that the accused persons in connivance with each other administered

poison to his son on 14th July, 2000, which resulted in his death. Broadly on these allegations, the above FIR was registered for alleged commission of offences punishable under Sections 302, 147 and 406 IPC against eight accused persons including the applicants namely Smt. Rekha, Anant Ram Awasthi, Smt. Ram Boli and Barkan.

3. Thereafter, the investigation in the case was conducted, and through the final report under Section 173(2) Cr.P.C., only five accused persons were sent to face trial, and during investigation, accused namely Virendra Kumar (son-in-law of Ram Narain Mishra) was also arraigned, whereas the applicants were declared innocent.

4. After considering the final report under Section 173(2) Cr.P.C., the trial against the five accused persons commenced and in order to discharge the onus, prosecution had examined three witnesses namely Kanshi Ram (PW-1), Om Prakash (PW-2) (another son of complainant) and Putti Ram (PW-3), and at that stage, an application under Section 319 Code of Criminal Procedure was moved for summoning the applicants as an additional accused.

5. The trial court vide impugned order dated 14.09.2007 proceeded to allow the said application and summoned the applicants as additional accused. Hence, this application.

6. Learned counsel for the applicants has argued that the trial court has committed an error of law in exercising jurisdiction under Section 319 Cr.P.C. in a casual manner, as the facts, circumstances and the evidence on record do not suggest

the involvement of the applicants in the alleged commission of crime. Learned counsel has drawn the attention of the Court to the impugned order to point out that the trial court has noticed the testimony of three witnesses examined by the prosecution and proceeded to observe that a prima facie case regarding involvement of the applicants-accused is also made out, and the court has not examined the nature of the evidence adduced and the case set up by prosecution. Learned counsel submits that pursuant to the interim protection granted by this Court, the proceedings against the newly added accused made no progress, whereas the trial regarding other five accused continued, which finally ended in their acquittal through the judgment dated 11th September, 2009. Learned counsel prays that the impugned order is not based upon the correct appreciation of material on record, therefore, it calls for interference by this Court. He prays that the impugned order be set aside and the application be dismissed.

7. Learned State Counsel while opposing the prayer has argued that the complainant from the very beginning had set up a common case against all the accused persons and name of the applicants was also mentioned in the statements of prosecution witnesses recorded under Section 161 Cr.P.C. Learned State Counsel submits that in their depositions recorded before the trial court, the witnesses have narrated about the involvement of the accused-applicants, therefore, considering the material on record, the trial court has rightly exercised the jurisdiction under Section 319 Cr.P.C. According to him, at the stage of considering the prosecution case for summoning additional accused, the Court is not required to record a satisfaction that the evidence adduced

during trial would certainly lead to the conviction of the said accused and even prima facie involvement in commission of crime is sufficient to summon the additional accused.

8. Mr. Rajiv Kumar Verma, learned State Counsel submits that the impugned order is based upon proper appreciation of material on record, therefore, no interference is warranted by this Court. He prays that the application be dismissed.

9. Upon hearing the learned counsel for the parties and considering their submissions, this Court finds that the entire case of the prosecution hinges upon circumstantial evidence, and according to the complainant, his son had visited the house of his brother-in-law Rambilas Mishra, where he was administered poison and the motive behind this occurrence is that the accused wanted to take away cash and gold ornaments worn by the victim. Though, the complainant has alleged conspiracy amongst all the accused persons, but in the FIR or in the final charge sheet, Section 120-B IPC or any other section, much less showing the common intention/object has not been incorporated. The death of the victim is stated to be because of poison, which was administered at the house of the accused persons, who had faced the trial, but there is nothing on record to indicate that all these accused-applicants, who have been summoned as an additional accused either resided or visited the said place, when the alleged crime was committed. The allegations by complainant in the beginning relating to the involvement of the accused-applicants is vague and was disbelieved by the investigating officer while declaring them innocent.

10. Time and again, the Hon'ble Supreme Court as well as various High Courts have consistently examined the scope of Section 319 Cr.P.C., which empowers the trial court to summon any other person as an accused in a pending trial, where the evidence recorded during trial suggests the involvement of such person in commission of the alleged crime. The said provision reads as under:-

"Section 319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

11. A reading of the above would show that this Section vests extraordinary power with the trial court to summon any other person as an accused to face trial along with other accused, who are before the trial court, but invariably the Hon'ble Supreme Court as well as different High Courts have held that this discretionary power should be exercised sparingly and with circumspection. At this juncture, when the trial has already commenced, the degree of satisfaction required to be recorded by the trial court while summoning any other person as additional accused, should be more than the standards required at the stage of framing of charges. In other words, the evidence on record must strongly suggest more than a "prima facie" case against such a person and his involvement in commission of the crime.

12. Reference in this regard can be made to the decision of larger Bench of Hon'ble Supreme Court rendered in **Hardeep Singh Vs. State of Punjab and others reported in (2014) 3 SCC 92**, wherein the Question (iv), was answered in the following manner:-

"Question (iv)- What is the degree of satisfaction required for invoking the power under Section 319 Cr.P.C.?"

Ans.-105. Power under Section 319 Cr.P.C. is a discretionary and an extraordinary power. It is to be exercised

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

13. Though, according to the learned State Counsel, the deposition of complainant-PW-1 recorded during the trial proceedings is enough for summoning the applicants as an additional accused. But, this Court does not find any force in the arguments advanced by the learned State Counsel as the deposition of complainant-PW-1 before the court cannot be construed as a new piece of evidence, which emerged for the first time and was not previously available when either the first information report was registered or the investigation was carried out. The expression "Evidence" as contained in Section 319 Cr.P.C. would not include a vague statement, and essentially the deposition of prosecution witness has to be tested in its substance.

14. The decision in **Hardeep Singh's case (supra)** was again followed by Hon'ble Supreme Court in **Labhuji Amratji Thakor and others Vs. State of Gujraat and another reported in (2019) 12 SCC 644**, wherein it was held that the process under Section 319 Cr.P.C. cannot be issued by the trial court in a casual manner, as in view of the decision in **Hardeep Singh's case (supra)**, the trial court is required to analyze the substance of the evidence recorded during trial. The

relevant observations are reproduced below:

*"13. The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that the Court has power under Section 319 Cr.P.C. to proceed against any person who is not named in the F.I.R. or in the Charge Sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 Cr.P.C. The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in **Hardeep Singh's (supra)** has to apply the test, i.e. "more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction."*

15. Further, a reading of the impugned order dated 14th September, 2007 would show that the trial court has failed to analyze the substance of the prosecution witnesses while exercising the powers under Section 319 Cr.P.C. Thus, this Court has no hesitation in holding that the impugned order dated 14th September, 2007 suffers from grave illegality and impropriety and warrants interference by this Court.

16. Resultantly, the petition succeeds and the impugned order dated

14th September, 2007 is hereby set aside. The application under Section 319 Cr.P.C. filed by the prosecution is dismissed.

17. The petition is allowed.

(2025) 1 ILRA 575
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.01.2025

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application U/S 482 No. 724 of 2012
 Alongwith
 Application U/S 482 No. 2966 of 2017

Dr. Rajesh Kumar Singh & Anr.

...Applicants

Versus

The State of U.P. & Anr. ...Respondents

Counsel for the Applicants:

Sushil Kumar Singh

Counsel for the Respondents:

Govt. Advocate, Mandeep Kumar Mishra,
 Prabhat, S.M. Royekwar

Criminal Law - Indian Penal Code, 1860-Sections 406, 504 & 506-No specific threats amounting to criminal intimidation-alleged offences u/s 504 and 506 not prima facie made out-ingredients to constitute the offence u/s 406 IPC are also absent, no voluntary entrustment by complainant to the accused persons-merely pendency of civil suit and non-payment of the amount would not constitute the offence u/s 406 IPC.

Application allowed. (E-9)

List of Cases cited:

Vesa Holdings Pvt. Ltd. & anr. Vs St. of Kerala & ors. reported in 2015 (8) SCC 293

(Delivered by Hon'ble Manoj Bajaj, J.)

1. The above two applications have been filed by the respective accused persons under Section 482 Code of Criminal Procedure for quashing of the charge sheet bearing No. 160/2010 dated 11th May, 2010, arising out of Case Crime No. 241 of 2010, under Sections 406, 504 and 506 IPC, Police Station Ghazipur, District Lucknow, and the charge sheet bearing No. 160A/2014 dated 14th July, 2014, arising out of Case Crime No. 241A of 2010, under Sections 147, 148, 323, 504 and 506 IPC, Police Station Ghazipur, District Lucknow, which were registered by the rival parties against each others. Besides, the applicants have also challenged the respective cognizance orders dated 24th June, 2010 and 4th September, 2014, whereby they have been summoned in the pending criminal proceedings.

2. Briefly the facts leading to the applications are that two work orders for setting up Sewerage Treatment Plants (STP) and Effluent Treatment Plants (ETP) was placed by M/s Sawen Consultancy Services (hereinafter referred to as "Party No. I") to M/s Eco Water Solutions Technologies Private Limited (hereinafter referred to as "Party No. II") vide letters dated 23.06.2008 and 04.07.2008, and relating to the said works, dispute between the two companies arose and litigation also commenced. Apart from the civil litigation instituted by both sides against each other, the respective parties lodged criminal cases against each other for their prosecution through the above noticed two FIR(s). The applicants in Application u/s 482 No. 724 of 2012; titled *Dr. Rajesh Kumar Singh and another vs. the State of U.P and another*, are the Director and Joint Director, respectively of "Party No. I", whereas Sachchidanand Rai and Guna Kesh Rai are Director(s) of "Party No. II".

3. The Case Crime No. 241/2010□ was registered on the basis of a written complaint dated 3rd April, 2010 given by complainant Guna Kesh Rai, wherein it is alleged that his company "Party No. II" situated at B-38, Okhla Industrial Area, Phase-I, New Delhi received a work order from "Party No. I" situated at 409-A, 426-B, IVth Floor, Sahara Shopping Centre, Faizabad Road, Lucknow and the total worth of the two work orders was Rs. 20,00,000/- and Rs. 47,00,000/- respectively, and against it, a sum of Rs. 23,80,500/- is outstanding. On demanding the money, the debtors abused the complainant and extended threats, who also refused to issue Form 'C'. Broadly, on these allegations, the complainant prayed for prosecution of the accused, i.e. Director(s) of "Party No. I", whereupon the case was registered for alleged commission of offences punishable under Sections 406, 504 and 506 IPC.

4. After completion of investigation, the charge sheet against the accused namely Dr. Rajesh Kumar Singh and Satendra Singh was filed, whereupon the impugned cognizance order dated 24th June, 2010 was passed by Special Chief Judicial Magistrate, Custom, Lucknow. Hence, this Application U/s 482 No. 724 of 2012.

5. The other FIR was registered at the instance of Dr. Rajesh Kumar Singh, who had also given a written complaint to the police dated 3rd April, 2010, wherein it is alleged that they had given order for setting up Sewerage Treatment Plants (STP) and Effluent Treatment Plants (ETP) to "Party No. II", but the said firm left the job incomplete, and in this regard, a legal notice was served upon the defaulting firm. In relation to the dispute, Sachchidanand

Rai called the complainant at Police Station Ghazipur, where they all used abusive language against the complainant and refused to discuss the issue. Later, the accused Sachchidanand Rai and few unknown persons in the absence of the officials/Director(s) of the complainant's company came to the premises of their company and proclaimed that they know how to recover the money. The accused had come in the vehicles bearing Nos. U.P.65-K 0009 'Safari', U.P. 32-C.N.3327 'Tavera' and 'Scorpio' (number not known)". The accused also misbehaved with Dr. Arpita Sinha, Junior Manager. On these allegations, the FIR was registered for alleged commission of offences punishable under Sections 147, 148, 323, 504 and 506 IPC, Police Station Ghazipur, Lucknow.

6. After completion of the investigation in this case, the police initially did not find any incriminating material against the accused, and a final report under Section 173(2) Cr.P.C. exonerating the accused was filed, but aggrieved against the said final report, complainant preferred a Protest Petition, and thereafter, the Special Chief Judicial Magistrate, Custom, Lucknow ordered further investigation on 29th January, 2014 (Annexure No. '7').

7. In deference to the said order, the investigating officer again looked into the allegations and filed a charge sheet against the accused on 14th July, 2014, whereupon the impugned cognizance order was passed on 4th September, 2014. Hence, this Application u/s 482 No. 2966 of 2017.

8. Mr. Sushil Kumar Singh, learned counsel appearing on behalf of the applicants in Application u/s 482 No. 724 of 2012 has argued that the applicants are

the Director(s) of a renowned "Party No. I", who were granted contract for setting up Sewage Treatment Plants (STP) and Effluent Treatment Plant (ETP) at Medical College Kannauj and to execute the said job, they had further engaged "Party No. II" and the said work was to be completed in a stipulated period, but the same was not completed. Learned counsel submits that though the work was started by "Party No. II" and was left incomplete, which gave rise to a dispute between the parties and a legal notice was issued to "Party No. II", however later on, a civil suit dated 21st April, 2011 for Rendition of Accounts was filed by "Party No. I", which is pending adjudication before the Commercial Court at Lucknow. Learned counsel submits that the other side has also instituted two suits for recovery, i.e. the first suit instituted on 21st April, 2011 for recovery of a sum of Rs. 38,57,512/- before the High Court of Delhi at New Delhi, followed by another suit instituted on 5th May, 2011 at District Court, Saket, New Delhi for recovery of a sum of Rs. 5,25,786/-.

9. According to Mr. Sushil Kumar Singh, learned counsel, the suit filed at the Saket Court was stayed in terms of Section 10 Code of Civil Procedure being subjudice, as the issues raised in the said suit were identical to the issues raised by the applicants Dr. Rajesh Kumar Singh and Satendra Singh in their suit at Lucknow. Learned counsel submits that apparently it is purely a civil dispute between the parties and the impugned FIR has been registered with an oblique motive to pressurize the applicants. Learned counsel has further pointed out that the investigating officer has not analyzed the allegations made in the impugned FIR, who has filed the charge sheet under Section 173(2) Cr.P.C., whereupon the impugned

cognizance order has been passed against the applicants of petition bearing Application u/s 482 No. 724 of 2012. Learned counsel submits that the alleged offences are not made out, therefore, the applicants have approached this Court for quashing of the impugned criminal proceedings.

10. The prayer is opposed by Mr. Mandeep Kumar Mishra, learned counsel for the complainant-opposite party no. 2 Guna Kesh Rai (applicant no. 2 in Application u/s 482 No. 2966 of 2017; titled Sachchidanand Rai and another vs. State Of U.P. and another), who has argued that once it is not disputed by the Director(s) of "Party No. I" that pursuant to the work order placed by their company in favour of "Party No. II, the work was carried out, and the cost incurred by the company "Party No. II" has not been paid by "Party No. I", much less in terms of the written agreement between the parties, therefore, this amounts to "breach of trust" and prima facie the case punishable under Section 406 IPC is made out against the accused. Learned counsel further pointed out that whenever the money was demanded from the debtors, they extended threats, therefore, the offences punishable under Sections 504 and 506 IPC are also made out and the trial court has rightly taken cognizance of the said offences, and in this background, no interference is called for by this Court in exercise of inherent powers under Section 482 Cr.PC. Learned counsel prays that the petition bearing Application u/s 482 No. 724 of 2012 be dismissed.

11. Mr. Mandeep Kumar Mishra, learned counsel further argued that the FIR against the Director(s) of "Party No. I" is based upon the complaint dated 3rd April,

2010, and in retaliation, complainant Dr. Rajesh Kumar Singh has falsely implicated them through the Case Crime No. 241A of 2010 registered for alleged commission of offences punishable under Sections 147, 148, 323, 504 and 506 IPC. Learned counsel submits that after completion of investigation, a final report under Section 173(2) Cr.P.C. was filed in favour of the accused, who were declared innocent, but after conducting further investigation, the impugned charge sheet No. 160A of 2014 dated 14th July, 2014 has been filed against Sachchidanand Rai and Guna Kesh Rai.

12. Mr. Mandeep Kumar Mishra, learned counsel has argued that a reading of impugned FIR would show that the ingredients to constitute the alleged offences punishable under Sections 147, 148, 323, 504 and 506 IPC are not made out, therefore, the applicants have approached this Court to seek quashing of the criminal proceedings, which is nothing, but an abuse of the process of the law. He prays that Application u/s 482 No. 2966 of 2017 be allowed and the impugned criminal proceedings based upon the charge sheet no. 160-A dated 14th July, 2014 be set aside.

13. In response, Mr. Sushil Kumar Singh, learned counsel appearing on behalf of the opposite party no. 2-complainant has argued that, even if, it is a civil dispute between the parties, but the accused resorted to the violence, who alongwith their companions entered the premises of the complainant's company and misbehaved with the staff and extended threats, so the criminal case can also proceed simultaneously. In this regard, learned counsel has produced the statement of Dr. Arpita Sinha, Junior Manager of "Party No. I" and pointed out that the

accused misbehaved with her and asked about the whereabouts of Director(s) of the company "Party No. I" in order to forcibly recover the money from them. He submits that the final report filed earlier in favour of the accused was not based upon the proper investigation, therefore, the Magistrate had directed further investigation, and finally, the charge sheet against the accused has been filed. He prays that Application u/s 482 No. 2966 of 2017 be dismissed.

14. Learned State Counsel has argued that the two FIR(s) are based upon two different occurrences and the dispute originally between the parties started for breach of contract, but both the sides have shown aggression against each other, and since, all these offences are cognizable, therefore, the respective FIR(s) were registered. Learned State Counsel submits that after thorough investigation, the evidences in respect of the two occurrences were collected, whereupon both the sides have been sent to face trial, separately. He submits that these cases involve the disputed facts, which can be effectively ascertained only on the basis of the evidence, therefore, he prays that both the applications be dismissed.

15. After hearing the learned counsel for the parties and considering their submissions, this Court finds that as far as the business relations between the two companies "Party No. I and Party No. II" are concerned, the same is not disputed, which is based upon a written agreement. For this commercial dispute, both rival parties have levelled allegations each other and have claimed to have suffered losses, but concededly, the parties have already reached before the civil court, who have filed their respective civil suits either seeking rendition of accounts or recovery

of money. As far as the rights arising from the written contract between the two companies are concerned, the same would be determined by the civil court and during the course of hearing, it is also fairly stated by learned counsels for both the parties that the first suit instituted by "Party No. I" pending before the Commercial Court at Lucknow has reached at an advanced stage, as both sides have adduced their respective evidence.

16. Similarly, out of two suits instituted by "Party No. II" at Delhi, proceedings only in one suit are going on, whereas the other one has been stayed and their claim for recovery against "Party No. I" would be also adjudicated upon by the Civil Court.

17. Now, while reverting to the written complaint dated 3rd April, 2010 given by complainant Guna Kesh Rai, this Court finds that it only narrates the placement of work order by "Party No. I" in favour of "Party No. II" and defines the value of the contract as well as the outstanding debt amount. The allegations regarding extending threats are apparently vague, and even, the place of occurrence is not disclosed. The complainant only made a prayer for appropriate action, but in the considered opinion of this Court in the absence of any specific threats amounting to criminal intimidation, the alleged offences punishable under Sections 504 and 506 would not be even prima facie made out.

18. Similarly, the ingredients to constitute the offence punishable under Section 406 IPC are also absent, as it is not a case of any voluntary entrustment by complainant Guna Kesh Rai to the accused persons. Merely because, the parties are

having a civil dispute, and according to complainant, some amount is outstanding and the non-payment of the said amount, at least, would not constitute the offence punishable under Section 406 IPC. The definition of "criminal breach of trust" as contained in Section 405 IPC reads as under:-

"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".

19. A reading of the above makes it absolutely clear that neither there is any entrustment by the complainant or the firm "Party No. II", nor there is any misappropriation by "Party No. I" or its Director(s) resulting in breach of trust, therefore, the prosecution of the applicants in Application u/s 482 No. 724 of 2012 is unjustified and the continuation of the criminal proceedings against them deserve to be set aside.

20. Now, while analyzing the other complaint dated 3rd April, 2010 by Dr. Rajesh Kumar Singh submitted before the police against the Director(s) of "Party No. II", this Court finds that mainly the

complainant has raised his grievance regarding non-completion of the contract awarded in favour of the accused and a consequent loss suffered by him. Since, the complainant himself has filed a suit for rendition of accounts, which has already reached at the final stage, this Court finds that the continuation of the criminal proceedings against the Director(s) of "Party No. II" is also not proper, particularly when the complainant has not made any allegation regarding criminal intimidation.

21. Most importantly, a perusal of the complaint dated 3rd April, 2010 would show that the complainant has alleged only misbehaviour by the accused and the same cannot be construed as an intimidation to the victim, because discourtesy or improper behaviour may give a feeling of insult to a victim, but it would not strictly constitute the offences punishable under Sections 504 or 506 IPC. The statement of Dr. Arpita Sinha, Junior Manager recorded after four years of the complaint is also lacking in material particulars, and is not specific, therefore, the same cannot be given credence for prosecution of the Director(s) of "Party No. II".

22. At this juncture, reliance can be placed upon the decision of the Hon'ble Apex Court in ***Paramjeet Batra v. State of Uttarakhand and others, passed in Criminal Appeal No. 2069 of 2012***, wherein while examining a similar issue in the context of exercise of inherent powers under Section 482 Cr.P.C. The Hon'ble Apex Court made the following observations:-

"7. While exercising its jurisdiction under Section 482 of the Code the High Court has to be

cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash criminal proceedings to prevent abuse of process of court."

23. In ***Vesa Holdings Pvt. Ltd. and another vs. State of Kerala & Ors reported in 2015 (8) SCC 293***, the Hon'ble Supreme Court examined the abuse of process of law in the context of civil disputes between the parties and made the following observations:-

"9. It is true that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may be available to the complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose the criminal offence of cheating or not. In the present case there is nothing to show that at the very inception there was any intention on behalf of

the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC. In our view the complaint does not disclose any criminal offence at all. Criminal proceedings should not be encouraged when it is found to be malafide or otherwise an abuse of the process of the court. Superior courts while exercising this power should also strive to serve the ends of justice. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and the High Court committed an error in refusing to exercise the power under Section 482 Criminal Procedure Code to quash the proceedings."

24. Further, the Hon'ble Apex Court in **State of Haryana and others v. Ch. Bhajan Lal and others, 1991(1) RCR (Criminal) 383 : 1992 Supp(1) Supreme Court Cases 335**, had laid down the principles and guidelines for exercise of inherent powers under Section 482 Cr.P.C. The relevant portion of the judgment is reproduced below :-

"The following categories of cases can be stated by way of illustration wherein the extraordinary power under Article 226 or the inherent powers under Section 482, Cr.P.C., 1973 can be exercised by the High Court 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 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 specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of 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.

We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

25. Thus, in the considered opinion of this Court, this case is also a fit case for exercise of inherent powers under Section 482 Cr.P.C. to avoid the misuse of law.

26. Resultantly, both the applications succeed and Charge Sheet No. 160/2010 dated 11th May, 2010 as well as

the cognizance order dated 24th June, 2010, arising out of Case Crime No. 241/2010, under Sections 406, 504 and 506 IPC, Police Station Ghazipur, Lucknow and Charge Sheet No. 160A/2014 dated 14th July, 2014 as well as the cognizance order dated 04th September, 2014, arising out of Case Crime No. 241A/2010, under Sections 147, 148, 323, 504 and 506 IPC, Police Station Ghazipur, Lucknow, and the entire proceedings arising therefrom, pending in the Court of Special Chief Judicial Magistrate, Custom, Lucknow, are ordered to be quashed.

27. The applications are allowed.

(2025) 1 ILRA 582
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.01.2025

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application U/S 482 No. 2440 of 2016

Ram Surat Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
 Rajendra Prasa Mishra, Rakesh Kumar Singh

Counsel for the Respondents:
 Govt. Advocate, Devi Prasad Maurya

Criminal Law - Code of Criminal Procedure 1973 - Section 482-Final report in favour of the applicants-accused-allegations relate to the forged compromise-got the said land entered in their favour- but once the said consolidation proceedings were finally adjudicated on the strength of the said document- it does not appeal to prudence that the complainant would not challenge the said proceedings- inconsistency in their St.ments-trial court has only referred to the St.ments of the

witnesses-not on the substance of the said St.ments while summoning the accused-impugned order is not sustainable.

Application allowed. (E-9)

List of Cases cited:

1. S.W. Palantkar & ors. Vs St. of Bihar & anr., (2002) 1 Supreme Court Cases 241
2. St. of Har. & ors. Vs Ch. Bhajan Lal & ors., 1992 SCC(Cr.) 426
3. Bhajan Lal (Supra), in the case of Salib alias Shalu @ Salim Vs St. of U.P. & ors., 2023 SCC OnLine SC 947

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicants-Accused have filed this application under Section 482 Code of Criminal Procedure for quashing of the Complaint Case No. 1228 of 2011; titled *Udai Raj vs. Ram Surat Singh and others*, as well as the impugned summoning order dated 27th February, 2016 passed by Additional Chief Judicial Magistrate-II, Faizabad, whereby they have been summoned for alleged commission of offences punishable under Sections 504 and 506 IPC, and the entire proceedings arising therefrom.

2. The facts in brief leading to the petition are that initially on the basis of a complaint given by Udai Raj-opposite party no. 2, a Case Crime No. 42 of 2011, under Sections 419, 420, 467, 468, 471, 120-B, 504, 506 IPC and Section 3(1)(X) Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Haiderganj, District Faizabad (Annexure No. 8) was registered, wherein it is alleged that he belongs to a scheduled caste category and is a poor person. The land comprised in Gata No. 638 situated at

Village Baintikala, Police Station Haiderganj, District Faizabad is in the name of his mother, and the accused namely Ram Surat Singh alongwith his sons exercised influence upon the officials of the Consolidation department, and by using a forged compromise purportedly on behalf of complainant's mother got the said land entered in their favour. The officials of the Consolidation department also connived with them, and in this regard, on 28th November, 2010, when complainant asked for information from Ram Surat Singh, in response, they all abused him in the name of his caste and extended threats. A complaint was given to the police, but no action was taken, therefore, the complainant resorted to Section 156(3) Cr.P.C., whereupon the above noticed FIR was registered.

3. After registration of the case, the investigation was conducted, and finally, nothing incriminating was found against the accused persons, who were declared innocent through the final report under Section 173(2) Cr.P.C. dated 28th April, 2011 (Annexure No. 11).

4. Aggrieved against the said final report, the complainant instituted a protest petition dated 1.7.2011 (Annexure No. 12), and thereafter, in support of the complaint, he got recorded his statement under Section 200 Cr.P.C., and his mother-Faguna Devi also appeared to support his version. Considering the contents of the complaint and the pre-summoning evidence, only three accused persons (applicants) were summoned for alleged commission of offences punishable under Sections 504 and 506 IPC, whereas no incriminating evidence was found against the rest of the accused arraigned in the complaint.

5. Learned counsel for the applicants-accused has argued that the entire case of the complainant is based upon documentary material and the allegations contained in the complaint were thoroughly investigated by police initially after FIR (Annexure No. 8) was registered and nothing was found against the accused persons. Learned counsel next submits that the complainant has been taking conflicting stands, who initially in his version contained in the FIR has levelled allegations against Ram Surat Singh and officials of the Consolidation department, but in the protest petition/complaint, he has chosen to implicate the applicant nos. 2 and 3 also. Learned counsel submits that the summoning order dated 27th February, 2016 has been passed in a mechanical manner, and the background of the case, as well as evidence on record has not been carefully examined, much less to record a satisfaction that a prima facie case is made out against the accused. Learned counsel has further argued that as per the allegations, the dispute between the parties related to the consolidation proceedings, but the said dispute stands finally adjudicated in favour of the applicants, therefore, it is evident that the prosecution of the accused is attended with malafide. Learned counsel submits that the impugned order is against the settled principles of law, therefore, it calls for interference by this Court in exercise of inherent powers under Section 482 Code of Criminal Procedure.

6. Notice of the petition was issued to opposite party no. 2-complainant, and as per office report dated 22nd December, 2016, the complainant was effectively served, and to represent him, power of attorney by Mr. Devi Prasad Maurya, Advocate was filed. But, till date, no counter affidavit on behalf of complainant

has been filed, and even today no one is present to represent the complainant.

7. After hearing the learned counsel for the applicants and considering his submissions, this Court finds that the allegations levelled by the complainant in the FIR were not found to be truthful and noting incriminating was found against the accused, which resulted in submission of final report in favour of the applicants-accused, who were declared innocent. Though, the allegations in the FIR, as well as in the complaint relate to the forged compromise, which had been relied upon by Ram Surat Singh, but once the said consolidation proceedings were finally adjudicated on the strength of the said document, it does not appeal to prudence that the complainant would not challenge the said proceedings. Thus, this amounts acceptance of the said verdict by Faguna and her descendants.

8. That apart, the allegations relating to the forgery and cheating have been disbelieved by the Magistrate as well, as the impugned summoning order dated 27th February, 2016 relates to the alleged commission of offences punishable under Sections 504 and 506 IPC. Similarly, the allegations relating to the alleged offence under SC/ST Act has also not been made out and while examining the statements of the material witnesses, i.e. Udai Raj and Faguna Devi (complainant's mother), this Court finds inconsistency in their statements. The statement of complainant Udai Raj was recorded under Section 200 Cr.P.C. on 21st October, 2011, wherein there is no mention of intimidation to the complainant, much less by the accused persons, who only stated that when he went to the house of Ram Surat Singh to enquire

about the settlement, he abused him in the name of his caste.

9. Likewise, the other statement of Faguna Devi does not lend any strength to the case of the complainant, who was not present at the place of occurrence, and in her statement before the court under Section 202 Cr.P.C., she stated that when her son visited the house of Ram Surat Singh, the applicants-accused abused him in the name of his caste. Thus, the material on record is not enough to prima facie show the commission of alleged offences, but the trial court has proceeded to issue process against the accused in a routine manner. Here, it will be useful to rely upon the decision by the Hon'ble Supreme Court in the case of **S.W. Palantikar and others versus State of Bihar and another, (2002) 1 Supreme Court Cases 241**. The relevant observations read as under:-

"23. Many a times, complaints are filed under Section 200 Cr.P.C. by the parties with an oblique motive or for collateral purposes to harass, to wreck vengeance, pressurize the accused to bring them to their own terms or to enforce the obligations arising out of breach of contract touching commercial transactions instead of approaching civil courts with a view to realize money at the earliest. It is also to be kept in mind that when parties commit a wrongful act constituting a criminal offence satisfying necessary ingredients of an offence,

they cannot be allowed to walk away with an impression that no action could be taken against them on criminal side. A wrongful or illegal act such as criminal breach of trust, misappropriation, cheating or defamation may give rise to action both on civil as well as on criminal side when it is clear from the complaint and sworn statements that necessary ingredients of constituting an offence are made out. May be parties are entitled to proceed on civil side only in a given situation in the absence of an act constituting an offence but not to proceed against the accused in a criminal prosecution. Hence before issuing a process a Magistrate has to essentially keep in mind the scheme contained in the provisions of Section 200-203 of Cr.P.C. keeping in mind the position of law stated above and pass an order judiciously and not mechanically or in routine manner."

XX XX XX
XX XX XX

"27 ?.....The approach and considerations while exercising power and jurisdiction by a Magistrate at the time of

issuing process are to be in terms of Sections 200 to 203 under Chapter XV of Criminal Procedure Code, having due regard to the position of law explained in various decisions of this Court, and whereas while exercising power under Section 482 of Criminal Procedure Code the High Court has to look at the object and purpose for which such power is conferred on it under the said provision. Exercise of inherent power is available to the High Court to give effect to any order under the Criminal Procedure Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This being the position, exercise of power under Section 482 Criminal Procedure Code should be consistent with the scope and ambit of the same in the light of the decisions aforementioned. In appropriate cases, to prevent judicial process from being an instrument of oppression or harassment in the hands of frustrated or vindictive litigants, exercise of inherent power is not only desirable but necessary also, so that the judicial forum of the Court may not be allowed to be utilized for any oblique motive. When a person approaches the High Court

under Section 482 Criminal Procedure Code to quash the very issue of process, the High Court on the facts and circumstances of a case has to exercise the powers with circumspection as stated above to really serve the purpose and object for which they are conferred."

10. A perusal of the impugned order would also show that the trial court has only referred to the recording of the statements of the witnesses, and has not chosen to comment on the substance of the said statements while summoning the accused. Thus, the impugned order dated 27th February, 2016 is not sustainable and calls for interference by this Court.

11. Further, in **State of Haryana and others Vs. Ch. Bhajan Lal and others, 1992 SCC(Cr.) 426**, the Hon'ble Supreme Court had closely analysed the inherent powers contained in Section 482 Cr.P.C. and laid down clear guidelines for exercise of such power, and held that where the criminal proceedings are attended with malafide intentions, the exercise of inherent powers is justified to prevent the abuse of the process of law. The relevant portion of the decision reads as under:-

"The following categories of cases can be stated by way of illustration wherein the extraordinary power under Article 226 or the inherent powers under Section 482, Cr.P.C. can be exercised by the High Court 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 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. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

(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 specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of 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.

We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that

the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

12. Recently, the Apex Court again followed the above view contained in the case of **Bhajan Lal (Supra)**, in the case of **Salib alias Shalu alias Salim Vs. State of U.P. and others, 2023 SCC OnLine SC 947**. The relevant observations relating to exercise of inherent powers under Section 482 Cr.P.C. are reproduced hereunder:-

"27. In our opinion, the present case falls within the parameters Nos. 1, 5 and 7 resply referred to above.

28. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for

wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation. Take for instance the case on hand. Multiple FIRs have been registered over a period of time. It is in the background of such circumstances the registration of multiple FIRs assumes importance, thereby attracting the issue of wreaking vengeance out of private or personal grudge as alleged."

(Emphasis Supplied)

13. Thus, in view of the above discussion, this Court has no hesitation in holding that impugned complaint filed by the opposite party no.2 against the applicant is nothing, but an abuse of the process of law, therefore this Court finds it to be a fit case for exercise of inherent powers under Section 482 Cr.P.C.

14. Resultantly, the present application succeeds and the Complaint Case No. 1228 of 2011; titled Udai Raj vs. Ram Surat Singh and others, under Sections 504 and 506 IPC, as well as the impugned summoning order dated 27th February, 2016 passed by Additional Chief Judicial Magistrate-II, Faizabad, and the proceedings arising therefrom, are ordered to be quashed.

15. The application is allowed.

(2025) 1 ILRA 589
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.01.2025

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Application U/S 482 No. 6982 of 2017

Sharad Kumar & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
 Gopesh Tripathi

Counsel for the Respondents:
 Govt. Advocate

Criminal Law - Indian Penal Code, 1860 - Sections 107 & 306-no evidence in the case of alleged abetment of suicide - no active act shown on the part of the applicants - the loan was sanctioned in the name of the deceased,

who could not repay the same-the applicants being brothers could not have been held responsible for abetment in commission of suicide by the deceased- no evidence to establish that applicants were responsible to repay the loan amount which was advanced in the name of the deceased-continuance of the present criminal proceedings is nothing but an abuse of process of law.

Application allowed. (E-9)

List of Cases cited:

1. Mariano Anto Bruno & anr. Vs The Inspector of Police, 2022 Livlaw (SC) 834: 2022 SCC Online SC 1387;

2. Criminal Appeal No.3578 of 2023, Mohit Singhal & anr. Vs The St. of Uttarakhand & ors., decided on 01.12.2023;

3. Swamy Prahaladdas Vs St. of M.P. & anr., 1995 Supp (3) SCC 438

4. Application U/s 482 No.24303 of 2016, Ambesh Mani Tripathi Vs St. of U.P. & anr., decided on 01.12.2023

5. Geo Verghese Vs St. of Raj. & anr., 2021 SCC OnLine SC 873

6. M. Arjunan Vs St., represented by its Inspector of Police, (2019) 3 SCC 315

7. S.S. Cheena Vs Vijay Kumar Mahajan & anr., (2010) 12 SCC 190

8. Ude Singh & ors. Vs St. of Har., (2019) 17 SCC 301

9. Madan Mohan Singh Vs St. of Guj. & anr., (2010) 8 SCC 628

10. St. of Kerala & ors. Vs S. Unnikrishnan Nair & ors., (2015) 9 SCC 639

11. Kanchan Sharma Vs St. of U.P. & anr., decided on 17.09.2021

12. M. Vijayakumar Vs St. of T.N., (2024) 4 SCC 633

13. Criminal Appeal No.221 of 2025, Mahendra Awase Vs The St. of M.P., decided on 17.01.2025

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

1. The present application under Section 482 Cr.P.C. has been filed seeking quashing of the entire proceedings of Criminal Case No.5450 of 2016, State Vs. Sharad Kumar and another, arising out of Case Crime No.135 of 2016, under Section 306 IPC, Police Station Maheshganj, District Pratapgarh as well as the cognizance order dated 06.12.2016 passed by the Judicial Magistrate, Pratapgarh.

2. Facts, in brief, are that Shishir Kumar, elder brother of the applicants, consumed Sulphas on 27.05.2016 and he succumbed. Smt. Kanti Srivastava, wife of Shishir Kumar, informed the police about the said incident, which is entered vide Report No.26 of 27.05.2016 at 15.30 hrs. that her husband committed suicide by consuming Sulphas and inquest was also prepared on the same day. Thereafter, post-mortem was conducted on 28.05.2016. Opposite party no.2, brother-in-law of the deceased, lodged an FIR on 02.06.2016 making allegation that applicants abetted the deceased to commit suicide for the reason that the loan, which was advanced by the bank to the deceased, was to be repaid by the applicants and the deceased, who are real brothers, but the applicants refused to repay the loan and also they did not give the share of the property, therefore, the deceased Shishir Kumar committed suicide. The FIR further indicates that father of the applicants had assured the deceased that his brothers will also help him in repaying the loan.

3. Learned counsel for the applicants has submitted that all the three

sons i.e. applicants and the deceased were residing separately and deceased Shishir Kumar had no issue. The deceased had purchased a Tractor by taking a loan, but could not repay the amount of loan, that is why a recovery notice was issued against him. The deceased was taken to Swaroop Rani Hospital, Allahabad for treatment by the applicants themselves, however, deceased could not be saved. Statement of father of the applicants was also recorded under Section 161 Cr.P.C., in which he categorically stated that it is opposite party no.2, who was responsible for abetment to suicide because he wanted that the deceased should adopt his son, so that he could claim the property of the deceased. Counsel for the applicants has further submitted that name of the deceased was recorded in the revenue record as co-tenure holder along with the applicants and he took the loan by mortgaging his land, which was recorded in his name. He has also submitted that there is no act of abetment by the applicants in commission of crime. It is further submitted that there is no ingredient of Section 106 IPC against the applicants as there is no evidence of any kind of active act committed by the applicants. Charge sheet has been filed on the wrong presumption that applicants abetted the deceased to commit suicide without there being any evidence. Learned counsel has further submitted that vague and bald allegations have been levelled against the applicants that too without supporting of any evidence and the applicants have been charge sheeted on surmises and conjunctures.

4. In support of his contention, counsel for the applicants has placed reliance upon the following cases:-

1. *Mariano Anto Bruno and another Vs. The Inspector of*

Police, 2022 Livelaw (SC) 834: 2022 SCC Online SC 1387;

2. **Criminal Appeal No.3578 of 2023, Mohit Singhal and another Vs. The State of Uttarakhand and others**, decided on 01.12.2023;

3. **Swamy Prahaladdas Vs. State of M.P. and another**, 1995 Supp (3) SCC 438; and

4. **Application U/s 482 No.24303 of 2016, Ambesh Mani Tripathi Vs. State of U.P. and another**, decided on 01.12.2023.

5. On the other hand, learned AGA has submitted that evidence has been collected by the Investigating Officer, in which it has been found that applicants were involved in abetment of suicide and the deceased had committed suicide under pressure because he could not repay the amount of loan. Learned AGA has pointed out the statement of Smt. Kanti Srivastava, wife of the deceased, who stated that the loan was taken by her husband with the help of her father-in-law and he assured that the loan amount will be repaid by all the three brothers i.e. applicants and the deceased. She further stated that the loan amount was not repaid by the applicants, that is why her husband committed suicide. He has, therefore, submitted that this application is liable to be rejected.

6. Despite of service of notice, no one has put in appearance on behalf of opposite party no.2.

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

8. After going through the record, I find that there is no active act on the part of the applicants, which could establish that

they were involved in abetting the deceased to commit suicide. An important fact has also come out that the deceased was having his own agricultural property, on which loan was sanctioned in his name, therefore, he was responsible to repay the loan amount. In case he could not repay the loan amount and under pressure he committed suicide, then how the applicants are responsible in any manner. It is not worth to presume that applicants being brothers, had to repay the loan amount, which was advanced to the deceased by the bank. The evidence on record does not indicate that applicants abetted the deceased in any manner to instigate him to commit suicide.

9. Hon'ble Supreme Court in the case of Swamy Prahaladdas (supra) has considered the issue of abetment of suicide in paragraph-3 of the judgement, which reads as under:-

"3. At the time of framing of charge, the trial court thought it appropriate to associate the appellant herein as an accused because of the words he uttered to the deceased. We think that just on the basis of that utterance the Court of Session was in error in summoning the appellant to face trial. In the first place it is difficult, in the facts and circumstances, to come to even a prima facie view that what was uttered by the appellant was enough to instigate the deceased to commit suicide. Those words are casual in nature which are often employed in the heat of the moment between quarrelling people. Nothing serious is expected to follow thereafter. The said act does not reflect the requisite mens rea on the

assumption that these words would be carried out in all events. Besides the deceased had plenty of time to weigh the pros and cons of the act by which he ultimately ended his life. It cannot be said that the suicide by the deceased was the direct result of the words uttered by the appellant. For these reasons, the error is apparent requiring rectification. The appeal is accordingly allowed. The orders of the High Court and that of the Court of Sessions are thus upset. The appellant need not face the charge."

10. Hon'ble Supreme Court in the case of **Mohit Singhal** (supra) has held that instigation on the part of the accused is the pivotal thing which is to be seen and there must be instigation in some form on the part of the accused to cause the deceased to commit suicide. Paragraphs 9 and 10 of the said judgement are quoted herein-below:-

"9. In the facts of the case, secondly and thirdly in Section 107, will have no application. Hence, the question is whether the appellants instigated the deceased to commit suicide. To attract the first clause, there must be instigation in some form on the part of the accused to cause the deceased to commit suicide. Hence, the accused must have mens rea to instigate the deceased to commit suicide. The act of instigation must be of such intensity that it is intended to push the deceased to such a position under which he or she has no choice but to commit suicide. Such instigation must be

in close proximity to the act of committing suicide.

10. In the present case, taking the complaint of the third respondent and the contents of the suicide note as correct, it is impossible to conclude that the appellants instigated the deceased to commit suicide by demanding the payment of the amount borrowed by the third respondent from her husband by using abusive language and by assaulting him by a belt for that purpose. The said incident allegedly happened more than two weeks before the date of suicide. There is no allegation that any act was done by the appellants in the close proximity to the date of suicide. By no stretch of the imagination, the alleged acts of the appellants can amount to instigation to commit suicide. The deceased has blamed the third respondent for landing in trouble due to her bad habits."

11. Hon'ble Supreme Court in the case of **Geo Verghese Vs. State of Rajasthan and another**, 2021 SCC OnLine SC 873, has held that while suicide in itself is not an offence as a person committing suicide goes beyond the reach of law, but an attempt to suicide is considered to be an offence under section 309 IPC. Paragraphs 13, 14, 15 and 16 of the said judgement are extracted herein-below:-

"13. In our country, while suicide in itself is not an offence as a person committing suicide goes beyond the reach of law but an attempt to suicide is considered to

be an offence under Section 309 IPC. The abetment of suicide by anybody is also an offence under Section 306 IPC. It would be relevant to set out Section 306 of the IPC which reads as under :-

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

14. Though, the IPC does not define the word ‘Suicide’ but the ordinary dictionary meaning of suicide is ‘self-killing’. The word is derived from a modern latin word ‘suicidium’, ‘sui’ means ‘oneself’ and ‘cidium’ means ‘killing’. Thus, the word suicide implies an act of ‘self-killing’. In other words, act of death must be committed by the deceased himself, irrespective of the means adopted by him in achieving the object of killing himself.

15. Section 306 of IPC makes abetment of suicide a criminal offence and prescribes punishment for the same.

16. The ordinary dictionary meaning of the word ‘instigate’ is to bring about or initiate, incite someone to do something. This Court in the case of Ramesh Kumar Vs. State of Chhattisgarh, 2021 SCC OnLine SC 873 has defined the word ‘instigate’ as under :-

“Instigation is to goad, urge forward, provoke, incite or encourage to do an act.”

12. In the case of M. Arjunan Vs. State, represented by its Inspector of Police, (2019) 3 SCC 315, Hon'ble Supreme Court has further dealt with the ingredients of Section 306 IPC extensively. The relevant paragraph of the said judgement is quoted herein-below:-

“The essential ingredients of the offence under Section 306 I.P.C. are: (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. The act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 I.P.C.”

13. The scope and ambit of Section 107 IPC and its co-relation with Section 306 IPC has been discussed by the Hon'ble Supreme Court in the case of S.S. Cheena Vs. Vijay Kumar Mahajan and another, (2010) 12 SCC 190. The relevant paragraph of the said judgement reads as under:-

“Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of

the cases decided by the Supreme Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

14. In the case of ***Ude Singh and others Vs. State of Haryana***, (2019) 17 SCC 301, Hon'ble Supreme Court while discussing the question that state of mind to commit suicide is to be seen, which is mentioned under Section 306 IPC, held as under:-

"16. In cases of alleged abetment of suicide, there must be a proof of direct or indirect act/s of incitement to the commission of suicide. It could hardly be disputed that the question of cause of a suicide, particularly in the context of an offence of abetment of suicide, remains a vexed one, involving multifaceted and complex attributes of human behavior and responses/reactions. In the case of accusation for abetment of suicide, the Court would be looking for cogent and convincing proof of the act/s of incitement to the commission of suicide. In the case of suicide, mere allegation of harassment of the deceased by another person would not suffice unless there be such action on the part of the accused which compels the person to commit suicide; and such an offending action ought to

be proximate to the time of occurrence. Whether a person has abetted in the commission of suicide by another or not, could only be gathered from the facts and circumstances of each case.

16.1. For the purpose of finding out if a person has abetted commission of suicide by another; the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions above-referred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of accused is otherwise not ordinarily expected to induce a similarly circumstanced person to commit suicide, it may not be safe to hold the accused guilty of abetment of suicide. But, on the other hand, if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four-corners of Section 306 IPC. If the accused plays an active role in tarnishing the self-esteem and self-respect of the victim, which eventually draws the victim to commit suicide, the accused may be held guilty of abetment of suicide. The question of mens rea on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the

accused intended nothing more than harassment or snap show of anger; a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. Such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all the surrounding factors having bearing on the actions and psyche of the accused and the deceased."

15. In the case of **Madan Mohan Singh Vs. State of Gujarat and another**, (2010) 8 SCC 628, Hon'ble Supreme Court has also taken the similar view in paragraphs 10, 11, 12, 13, 16, 17, which read as under:-

"10. We are convinced that there is absolutely nothing in this suicide note or the FIR which would even distantly be viewed as an offence much less under Section 306, IPC. We could not find anything in the FIR or in the so-called suicide note which could be suggested as abetment to commit suicide. In such matters there must be an allegation that the accused had instigated the deceased to commit suicide or secondly, had engaged with some other person in a conspiracy and lastly, that the accused had in any way aided any act or illegal omission to bring about the suicide.

11. In spite of our best efforts and microscopic

examination of the suicide note and the FIR, all that we find is that the suicide note is a rhetoric document in the nature of a departmental complaint. It also suggests some mental imbalance on the part of the deceased which he himself describes as depression. In the so-called suicide note, it cannot be said that the accused ever intended that the driver under him should commit suicide or should end his life and did anything in that behalf. Even if it is accepted that the accused changed the duty of the driver or that the accused asked him not to take the keys of the car and to keep the keys of the car in the office itself, it does not mean that the accused intended or knew that the driver should commit suicide because of this.

12. In order to bring out an offence under Section 306, IPC specific abetment as contemplated by Section 107, IPC on the part of the accused with an intention to bring out the suicide of the concerned person as a result of that abetment is required. The intention of the accused to aid or to instigate or to abet the deceased to commit suicide is a must for this particular offence under Section 306, IPC. We are of the clear opinion that there is no question of there being any material for offence under Section 306, IPC either in the FIR or in the so-called suicide note.

13. It is absurd to even think that a superior officer like the appellant would intend to bring about suicide of his driver and, therefore, abet the offence. In fact, there is no nexus between the so

called suicide (if at all it is one for which also there is no material on record) and any of the alleged acts on the part of the appellant. There is no proximity either. In the prosecution under Section 306, IPC, much more material is required. The Courts have to be extremely careful as the main person is not available for cross-examination by the appellant/accused. Unless, therefore, there is specific allegation and material of definite nature (not imaginary or inferential one), it would be hazardous to ask the appellant/accused to face the trial. A criminal trial is not exactly a pleasant experience. The person like the appellant in present case who is serving in a responsible post would certainly suffer great prejudice, were he to face prosecution on absurd allegations of irrelevant nature. In the similar circumstances, as reported in *Netai Dutta v. State of W.B.* 2005 (2) SCC 659, this Court had quashed the proceedings initiated against the accused.

16. Insofar as Section 294(b) IPC is concerned, we could not find a single word in the FIR or even in the so-called suicide note. Insofar as Section 306 IPC is concerned, even at the cost of repetition, we may say that merely because a person had a grudge against his superior officer and committed suicide on account of that grudge, even honestly feeling that he was wronged, it would still not be a proper allegation for basing the charge under Section 306 IPC. It will still fall short of a

proper allegation. It would have to be objectively seen whether the allegations made could reasonably be viewed as proper allegations against the appellant/accused to the effect that he had intended or engineered the suicide of the concerned person by his acts, words etc. When we put the present FIR on this test, it falls short.

17. We have already explained that the baseless and irrelevant allegations could not be used as a basis for prosecution for a serious offence under Section 306 IPC. Similarly, we have already considered Section 294(b) IPC also. We have not been able to find anything. Under such circumstances, where the FIR itself does not have any material or is not capable of being viewed as having material for offence under Sections 306 and 294(b) IPC, as per the law laid down by this Court in *State of Haryana and Ors. v. Bhajan Lal and Ors.* 1992 Suppl. 1 SCC 335, it would be only proper to quash the FIR and the further proceedings."

16. Hon'ble Supreme Court has considered the issue of abetment to suicide in the case of ***State of Kerala and others Vs. S. Unnikrishnan Nair and others***, (2015) 9 SCC 639. Relevant paragraphs of the said judgement read as under:-

"9. To appreciate the rivalised submissions in the obtaining factual matrix, it is necessary to understand the concept of abatement as enshrined in Section 107 Indian Penal Code.

The said provision reads as follows:

07. A person abets the doing of a thing, who-

First-Instigates any person to do that thing; or

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

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

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

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

10. The aforesaid provision was interpreted in Kishori Lal v. State of M.P. (2007) 10 SCC 797 by a two-Judge Bench and the discussion therein is to the following effect:

Section 107 Indian Penal Code defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in Indian Penal Code. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages

with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. "Abetted" in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence.

11. In Amalendu Pal v. State of West Bengal (2010) 1 SCC 707 dealing with expression of abetment the Court observed:

The expression "abetment" has been defined Under Section 107 Indian Penal Code which we have already extracted above. A person is said to abet the commission of suicide when a person instigates any person to do that thing as stated in clause Firstly or to do anything as stated in clauses Secondly or Thirdly of Section 107 Indian Penal Code. Section 109 Indian Penal Code provides that if the act abetted is committed pursuant to and in

consequence of abetment then the offender is to be punished with the punishment provided for the original offence. Learned Counsel for the Respondent State, however, clearly stated before us that it would be a case where clause Thirdly of Section 107 Indian Penal Code only would be attracted. According to him, a case of abetment of suicide is made out as provided for Under Section 107 Indian Penal Code.

12. As we find from the narration of facts and the material brought on record in the case at hand, it is the suicide note which forms the fulcrum of the allegations and for proper appreciation of the same, we have reproduced it hereinbefore. On a plain reading of the same, it is difficult to hold that there has been any abetment by the Respondents. The note, except saying that the Respondents compelled him to do everything and cheated him and put him in deep trouble, contains nothing else. The Respondents were inferior in rank and it is surprising that such a thing could happen. That apart, the allegation is really vague. It also baffles reason, for the department had made him the head of the investigating team and the High Court had reposed complete faith in him and granted him the liberty to move the court, in such a situation, there was no warrant to feel cheated and to be put in trouble by the officers belonging to the lower rank. That apart, he has also put the blame on the Chief Judicial Magistrate by stating that he had put pressure on him. He has

also made the allegation against the Advocate.

13. In Netai Dutta (supra), a two-Judge Bench, while dealing with the concept of abetment Under Section 107 Indian Penal Code and, especially, in the context of suicide note, had to say this:

In the suicide note, except referring to the name of the Appellant at two places, there is no reference of any act or incidence whereby the Appellant herein is alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased Pranab Kumar Nag in committing the act of suicide. There is no case that the Appellant has played any part or any role in any conspiracy, which ultimately instigated or resulted in the commission of suicide by deceased Pranab Kumar Nag.

Apart from the suicide note, there is no allegation made by the complainant that the Appellant herein in any way was harassing his brother, Pranab Kumar Nag. The case registered against the Appellant is without any factual foundation. The contents of the alleged suicide note do not in any way make out the offence against the Appellant. The prosecution initiated against the Appellant would only result in sheer harassment to the Appellant without any fruitful result. In our opinion, the learned Single Judge seriously erred in holding that the First Information Report against the Appellant disclosed the elements of a cognizable offence. There was absolutely no ground to

proceed against the Appellant herein. We find that this is a fit case where the extraordinary power Under Section 482 of the Code of Criminal Procedure is to be invoked. We quash the criminal proceedings initiated against the Appellant and accordingly allow the appeal.

14. In M. Mohan (supra), while dealing with the abatement, the Court has observed thus:

Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

The intention of the Legislature and the ratio of the cases decided by this Court are clear that in order to convict a person Under Section 306 Indian Penal Code there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide.

15. As far as Praveen Pradhan (supra), is concerned, Mr. Rao, has emphatically relied on it for the purpose that the Court had declined to quash the F.I.R. as there was a suicide note. Mr. Rao has drawn out attention to paragraph 10 of the judgment, wherein the suicide note has been reproduced. The Court in the said case has referred to certain authorities with

regard to Section 107 Indian Penal Code and opined as under:

“18. In fact, from the above discussion it is apparent that instigation has to be gathered from the circumstances of a particular case. No straight-jacket formula can be laid down to find out as to whether in a particular case there has been instigation which force the person to commit suicide. In a particular case, there may not be direct evidence in regard to instigation which may have direct nexus to suicide. Therefore, in such a case, an inference has to be drawn from the circumstances and it is to be determined whether circumstances had been such which in fact had created the situation that a person felt totally frustrated and committed suicide. More so, while dealing with an application for quashing of the proceedings, a court cannot form a firm opinion, rather a tentative view that would evoke the presumption referred to Under Section 228 Code of Criminal Procedure.

19. Thus, the case is required to be considered in the light of aforesaid settled legal propositions. In the instant case, alleged harassment had not been a casual feature, rather remained a matter of persistent harassment. It is not a case of a driver; or a man having an illicit relationship with a married woman, knowing that she also had another paramour; and therefore, cannot be compared to the situation of the deceased in the instant case, who was a qualified graduate engineer and still suffered persistent harassment and

humiliation and additionally, also had to endure continuous illegal demands made by the Appellant, upon non-fulfillment of which, he would be mercilessly harassed by the Appellant for a prolonged period of time. He had also been forced to work continuously for a long durations in the factory, vis-à-vis other employees which often even entered to 16-17 hours at a stretch. Such harassment, coupled with the utterance of words to the effect, that, "had there been any other person in his place, he would have certainly committed suicide" is what makes the present case distinct from the aforementioned cases considering the facts and circumstances of the present case, we do not think it is a case which requires any interference by this Court as regards the impugned judgment and order of the High Court.

16. We have quoted in extenso from the said judgment and we have no hesitation in stating that the suicide note therein was quite different, and the Court did think it appropriate to quash the proceedings because of the tenor and nature of the suicide note. Thus, the said decision is distinguishable regard being had to the factual score exposted therein.

17. Coming to the case at hand, as we have stated earlier, the suicide note really does not state about any continuous conduct of harassment and, in any case, the facts and circumstances are quite different. In such a situation, we are disposed to think that the High Court is justified in quashing the

proceeding, for it is an accepted position in law that where no prima facie case is made out against the accused, then the High Court is obliged in law to exercise the jurisdiction under Section 482 of the Code and quash the proceedings."

17. Similar issue has been dealt with by the Hon'ble Supreme Court in Criminal Appeal No.1022 of 2021, **Kanchan Sharma Vs. State of U.P. and another**, decided on 17.09.2021. Relevant paragraphs of the said judgement are quoted herein below:-

"9. Having heard learned counsel on both sides, we have perused the impugned order and other material placed on record. Except the self-serving statements of the complainant and other witnesses stating that deceased was in love with the appellant, there is no other material to show that appellant was maintaining any relation with the deceased. From the material placed on record it is clear that on the date of incident on 04.05.2018 deceased went to the house of the appellant and consumed poison by taking out from a small bottle which he has carried in his pocket. Merely because he consumed poison in front of the house of the appellant, that itself will not indicate any relation of the appellant with the deceased. 'Abetment' involves mental process of instigating a person or intentionally aiding a person in doing of a thing. Without positive act on the part of the accused to instigate or aid in

committing suicide, no one can be convicted for offence under Section 306, IPC. To proceed against any person for the offence under Section 306 IPC it requires an active act or direct act which led the deceased to commit suicide, seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide. There is nothing on record to show that appellant was maintaining relation with the deceased and further there is absolutely no material to allege that appellant abetted for suicide of the deceased within the meaning of Section 306, IPC. Even with regard to offence alleged under Section 3(2)(v) of the Act it is to be noticed that except vague and bald statement that the appellant and other family members abused deceased by uttering casteist words but there is nothing on record to show to attract any of the ingredients for the alleged offence also.

This Court in the case of Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi) (2009) 16 SCC 605 had an occasion to deal with the aspect of abetment. In the said case this Court has opined that there should be an intention to provoke, incite or encourage the doing of an act by the accused. Besides, the judgment also observed that each person's suicidability pattern is different from the other and each person has his own idea of self-esteem and self-respect. In the said judgment it is held that it is impossible to lay down any straightjacket formula

dealing with the cases of suicide and each case has to be decided on the basis of its own facts and circumstances. In the case of Amalendu Pal @ Jhantu v. State of West Bengal (2010) 1 SCC 707 in order to bring a case within the purview of Section 306, IPC this Court has held as under :

"12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

13. In order to bring a case within the purview of Section 306 IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person

charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC.”

In the judgment in the case of S.S. Chheena v. Vijay Kumar Mahajan & Anr. (2010) 12 SCC 190 this Court reiterated the ingredients of offence of Section 306 IPC. Paragraph 25 of the judgment reads as under :

“25. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide.”

In the judgment in the case of Rajiv Thapar & Ors. v. Madan Lal Kapur (2013) 3 SCC 330 this Court has considered the scope of the provision under Section 482, Cr.PC and has laid down the steps which should be followed by the High Court to determine the veracity of a prayer for quashing of proceedings in exercise of power under Section 482, Cr.PC. Paragraph 30 containing the four steps read 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."

10. By applying the aforesaid ratio decided by this Court, we have carefully scrutinized the material on record and examined the facts of the case on hand. Except the statement that the deceased was in relation with the appellant, there is no material at all to show that appellant was maintaining any relation with the deceased. In fact, at earlier point of time when the deceased was stalking the appellant, the appellant along with her father went to the police station complained about the calls which were being made by the deceased to the appellant. Same is evident from the statement of S.I. Manoj Kumar recorded on 05.07.2018. In his statement recorded he has clearly deposed that the father along with the appellant went to the police post and complained against the deceased who was continuously calling the appellant and proposing that she should marry him with a threat that he will die otherwise. Having regard to such material placed on record and in absence of any material within the meaning of Section 107 of IPC, there is absolutely no basis to proceed against the appellant for the alleged offence under Section 306 IPC and Section 3(2)(v) of the Act. It would be travesty of justice to

compel the appellant to face a criminal trial without any credible material whatsoever.

11. In view of the same, we are of the view that the High Court has committed error in rejecting the application filed by the appellant by merely recording a finding that in view of the factual disputes same cannot be decided in a petition under Section 482, Cr.PC.

.....
23. Section 107 I.P.C. read with Section 306 I.P.C. is very much clear for abetment of a thing. Instigation is the first condition, second condition is engagement of one or more persons in any conspiracy and further an act or illegal omission in pursuance of conspiracy and the third thing is intention to do by any act or illegal omission. All these legal ingredients are fully missing in this case. In fact, only denial of marriage not coupled with any other fact does not come within the purview of abetment as defined in Section 107 I.P.C., therefore, it would not be an offence under Section 306 I.P.C."

18. Hon'ble Supreme Court in the case of **M. Vijayakumar Vs. State of Tamilnadu**, (2024) 4 SCC 633 while considering the question of mens rea in committing the crime under Section 306 IPC held as under:-

"19. In the contextual situation, in view of the analysis of the provisions under section 306 IPC and the decisions referred to supra, we will also have to

consider what is mens rea? 'Mens rea' means a guilty mind. As a general rule, every crime requires a mental element, the nature of which, will depend upon definition of the particular crime in question. Although it is impossible to ascribe any particular meaning to the term 'mens rea' as the circumstance to determine the existence of mens rea depends upon the ingredients constituting the particular offence and the expression used in the definition of the particular offence to constitute such offence. It is only appropriate to refer to Halsbury's Laws of England (4th Edn., Vol-11, Para-10), going by the same:

"...it is impossible to ascribe any particular meaning to the term 'mens rea', concepts such as those of intention, recklessness and knowledge which commonly used as the basis for criminal liability and in some respects, it may be said to be fundamental to it. Generally, subject to both qualification and exception, a person is not to be made criminally liable for serious crimes unless he intends to cause or foresees that he will probably cause or at the lowest he may cause the elements which constitute a crime in question."

20. In the decision in *Director of Enforcement v. MCTM Corp. Pvt. Ltd.*, it was observed that mens rea is a state of mind and held that under the criminal law mens rea is considered as the "guilty intention" and unless it is found that the 'accused' had the guilty intention to commit the crime, he could not be held guilty of committing the crime."

19. Recently, Hon'ble Supreme Court in ***Criminal Appeal No.221 of 2025, Mahendra Awase Vs. The State of Madhya Pradesh, decided on 17.01.2025*** after considering the earlier judgements in regard to abetment to suicide and its impact, held as under:-

"14. In Madan Mhan Singh Vs. State of Gujarat and another, (2010) 8 SCC 628, this Court held that in order to bring out an offence under Section 306 IPC specific abetment as contemplated by Section 107 IPC on the part of the accused with an intention to bring about the suicide of the person concerned as a result of that abetment is required. It was further held that the intention of the accused to aid or to instigate or to abet the deceased to commit suicide is a must for attracting Section 306.

15. In *Amalendu Pal alias Jhantu Vs. State of West Bengal, (2010) 1 SCC 707*, this Court held as under:-

"12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 PC, the court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of

suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

[Emphasis supplied]

16. In order to bring a case within the purview of Section 306 IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC.

17. *M. Mohan vs. State*, (2011) 3 SCC 626 followed *Ramesh Kumar vs. State of Chhattisgarh*, (2001) 9 SCC 618, wherein it was held as under:-

"41. This Court in SCC para 20 of *Ramesh Kumar* has examined different shades of the meaning of "instigation". Para 20 reads as under: (SCC p. 629) "20. Instigation is to goad, urge forward, provoke, incite or encourage to do 'an act'. To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence

must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

In the said case this Court came to the conclusion that there is no evidence and material available on record wherefrom an inference of the appellant- accused having abetted commission of suicide by Seema (the appellant's wife therein) may necessarily be drawn."

Thereafter, this Court in *Mohan (supra)* held:

"45. The intention of the legislature and the ratio of the cases decided by this Court are clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide." *[Emphasis supplied]*

18. As has been held hereinabove, to satisfy the requirement of instigation the accused by his act or omission or by a continued course of conduct should have created such circumstances that the deceased was left with no other option except

to commit suicide. It was also held that a word uttered in a fit of anger and emotion without intending the consequences to actually follow cannot be said to be instigation.

19. Applying the above principle to the facts of the present case, we are convinced that there are no grounds to frame charges under Section 306 IPC against the appellant. This is so even if we take the prosecution's case on a demurrer and at its highest. A reading of the suicide note reveals that the appellant was asking the deceased to repay the loan guaranteed by the deceased and advanced to Ritesh Malakar. It could not be said that the appellant by performing his duty of realising outstanding loans at the behest of his employer can be said to have instigated the deceased to commit suicide. Equally so, with the transcripts, including the portions emphasised hereinabove. Even taken literally, it could not be said that the appellant intended to instigate the commission of suicide. It could certainly not be said that the appellant by his acts created circumstances which left the deceased with no other option except to commit suicide. Viewed from the armchair of the appellant, the exchanges with the deceased, albeit heated, are not with intent to leave the deceased with no other option but to commit suicide. This is the conclusion we draw taking a realistic approach, keeping the context and the situation in mind.

Strangely, the FIR has also been lodged after a delay of two months and twenty days.

20. This Court has, over the last several decades, repeatedly reiterated the higher threshold, mandated by law for Section 306 IPC [Now Section 108 read with Section 45 of the Bharatiya Nyaya Sanhita, 2023] to be attracted. They however seem to have followed more in the breach. Section 306 IPC appears to be casually and too readily resorted to by the police. While the persons involved in genuine cases where the threshold is met should not be spared, the provision should not be deployed against individuals, only to assuage the immediate feelings of the distraught family of the deceased. The conduct of the proposed accused and the deceased, their interactions and conversations preceding the unfortunate death of the deceased should be approached from a practical point of view and not divorced from day-to-day realities of life. Hyperboles employed in exchanges should not, without anything more, be glorified as an instigation to commit suicide. It is time the investigating agencies are sensitised to the law laid down by this Court under Section 306 so that persons are not subjected to the abuse of process of a totally untenable prosecution. The trial courts also should exercise great caution and circumspection and should not adopt a play it safe syndrome by mechanically framing charges, even if the investigating agencies in a given case have shown utter disregard for the ingredients of Section 306."

20. In the present case, while considering the case in view of Sections 107 and 306 IPC, I find that there is no evidence in the case of alleged abetment of suicide because there is no active act shown on the part of the applicants in any manner so that the deceased was compelled to commit suicide. It is apparent on the face of record that the loan was sanctioned in the name of the deceased, who could not repay the same, then how the applicants being brothers, could have been held responsible for abetment in commission of suicide by the deceased. There is no evidence or any adverse material between the applicants and the deceased, which could establish that applicants were responsible to repay the loan amount which was advanced in the name of the deceased. The question of mens rea on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused, but in the present case, no evidence is available to establish that applicants were having mens rea in abetment of commission of suicide. Therefore, continuance of the present criminal proceedings against the applicants is nothing but an abuse of process of law.

21. Application is accordingly allowed and the entire proceedings of Criminal Case No.56450 of 2016, State Vs. Sharad Kumar and another, arising out of Case Crime No.135 of 2016, under Section 306 IPC, Police Station Maheshganj, District Pratapgarh pending in the court of Judicial Magistrate, Pratapgarh against the applicants, are hereby quashed.

(2025) 1 ILRA 607
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2025

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 7768 of 2024

Raghvendra Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:

Sri Dharmendra Singh, Sri Kunwar Bhaskar Parihar, Ms. Neeja Srivastava, Sri Surya Bhan Singh, Sri Veerendra Singh, Sri Vikas Sharma, Sri V.P. Srivastava (Sr. Advocate)

Counsel for the Respondents:

Ms. Abhilash Singh, Sri Ashutosh Yadav, G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 498A, 304B & 328 - Dowry Prohibition Act, 1961 - Section 3/4 - Constitution of India, 1950 - Article 21 - Bail - In FIR, there was demand of additional dowry from deceased person by applicant along with other family members, forcibly administered her some poisonous material in night of 04/05.06.2023 at about 1:33 a.m., she informed said fact to her father, who rushed to house of in-laws of his daughter and took her to Hospital, froth was coming up from her mouth, it was smelling pungent and during treatment she expired. (Para 4, 5)

Contention by applicant, FIR was delayed by about ten days, no explanation given by prosecution - Cause of death could not be ascertained, case of suicide as victim consumed aluminium phosphide as common pesticide used in house - During inquest proceedings, informant not whispered about demand of dowry and St.d she expired under mysterious circumstances - Further argued that she had close relationship with Devar of her elder sister , talked to him in late hours of night, confirmed by CDR - During investigation, mobile numbers of Devar not supplied to Investigating Officer deliberately so that WhatsApp chats are not retrieved. (Para 7, 8, 9, 10, 11, 15)

Held, conversations between them are admitted and cast doubt on case, defence has to put its case on basis of preponderance and probabilities only - There was presumption u/s 113B, Indian Evidence Act which may be raised in case but prior to it, duty of prosecution to prove its case beyond reasonable doubt. (Para 31)

Bail application allowed. (E-13)

List of Cases cited:

1. Niranjan Singh & anr. Vs Prabhakar Rajaram Kharote & ors., AIR 1980 SC 785
2. Satender Kumar Antil Vs Central Bureau of Investigation & ors., 2022 INSC 690
3. Manish Sisodia Vs Directorate of Enforcement 2024 INSC 595

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

[1] List has been revised.

[2] Heard Sri V.P. Srivastava, learned Senior Counsel assisted by Ms. Neeja Srivastava and Sri Dharmendra Singh, learned counsel for the applicant and Sri Ashutosh Yadav, learned counsel for the informant as well as Sri Deepak Kumar Singh, learned A.G.A. for the State and perused the record.

[3] Applicant seeks bail in Case Crime No. 415 of 2023, under Sections 498A, 304B, 328 I.P.C. and Section 3/4 of the D.P. Act, Police Station Kotwali, District Fatehpur, during the pendency of trial.

PROSECUTION STORY:

[4] The marriage of the daughter of the informant was solemnized with the applicant as per Hindu rites on 22.02.2023 and enough pleasantries and gifts were

exchanged in it. It is alleged that the applicant along with other family members is stated to have subjected his daughter to cruelty for demand of a Fortuner car as an additional dowry thereby had forcibly administered her some poisonous material in the night of 04/05.06.2023 at about 1:33 a.m. whereby she informed the said fact to her father, who rushed to the house of the in-laws of his daughter and took her to Sadar Hospital, Fatehpur whereby froth was coming up from her mouth and it was smelling pungent.

[5] As such, the doctor had conducted the procedure of gastric lavage and referred her to Kanpur seeing her deteriorated condition. On way to Kanpur, daughter of the informant is stated to have expired.

ARGUMENTS ON BEHALF OF APPLICANT :

[6] The applicant has been falsely implicated in the present case and he has nothing to do with the said offence.

[7] The FIR is delayed by about ten days and there is no explanation of the said delay caused.

[8] The cause of death could not be ascertained as such the viscera was preserved and during the forensic analysis, aluminium phosphide chemical was found as such the cause of death was stated to be aluminium phosphide only.

[9] It is a clear cut case of suicide as the victim had consumed aluminium phosphide which is a common pesticide used in the house and she had consumed it herself.

[10] The inquest proceedings of the deceased person was conducted the

same day i.e. on 05.06.2023 and the informant had moved an application before the Investigating Officer for the same whereby he has not whispered a single word about the demand of dowry and he has simply stated that his daughter had expired under mysterious circumstances, as such her post mortem may be conducted. The informant is panch witness no.1 in the inquest proceedings.

[11] It is true that the deceased had expired within a span of about four months of her marriage but the deceased was having close relationship with the younger brother-in-law (Devar) of her elder sister and she used to talk to him even in the late hours of the night.

[12] The said fact stands fortified from the C.D.R. details which categorically indicates that the deceased immediately before her marriage and after her marriage used to talk to him during the night.

[13] The mobile of the deceased was 8795779578 and that of the brother-in-law (devar) of her elder sister was 7068224351. The relevant dates and times of her talks in detail are being highlighted as follows :-

Sr no.	Date	Time	Duration
1.	19.02.2023	1: 53 : 28 hrs.	2305 seconds
2.	27.02.2023	4 : 37: 25 hrs.	155 seconds
3.	27.02.2023	4 : 40: 13 hrs.	2057 seconds

4.	27.02.2023	5 :17: 20 hrs.	2216 seconds
5.	14.03.2023	1 : 24 : 49 hrs.	10794 seconds
6.	14.03.2023	4 : 26 : 41 hrs.	6624 seconds

[14] As such, it is clear cut case of suicide as she did not want to marry the applicant, rather she wanted to marry the brother-in-law of her elder sister.

[15] It has come up during investigation that the mobile numbers of the brother-in-law of the sister of deceased has not been supplied to the Investigating Officer deliberately so that the WhatsApp chats are not retrieved whatsoever.

[16] The C.D.Rs. have been filed in the supplementary affidavit itself.

[17] Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length.

[18] There is no criminal history of the applicant. The applicant is languishing in jail since 22.09.2023. The applicant is ready to cooperate with trial. In case, the applicant is released on bail, he will not misuse the liberty of bail.

ARGUMENTS ON BEHALF OF INFORMANT :

[19] The bail application has been opposed on the ground that the Field Unit was called to the place of occurrence and they had retrieved the mobile phones of the deceased as well as her husband the same day, as such the said details could have been taken up by the Investigating Officer by retrieving the mobile of the deceased from the said Field Unit Team.

[20] There are no WhatsApp chats between the two. In the modern era, it is but common for one and all to communicate with each other on WhatsApp and it would have been open and shut case if those WhatsApp chats had been retrieved.

[21] The said WhatsApp chats have deliberately been concealed by the Investigating Officer in collusion with the applicant.

[22] The statement of brother-in-law of the elder sister of the deceased was recorded and he has categorically stated that the mobile of the sister of the deceased was not working, as such she used to take his mobile phone and talk with her sister which is but natural, as such the applicant is not entitled for bail.

[23] In the light of presumption under Section 113-B of the Indian Evidence Act, the onus lies on the applicant to rebut the said fact as the deceased had expired within a period of four months of her marriage after forcibly administering her poison within the precincts of the house of the applicant.

ARGUMENTS ON BEHALF OF STATE :

[24] The bail application has been opposed on the ground that the deceased had expired within seven years of her

marriage and there was demand of a Fortuner car as an additional dowry from the deceased person, although he has not disputed the fact narrated in compliance affidavit which states that the mobile phones could not be obtained during investigation and as such, the conversation details could not be retrieved. The conversations between the deceased and the brother-in-law (Devar) of the elder sister of the deceased are admitted.

CONCLUSION:

[25] In light of the judgement of the Supreme Court passed in *Niranjan Singh and another vs Prabhakar Rajaram Kharote and others AIR 1980 SC 785*, this Court has avoided detailed examination of the evidence and elaborate documentation of the merits of the case as no party should have the impression that his case has been prejudiced. A prima facie satisfaction of case is needed but it is not the same as an exhaustive exploration of the merits in the order itself.

[26] The well-known principle of "*Presumption of Innocence Unless Proven Guilty*," gives rise to the concept of bail as a rule and imprisonment as an exception.

[27] A person's right to life and liberty, guaranteed by Article 21 of the Indian Constitution, cannot be taken away simply because the person is accused of committing an offence until the guilt is established beyond a reasonable doubt. Article 21 of the Indian Constitution states that no one's life or personal liberty may be taken away unless the procedure established by law is followed, and the procedure must be just and reasonable. The said principle has been recapitulated by the Supreme Court in *Satender Kumar Antil*

Vs. Central Bureau of Investigation and Ors., 2022 INSC 690.

[28] Reiterating the aforesaid view the Supreme Court in the case of Manish Sisodia Vs. Directorate of Enforcement 2024 INSC 595 has again emphasised that the very well-settled principle of law that bail is not to be withheld as a punishment is not to be forgotten. It is high time that the Courts should recognize the principle that "bail is a rule and jail is an exception".

[29] Learned AGA could not bring forth any exceptional circumstances which would warrant denial of bail to the applicant.

[30] It is settled principle of law that the object of bail is to secure the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA.

[31] The said conversations cast doubt on the case but the defence is not supposed to prove its case beyond reasonable period, it has to put its case on the basis of preponderance and probabilities only. It is true that there is presumption under section 113B of the Indian Evidence Act which may be raised in the case but prior to it, it is the utmost duty of the prosecution to prove its case beyond reasonable doubt.

[32] Considering the facts and circumstances of the case, submissions made by learned counsel for the parties,

and taking into evidence and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is **allowed**.

[33] Let the applicant- **Raghvendra Singh Alias Prince** involved in aforementioned case crime number be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

(i) The applicant shall not tamper with evidence.

(ii) The applicant shall remain present, in person, before the Trial Court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

[34] In case of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

[35] It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2025) 1 ILRA 612
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.01.2025

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 165 of 2001

Raj Deo & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
U.P. Singh

Counsel for the Respondent:
G.A., Anil Kumar Singh, Vijai Shankar Tripathi

A. Criminal Law - Murder - Dying Declaration - Indian Evidence Act, 1872 – Section 32 - Code of Criminal Procedure, 1973 – Sections 161 & 162(2) - Admissibility of Statement to Police- Under Section 162(2) CrPC, any statement falling under Clause (1) of Section 32 of the Indian Evidence Act is admissible, even if recorded under Section 161 CrPC. A statement by a person, who later dies, regarding the cause or circumstances of his death, is relevant and may be treated as a dying declaration. Such a statement, if voluntarily and truthfully made by a person in a fit mental state, is admissible even without medical certification. Requirement of certification is a rule of caution and not mandatory. In the present case statement of the injured/deceased was recorded by the Investigating Officer while he was admitted in the hospital. In his statement recorded under Section 161 Cr.P.C., he categorically stated that the accused persons had assaulted him with 'lathi', and the appellant Ram Vishal was carrying a 'kulhari' and had assaulted him with its blunt side. After his death, the said statement—being related to the cause of his death—is admissible in evidence by virtue of Section 32 of the Indian Evidence Act (Para 21, 22)

B. Criminal Law - Murder - Indian Penal Code, 1860 - Sections 302, 147, 148 & 149 - Common Object, Common Intention - Most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth" and "Fifth" of that section. In order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. Active participation is not a necessary condition under Section 149 IPC; knowledge of the common object suffices. (Para 37)

C. Criminal Law - Murder - Deceased, returning home after purchasing a tractor part, was ambushed by the accused hiding near the roadside. He was pulled off his bicycle and assaulted with lathi-danda and kulhari; Kulhari was used by appellant Ram Vishal from its blunt side. Witnesses rushed to the spot and took the injured to the hospital, where he later succumbed to his injuries. He sustained 21 injuries, including a fractured skull, and death occurred due to their cumulative effect. Formation of unlawful assembly by the accused persons was well-established. Though it is not necessary for every

member of the unlawful assembly to take active part, it was evident that all the accused had participated in the 'marpeet', and considering the fact that 21 injuries were found on the person of the deceased, it was inferred that the common object of the unlawful assembly was to commit the murder of the deceased by beating him to death. The fact that after the deceased had been assaulted by the accused persons with 'lathi', it is thereafter the accused Ram Vishal assaulted the deceased on his head with the blunt side of the 'axe' would not be sufficient to assume/presume that the common object of the assembly was not to cause the death of the deceased or to infer that it was only Ram Vishal who could be responsible for the death of the deceased. Once all the accused persons had formed an 'unlawful assembly' and they had acted in a concerted and well-planned manner and had inflicted around 21 injuries on vital parts of the body in furtherance of common object established that all the members of the unlawful assembly were in knowledge of the common object of the assembly, which was to cause/commit the murder to beat Ram Jas to death. The common object of the unlawful assembly to cause the death of the deceased stood established beyond reasonable doubt. Trial court's judgment was based on proper appreciation of evidence. Court found no merit in the appeal, and accordingly, the appeal preferred by the appellants was dismissed. Conviction Affirmed. (Para 18, 38, 40)

Dismissed. (E-5)

List of Cases Cited:

1. Ram Bharosey Vs St. of U.P., 2010 Cri LJ 871
2. Suresh Dattu Bhojane Vs St. of Mah., (2024) 7 SCC 15
3. Gurmej Singh & ors. Vs St. of Punj., AIR 1992 SC 214
4. Lalji & ors. Vs St. of U.P., (1989) 1 SCC 437

5. Dharmendra Kumar Vs St. of M.P., MANU/SC/0566/2024

6. Harendra Rai Vs St. of Bihar & ors., MANU/SC/0905/2023

7. Manjit Singh Vs The St.of Pun., MANU/SC/1195/2019

8. Kuldip Yadav & ors. Vs St. of Bihar, MANU/SC/0390/2011

9. Chanakya Dhibar (Dead) Vs St. of W.B. & ors., MANU/SC/1096/2003

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J. & Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard Shri U.P.Singh, learned counsel for the appellants, Shri U.C. Verma, learned A.G.A. for the State, Shri Vijai Shankar Tripathi, learned counsel appearing for the complainant/informant and perused the record.

2. This criminal appeal has been preferred by the appellants, namely, **Raj Deo, Ram Singar, Ram Vishal, Ram Bodh and Surya Bhan** under Section 374(2) of the Cr.P.C. against the judgment and order of the trial court dated 05.03.2001 passed by IIIrd Additional Sessions Judge, Sultanpur in Sessions Trial No. 222 of 1992 (State vs. Raj Deo and others), arising out of Case Crime No. 263 of 1991, under Sections 147, 148, 302/149 I.P.C., Police Station Lambhua, District Sultanpur, whereby the appellant- Ram Vishal has been convicted for committing offence under Section 148 and 302/149 I.P.C. and rest of the appellants have been convicted for committing offence under Section 147 and 302/149 I.P.C. and have been sentenced with maximum term of rigorous life imprisonment' pertaining to

offence under Section 302/149 I.P.C. with fine of Rs. 5000/- along with default clause.

3. Shri U.P. Singh, learned counsel representing the appellants submits that appellant no.1/Raj Deo and appellant no.4/Ram Bodh had died on 13.02.2015 and 09.07.2012 respectively during the pendency of this appeal. This submission of learned counsel for the appellant has also been corroborated by the report of the C.J.M., Sultanpur of date 30.09.2019. Vide order of date 13.03.2024 passed by this Court, the proceedings of this appeal have already been **abated** with regard to appellant no.1/Raj Deo and appellant no.4/Ram Bodh. Thus, the instant appeal survives only for appellants no.2, 3 and 5, namely, **Ram Singar, Ram Vishal and Surya Bhan.**

4. The necessary facts required for disposal of the instant appeal appears to be that, an F.I.R. was lodged by the informant Raj Mani at Police Station Kadipur at 19:25 hours on 10.09.1991 alleging that his nephew Ramjas S/o Babban Mishra was returning from Lambhua market at about 5:00 pm. after purchasing spare parts of a tractor on bicycle and he was intercepted by the accused persons Raj Deo, Ram Singar, Ram Vishal, Ram Bodh and Surya Bhan at Lambhua-Durgapur road, who were armed with 'lathi-danda' and Axe (kulhari) and assaulted him brutally whereby he sustained grievous injuries. On an alarm being raised, Radhey Shyam S/o Badri, Ram Jiyawan S/o Lal Mohan, Mahendra S/o Raj Mani and Ram Baran Tiwari S/o Ram Abhilakh arrived at the scene of the crime and challenged the assailants. The deceased, who at that point of time was injured, was taken to the hospital on a 'rickshaw' by Ram Baran and Mahendra Kumar and at the time of his

admission in the hospital he was bleeding heavily.

5. On the basis of this written information, an F.I.R. at Case Crime No. 263 of 1991, under Sections 147, 148, 323 and 308 I.P.C. was registered at Police Station Kadipur, District Sultanpur, substance of which was entered in the General Diary of the police station.

6. The deceased Ram Jas, who at that point of time was injured, was examined by doctor R.P. Singh on 10.09.1991 at 6:45 pm. at C.H.C., Lambhua, Sultanpur and he noted following injuries on his person.

(1) Contusion at right side of the parietal region 4cm x 3cm. Reddish in colour 6cm above the right ear. Bleeding from the right nose is present. Patient is drowsy. Right pupil is semi dilated.

(2) Contusion at left upper arm 7cm x 2cm .2cm below from left shoulder joint reddish in colour.

(3) Abraded contusion at posterior aspect of the right elbow joint 4cm x 2cm. Oozing of the blood is present.

(4) Multiple contusions all over the back of the Patient in area of chest region size 14cm x 2cm. Each reddish in colour.

(5) Lacerated wound on the right leg 6cm x 2 cm x bone deep. Fresh bleeding present.

Opinion:- All the injuries are fresh caused by blunt object. Patient kept under observation because he is having head injury x-ray skull, right elbow joint and right leg advised.

7. During the course of treatment, the injured Ram Jas died and information pertaining to his death was sent to the concerned police station whereon the investigation of the case was amended in Section 302 of the I.P.C. The inquest of the body of the deceased was prepared and after necessary paper work the dead body of the deceased was sent in sealed condition for postmortem.

8. The postmortem of the body of the deceased was performed by Doctor S.M.M. Naqvi at district hospital Sultanpur on 11.09.1991 at 12:00 noon. The body of the deceased was found of good built. Rigor mortis was present in all four limbs, no signs of decomposition were found.

Following ante-mortem injuries were noted by the doctor at the time of postmortem:-

(i) *Abraded contusion 7.5 cm. x 5 cm. on right side of head.*

(ii) *Abrasion 1 cm. x 0.8 cm. on right zygomatic process.*

(iii) *Multiple abrasions on Posterior Lateral aspect of upper limb up to palm.*

(iv) *Multiple contusions on Posterior aspect of left upper limb up to palm.*

(v) *Lacerated wound 0.5 cm. x 0.5 cm. muscle deep on right elbow joint.*

(vi) *Multiple contusions crossing each other in an area of 30 cm. x 13 cm. on right side back of chest 7 cm. away from mid line.*

(vii) *Contusions 11 cm. x 1.5 cm. on right side of back 8 cm. away from mid line.*

(viii) *Multiple contusions crossing each other 28 cm. x 13 cm. over right side of right hip.*

(ix) *Multiple abrasions in an area of 04 cm. x 01 cm. on right side of chest 7 cm. below from right nipple at 8'o clock position.*

(x) *Multiple contusions crossing each other 26 cm. x 8 cm. on front aspect of right thigh 05 cm. below Rt. illiac crest.*

(xi) *Multiple contusions 8 cm. x 5 cm. on mid of left thigh.*

(xii) *One stitched wound 5 cm. on right leg 7 cm. below right knee joint.*

(xiii) *Abrasion 2 cm. x 0.5 cm. on mid of right leg.*

(xiv) *Lacerated wound 2 cm. x 0.5 cm. muscle deep on lower part of right leg 5 cm. below knee.*

(xv) *One abrasion 1.5 cm. x 0.8 cm. on the right leg.*

(xvi) *One lacerated wound 1 cm. x 0.5 cm. muscle deep on right toe.*

(xvii) *Abrasion 2.5 cm. x 1 cm. at medial aspect of left leg 3 cm. below left knee.*

(xviii) *One lacerated wound 3 cm. x 1 cm. x muscle deep on right foot 9 cm. below the knee joint.*

(xix) *One lacerated wound 3 cm. x 1 cm. muscle deep on left leg 6 cm. below above injury.*

(xx) *Multiple abrasions in an area of 5 cm. x 4 cm. at medial aspect of left leg 4 cm. above left lateral malleolus.*

(xxi) *Contusions 3.5 cm. x 2 cm. on the base of left toe.*

Internal Examination

On internal examination the scalp was found congested. Skull was found fractured on right side of parietal region subdural hematoma was found on the right side of cerebral hemisphere. The brain was found congested. Heart was found full of blood and was weighing 250 grams. The bladder was empty.

In the opinion of the doctor, the death of the deceased was caused due to 'coma and shock' as a result of ante-mortem injuries.

9. The investigating officer of the case also recorded the statement of the injured (deceased) Ram Jas under Section 161 Cr.P.C., wherein he stated that when on the relevant day and time when he was going to his house with the tractor part he was assaulted by the accused persons with '*lathi-danda*' and '*kulhari*' and accused Ram Vishal assaulted him with '*kulhari*' while other accused persons assaulted him with '*lathi*'. It is also stated by him that Ram Vishal was assaulting him with the back of the '*kulhari*' (not with the sharpen side of it).

10. The investigating officer prepared the site plan and also recorded the statement of various prosecution witnesses and after finding sufficient material submitted charge sheet against all the accused persons under Sections 147, 148, 302 and 323 I.P.C.

11. The trial court framed the charges under Section 148 and 302 read with Section 149 I.P.C. against appellant-Ram Vishal, while the charges under Section 147 read with Section 302/149 I.P.C. were framed against the other accused persons, namely, Raj Deo, Ram Singar, Ram Bodh and Surya Bhan, which, they denied and claimed trial.

12. The prosecution in order to prove its case has presented P.W.-1/Informant, P.W.-2/Ram Jiyawan Mishra, P.W.-3/Ram Baran Tiwari, P.W.-4/Mahendra Kumar Mishra (eye witness), P.W.-5/Dr. R.P. Singh (doctor who has examined the deceased when he was

injured), P.W.-6/Dr. S.M.M. Naqvi (doctor who has conducted the postmortem), P.W.-7/S.I. Purushottam Mishra, who conducted the investigation and the first investigating officer, P.W.-8/Ramakant Sharma, who has filed charge sheet.

13. Apart from the above-mentioned oral evidence, the prosecution has also relied on documentary evidence e.g. written Tehrir, Exhibit-ka-1, panchnama, Exhibit-ka-2, statement of the deceased recorded under Section 161 Cr.P.C., Exhibit-ka-3, Injury report of the deceased, Exhibit-ka-5, Photo lash, Chitthi R.I., Chitthi C.M.O., Exhibit-ka-11, Letter to R.I., Exhibit-ka-12, Sample Seal, Exhibit-ka-13, Site Plan, Exhibit-ka-14, Chik F.I.R., Exhibit-ka-16, G.D. kayami, Exhibit-ka-17, postmortem report of the deceased, Exhibit-ka-7, charge sheet, Exhibit-ka-15.

14. After conclusion of the evidence of the prosecution, the statement of the appellants/accused were recorded under Section 313 Cr.P.C., wherein they denied all the evidence produced by the prosecution and claimed that they have been falsely implicated in this case.

15. The trial court after hearing learned counsel for the parties found the case of the prosecution proved beyond reasonable doubt and convicted the accused Ram Vishal under Section 148 I.P.C. and other co-accused persons under Section 147 I.P.C. while convicting all the accused persons under Section 302 I.P.C. with the help of Section 149 I.P.C. in the manner described in the 2nd paragraph of this judgment.

16. Learned counsel for the appellants while challenging the impugned

judgment and order of the trial court, submits that the trial court has committed manifest illegality in appreciating the evidence available on record and has passed the judgment of conviction only on the basis of '*surmises* and *conjectures*'.

While drawing the attention of this Court towards the testimony of four prosecution eye witnesses, it is submitted that if the evidence of these prosecution witnesses is perused in totality, it would emerge that they may not be the eye witness of the alleged crime and it is submitted that it is hard to digest that none of the prosecution witness has come forward to save the deceased and none of them has sustained any injury in the process while their close relative was being done to death in front of them.

It is further submitted that there were only five accused persons, as per the prosecution story, on the spot, while there were four prosecution witnesses and the accused persons were not armed with any deadly weapon. Therefore, the conduct of the witnesses in not making any attempt to save the deceased would suggest that they were not present at the spot and they have not seen any occurrence and a blind murder has been attributed to the appellants on the basis of prior enmity.

It is also submitted that even if the case of the prosecution is taken on its face value, it would emerge that the object of the unlawful assembly was not to cause the death of the deceased, as all the accused persons were carrying simple household articles which could be used as weapon also. It is highlighted that 'kulhari' and 'lathi' is a common article found in every household in village and, thus, the evidence of the prosecution would itself suggest that

there was no common object of the alleged unlawful assembly to cause the death of the deceased.

It is further submitted that the trial court has committed an illegality in relying on the statement of the deceased recorded by the investigating officer under Section 161 Cr.P.C. and the manner in which the statement is shown to have been recorded, could not be believed as it has come in the evidence of the doctor that after sustaining the injury on his head, the deceased might have gone in 'coma' at once, thus, he could not be in a position to give any statement.

17. It is also submitted that when a weapon is stated to have been used by the accused person, it would be deemed to have been used in its natural way and, thus, when it is stated that 'kulhari' has been used by appellant- Ram Vishal, the same would be deemed to have been used from its sharper side and no injury has been caused to the deceased, which could be attributed to 'kulhari' and, thus, there is major contradiction in the ocular and medical evidence. It is also argued with considerable force that Chhotelal who is shown to be coming with the deceased on bicycle has not been presented as a witness by the prosecution, rendering the case of prosecution as false.

It is next submitted that even if it is believed that the accused persons had formed an unlawful assembly, the object of the said assembly could only be to inflict minor injuries, as except the one injury sustained by the deceased on his head, other injuries have been found simple and the injury which has been sustained on head could only be attributed to the appellant Ram Vishal and, hence, it could not be said that the common object of the assembly was to cause the death of the deceased.

It is also submitted that the motive, which has been placed for the purpose of commission of crime, is very weak and there are major contradictions, embellishments, inherent weaknesses in the evidence of the prosecution witnesses and it was a case wherein the reasonable doubt was emerging out of the evidence of the prosecution tendered before the trial court and the trial court has committed a mistake in convicted the appellants. Thus, the impugned judgment and order of the trial court be set-aside and appellants be acquitted of all the charges framed against them.

18. Learned A.G.A. on the other hand submits that there was enmity existing between the two families which is an admitted fact. The deceased had gone on the relevant day to purchase a part of the tractor and it was known to the accused persons that he would return to his home and, thus, they laid a trap and waited for his return and when he was coming back to his home with Chhotelal he was assaulted by the accused persons/appellants who were armed with 'lathi' and 'kulhari'.

It is further submitted that from the start, it is the case of the prosecution that accused/appellant Ram Vishal has assaulted the deceased on his head with the blunt side of the 'axe' and the medical evidence corroborates this fact.

It is also submitted that the deceased has sustained as many as 21 injuries and having regard to the manner in which the assault has been made, the only conclusion that could be drawn is that the object of the unlawful assembly was to cause the death of the deceased.

It is next submitted that there are no major contradictions in the evidence of the prosecution eye witnesses. They were

natural witnesses and their testimony could not be doubted only on the score that they are related to the deceased as they were natural witnesses. The spot has been fixed by the witnesses and, thus, no illegality has been committed by the trial court in convicting the appellants.

Learned A.G.A. representing the State has placed reliance on the following law reports:

(1) *Ram Bharosey Vs. State of U.P.* reported in **2010 CRI.L.J. 871**.

(2) *Suresh Dattu Bhojane Vs. State of Maharashtra* reported in **(2024) 7 SCC 15**.

(3) *Gurmej Singh and others Vs State of Punjab* reported in **AIR 1992 SC 214**.

(4) *Lalji and Others Vs. State of U.P.* reported in **(1989) 1 SCC 437**.

19. Before proceeding further, in the direction of appreciating the evidence of the prosecution witness(s) vis-a-vis the submissions raised by learned counsel for the appellants, it is in the interest of justice to recollect the evidence of the prosecution witnesses.

P.W.-1/Raj Mani Mishra, who is the informant of this case, is not the eye witness of the incident and his evidence is only with regard to the fact that he had sent the deceased to purchase a part of the tractor and thereafter he had gone to his agricultural field situated in Village Chaukia where he was informed by his servant about the incident and, thereafter, he is stated to have arrived at the scene of crime where he was informed about the fact that his brother has been taken to the hospital and thereafter he arrived at the hospital and the whole incident has been

narrated to him by his son Mahendra Kumar Mishra/P.W.-4.

P.W.-2/Ram Jiyawan Mishra, has claimed himself to be the eye witness of the incident and according to him, he at the relevant point of time was in his sugarcane field, when he heard an alarm raised by the deceased he immediately arrived and has witnessed the whole incident. He has given detailed account of the incident in terms that all accused persons were assaulting the deceased in front of his eyes and accused persons Raj Deo, Ram Singar, Surya Bhan and Ram Bodh were possessing 'lathi' while accused Ram Vishal was having a 'kulhari' in his hand and also that it was Ram Vishal who had assaulted the deceased from the blunt side of the accused on his head. According to him, the deceased was taken to the hospital by P.W.-3/Ram Baran Tiwari and P.W.-4/Mahendra Kumar Mishra.

P.W.-3/Ram Baran Tiwari has also claimed to have seen the incident, as at the relevant point of time he was going to Lambhua on a rickshaw and when he arrived near the scene of crime, he saw the accused persons assaulting the deceased and except Ram Vishal who is possessing a 'kulhari', the other accused persons were armed with 'lathi' and Ram Vishal assaulted the deceased with the blunt side of the 'axe' on his head while the other persons assaulted the deceased with 'lathi'. He also claimed to have scolded the accused persons pertaining to the assault given by them to the deceased. He also stated to have taken the deceased to hospital on his rickshaw with the help of P.W.-4/Mahendra Mishra and also that the investigating officer (daroga ji) has taken the statement of the deceased (who at that point of time was injured) in the presence of the doctor and thereafter the deceased had died that very night.

P.W.-4/Mahendra Kumar Mishra is the paternal cousin of the deceased. He has also claimed to have seen the incident, as at the relevant point of time he was in his field and it was there he heard alarms raised by the deceased as the deceased was returning from Lambhua to his home. He also stated to have seen the assault made by the accused Ram Vishal with 'kulhari' from its blunt side on the head of the deceased while the other accused persons were assaulting with 'lathi' possessed by them. He also claimed to have taken the deceased to the hospital with the help of P.W.3/Ram Baran Tiwari and also that the deceased had regained consciousness in the night and his statement was recorded by the investigating officer.

P.W.-5 is the **Dr. R.P. Singh**, who has examined the injuries sustained by the deceased when he was injured and these injuries have been recorded in this statement at an appropriate place.

P.W.-6/Dr. S.M.M. Naqvi has stated to have conducted the postmortem of the deceased at 12:00 pm. on 11.09.1991 and also proved the postmortem report and according to him the death of the deceased was caused on account of 'shock and hemorrhage' as a result of antemortem injuries.

P.W.-7/S.I. Purushottam Mishra is the first investigating officer of the case who has proved to have recorded the statement of the deceased under Section 161 Cr.P.C. and proved a copy of the same available on record as Exhibit-ka-8. He also stated to have prepared necessary papers for the postmortem of the deceased including inquest report and also to have sent the body of the deceased for postmortem.

P.W.-8/S.H.O. Ramakant Sharma is the third investigating officer of this case, who has taken the charge of the investigation, as earlier investigating officers, namely, Purushottam Mishra and Shri Ashutosh Sharma were transferred to some other police station. He has proved the lodging of the F.I.R. as well as the signatures and the proceedings done by the earlier investigating officer S.I. Purushottam Mishra and Shri Ashutosh Sharma.

20. Having heard learned counsel for the parties and having perused the record, it is evident that the case of the prosecution in nutshell was that on 10.09.1991 at about 5:00 pm. in the evening the deceased was returning to his home after purchasing a part of the tractor, which had gone out of order and when he arrived at 'Lambhua-Durgapur road', the appellants armed with 'lathi-danda' and 'kulhari' were waiting for him and started assaulting him with 'lathi-danda' and 'kulhari'. The 'kulhari' (axe) has been used by the appellant- Ram Vishal from its blunt side. On an alarm raised, the witnesses Radhey Shyam, Ram Jiyawan, Mahendra, Ram Baran Tiwari had arrived at the scene of crime and had taken the deceased, who at that point of time was injured, to the hospital on a 'rickshaw' and during the course of treatment the deceased has succumbed to the injuries.

21. So far as the submission of learned counsel for the appellants with regard to the uses of axe/kulhari by accused-appellant Ram Vishal and also that there are contradictions in the medical and ocular testimony is concerned, it is to be recalled that though, in the first information report, it has been stated that the appellants have assaulted the deceased with 'lathi-

danda' and 'kulhari', however, the statement of the injured was recorded by the investigating officer while he was admitted in the hospital and he in his statement recorded under Section 161 Cr.P.C. has categorically stated that the other co-accused persons had assaulted him with 'lathi' while the appellant Ram Vishal was carrying a 'kulhari' and was assaulting him with the blunt side of the 'kulhari'. This statement of the injured/deceased Ram Jas recorded while he was admitted in the hospital. After his death, it is admissible in evidence by virtue of Section 32 of the Indian Evidence Act as the same is related to the cause of his death. In this regard the law laid down by Hon'ble Supreme Court in **Dharmendra Kumar Vs. State of Madhya Pradesh** reported in **MANU/SC/0566/2024** and in **Harendra Rai Vs. The State of Bihar and Ors.** reported in **MANU/SC/0905/2023** may be recalled, which is reproduced as under:-

Honb'le Supreme Court in **Dharmendra Kumar Vs. State of Madhya Pradesh** reported in **MANU/SC/0566/2024** has held as under :

"64. Before we proceed further, it would be apt to recapitulate Section 32(1) of the IEA, whereunder the statement made by a person, who is dead, as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, is relevant and admissible, irrespective of the fact that such person at the time of making the statement was not under expectation of death.

65. Section 161 Code of Criminal Procedure empowers the Police to examine orally any

person who is acquainted with the facts and circumstances of the case under investigation. The Police may reduce such statement into writing also. Section 162(1) Code of Criminal Procedure, nonetheless, mandates that no statement made by any person to a Police Officer, if reduced to writing, be signed by the person making it, nor shall such statement be used in evidence except to contradict a witness in the manner provided by Section 145 of the IEA. However, Sub-section (2) of Section 162 Code of Criminal Procedure carves out an exception to Sub-section (1) as it explicitly provides that nothing in Section 162 shall be deemed to apply to any statement falling within the ambit of Clause (1) of Section 32 of the IEA. In other words, a statement made by a person who is dead, as to the cause of his death or to the circumstances of the transaction which resulted in his death, to a Police Officer and which has been recorded Under Section 161 Code of Criminal Procedure, shall be relevant and admissible, notwithstanding the express bar against use of such statement in evidence contained therein. In such eventuality, the statement recorded Under Section 161 Code of Criminal Procedure assumes the character of a dying declaration. Since extraordinary credence has been given to such dying declaration, the court ought to be extremely careful and cautious in placing reliance thereupon. There are a catena of decisions of this Court which lend support to the inter-play between

provisions of the Code of Criminal Procedure and the IEA, as explained above.

67. The Constitution Bench in **Laxman v. State of Maharashtra** **MANU/SC/0707/2002** : 2002:INSC:352 : (2002) 6 SCC 710 has authoritatively ruled that:

3. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer.

... ..

What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a Rule of caution and

therefore the voluntary and truthful nature of the declaration can be established otherwise.

68. *It is important in this case to appreciate that the Investigating Officer recorded the statement instantly, a day after the incident. He has categorically stated that the medical report did not mention that the condition of the declarant, Tularam, was serious in nature. More importantly, Tularam was able to convey his statement properly. Furthermore, on perusal of the statement, it is clear that the declarant Tularam was in a fit condition as not only did he properly explain the incident but has also markedly specified the role of the Appellant. That apart, the injuries found during the post-mortem examination conducted by P.W.13 and P.W.15 have duly corroborated the statement of deceased Tularam.*

69. *From the above discussion, it is manifest that the mere non- obtainment of a medical fitness certificate will not deter this Court from considering a properly recorded statement Under Section 161 Code of Criminal Procedure to be a dying declaration."*

Hon'ble Supreme Court in ***Harendra Rai Vs. The State of Bihar and Ors.*** reported in ***MANU/SC/0905/2023*** has held as under :

"91. Now further issue crops up about the treatment of the FIR/Bayan Tahriri as dying declaration and in this respect various earlier pronouncements of this Court have clarified the position of law that the statement

by an injured person recorded as FIR can be treated as a dying declaration and such a statement is admissible Under Section 32 of the Indian Evidence Act. It was also held that the dying declaration must not cover the whole incident or narrate the case history. Corroboration is not necessary for this situation; a dying declaration can be the sole basis for conviction.

92. *In the case of **Munnu Raja and Anr. v. State of M.P.** MANU/SC/0174/1975 : (1976) 3 SCC 104, the following observations are relevant:*

Para 5. In regard to these dying declarations, the judgment of the Sessions Court suffers from a patent infirmity in that it wholly overlooks the earliest of these dying declarations, which was made by the deceased soon after the incident in the house of one Barjor Singh. The second statement which has been treated by the High Court as a dying declaration is Ex. P-14, being the FIR which was lodged by the deceased at the police station. The learned Sessions Judge probably assumed that since the statement was recorded as a FIR, it could not be treated as a dying declaration. In this assumption, he was clearly in error. After making the statement before the police, Bahadur Singh succumbed to his injuries and therefore the statement can be treated as a dying declaration and is admissible Under Section 32(1) of the Evidence Act. The maker of the statement is dead and the statement relates to the cause of his death.

Para 6. The High Court has held that these statements are essentially true and do not suffer from any infirmity. It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination, there is neither a Rule of law nor a Rule of prudence which has hardened into a Rule of law that a dying declaration cannot be acted upon unless it is corroborated...

Para 10. We are in full agreement with the High Court that both of these dying declarations are true. We are further of the opinion that considering the facts and circumstances of the case, these two statements can be accepted without corroboration. Bahadur Singh was assaulted in broad day light and he knew the Appellants. He did not bear any grudge towards them and had therefore no reason to implicate them falsely. Those who were in the constant company of Bahadur Singh after the assault, had also no reason to implicate the Appellants falsely. They bore no ill-will or malice towards the Appellants. We see no infirmity attaching to the two dying declarations which would make it necessary to look out for corroboration.

*93. This Court in the case of **Ram Bihari Yadav v. State of Bihar and Ors.** MANU/SC/0302/1998 : (1998) 4 SCC 517, has discussed the law in paragraph 6 as follows:*

Para 6. The law relating to dying declaration- the relevancy, admissibility, and its probative value- is fairly settled. More often the expressions 'relevancy and admissibility' are used as synonyms but their legal implications are distinct and different for more often than not facts which are relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible. The probative value of the evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case. In this case, the thrust of the submission relates not to relevancy or admissibility but to the value to be given to Exh.2. A dying declaration made by a person who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant Under Section 32 of the Evidence Act and is also admissible in evidence. Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the Rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an Accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be

determined on the facts of each case.

94. We may usefully reproduce the relevant paragraphs of the judgment of this Court in the case of *Suresh Chandra Jana v. State of West Bengal and Ors.*, reported in MANU/SC/0997/2017 : (2017) 16 SCC 466, which reads as follows:

32. It would not be out of place to discuss the importance of dying declaration Under Section 32 of the Evidence Act. The principle underlying Section 32 of the Evidence Act is 'Nemo moriturus praesumitur mentire' i.e., man will not meet his maker with a lie in his mouth. Dying declaration is one of the exceptions to the Rule of hearsay. It is well settled that there is no absolute Rule of law 'that the dying declaration cannot form the sole basis of conviction unless it is corroborated'. The Rule requiring corroboration is merely a Rule of prudence [refer *Paniben (Smt.) v. State of Gujarat*, MANU/SC/0346/1992 : (1992) 2 SCC 474; *Munnu Raja and Anr. v. State of Madhya Pradesh*, MANU/SC/0174/1975 : (1976) 3 SCC 104; *State of U.P. v. Ram Sagar Yadav*, MANU/SC/0118/1985 : (1985) 1 SCC 552; *Ramawati Devi v. State of Bihar*, MANU/SC/0135/1983 : (1983) 1 SCC 211]. Moreover, if the person making the dying declaration survives, then such statement would not be admissible Under Section 32 of the Evidence Act, rather such Statements may be admissible Under Section 157 of the Evidence Act [refer *Gajula Surya Prakasrao*

v. State of A.P., MANU/SC/1809/2009 : (2010) 1 SCC 88]

33. In light of the importance the dying declaration holds in a criminal trial, the dereliction of duty in recording the dying declaration and the doctor's ignorance of medico-legal jurisprudence is apparent from the material placed before us. My attention has been drawn to various judgments, which have addressed the aspects of dereliction of duty by the doctors and importance of medico-legal aspect in medical jurisprudence [refer *State of Gujarat v. Hasmukh @ Bhikha Gova Harijan*, MANU/GJ/0280/1995 : (1996) 1 Guj LR 292, *Muniammal v. Supt. of Police*, MANU/TN/0239/2008 and *Indrajit Khandekar v. Union of India and Ors.*, MANU/MH/3171/2014]. It has to be remembered that every stakeholder in this criminal justice system is expected to act with a sense of fairness to bring out the truth so that punishment can be meted out to those who deserve. Although courts are provided with the duty to dispense justice, it cannot be denied that effective dispensation of justice by the courts in this country requires support of all the stakeholders. In light of the above, every stakeholder is expected to be aware of their responsibility and work towards achieving ends of the criminal justice system."

22. In the instant appeal, the other witnesses, who have been examined before

the trial court, namely, P.W.-1/Raj Mani Mishra (Informant), P.W.-2/Ram Jiyawan Mishra, P.W.-3/Ram Baran Tiwari, P.W.-4/Mahendra Kumar Mishra, have all in one voice have stated that it was Ram Vishal who was carrying a 'kulhari' and has used it with its blunt side while the other accused persons had assaulted the deceased with 'lathi'.

In this regard, much emphasis has been given by learned counsel for the appellants with regard to the manner in which the statement of the deceased (who at that point of time was injured) has been recorded in order to show that it is highly doubtful that the deceased might have been in a position to give any statement. In this regard, the statement of P.W.-5/Dr. R.P. Singh is important, who at first examined the deceased/injured Ram Jas Mishra on 10.09.1991 at 6:45 pm. and he in his statement has specifically stated that the patient was admitted in the hospital and during the course of treatment he had regained his consciousness and was talking and when the deceased was in a condition of making conversation, the Sub Inspector of Police had visited the hospital and has made inquiry from the deceased and has also inquired from him about the incident. It has also stated by this witness while under cross-examination that when 'daroga ji' was recording the statement of the injured he had asked all others to remain outside and only he (daroga ji) and the injured person was present in the room wherein the statement of the injured was recorded. It has also been stated by this witness that the injured was not in the stage of 'coma', but drowsy.

In this regard, the statement of P.W.-3/Ram Baran Tiwari and P.W.-4/Mahendra Kumar Mishra, who had taken the deceased/injured to the hospital, is also

important. These witnesses have stated that at about 1:15 am. in the intervening night 'daroga ji' had come to the hospital and had inquired about the incident from the injured/deceased Ram Jas and also recorded his statement and at that point of time Ram Jas was in his senses. It has also stated by him that his statement was also recorded by 'daroga ji'. It has also stated by this witness that it was about at 3:00 am. in the night the condition of the injured deteriorated and he consequently died. P.W.-4/Mahendra Kumar Mishra had also stated that it was about at 12:00 in the night the deceased/injured had gained consciousness and he had also taken milk and at about 1-1:15 am. in the night 'daroga ji' had come and recorded the statement of the injured and it was in the hospital the statements of his father and uncle Ram Anjor and witness Ram Baran were also recorded and after the departure of the investigating officer the condition of the injured had deteriorated. Thus, the evidence of these witnesses clearly establishes that statement under Section 161 Cr.P.C. of the injured/deceased was recorded by the investigating officer in the intervening night of 10-11.09.1991. Therefore, factum of recording of statement of injured-deceased Ram Jas by the investigating officer has been proved by these witnesses, and in view of the fact that the statement related to the death of deceased it is admissible as dying declaration under Section 32 of Indian Evidence Act. Injured has also stated that other accused persons assaulted him with 'lathi' while Ram Vishal assaulted with the blunt side of 'kulhari' on his head. Admittedly P.W.-1/Raj Mani Mishra was not present at the spot when the alleged incident had occurred, however, the witnesses P.W.-2/Ram Jiyawan Mishra, P.W.-3/Ram Baran Tiwari, P.W.-4/Mahendra Mishra had claimed that they

have seen the incident and they in one voice have stated that the appellant Ram Vishal had used 'kulhari' from its blunt side. Thus, having regard to the evidence available on record, in our opinion, it is established beyond reasonable doubt that the 'kulhari' from its blunt side was used by the appellant Ram Vishal and, therefore, there appears no contradictions in the oral and medical evidence tendered before the trial court.

23. It is also argued by learned counsel for the appellants that none of the prosecution witnesses had attempted to save the deceased and has sustained any injury in the process which suggest that these witnesses are planted witnesses and they have not seen any occurrence. In this regard, as has been stated earlier, P.W.-1/Raj Mani Mishra is admittedly not the eye witness of the crime. The prosecution has relied on the statement of P.W.-2/Ram Jiyawan Mishra, P.W.-3/Ram Baran Tiwari and P.W.-4/Mahendra Mishra, who claimed themselves to be the eye witnesses of the crime. The case of the prosecution is that when the deceased was returning after purchasing a part of the tractor he was assaulted by the appellants with 'lathi' and 'kulhari'. It is also the case that the axe/kulhari was used by only appellant Ram Vishal while the other co-accused persons had assaulted with 'lathi'. It is also the case of the prosecution that the appellants had laid a trap and they were waiting for the return of the deceased who had come on the bicycle of one Chhotelal. It is evident from the evidence of these prosecution witnesses that none of the witness was possessing either 'lathi' or any other weapon, as P.W.-2/Ram Jiyawan Mishra has stated to be present at his agricultural field; P.W.-3/Ram Baran Tiwari has stated to be going on a rickshaw to

Lambhua and P.W.-4/Mahendra Kumar Mishra has also stated to be present at his agricultural field which was about 70-75 paces away from the incident. P.W.-2/Ram Jiyawan has stated to be in his sugarcane field and, thus, none of these witnesses was possessing any weapon or 'lathi', etc. They had not seen the appellants before the incident and it is the case of the prosecution that when an alarm was raised by the deceased, they came to know about the assault by the appellants. The incident is stated to have been caused in furtherance of a plan and, thus, all the appellants stated to have participated in the incident. P.W.-2/Ram Jiyawan Mishra has stated that when he at first saw the injured/deceased he had fallen on the ground and it was P.W.-4/Mahendra and P.W.-3/Ram Baran who had arrived at the scene of crime before him and he had seen the accused persons assaulting the deceased from the distance of 40-45 paces. P.W.-3/Ram Baran Tiwari has stated that he had scolded the appellants and asked the rickshaw puller to drive fast and when he was about 10-15 paces away the accused persons had fled away from the scene. P.W.-4/Mahendra Mishra had stated that when the assault started, he was attracted by the alarm raised by the deceased/injured and started running towards the scene of the crime raising alarm and witness Ram Baran Tiwari, Ram Jiyawan Mishra and Radhey Shyam had also started running towards the place of occurrence and when they were 10-15 paces away from the incident from the spot, the appellants/accused persons had turned away and it was at that moment the appellant Ram Vishal had given a blow on the head of the deceased by the blunt side of the 'axe'/kulhari on the head of the deceased. The evidence of these witnesses clearly establishes that when the accused persons had assaulted the deceased they

were not present at the spot and arrived at the scene only after hearing alarm of the deceased and when they were about 10-15 paces away the assault was over and, hence, there was no opportunity for these witnesses to have participated in the 'marpeet' or to make any attempt to save the deceased.

24. It is also to be recalled that different witnesses' behave in different ways, there is no straight-jacket formula for the witness to behave in a stereotypical manner and if the behavior of the witnesses is not in the line of the defence set up by the accused persons it could not make any dent in the story of the prosecution. Thus, simply on the score that the witnesses have not sustained any injury or did not make any attempt to save deceased, the case of the prosecution could not be seen with suspicion.

25. It is also argued with considerable force that all the witnesses are related to the deceased and the informant and there are various material contradictions, improvements and embellishments in the evidence of these witnesses and it emerges that these witnesses may not be the eye witnesses of the incident and they are planted witnesses. The manner in which the evidence of the witnesses of fact or to say the eye witnesses is to be appreciated is now no more res integra and the same has been set at rest by a number of judgments propounded by the Hon'ble Supreme Court. However, each criminal case is having its own facts and circumstances and own blend. Therefore, no straight-jacket formula could be evolved for universal application and it will depend upon the factual matrix of each and every case having regard to the nature of the testimony given by the witnesses, the basis

of which it could be assumed as to whether the witness of fact who are claiming themselves to have seen the incident are truthful, reliable and may be acted upon.

12. In State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : AIR 1981 SC 1390, this Court held:

"5A. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a 'highly interested' witness because she 'is the wife of the deceased'.....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W. 1 had no interest in protecting the real culprit, and falsely implicating the Respondents."(Emphasis added)(See also: Chakali Maddiley and Ors. v. State of A.P. MANU/SC/0609/2010 : AIR 2010 SC 3473).

13. In *Sachchey Lal Tiwari v. State of U.P.* MANU/SC/0865/2004 : AIR 2004 SC 5039, while dealing with the case this Court held:

“7....Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. 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 where people are less formal and more casual, at any rate in the matter explaining their presence.”

14. In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased.”

In *Bhagaloo Lodh and Ors. vs. State of U.P.* reported in

MANU/SC/0700/2011, It was held as under :-

“14. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased. (Vide: *M.C. Ali and Anr. v. State of Kerala* MANU/SC/0247/2010 : AIR 2010 SC 1639; *Myladimall Surendran and Ors. v. State of Kerala* MANU/SC/0670/2010 : AIR 2010 SC 3281; *Shyam v. State of Madhya Pradesh* MANU/SC/7112/2007 : (2009) 16 SCC 531; *Prithi v. State of Haryana* MANU/SC/0532/2010 : (2010) 8 SCC 536; *Surendra Pal and Ors. v. State of U.P. and Anr.* MANU/SC/0713/2010 : (2010) 9 SCC 399; and *Himanshu @ Chintu v. State (NCT of Delhi)* MANU/SC/0006/2011 : (2011) 2 SCC 36).

In view of the law laid herein above, no fault can be found with the evidence recorded by the courts below accepting the

evidence of closely related witnesses.”

26. It is therefore settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with deceased is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence of such witness to find out whether he is a natural witness and whether in the facts and circumstances of the case his evidence is cogent and credible.

Hon’ble Supreme Court Of India in ***Mahendran and Ors. Vs. State of Tamil Nadu and Ors. Reported in MANU/SC/0257/2019*** in para 38 of the report held as under :-

“38. The argument that the entire case set up is based on falsehood and thus not reliable for conviction of the Appellants, is not tenable. It is well settled that the maxim "falsus in uno, falsus in omnibus" has no application in India only for the reason that some part of the statement of the witness has not been accepted by the trial court or by the High Court. Such is the view taken by this Court in Gangadhar Behera's case, wherein the Court held as under:

15 . To the same effect is the decision in *State of Punjab v. Jagir Singh* MANU/SC/0193/1973 : (1974) 3 SCC 277 and *Lehna v. State of Haryana*, MANU/SC/0075/2002 : (2002) 3

SCC 76. Stress was laid by the Accused- Appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "falsus in uno, falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an Accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an Accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other Accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of Rule of law. It is merely a Rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a

mandatory Rule of evidence". (See Nisar Alli v. State of U.P. MANU/SC/0032/1957 : AIR 1957 SC 366) Merely because some of the Accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the Accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab MANU/SC/0122/1955 : AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound Rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment.

(See Sohrab v. State of M.P. MANU/SC/0254/1972 : (1972) 3 SCC 751 and Ugar Ahir v. State of Bihar MANU/SC/0333/1964 : AIR 1965 SC 277.) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. MANU/SC/0093/1952 : AIR 1954 SC 15 and Balaka Singh v. State of Punjab MANU/SC/0087/1975 : (1975) 4 SCC 511.)"

27. Now the evidence of three prosecution eye witnesses, namely, P.W.-2/Ram Jiyawan Mishra, P.W.-3/Ram Baran Tiwari and P.W.-4/Mahendra Kumar Mishra is to be appreciated in the background of the aforementioned settled principles. It appears to be an admitted situation that P.W.-1/Raj Mani Mishra /informant has not seen the incident and he was informed about the incident by P.W.-4/Mahendra and it is thereafter he had gone to the hospital. P.W.-2/Ram Jiyawan stated that he at the relevant point of time was in his sugarcane field, which is situated nearby the place of occurrence and after hearing screams of the deceased, he rushed to the spot and had seen the appellants assaulting the deceased with 'lathi' and also

that it was Ram Vishal who had assaulted the deceased with the blunt side of 'kulhari' on his head and when he has arrived at the scene of crime, the accused persons had turned away. It is also stated that the deceased at that point of time had lost his consciousness. **P.W.-3/Ram Baran Tiwari** has stated that he at the relevant point of time was going on a 'rickshaw' to Lambhua and when he was about 100 paces towards west of the culvert he had seen the appellants assaulting the deceased with 'lathi' and 'kulhari'. He also stated that the accused Ram Vishal had assaulted the deceased with the blunt side of the 'kulhari' on his head. It has also stated by him that when he saw appellants assaulting the deceased, he had shouted at them and rushed towards the spot and when he was about 10-15 paces away from the spot the accused persons had fled away towards North. The injured Ram Jas had lost its consciousness. He also stated that he with the help of Mahendra and Ram Jiyawan had placed the injured/deceased Ram Jas on the rickshaw and he was taken to hospital where he was admitted. **P.W.-4/Mahendra Kumar Mishra** is the cousin brother of the deceased. He stated that at the relevant point of time he was in his agricultural field, which is situated about 70-75 paces away from the spot and he had seen the deceased going on the bicycle of Chhotelal from Lambhua to his home. He also stated that accused persons/appellants had emerged from a pit situated by the side of the road and dragged the deceased from the bicycle and thereafter assaulted him with 'lathi' and it was accused/appellant Ram Vishal who had assaulted the deceased with the blunt side of the 'kulhari'. He also stated that he and other witnesses were about 10-15 paces away from the spot when the appellants had fled away. Thus, all these witnesses in one

voice have stated the manner of commission of the offence and the role played by the accused Ram Vishal and other co-accused persons by stating specifically that all other accused persons were carrying 'lathi' while the accused Ram Vishal was carrying a 'kulhari' and at first those who were possessing 'lathi', assaulted the deceased and thereafter accused Ram Vishal has assaulted the deceased on his head by the blunt side of 'kulhari'.

28. The postmortem report of the deceased would reveal that he had sustained as many as 21 injuries and all these injuries are either contusions, lacerated wounds, abrasions, stitched wounds and on the opening of the body, the skull was found fractured at right parietal region, which was beneath the injury no.1 sustained by the deceased on the right side of his head. The membranes were found congested and clotting was found along with Sub-dural hematoma' and in the opinion of the doctor, the deceased had died due to 'shock, hemorrhage and coma' as a result of antemortem injuries.

29. It is true that all the witnesses of fact in this case are related to the informant and deceased but as has held in the cases cited herein-before the Hon'ble Supreme Court in a number of Judgments has held that the testimony of these related witnesses may not be discarded only on this score and the duty of the Court is to appreciate the evidence of these witnesses with same caution in its mind. We have perused the evidence of these three eye witnesses, namely, P.W.-2/Ram Jiyawan, P.W.-3/Ram Baran Tiwari and P.W.-4/Mahendra Mishra. Except P.W.-3/Ram Baran Tiwari, who stated that he at the relevant point of time was going on a

'rickshaw' from Lambhua and was about 100 paces away from the place where the incident had taken place, other two witnesses, namely, P.W.-2/Ram Jiyawn Mishra and P.W.-4/Mahendra Mishra are the natural witnesses as they at the relevant point of time stated to be in their agricultural field, which is normal and natural at that time of the day.

30. Perusal of the evidence of these three witnesses of fact would reveal that though there are minor contradictions in the evidence of these witnesses but their testimony is firm and trustworthy on the core of the prosecution story.

31. It is to be recalled that it is not expected from the witnesses to give a video-graphic account of the incident in a 'parrot like manner'. If the evidence of the witnesses is being recorded after lapse of some time, minor contradictions are bound to occur and these contradictions, in our considered opinion, put the testimony of such witnesses in the category of reliable witnesses, as emerging of minor contradictions is quite natural and it fortifies the belief that they are not tutored witnesses. After giving our thoughtful consideration to the evidence of these witnesses, we have not found any major infirmity, embellishments or contradictions in their evidence and in our considered opinion the evidence of these witnesses is having a ring of truth around it and could have been accepted and, thus, the trial court has not committed any illegality by relying on the evidence of such truthful witnesses.

32. Learned counsel for the appellants submits that there are contradictions in the oral account of the incident vis-a-vis medical evidence and highlighted that the deceased was also

medically examined, when he was alive, by Dr. R.P. Singh and, thereafter, when he died, his postmortem was conducted by P.W.-6/Dr. S.M.M. Naqvi and while in the life time injury report, only five injuries have been found, in his postmortem report, 21 injuries have been found and this is a contradiction and benefit of which must go to the accused persons/appellants.

33. On perusal of the record in the background of the submissions advanced by learned counsel for the appellants, it would emerge that the deceased was taken to the hospital and was admitted on 10.09.1991 and it was at 6:45 pm. his injuries were examined and recorded by P.W.-5/Dr. R.P. Singh, who appeared before the trial court and stated that the injured/deceased had sustained five injuries. These five injuries have been found on the head, left hand, right elbow-joint, multiple contusions on the back in an area of 14 cm. x 02 cm. and a lacerated wound at the front side of the right leg. The contusions, which have been found on the left side of the back, were in an area of 7 cm. x 2 cm. After the death of the deceased when his body was subjected to postmortem and the same was conducted by P.W.-6/S.M.M. Naqvi and about 21 injuries of different nature were found on his body, the details of which has already been given at the appropriate place in this judgment and there is no need to repeat the same.

34. It is to be understood that when a severely injured person whose condition is not stable is admitted in the hospital, the prime concern for a doctor is to save his life and there is difference between the caution adopted by the doctors while noticing the injuries during the lifetime of an accused person and the caution

exercised while subjecting the body of the deceased to postmortem. Whenever there is contradiction in the evidence of life time injury report and postmortem report, due weightage should be given to the injuries or the facts recorded in the postmortem report.

35. It is also to be understood that the deceased has sustained multiple contusions criss-crossing each other which might have been considered by P.W.-5/Dr. R.P. Singh as one injury while the same has been described in the postmortem report individually. Moreover, many of these injuries are abrasions, which might have missed the attention of P.W.-5. Also, this discrepancy in their statements has not been put to both the doctors who have been examined as P.W.-5 and P.W.-6/ and in our considered opinion, the same cannot be given much importance as the postmortem report of the deceased is commensurate and in the line of the oral evidence given by the three witnesses of fact and except injury no.1 sustained on the head of the deceased, all these injuries may be caused by 'lathi' and from the inception the case of the prosecution is that accused Ram Vishal had assaulted the deceased on his head with the blunt side of the 'kulhari', which is also corroborated by the medical evidence. Thus, we do not find any contradiction of medical evidence with the ocular version of the incident.

36. Finally, it is submitted by Shri U.P. Singh, learned counsel for the appellant that even if the case of the prosecution is believed as it is, there was no common object to commit the death of the deceased, as even by accused Ram Vishal, the natural side of the 'axe'/kulhari was not used while the other accused persons were armed with 'lathi', which is not a deadly weapon and, thus, the trial court has

committed an illegality in convicting the appellants for committing the murder of the deceased under Section 302 I.P.C.

37. It is to be recalled that instant appeal is a case where the accused persons were waiting for the return of the deceased and when the deceased arrived at the scene of crime on the bicycle of Chhotelal, he was pulled down and assaulted with 'lathi-danda' and kulhari. The formation of an unlawful assembly and its common object could only be known by the manner in which the members of such assembly have committed the offence and the weapons carried by them and direct evidence of such common object is seldom available.

Hon'ble Supreme Court Of India in ***Chanakya Dhibar (Dead) Vs. State of West Bengal and Ors., MANU/SC/1096/2003*** while dwelling on the scope of section 149 IPC has held as under :-

"11. The emphasis in Section 149 IPC is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down

as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it, a common object may be formed by express agreement after mutual constitution, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge,

possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

12. 'Common object' is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behavior of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently

become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti.

13. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that he offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the

common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behavior at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first

offences committed in prosecution of the common object, but would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikarange Gowda and Ors. v. State of Mysore, MANU/SC/0116/1956 : 1956CriLJ1365 ."

In ***Lalji v. State of U.P. MANU/SC/0283/1989*** it was observed that:

"Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behavior of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

16. Hon'ble Supreme Court in ***Roy Fernandes vs State of Goa and Ors.*** Reported in ***MANU/SC/0072/2012*** while elaborating the scope of section 149 of the penal code has held as under :-

"19. In *Gajanand and Ors. v. State of Uttar Pradesh MANU/SC/0173/1954 : AIR 1954 SC 695*, this Court approved the following passage from the decision of the Patna High Court in *Ram Charan Rai v. Emperor MANU/BH/0073/1945 : AIR 1946 Pat 242*:

"Under Section 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was

likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise.

20. This Court then reiterated the legal position as under:

The question is whether such knowledge can be attributed to the Appellants who were themselves not armed with sharp edged weapons. The evidence on this point is completely lacking. The Appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of Section 149 Indian Penal Code. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the Appellants, much less that they would be used in order to cause death.

21. In *Mizaji and Anr. v. State of U.P. MANU/SC/0040/1958 : AIR 1959 SC 572* this Court was dealing with a case where five persons armed with lethal weapons had gone with the common object of getting forcible possession of the land which was in the cultivating

possession of the deceased. Facing resistance from the person in possession, one of the members of the assembly at the exhortation of the other fired and killed the deceased. This Court held that the conduct of the members of the unlawful assembly was such as showed that they were determined to take forcible possession at any cost. Section 149 of Indian Penal Code was, therefore, attracted and the conviction of the members of the assembly for murder legally justified. This Court analysed Section 149 in the following words:

6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a pre-concert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be

committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all.

22. In Shambhu Nath Singh and Ors. v. State of Bihar MANU/SC/0214/1959 : AIR 1960 SC 725, this Court held that members of an unlawful assembly may have a community of object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object. As a consequence, the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court Gangadhar Behera and Ors. v. State of Orissa

MANU/SC/0875/2002 : 2002 (8) SCC 381 and Bishna Alias Bhiswadeb Mahato and Ors. v. State of West Bengal MANU/SC/1913/2005 : 2005 (12) SCC 657 similarly explain and reiterate the legal position on the subject.”

17. Hon’ble Supreme Court Of India in ***Kuldip Yadav and Ors. Vs. State of Bihar, MANU/SC/0390/2011*** while commenting on the scope of conviction with the aid of section 149 of penal Code has held as under :-

“Para 25-.....149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.-If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

26. The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence.

Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established.

The above principles have been reiterated in Bhudeo Mandal and Ors. v. State of Bihar MANU/SC/0125/1981 : (1981) 2 SCC 755.

27. In *Ranbir Yadav v. State of Bihar MANU/SC/0245/1995 : (1995) 4 SCC 392*, this Court highlighted that where there are party factions, there is a tendency to include the innocent with the guilty and it is extremely difficult for the court to guard against such a danger. It was pointed out that the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the court.

28. In *Allauddin Mian and Ors. Sharif Mian and Anr. v. State of Bihar MANU/SC/0648/1988 : (1989) 3 SCC 5*, this Court held: *...Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act*

done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly.

Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any

offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, IPC....

29. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

30. In *Rajendra Shantaram Todankar v. State of Maharashtra and Ors.* MANU/SC/0002/2003 : (2003) 2 SCC 257 : 2003 SCC (Crl.) 506, this Court has once again explained Section 149 and held as under:

14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in

prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the

background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behavior of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 - either clause - is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act...." (Emphasis ours)

18. Hon'ble Supreme Court Of India in **Manjit Singh Vs. The State of Punjab**, MANU/SC/1195/2019 held as under :-

"14.4. In the case of Subal Ghoral v State of West Bengal, MANU/SC/0296/2013 (supra), this Court, after a survey of leading cases, summed up the principles as follows:

52. The above judgments outline the scope of Section 149 Indian Penal Code. We need to sum up the principles so as to examine the present case in their light. Section 141 Indian Penal Code

defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 Indian Penal Code postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 Indian Penal Code provides for punishment for being a member of unlawful assembly. Section 149 Indian Penal Code provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth" and "Fifth" of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 Indian Penal Code, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member

of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 Indian Penal Code if they shared common object of the unlawful assembly.

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 Indian Penal Code. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The

court must have before it some materials to form an opinion that the Accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a Rule of caution."

(emphasis supplied by us)

38. The appreciation of the evidence of the three witnesses of fact in the background of the aforesaid law would reveal that the accused persons had laid a trap as they were hiding in the pit situated by the side of the road and were waiting for the return of the deceased as he had gone earlier in the day to purchase a part of the tractor as his tractor had gone out of order. P.W.-1/Raj Mani Mishra in his statement has stated in clear terms the name of the part of the tractor which was required to be replaced and, thus, it is established that the accused persons were also in knowledge that the deceased would return to his home after purchasing the part of the tractor and the manner in which the deceased was pulled down from the bicycle and was assaulted by all the accused persons in a pre-concerted manner and keeping in view that about 21 injuries have been inflicted on

the body of the deceased and the death of the deceased had occurred on account of cumulative effect of these injuries, it may safely be inferred that the object of this unlawful assembly was to commit the murder of the deceased. The fact that the accused Ram Vishal had assaulted the deceased with the blunt side of the 'kulhari'/axe is not sufficient to infer that the common object of this assembly was not to commit the death of the deceased. The infliction of 21 injuries on vital parts on the body of the deceased, in our considered opinion, is sufficient to infer that the common object of the assembly was to cause the death of the deceased and all the members of this unlawful assembly were in knowledge of this common object or they were in knowledge that the murder of the deceased was likely to be the result of the action of one or more members of such assembly. As has been held in various cases the participation of an accused person, who is member of such an unlawful assembly is not a pre-condition for his conviction. It is sufficient that he was in knowledge of the common object of the unlawful assembly or was having sufficient knowledge that this offence is likely to be committed by such assembly and has not withdrawn himself from such assembly at an appropriate time. The conduct of the accused persons emerging out of the pit together and after commission of the incident running away together would suggest in manifest terms that they had hatched a plan to commit the murder of the deceased. Thus, the fact that after the deceased had been assaulted by the accused persons with 'lathi', it is thereafter the accused Ram Vishal assaulted the deceased on his head with the blunt side of the 'axe' would not be sufficient in itself to assume/presume that the common object of the assembly was not to cause the death of

the deceased or to infer that it was only Ram Vishal who could be responsible for the death of the deceased. Once all the accused persons had formed an 'unlawful assembly' and they had acted in a concerted and well-planned manner and had inflicted around 21 injuries on vital parts of the body in furtherance of common object and at the cost of repetition, we reiterates that all these members of this unlawful assembly were in knowledge of the common object of the assembly, which was to cause/commit the murder to beat Ram Jas to death.

39. It is also to be recalled that when there is an intention to commit the murder of the deceased, it would always be a case of 'first degree murder' i.e. punishable under Section 302 I.P.C. Thus, we do not find any weight in this submission of learned counsel for the appellants.

Non-production of witness Chhotelal is also not a circumstance which would be sufficient to create a reasonable doubt in the story of the prosecution. Today no body wants to get himself involved in the affairs of others and invite difficulties for themself when we are not having any robust system for witnesses protection. Thus, the case of the prosecution is to be seen on the appreciation of evidence of witnesses who have been presented before trial court.

40. Having considered all the facts and circumstances of the case, we are of the considered opinion that the trial court has passed a well reasoned judgment based on the valid appreciation of evidence and all the attempts made by learned counsel for the appellants to show that the judgment of the trial court is perverse and is based on

mis-appreciation of the evidence, do not carry any weight and in our considered opinion the evidence, which was produced before the trial court, has established the case of the prosecution beyond reasonable doubt. The spot where the incident had taken place, has been fixed by the three prosecution eye witnesses, they have given detailed account of the incident. The parties were having enmity from before the incident and it is an admitted fact and has not been denied by the accused persons. The formation of unlawful assembly by the accused persons has been well-established and though it is not necessary for a member of the unlawful assembly to take active part it is evident that all accused persons had participated in the 'marpeet' and keeping in view the fact that 21 injuries have been found on the person of the deceased, it could safely be inferred that the common object of this unlawful assembly was to commit the murder of the deceased by beating him to death and, thus, we do not find any force in the instant appeal and, thus, the appeal preferred by the appellants, namely, **Ram Singar, Ram Vishal and Surya Bhan** is, hereby, dismissed and impugned judgment and order of the trial court dated 05.03.2001 is **affirmed**.

41. The appellants- **Ram Singar, Ram Vishal and Surya Bhan** appear to be on bail. They will surrender within 30 days from today before the trial court concerned and shall serve the sentence, as imposed by the trial court.

42. It is clarified that if the accused/appellants do not surrender before the trial court within the time stipulated herein-before, the trial court will issue coercive process against them so that the sentence, as imposed by the trial court is served by them.

43. A copy of this order along with the record of the trial court be immediately sent to the trial court for compliance.

(2025) 1 ILRA 644

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 06.01.2025

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 4027 of 2024

Asha **...Appellant**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
Dhirendra Pratap Singh

Counsel for the Respondents:
G.A.

A. Criminal Law - Mandatory Registration of First Information Report - Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 4 – Under the Act, it is the duty of a public servant to read out to an informant the information given orally and reduced to writing, and to register a complaint or a First Information Report. Under Section 18A(1) of the Act, preliminary enquiry is not required for the registration of a First Information Report against any person - Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, Rule 5 – It is the statutory duty of the concerned police station, including its officers, to follow the mandate under the SC/ST Act, and an FIR should be registered. (Para 5)

B. Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 – Registration of First Information Report – In the instant case, the First

Information Report was not registered by the concerned Police Officer at the Police Station. Since the F.I.R. was not registered, the victim approached the Superintendent of Police. The S.P. also did not follow the mandate u/s 4 of the SC/ST Act as well as Rule 5 of the SC/ST Rules. Thereafter, the learned Special Court rejected the complaint of the victim. Held : Learned Special Court, while passing the impugned order, instead of directing the concerned Police Station to register the First Information Report, conducted the inquiry himself, which is prohibited under Section 18A of the SC/ST Act. Impugned order set aside. (Para 11)

Allowed. (E-5)

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

1. Heard learned counsel for the appellant and learned A.G.A. for respondent State.

2. Under challenge is the impugned order dated 18.11.2024 passed by the learned Special Judge SC./ST Act Raebareli in Criminal Misc Case Number 709 of 2024 vide the application of the applicant under Section 173(4) BNSS (earlier 156(3) Cr.P.C.) has been rejected.

3. Learned counsel for the appellant submits that one Yashwant Maurya has made physical relationship with the applicant on the false pretext of marriage and on 4.8.2024 when she asked him to marry he has given life threat to her and also abused her on the basis of caste as she is related to chamar caste. The applicant has moved an application to the Police Station Jagatpur district Raebareli for registering the FIR, however, no action was taken by the police. Then an application dated 4.9.2024 has been moved

by the applicant to Superintendent of Police Raebareli through registered post. Still no action was taken by the Superintendent of Police Raebareli. Thereafter the applicant has moved an application under Section 173(4) BNSS (Earlier 156(3) Cr.P.C.) on 12.9.2024. Upon which a report was sought by the court from the concerned police station Jagatpur. □ The report dated 2.10.2024 was received by the learned Special Court, however learned court below instead of directing to register the FIR has conducted enquiry himself and rejected the complaint, which is clear violation of Section 4 of the The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'SC/ST Act'), Rule 5 of the the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereinafter referred to as 'SC/ST Rules') and also it is against the provisions of Section 18(A)(1) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4. Learned A.G.A. has opposed the objection, however, could not dispute the statutory/mandatory duties of the public servant under the SC/ST Act.

5. Perused the record.

6. Section 4 of the SC/ST Act provides punishment to the public servants who willfully neglects his duties required to be performed by him under this Act and the rules made thereunder.

7. Sub-section 2 (a) of Section 4 of the SC/ST Act further provides that upon receiving the oral information from the informant it shall be read out to the informant and shall be reduced into writing by the concerned public servant/Police

Officer. Sub-section 2(b) of Section 4 of the SC/ST Act provides that a complaint or a First Information Report shall be registered. Likewise Sub-rule (1) of Rule 5 of the SC/ST Rules also provides that every information relating to the commission of an offence under the SC/ST Act, 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 shall be signed by the persons giving his complaint and the substance thereof shall be entered in a book to be maintained by that police station. A copy of the information so recorded under sub-rule (1) of Rule 5 of SC/ST Rules shall be given forthwith free of cost to the informant. Sub rule (3) of Rule 5 of SC/ST Rules provides any person aggrieved by a refusal on the part of an officer incharge of a police station to record the information referred to in sub-rule (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who after investigation either by himself or by a police officer not below the rank of Deputy Superintendent of Police, shall make an order in writing to the officer in-charge of the concerned police station to enter the substance of that information to be entered in the book to be maintained by the police station.

8. Section 4 of the SC/ST Act and Rule 5 of the SC/ST Rules are extracted below:-

Section 4. Punishment for neglect of duties.?

"(1) Whoever, being a public servant but not being a member of a Scheduled Caste or a Scheduled Tribe, wilfully neglects his duties required to be performed

by him under this Act and the rules made thereunder; shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to one year. (2) The duties of public servant referred to in sub-section (1) shall include?? (a) to read out to an informant the information given orally, and reduced to writing by the officer in charge of the police station, before taking the signature of the informant; (b) to register a complaint or a First Information Report under this Act and other relevant provisions and to register it under appropriate sections of this Act; (c) to furnish a copy of the information so recorded forthwith to the informant; (d) to record the statement of the victims or witnesses; (e) to conduct the investigation and file charge sheet in the Special Court or the Exclusive Special Court within a period of sixty days, and to explain the delay if any, in writing; (f) to correctly prepare, frame and translate any document or electronic record; (g) to perform any other duty specified in this Act or the rules made thereunder: Provided that the charges in this regard against the public servant shall be booked on the recommendation of an administrative enquiry. (3) The cognizance in respect of any dereliction of duty referred to in sub-section (2) by a public servant shall be taken by the Special Court or the Exclusive Special Court and shall give direction for penal proceedings against such public servant.]"

Rule 5. Information to police officer in-charge of a police station ?

"(1) Every information relating to the commission of an offence under the Act, 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 maintained by that police station.

(2) A copy of the information as so recorded under sub-rule (1) above shall be given forth-with 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 sub-rule (1) may send the substance of such information, in writing and writing any by post, to the Superintendent of Police concerned who, after investigation either by himself or by police officer not below the rank of Deputy Superintendent of Police, shall make an order in writing to the officer in-charge of the concerned police station to enter the substance of that information to be entered in the book to be maintained by that police station."

9. *Prima facie*, from perusal of the aforesaid Section 4 of the SC/ST Act and Rule 5 of the SC/ST Rules, it is evident that

it was the statutory duty of the concerned police station, including its officers, to follow the mandate under the SC/ST Act, and an FIR should have been registered.

10. Section 18A of the SC/ST Act provides rather prohibits that no inquiry or approval is required for registering the FIR. The relevant paragraph of Section 18A of SC/ST Act is extracted below:-

"18A. No enquiry or approval required.?"

(1) For the purposes of this Act,?

(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply."

11. From a perusal of the impugned order, it appears that the learned Magistrate has inquired into the factum before passing the impugned order. Thus, in fact, he has conducted an inquiry himself, which is prohibited under the Act. In this case, the First Information Report should have been registered by the concerned Police Officer at the Police Station, Jagatpur. Since the F.I.R. was not registered, she approached the Superintendent of Police Raebareli. He also appears to have not followed the mandate under Section 4 of the SC/ST Act as well as Rule 5 of the SC/ST Rules. Thereafter,

learned Special Court, while passing the impugned order, instead of directing the concerned Police Station to register the First Information Report, conducted the inquiry himself, which is prohibited under Section 18-A of the SC/ST Act. Thus, in view of the aforesaid discussion, this impugned order cannot be sustained and is liable to be set aside.

12. Accordingly, the appeal is ***allowed***. The impugned order dated 18.11.2024 passed by the learned Special Judge SC/ST Act Raebareli is hereby quashed and the matter is remanded to the learned court below to decide the application filed by the applicant/victim under Section 173(4) BNSS and pass a fresh order within a period of one month from the date of production of the certified copy of this order in view of the discussion made herein-above and keeping in view the mandatory provisions of the SC/ST Act as well as the SC/ST Rules.

(2025) 1 ILRA 647
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.01.2025

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 4817 of 2019

&

Criminal Appeal No. 4639 of 2019

Arun Kumar Yadav & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:

Sri Anand Kumar Mishra, Sri Ashwini Kumar Awasthi, Sri Kamlesh Kumar Tripathi, Sri Manish Pandey (Sr. Adv.)

Counsel for the Respondent:

G.A., Sri Rajiv Kumar Singh

क. आपराधिक विधि — चिकित्सा विधि शास्त्र — हत्या — लाठी-डण्डे से मारने का आरोप — भाव विच्छेदन आख्या — चिरा-फटा चोट (Lacerated injury) और कुचलाव/क्षति चोट (Contusion injury) — लाठी-डण्डा की चोट होने पर Contusion (कुचलाव) और Lacerated (चिरा-फटा) दोनों आ सकते हैं, जिसका समर्थन मृतक के भाव विच्छेदन आख्या में आयी चोटों के अवलोकर से परिलक्षित हो रहा है — यह भी विदित है कि केवल क्षति (Contusion) से हड्डी नहीं टूट सकती, जबकि इस मामले में मृतक की हड्डियां भी टूटी पायी गयी है। [पैरा 20 (घ)]

ख. आपराधिक विधि — भारतीय दण्ड संहिता — धारा 34 एवं 302 — हत्या — आजीवन कारावास — मारपीट के बाद ट्रैक्टर से कुचलकर मृतक की हत्या करने का आरोप — हत्या का हेतुक (Motive) — मामले में घटना का प्रत्यक्षदृष्टि मौजूद — अन्तिम दृष्टि का सिद्धान्त — प्रयोज्यता (Applicability) — निर्धारित किया गया — हत्या से सम्बन्धित घटना को प्रत्यक्ष रूप से अभियोजन साक्षी द्वारा देखी गयी, इसलिए प्र नगत प्रकरण में अन्तिम दृष्टि का सिद्धान्त लागू नहीं होता है, बल्कि प्रत्यक्ष रूप से घटना देखने का सिद्धान्त लागू होता है — मृतक एवं अभियुक्तगण के मध्य रूपों के लेन-देन की रंजि 1 है, अभियुक्तगण द्वारा मृतक को पूर्व रंजि 1 के कारण मारने का हेतुक विद्यमान था. [पैरा 20 (ज) एवं (झ)]

ग. आपराधिक विचारण — भारतीय साक्ष्य अधिनियम, 1972 — धारा 8 — अभियुक्त का फरार होना — अपराध में संलिप्तता के लिए कितना सुसंगत तथ्य — द0 प्र0 सं0 की धारा 83 की उद्घोषणा के बाद और धारा 174ए के अंतर्गत आरोप पत्र दाखिल होने के बाद अभियुक्त द्वारा आत्मसमर्पण किया गया — सुसंगति (Relevancy) — निर्धारित किया गया — घटना के पचास सभी अभियुक्तों का घर से फरार होना उनकी अपराध में संलिप्तता को साबित करने के उद्देश्य से भारतीय साक्ष्य अधिनियम की धारा 8

के अन्तर्गत एक सुसंगत तथ्य है — अनन्तचिंतामन मामले पर भरोसा किया गया. [पैरा 20 (ठ)]

आपराधिक अपील निरस्त (E-1)

उल्लेखित पूर्व-निर्णयों की सूची:-

1. रो. अन. बनाम तमिलनाडु राज्य; एआईआर 1976 सुप्रीम कोर्ट 2027
2. महाराष्ट्र राज्य बनाम कालू शिवराम; एआईआर 1980 सुप्रीम कोर्ट 879
3. नन्दू रस्तोगी बनाम बिहार राज्य; एआईआर 2002 सुप्रीम कोर्ट 3443
4. देवीलाल बनाम राजस्थान राज्य; एआईआर 1971 सुप्रीम कोर्ट 1444
5. अनन्तचिंतामन बनाम बॉम्बे राज्य; एआईआर 1960 सुप्रीम कोर्ट 500
6. सैफुद्दीन बनाम पश्चिम बंगाल; क्रिमिनल लॉ जनरल एन0ओ0सी0 140 कोलकाता

(Delivered by Hon'ble Dr. Gautam Chowdhary, J.)

१. दाण्डिक अपील सं० 4817/2019 अपीलार्थीगण अरूण कुमार यादव, उमेश कुमार, रूचित सिंह तथा दाण्डिक अपील सं० 4639/2019 अपीलार्थी अरविन्द कुमार की ओर से, मु०अ०सं० 376/2016, अन्तर्गत धारा- 302/34 भा०दं०वि०, थाना दिबियापुर, जनपद औरैया से उद्भूत सत्र परीक्षण सं० 07/2017 एवं सत्र परीक्षण सं०-76/2017 में सत्र न्यायाधीश, औरैया द्वारा पारित निर्णय/आदेश दिनांक 22.06.2019, जिसके द्वारा अपीलार्थीगण/अभियुक्तगण को धारा- 302 भा०दं०वि० सपठित धारा 34 भा०दं०वि० के अंतर्गत आजीवन कारावास व अंकन 1,00,000/- रुपये (प्रत्येक) अर्थदण्ड से दण्डित किया गया, के विरुद्ध योजित किया गया है।

२. उपरोक्त दोनों दाण्डिक अपीलें एक ही घटना से संबंधित हैं तथा एक ही सत्र परीक्षण में सत्र न्यायाधीश, औरैया द्वारा पारित निर्णय के विरुद्ध योजित की गयी है। इसलिए दोनों दाण्डिक

अपीलों को एकीकृत करते हुए दोनों अपीलों का निस्तारण एक ही निर्णय से किया जा रहा है।

३. वाद के तथ्य संक्षेप में इस प्रकार है कि अभियोगी मनोज कुमार पुत्र सुखवीर सिंह निवासी केविन की मढ़ैया, हाल निवासी नहर बाजार, दिबियापुर औरैया द्वारा थानाध्यक्ष दिबियापुर को लिखित तहरीर प्रदर्श क-1 प्रस्तुत की गयी, जिसमें उल्लेख है कि दिनांक 07/08/09/2016 की रात उसकी माताजी, वह तथा उसके चाचा अनिल कुमार तथा उसका भाई प्रशान्त उर्फ शेर सिंह उम्र करीब 19 वर्ष घर पर लेटे थे कि रात समय करीब दो बजे रुचित सिंह पुत्र सुनील सिंह निवासी बादशाह छौंक थाना सहायल अपने अन्य साथी अरविन्द कुमार पुत्र भारत सिंह, जो उसी के गांव बादशाहपुर छौंक का निवासी है तथा अरुण कुमार यादव व उसका भाई उमेश कुमार पुत्रगण रामकेश यादव निवासी अजमतपुर थाना दिबियापुर घर पर आये। रुचित ने उसके भाई प्रशान्त को आवाज देकर बुलाया और कहा कि कुछ जरूरी काम है। उसने पूछा कि क्या काम है, नहीं बताया और उसका भाई प्रशान्त बाहर गया, तो उसको मोटरसाइकिल पर बैठाकर लेकर चले गये। ले जाते समय उसके अलावा अनिल कुमार, उसकी मां ने देखा है। उक्त लोगों ने उसके भाई प्रशान्त को श्री साईं सीमेण्ट एजेंसी के गेट पर मारपीट कर समय करीब चार बजे सुबह हत्या कर दी। इस वाक्या को उसके भाई राजेश कुमार व चाचा यशपाल ने देखा है तथा बाद में चारपाई पर रखकर ट्रैक्टर चढ़ा दिया। चारों उपरोक्त लोग दबंग किस्म के हैं। उनके डर के कारण उसका भाई राजेश व यशपाल सिंह भाई को नहीं बचा सके। चारों मुल्जिमान से रुपया का लेन-देन व पुरानी रंजिश है।

४. अभियोगी के उपरोक्त लिखित तहरीर के आधार पर मुकदमा अपराध संख्या- 376/2016, धारा- 302/34 भा०दं०सं० के अन्तर्गत पंजीकृत हुआ, जिसकी चिक प्रथम सूचना रिपोर्ट प्रदर्श क-11 है तथा कायमी मुदकमा की जी०डी० दस्तावेज संख्या-16क है।

५- दिनांक 08.09.2016 को मृतक प्रशान्त कुमार के मृत शरीर का पंचायतनामा तैयार किया गया, पंचनामा रिपोर्ट पत्रावली पर प्रदर्श क-6 है। पंचायतनामा तैयार करने के पश्चात मृतक के मृत शरीर को पोस्टमार्टम के लिए भेजा गया, जिससे संबंधित दस्तवेज प्रदर्श क-7 लगायत प्रदर्श क -10 हैं।

६- दिनांक 08.09.2016 को समय 02:50 PM पर मृतक का पोस्टमार्टम प्रारम्भ किया गया जो इसी तिथि को 03:20 PM पर सम्पादित किया गया तथा पोस्टमार्टम रिपोर्ट

तैयार की गयी, जो पत्रावली पर प्रदर्श क-12 है। पोस्टमार्टम रिपोर्ट के अनुसार मृतक के शरीर पर मृत्यु पूर्व निम्न चोटें मौजूद थी:-

मृतक की बांयी आँख शरीर से अलग थी।
मृतक के बांये कान से खून निकल रहा था।

चोट संख्या 1- सिर से ब्रेन अलग हुआ था, चोट के कारण।

चोट संख्या 2- नीलगू निशान, जिसका आकार 3 सेमी० × 6 सेमी० छाती की बांयी तरफ पीछे। छठी एवं आठवीं पसली टूटी पाई गयी थी।

चोट संख्या 3- नीलगू निशान, जिसका आकार 3 सेमी० x 2 सेमी० जो दाहिने छाती के पीछे था, जिसकी चार एवं पांच नम्बर की पसलियां टूटी पाई गई थी।

चोट संख्या 4- एक नीलगू निशान 2.5 सेमी० x 2 सेमी० कंधे के पीछे नीचे की ओर हड्डी टूटी हुई थी।

चोट संख्या 5- कई प्रकार की खरोंच, जिनके आकार 10 सेमी० x 4 सेमी० दाहिनी रीढ़ की हड्डी की तरफ थी।

चोट संख्या 6- एक नीलगू निशान, जिसका आकार 2 सेमी० x 1 सेमी० बांयी टांग के ऊपर।

चोट संख्या 7- एक नीलगू निशान, जिसका आकार 6 सेमी० x 4 सेमी० जो दाहिनी टांग में थी।

चोट संख्या 8- खरोंचदार नीलगू निशान, जिसका आकार 4 सेमी० x 3 सेमी० जो बांये कंधे पर थी, इसकी हड्डी टूटी हुई पाई गई थी।

मृतक के शव का शव-विच्छेदन करने वाले चिकित्सक की राय के अनुसार मृतक की मृत्यु, मृत्यु पूर्व आई उपरोक्त चोटों से रक्तस्राव एवं सदमा से हुई है। मृत्यु का समय लगभग 1/2 दिन था। चार पहिए के वाहन चढ़ाने से उपरोक्त चोटें आना सम्भव है। इस साक्षी द्वारा शव विच्छेदन रिपोर्ट प्रदर्श क-12 को साबित किया गया है। मृतक की मृत्यु दिनांक 07/08 की रात्रि में सुबह 04:00 बजे उसके शरीर में आई चोटों के कारण हुई है।

७- विवेचनाधिकारी द्वारा दिनांक 08.09.2016 को तथाकथित घटनास्थल श्री साई सीमेण्ट एजेन्सी के गेट के पास फर्श से खूनालूदा एवं सादा मिट्टी ली गयी, जिसकी फर्द प्रदर्श क-2 है। घटनास्थल से मृतक के पास से रक्त रंजित कपड़े व एक जोड़ी सैण्डल बरामद किये गये, जिसकी फर्द प्रदर्श क-3 है, घटनास्थल से एक अदद मोबाइल सैमसंग बरामद किया गया, जिसकी फर्द प्रदर्श क-4 है तथा इसी तिथि को विवेचक द्वारा दो बण्डल मिट्टी खूनालूदा एवं सादा मृतक के शव के पास से कब्जे में ली गयी, जिसकी फर्द प्रदर्श क-5 है। घटनास्थल से बरामद खूनालूदा एवं सादा मिट्टी, फर्श के टुकड़े खूनालूदा एवं सादा एवं मृतक के कपड़े आदि को विधि विज्ञान प्रयोगशाला प्रेषित किया गया। विधि विज्ञान प्रयोगशाला की रिपोर्ट प्रदर्श क-18 है।

८- विवेचनाधिकारी द्वारा दिनांक 09.09.2016 को घटनास्थल का नक्शा-नजरी तैयार किया गया, जो प्रदर्श क 13 है। दिनांक 18.10.2016 को अभियुक्त अरुण कुमार को गिरफ्तार किया गया और उसकी निशानदेही पर एक अदद आलाकत्ल डण्डा, जो वस्तु प्रदर्श क-1 है, ट्रैक्टर की सीट में घुसा हुआ बरामद किया गया, फर्द बरामदगी प्रदर्श क-14 है तथा इसी तिथि को ट्रैक्टर पावर ट्रेक बिना नम्बर, जिससे मृतक को कुचला गया बरामद किया गया, फर्द बरामदगी प्रदर्श क-15 है।

९- विवेचना के पश्चात विवेचनाधिकारी द्वारा अपीलार्थीगण/अभियुक्तगण के विरुद्ध आरोप पत्र प्रस्तुत किये गये, जिन पर मजिस्ट्रेट के न्यायालय द्वारा संज्ञान लिया गया। अपीलार्थीगण/अभियुक्तगण को पुलिस दस्तावेजों की प्रतियाँ प्रदान करते हुए प्रकरण सत्र न्यायालय को सुपुर्द किया गया।

१०- प्रश्नगत प्रकरण में पुलिस थाना दिबियापुर द्वारा उक्त प्रेषित अलग-अलग आरोप पत्रों पर अपीलार्थीगण/अभियुक्तगण का विचारण धारा 302/34 भा०दं०सं० के अन्तर्गत किया गया है।

११- अपीलार्थीगण/अभियुक्तगण के विरुद्ध भारतीय दण्ड संहिता की धारा 302 सपठित धारा 34 के अन्तर्गत आरोप विरचित किया गया, जो बहस के स्तर पर दुरुस्त किया गया। अपीलार्थीगण/अभियुक्तगण ने आरोप से इन्कार करते हुए परीक्षण की मांग की है।

१२- सत्र परीक्षण के दौरान अभियोजन की ओर से अभियोजन साक्षी सं०-1 मनोज कुमार, अभियोजन साक्षी सं०-2

अनिल कुमार, अभियोजन साक्षी सं०-3 राजेश कुमार, अभियोजन साक्षी सं०-4 यशपाल, अभियोजन साक्षी सं०-5 उपनिरीक्षक पप्पू सिंह, अभियोजन साक्षी सं०-6 कां० जितेन्द्र सिंह, अभियोजन साक्षी सं०-7 डॉ० चन्द्रशेखर, अभियोजन साक्षी सं०-8 निरीक्षक आदित्य प्रकाश, अभियोजन साक्षी सं०-9 उपनिरीक्षक विनोद कुमार मिश्रा एवं अभियोजन साक्षी सं०-10 निरीक्षक जितेन्द्र कुमार का परीक्षण किया गया।

१३- अभियोजन साक्षी सं०-1 मनोज कुमार, अभियोजन साक्षी सं०-2 अनिल कुमार, अभियोजन साक्षी सं०-3 राजेश कुमार, अभियोजन साक्षी सं०-4 यशपाल तथ्य के साक्षी है, जिनका परीक्षण विचारण न्यायालय के समक्ष किया गया तथा इनसे बचाव पक्ष की ओर से जिरह भी की गयी।

१४- अभियोजन साक्षी सं०-5 उपनिरीक्षक पप्पू सिंह, अभियोजन साक्षी सं०-6 कां० जितेन्द्र सिंह, अभियोजन साक्षी सं०-7 डॉ० चन्द्रशेखर, अभियोजन साक्षी सं०-8 निरीक्षक आदित्य प्रकाश, अभियोजन साक्षी सं०-9 उपनिरीक्षक विनोद कुमार मिश्रा एवं अभियोजन साक्षी सं०-10 निरीक्षक जितेन्द्र औपचारिक साक्षी है, जिन्होंने अपने-अपने द्वारा की गयी कार्यवाही के संबंध में बयान दिया है तथा आवश्यक फर्द प्रदर्श आदि को साबित किया है।

१५- अभियोजन साक्ष्य संपन्न होने के उपरांत अपीलार्थीगण/अभियुक्तगण का बयान अंतर्गत धारा 313 दं०प्र०सं० अंकित किया गया, जिसमें उन्होंने अभियोजन साक्षीगण द्वारा गलत बयान दिये गये हैं, कुछ साक्ष्य की जानकारी होने से इन्कार किया गया है। मृतक को लाठी-डंडों से मारना तथा फोल्डिंग चारपाई पर लेटाकर ट्रैक्टर से कुचलने की बात से इन्कार तथा झूठा फंसाने की बात कही है।

१६- अपीलार्थीगण/अभियुक्तगण के विद्वान अधिवक्ता श्री कमलेश कुमार त्रिपाठी एवं विद्वान अपर शासकीय अधिवक्ता को सुना एवं पत्रावली का परिशीलन किया।

१७- अपीलार्थीगण/अभियुक्तगण के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि:-

क- प्रथम सूचनाकर्ता अर्थात अभियोजन साक्षी सं०-1 मनोज कुमार ने कहा है कि वह "सिविन की मड़ैया" का निवासी है तथा वर्तमान में "नहर बाजार

दिबियापुर" में रहता है, उसके इस बयान से स्पष्ट होता है कि मनोज कुमार की उस समय उपस्थिति अत्यधिक संदिग्ध है, उसने अपने बयान में यह भी बताया है कि घटनास्थल उसके घर से 1.5 किमी दूर है। चूँकि पीडब्लू 1 मनोज कुमार तथा पीडब्लू 2 अनिल कुमार मृतक की हत्या के गवाह नहीं हैं, इसलिए उन्होंने मृतक को 7/8.09.2016 की रात्रि में लगभग 02:00 बजे अभियुक्त के साथ जाते नहीं देखा था। उसे मृतक की हत्या के बारे में उसके भाई राजेश कुमार के माध्यम से सुबह लगभग 04:15 बजे पता चला, जिसने घटना को 08.09.2016 को सुबह 04:00 बजे का बताया है, इसलिए पीडब्लू 1 मनोज कुमार तथा पीडब्लू 2 अनिल कुमार को अंतिम बार देखे जाने का गवाह नहीं कहा जा सकता।

ख- वर्तमान मामले की प्रथम सूचना रिपोर्ट पूर्व निर्धारित दस्तावेज प्रतीत होती है, क्योंकि प्रथम सूचक मनोज कुमार को घटना अर्थात् मृतक की हत्या के बारे में लगभग 04:15 बजे पता चला और प्रथम सूचना रिपोर्ट 08.09.2016 को 08:30 बजे दर्ज की गई। इस संबंध में यह कहा गया है कि प्रथम सूचना रिपोर्ट जितेंद्र सिंह द्वारा लिखी गई थी जो प्रथम सूचनाकर्ता के गांव से 10 किमी की दूरी पर रहता है। इसके बाद वह प्रथम सूचनाकर्ता के गांव में आया, प्रथम सूचना रिपोर्ट लिखी और फिर लगभग 06:15 बजे पुलिस स्टेशन के लिए रवाना हुआ, इसलिए अभियोजन पक्ष द्वारा आरोपित समय तक प्रथम सूचना रिपोर्ट दर्ज नहीं की जा सकती थी। वास्तव में प्रथम सूचना रिपोर्ट कथित समय के बहुत बाद में अस्तित्व में आई है और अपीलकर्ताओं को झूठा फंसाने के लिए इसे पूर्वनिर्धारित किया गया है। जितेंद्र सिंह घटना के बारे में सुनने के बाद आया था।

ग- प्रथम सूचना रिपोर्ट में यह उल्लेख नहीं है कि 4 आरोपी व्यक्ति 2 मोटरसाइकिल पर प्रथम सूचनाकर्ता मनोज कुमार के घर आए थे और मृतक, उनके साथ मोटरसाइकिल पर गया था, लेकिन परीक्षण के दौरान यह कहा गया है कि 2 मोटरसाइकिलों पर आरोपी आए थे।

घ- अभियोजन साक्षी सं०- 3 राजेश कुमार और अभियोजन साक्षी सं०-4 यशपाल के बयान एक दूसरे के विरोधाभासी हैं, इसलिए उनकी गवाही पर

भरोसा नहीं किया जा सकता। अभियोजन साक्षी सं०- 2 अनिल कुमार और अभियोजन साक्षी सं०- 3 राजेश कुमार के धारा 161 द०प्र०सं० के तहत दिये गये बयान एवं परीक्षण के दौरान दिये गये बयान परस्पर विरोधाभासी हैं।

च- प्रथम सूचना रिपोर्ट में लाठी- डण्डे का कोई उल्लेख नहीं है। पोस्टमार्टम रिपोर्ट कई मामलों में अभियोजन पक्ष की कहानी को पूरी तरह से झुठलाती है, ऐसा लगता है कि मृतक की मृत्यु दुर्घटना में हुई थी और प्रथम सूचनाकर्ता और अन्य गवाहों को सुबह घटना के बारे में पता चला, फिर जितेंद्र सिंह को उसके गांव से बुलाया गया, फिर आवेदक को झूठा फंसाने के लिए पूरा अभियोजन मामला गढ़ा गया है। वास्तव में आरोपी अरुण से डण्डा की कोई बरामदगी नहीं हुई है, इसलिए बरामदगी पूरी तरह से झूठी है।

छ- अभियोजन साक्षी सं०- 1 मनोज कुमार और अभियोजन साक्षी सं०- 3 राजेश कुमार मृतक के सगे भाई हैं और अभियोजन साक्षी सं०- 3 अनिल कुमार और अभियोजन साक्षी सं०- 4 यशपाल मृतक के चाचा हैं, इस प्रकार यह सभी अभियोजन साक्षी हितबद्ध साक्षी हैं तथा घटना का कोई स्वतंत्र जन साक्षी नहीं है तथा घटनास्थल पर किसी प्रकाश स्रोत का उल्लेख न तो अभियोजन साक्षी द्वारा किया गया और न ही विवेचक द्वारा इसके संबंध में उल्लेख किया गया है।

ज- अपीलार्थीगण/अभियुक्तगण के विद्वान अधिवक्ता का यह भी कथन है कि अभियोजन साक्ष्य यह है कि अपीलार्थीगण/अभियुक्तगण, मृतक को मोटरसाइकिल से ले गये, उसके साथ मारपीट की फिर उसे चारपाई पर रखकर उसके ऊपर ट्रैक्टर चढ़ा दिया, यह कथन स्वयं में हास्यास्पद है एवं अविश्वसनीय प्रतीत हो रहा है कि कोई भी अभियुक्त किसी व्यक्ति को कहीं ले जाकर मार तो सकते हैं तथा मारकर भाग सकते हैं, किंतु किसी व्यक्ति को मारने के पश्चात उठाकर उसे चारपाई पर लेटाने के उपरांत उसके ऊपर ट्रैक्टर चढ़ाना अपने आप में विचारणीय तथ्य है।

झ- विचारण न्यायालय द्वारा पारित निर्णय/आदेश अभिलेख पर उपलब्ध साक्ष्य विपरीत पारित किया गया है तथा अपीलार्थीगण/अभियुक्तगण को दोषी ठहराते समय पूरे साक्ष्य पर सही परिप्रेक्ष्य में विचार और मूल्यांकन नहीं किया एवं

अपीलार्थीगण/अभियुक्तगण को उपरोक्तानुसार दोषी ठहराते हुए कठोर कारावास एवं अर्थदण्ड से दण्डित कर दिया गया। इसलिए प्रश्नगत आदेश/निर्णय खण्डित किये जाने योग्य है।

१८- विद्वान अरुण शासकीय अधिवक्ता ने अपीलार्थीगण/अभियुक्तगण के विद्वान अधिवक्ता के तर्कों का प्रबल विरोध करते हुए तर्क प्रस्तुत किया कि अपीलार्थीगण/अभियुक्तगण के विद्वान अधिवक्ता का यह कथन असत्य है कि विवेचक द्वारा घटनास्थल पर रोशनी के किसी स्रोत का उल्लेख नहीं किया गया, किंतु अभियोजन साक्षियों के बयान में यह तथ्य आया है कि घटना रात्रि की है तथा उस समय ट्रैक्टर की रोशनी थी, मृतक पर अभियुक्तगण द्वारा ट्रैक्टर चढ़ाया गया। इस प्रकार अभियोजन साक्षीगण द्वारा अभियुक्तों को ट्रैक्टर की रोशनी में पहचान की गयी तथा मृतक एवं अभियुक्तगण के मध्य रूपों के लेन-देन की पुरानी रंजिश चली आ रही थी तथा इसी रंजिश को लेकर अभियुक्तगण द्वारा मृतक को मारने का पर्याप्त हेतुक विद्यमान था। इसकी परिपुष्टि तथ्य के साक्षीगण के बयानों से भी हो रही है। अभियोजन साक्षीगण ने घटना को संदेह से परे साबित किया है। इस आधार पर यह दाण्डिक अपील निरस्त किये जाने योग्य है तथा विचारण न्यायालय द्वारा पारित प्रश्नगत आदेश/निर्णय, दिनांकित 22.06.2019 पुष्ट किये जाने योग्य है।

१९- विचारण न्यायालय ने उभय पक्ष के विद्वान अधिवक्ताओं के तर्कों को सुना, पत्रावली पर उपलब्ध साक्ष्य का परिशीलन किया तथा उपलब्ध साक्ष्य पर गहनतापूर्वक विचार करने के उपरांत यह अभिमत व्यक्त किया कि:-

क- विचारण न्यायालय ने अपीलार्थीगण/अभियुक्तगण को धारा 302/34 भा०द०वि० के अंतर्गत दोषी पाने हेतु यह अभिमत व्यक्त किया है कि अभियोजन साक्षी सं० 1. मनोज कुमार ने यह बयान दिया है कि दि० 7/8.09.2016 की रात्रि दो बजे वह तथा उसका भाई प्रशांत उर्फ शेर सिंह व उसकी माता सुमन देवी व चाचा अनिल कुमार घर पर लेटे हुए थे तो उस समय अपीलार्थी/अभियुक्त रूचित सिंह अपने साथ अपीलार्थीगण/अभियुक्तगण अरविंद कुमार, अरूण कुमार व उमेश कुमार के साथ उसके घर पर मोटर साइकिल से आये, उसके भाई प्रशांत कुमार को जरूरी कार्य हेतु बुलाया, प्रशांत कुमार को मोटर साइकिल पर बैठाकर साई सीमेंट एजेंसी के

पास बेला रोड ले गये उसके साथ मारपीट की तथा प्रशांत को चारपाई पर लेटाकर ट्रैक्टर चढ़ा दिया। इन सभी साक्षीगण ने इस घटना को अपनी आंखों से देखा है। वादी के इस कथन का समर्थन अन्य अभियोजन साक्षीगण ने भी किया है।

ख- अभियोजन केस की कहानी दो भागों में विभाजित है। अभियोजन कहानी का प्रथम भाग यह है कि दिनांक 07/08.09.2016 की रात 02:00 बजे रूचित सिंह अपने साथ अरविन्द कुमार, अरूण कुमार व उमेश कुमार के साथ दो मोटरसाइकिल से आये और प्रशान्त को घर से बुलाकर अपने साथ ले गये। अभियोजन साक्षी सं०- 1 मनोज कुमार ने मुख्य परीक्षा में उपरोक्त वर्णित तथ्यों की पुष्टि में बयान दिया है और यह कथन किया है कि सभी अभियुक्तों को वह पहले से जानते-पहचानते थे, क्योंकि ये लोग मृतक प्रशान्त के साथ सड़क पर मिट्टी डालने का काम साथ-साथ करते थे। मृतक इन चारों व्यक्तियों के साथ साझेदार था।

ग- अभियोजन साक्षी सं० 1 एवं 2 के अनुसार चार अपीलार्थीगण/ अभियुक्तगण मोटरसाइकिल पर मृतक प्रशान्त को घर से लेकर चले गये और इसके बाद उसकी हत्या की सूचना प्राप्त हुई, परन्तु हत्या से संबंधित घटना प्रत्यक्ष रूप से अभियोजन साक्षी सं०- ३ राजेश कुमार द्वारा देखी गयी, इसलिए प्रश्नगत प्रकरण में अन्तिम दृश्य का सिद्धान्त लागू नहीं होता, अपितु प्रत्यक्ष रूप से घटना देखने का सिद्धान्त लागू होता है, इसलिए पी०डब्लू० 1 एवं पी०डब्लू० 2 द्वारा मृतक को अन्तिम रूप से चार अपीलार्थीगण/अभियुक्तगण के साथ देखने और इसके पश्चात उसकी लाश मिलने के आधार पर परिस्थितिजन्य साक्ष्य पर विचार किया जाना विधि सम्मत नहीं है, क्योंकि घटना को घटित होते हुए स्वयं राजेश कुमार अभियोजन साक्षी सं०- ३ ने देखा है। इस साक्षी का बयान घटना घटित होने के संबंध में वर्णित किया गया है। इस साक्षी के बयान के अनुसार दिनांक 07/08.09.2016 की सुबह 04:00 बजे साई सीमेण्ट एजेंसी, दिबियापुर के पास सड़क पर ट्रैक्टर से मिट्टी डाली जा रही थी, उसी समय वहाँ पर यशपाल और प्रशान्त भी मौजूद थे तथा अपीलार्थीगण/अभियुक्तगण भी मौके पर मौजूद थे। इस साक्षी ने बयान दिया है कि अभियुक्तगण प्रशान्त उर्फ

शेर सिंह की लाठी-डण्डों से मारपीट कर रहे थे। इन चारों लोगों ने मारपीट के बाद मृतक के ऊपर ट्रैक्टर चढ़ा दिया। ट्रैक्टर चढ़ाने के कारण घटनास्थल पर ही उसकी मृत्यु हो गयी।

घ- आपराधिक न्यायशास्त्र का यह सिद्धान्त है कि अभियोजन द्वारा प्रस्तुत की गयी साक्ष्य संदेह से परे स्थापित होनी चाहिए, परन्तु यह सिद्धान्त इस प्रकृति का नहीं है कि अभियोजन द्वारा प्रस्तुत की गयी साक्ष्य हर दृष्टि से पूर्णता होनी चाहिए। प्रस्तुत प्रकरण में घटना के दोनों प्रत्यक्षदर्शी साक्षीगण जो मिट्टी डालने के कार्य में संलग्न थे, ने मारपीट के पश्चात अरुण द्वारा मृतक पर ट्रैक्टर चढ़ाने का कथन किया है। चारपाई पर डालने के बिन्दु पर साक्षियों का बयान विरोधाभासी है, परन्तु दोनों साक्षियों ने ट्रैक्टर चढ़ाने का कथन किया है। ट्रैक्टर चढ़ाने के तरीके में जो अन्तर मौजूद है, वह न्यायालय के परिवेश में बयान देते समय किसी ग्रामीण व्यक्ति द्वारा शब्दों का सही क्रम वर्णित न किये जाने के कारण सामने आ सकता है।

च- साक्षी ग्रामीण परिवेश का रहने वाला है। चूँकि चारों व्यक्तियों ने मृतक के साथ इस साक्षी के समक्ष मारपीट की थी, इसलिए चारों व्यक्तियों द्वारा ही ट्रैक्टर चढ़ाने का कथन किया गया और न्यायालय द्वारा पूछने पर स्पष्ट रूप से बताया गया कि ट्रैक्टर अरुण चला रहा था, परन्तु चूँकि सभी अभियुक्त मारपीट में संलग्न थे, इसलिए इस साक्षी द्वारा सभी के द्वारा ट्रैक्टर चढ़ाने का कथन किया गया है, चाहे ट्रैक्टर एक ही व्यक्ति चला रहा हो। अतः सभी व्यक्तियों द्वारा ट्रैक्टर चढ़ाने का बयान देने के कारण इस साक्षी का बयान असत्य नहीं माना जा सकता, क्योंकि विधि का यह सुस्थापित सिद्धान्त है कि एक बात में मिथ्या, तब सब बात में मिथ्या का सिद्धान्त भारतीय न्यायिक व्यवस्था में लागू नहीं होता, फिर यह भी कि इस साक्षी द्वारा जो शब्द प्रयुक्त किये गये हैं, उनमें केवल शब्दावली का अन्तर है, परन्तु तत्व एवं सार यही है कि सभी अभियुक्तों ने अपने सामान्य आशय के अग्रसरण में मृतक के प्रति आपराधिक कृत्य किया और ट्रैक्टर चढ़ाने के समय सभी अभियुक्त मौके पर मौजूद थे, इसलिए इस साक्षी ने सभी के द्वारा ट्रैक्टर चढ़ाने का कथन किया है।

छ- अभियोजन साक्षी सं०-3 ने शेष अभियुक्तों के संबंध में यह बयान दिया है कि सभी अभियुक्तों ने लाठी-डण्डों से मृतक के साथ मारपीट की,

परन्तु लाठी- डण्डों से मारपीट करने का कोई उल्लेख प्रथम सूचना रिपोर्ट में नहीं है, परन्तु मारपीट करने का उल्लेख अवश्य मौजूद है। विद्वान डी०जी०सी० का तर्क है कि प्रथम सूचना रिपोर्ट बृहद ग्रन्थ नहीं है, इस रिपोर्ट का उद्देश्य आपराधिक मशीनरी को गति प्रदान करना होता है और इसमें समस्त तथ्यों का विवरण आना आवश्यक नहीं है। विद्वान डी०जी०सी० का तर्क विधि से समर्थित है। इस प्रकार सभी अभियुक्तों ने प्रशान्त पर आक्रमण किया। अतः सभी अभियुक्त अपने सामान्य उद्देश्य के अग्रसरण में कार्य कर रहे थे। सामान्य आशय के उद्देश्य पर विचार करते समय भारतीय दण्ड संहिता की धारा 33 में दी गयी व्यवस्था को भी विचार में लिया जाना आवश्यक है। धारा 33 में यह उल्लेख है कि "कार्य" शब्द कार्यावली का द्योतक उसी प्रकार है, जिस प्रकार एक कार्य का "लोप" शब्द लोपावली का द्योतक उसी प्रकार है, जिस प्रकार एक लोप का। नजीर रोशन बनाम तमिलनाडू राज्य AIR 1976 सुप्रीम कोर्ट 2027 में व्यवस्था दी गयी है कि भारतीय दण्ड संहिता की धारा 34 को हमेशा धारा 33 के साथ पढ़ा जाना चाहिए, जिसमें बोले गये शब्द भी सामान्य आशय को इंगित करते हैं और जहाँ कोई कार्य अनेक व्यक्तियों द्वारा सम्पादित किया जाता है, तब उनका आपराधिक कृत्य अलग-अलग हो सकता है, लेकिन सबका रास्ता एक होता है और जहाँ पर शारीरिक हिंसा का तत्व मौजूद रहता है, तब मौके पर साक्षी की उपस्थिति साबित किया जाना आवश्यक है। धारा 34 भा०दं०सं० के अन्तर्गत सामान्य उद्देश्य के अग्रसरण में वे व्यक्ति भी शामिल हैं, जो उकसाते हैं या सहायता करते हैं। उपरोक्त नजीर में दी गयी व्यवस्था के अनुसार मौके पर मौजूद रहकर उकसाने एवं सहायता करने वाले सभी व्यक्ति धारा 34 भा०दं० सं० के अन्तर्गत परिभाषित अपराध की श्रेणी में आते हैं। नजीर महाराष्ट्र राज्य बनाम कालू शिवराम AIR 1980 सुप्रीम कोर्ट 879 में माननीय सर्वोच्च न्यायालय द्वारा व्यवस्था दी गयी है कि अपने सामान्य आशय के अग्रसरण में विभिन्न व्यक्तियों द्वारा विभिन्न प्रकृति के कार्य सम्पादित किये जा सकते, जिनका परिणाम अपराध का घटित होना है, तब धारा 34 भा०दं०सं० यह व्यवस्था करती है कि प्रत्येक व्यक्ति उस अपराध के लिए उसी प्रकार दोषी है, जैसे कि यह कार्य अकेले उसी के द्वारा किया गया हो। नजीर नन्दू रस्तोगी बनाम

बिहार राज्य AIR 2002 सुप्रीम कोर्ट 3443 के अनुसार धारा 34 भा०दं०सं० के लागू होने के लिए यह आवश्यक नहीं है कि प्रत्येक व्यक्ति ने मृतक पर प्रहार किया हो। अभियोजन के लिए केवल यह साबित करना पर्याप्त है कि जिस अभियुक्त द्वारा जो कार्य बताया गया है, वह कार्य अभियुक्त के द्वारा किया गया है। नजीर देवीलाल बनाम राजस्थान राज्य AIR 1971 सुप्रीम कोर्ट 1444 में व्यवस्था दी गयी है कि धारा 34 भा०दं०सं० के प्रावधान लागू करने के लिए आवश्यक है कि सभी अभियुक्तों का घटना से पूर्व घटना घटित करने का विचार-विमर्श करते हुए कोई प्लान हो। प्रस्तुत केस में अभियुक्त अरुण द्वारा ट्रैक्टर चढ़ाने के बावजूद शेष अभियुक्त भी भारतीय दण्ड संहिता की धारा 34 के अन्तर्गत प्रशान्त की हत्या करने के लिए मारपीट कर रहे थे।

ज- मृतक के शव परीक्षण आख्या के अनुसार मृतक प्रशान्त के शरीर पर 8 चोटें मौजूद थीं। अभियोजन साक्षी सं०- 7 डॉ० चन्द्रशेखर के बयान के अनुसार चोट संख्या 1 में (Brain), यानी कि दिमाग सिर से अलग हो चुका था। मृतक के शरीर पर अनेक नीलगू निशान तथा खरोंच के निशान मौजूद थे। डॉक्टर द्वारा बयान दिया गया है कि वाहन चढ़ाने के कारण ये चोटें आना सम्भव है। यद्यपि डॉक्टर द्वारा लाठी-डण्डे के प्रयोग से इनमें से कुछ चोटों की उपस्थिति के संबंध में कोई कथन नहीं किया गया है। यथार्थ में इस बिन्दु पर अभियोजन की ओर से कोई प्रश्न ही नहीं पूछा गया, परन्तु मृतक के शरीर पर मौजूद 8 चोटें, जिनमें से सिर से दिमाग अलग होने के अलावा शेष चोट नीलगू निशान और खरोंच के निशान हैं। अतः इस प्रकृति की चोट मृतक के ऊपर ट्रैक्टर चढ़ाने एवं लाठी-डण्डों से मारपीट करने से, यानी दोनों तरीकों से आ सकती हैं। इस प्रकार अभियोजन साक्षियों द्वारा जिन तरीकों से मृतक के शरीर पर चोट कारित करना बताया गया है, पोस्टमार्टम रिपोर्ट एवं अभियोजन साक्षी सं०- 7 के बयान के अनुसार उन्हीं तरीकों/प्रकृति की चोटें मृतक के शरीर पर मौजूद हैं। अतः अभियोजन साक्षियों की मौखिक साक्ष्य की पुष्टि मेडिकल साक्ष्य से होती है। नजीर देवेन्द्र तथा अन्य बनाम उत्तर प्रदेश राज्य 2007 (7) ए०एल० जे० 57 में व्यवस्था दी गयी है कि जब अभियोजन साक्षी द्वारा दी गयी घटना का विवरण मेडिकल साक्ष्य से

साबित हो, तब दोषसिद्धि उचित है। एक अन्य नजीर उत्तर प्रदेश राज्य बनाम सर्वजीत 2005 इलाहाबाद दण्ड निर्णय 511 में धारा 101 व 102 भारतीय साक्ष्य अधिनियम की व्याख्या की गयी है और व्यवस्था दी गयी है कि जब किसी घटना के संबंध में अभियोजन साक्षियों का साक्ष्य चिकित्सीय साक्ष्य से समर्थित हो, तो उसे अस्वीकार नहीं किया जा सकता।

झ- अभियोजन साक्षी सं०-8 विवेचनाधिकारी आदित्य प्रकाश ने बयान दिया है कि दिनांक 18.10.2016 को अभियुक्त अरुण कुमार को सुबह 08:30 बजे गिरफ्तार किया गया और उसका बयान अंकित किया गया। इसने बताया कि जिस डण्डे से मृतक प्रशान्त उर्फ शेर सिंह को मारकर घायल किया गया था और बाद में ट्रैक्टर चढ़ा दिया था, वह डण्डा ड्राइवर की दाहिनी तरफ सीट के नीचे घुसा दिया था। अभियुक्त अरुण कुमार द्वारा इस डण्डे को बरामद कराया गया, साथ ही विवेचनाधिकारी द्वारा घटना में प्रयुक्त ट्रैक्टर को भी बरामद किया गया तथा फर्द तैयार की गयी, जो पत्रावली पर क्रमशः प्रदर्श क-14 एवं प्रदर्श क-15 हैं। किसी अन्य अभियुक्त की निशानदेही से कोई डण्डा बरामद नहीं हुआ है। इस बिन्दु पर भी विधिक स्थिति स्पष्ट है कि घटना में प्रयुक्त हथियार की बरामदगी हर परिस्थिति में आवश्यक नहीं है। अतः शेष अभियुक्तों द्वारा जो डण्डें प्रयुक्त किये गये, उनकी बरामदगी न होने का अभियोजन केस पर कोई विपरीत प्रभाव नहीं है, परन्तु अरुण कुमार की निशानदेही पर जो डण्डा बरामद हुआ है, वह अभियोजन केस की पुष्टि में सहायक है।

ट- अग्रिम विवेचनाधिकारी अभियोजन साक्षी सं०- 10 जितेन्द्र कुमार सिंह के अनुसार अभियुक्त उमेश कुमार लगातार फरार रहा। इस अभियुक्त के विरुद्ध धारा 83 दण्ड प्रक्रिया संहिता के अन्तर्गत उदघोषणा प्राप्त की गयी, परन्तु यह अभियुक्त लगातार फरार चलता रहा, इसलिए इस अभियुक्त के विरुद्ध धारा 174ए भा०दं०सं० के अन्तर्गत आरोप पत्र प्रस्तुत किया गया और इस अभियुक्त ने दिनांक 09.01.2017 को न्यायालय में आत्मसमर्पण किया तथा अभियुक्त के विरुद्ध बाद में आरोप पत्र प्रेषित किया गया। अतः घटना के पश्चात सभी अभियुक्तों का घर से फरार होना उनकी अपराध में संलिप्तता को साबित करने

के उद्देश्य से भारतीय साक्ष्य अधिनियम की धारा 8 के अन्तर्गत एक सुसंगत तथ्य है। नजीर अनन्तचिंतामन बनाम बॉम्बे राज्य AIR 1960 सुप्रीम 500 में व्यवस्था दी गयी है कि घटना के पश्चात अभियुक्त का आचरण उसके विरुद्ध निर्दोष होने की अवधारणा को ध्वस्त कर देता है, सुसंगत होता है। एक अन्य नजीर सैफुद्दीन बनाम पश्चिम बंगाल 1984 क्रिमिनल लॉ जनरल एन०ओ०सी० 140, कोलकाता के अनुसार मृतक के मृत शरीर को तालाब से निकालने के पश्चात अभियुक्त घटनास्थल से फरार हो गया। अभियुक्त के इस आचरण को इस रूप से सुसंगत माना गया कि वह दोषी है।

ठ- हेतुक:- हत्या का हेतुक यह बताया गया है कि चारों मुल्जिमान लेन-देन के कारण रंजिश मानते थे। यह तथ्य पी०डब्लू० 1 द्वारा अपनी मुख्य परीक्षा में स्पष्ट किया गया है कि प्रशान्त के चार लाख रुपये इन चारों मुल्जिमान पर निकल रहे थे, भाई पैसे मांगता था, लेकिन ये लोग नहीं दे रहे थे। प्रशान्त ने इस साक्षी को इतना विवाद के बारे में बताया था।

ड- अभियोजन साक्षी सं०- 3 राजेश कुमार ने हेतुक के संबंध में निम्न बयान दिया है:- "मेरा भाई प्रशान्त और चारों मुल्जिमान मिलकर मिट्टी डालने की ठेकेदारी करते थे। मेरे भाई प्रशान्त का पैसा इन चारों लोगों पर निकल रहा था, जिसे वह मांगता था और ये लोग दे नहीं रहे थे, पैसे न देने के कारण ही इन चारों ने मिलकर मेरे भाई को मार डाला।" साई सीमेण्ट एजेंसी पर मृतक की मौजूद का तथ्य बचाव पक्ष की ओर से स्वीकार किया गया है, क्योंकि पी०डब्लू० 3 को यह सुझाव दिया गया है कि साई सीमेण्ट एजेंसी पर दुर्घटना के कारण उसकी मृत्यु कारित हुई है। पूछे गये प्रश्न का सुसंगत उत्तर निम्न प्रकार दिया गया है:- "यह भी गलत है कि भाई के साथ दुर्घटना मिट्टी डालते समय साई सीमेण्ट एजेंसी पर आराम करते हुए हुई हो।" अतः इस प्रकार बचाव पक्ष को यह स्थिति स्वीकार है कि मिट्टी डालने का कार्य मौके पर चल रहा था।

ढ- अतः साक्ष्य की उपरोक्त विवेचना के आधार पर अभियुक्तों के विरुद्ध भारतीय दण्ड संहिता की धारा 302 सपठित धारा 34 का आरोप संदेह से परे साबित होता है। सभी अभियुक्त प्रशान्त उर्फ शेर सिंह की हत्या अपने सामान्य आशय के अग्रसरण में करने के लिए दोषसिद्ध होने योग्य है।

२०- हमने उभय पक्ष के विद्वान अधिवक्ताओं के तर्कों को सुना तथा पत्रावली एवं विचारण न्यायालय के मूल अभिलेख पर उपलब्ध साक्ष्यों का परिशीलन किया एवं उन पर गहनतापूर्वक विचार किया। हमारा अभिमत है कि:-

क- मृतक के शरीर पर आयी चोट सं० 1 से 3 तक कुचलने की चोट (Crust Injury) है।

ख- शव विच्छेदन आख्या के अनुसार मृतक की चोट सं० 2 नीलगू निशान था, जिसका आकार 3 सेमी० X 6 सेमी० छाती की बांयी तरफ पीछे था, छठी एवं आठवीं पसली टूटी पायी गयी थी। चोट सं० 4 नीलगू निशान 2.5 सेमी० X 2 सेमी० कंधे के पीछे नीचे की ओर हड्डी टूटी हुयी थी तथा चोट सं० 8 खरोचदार नीलगू निशान, जिसका आकार 4 सेमी० X 3 सेमी० जो बांये बंधे पर थी, इसकी हड्डी टूटी हुयी पायी गयी थी।

ग- शव विच्छेदन करने वाले चिकित्सक के अनुसार मृतक के मृत्यु का समय लगभग ½ दिन पूर्व था। चार पहिए के वाहन चढ़ाने से सभी 8 चोटें आना सम्भव है।

घ- जहाँ तक अपीलार्थीगण के विद्वान अधिवक्ता का यह कथन है कि कथित रूप से लाठी-डण्डा की चोट होने पर मृतक के शरीर पर केवल चिरा-फटा (lacerated) की चोट आणी, अतः क्षति (Contusion) की चोट नहीं आणी, लेकिन हमारे अभिमत में लाठी-डण्डे की चोट होने पर Contusion एवं Lacerated दोनों आ सकते हैं, जिसका समर्थन मृतक के शव विच्छेदन आख्या में आयी हुयी चोटों को अवलोकन से परिलक्षित हो रहा है, चूँकि यह भी विदित है कि केवल अतः क्षति (Contusion) से हड्डी नहीं टूट सकती, जबकि इस मामले में मृतक की हड्डियां भी टूटी पायी गयी है।

च- जहाँ तक अपीलार्थीगण के विद्वान अधिवक्ता का यह कथन है कि तथाकथित घटना अभियुक्तगण ने नहीं कारित की बल्कि मृतक रोड के किनारे रात में चारपाई पर सो रहा था तथा किसी अज्ञात वाहन ने उस पर ट्रैक्टर चढ़ा दिया, किन्तु वे इस बात को साबित करने में असफल रहे हैं, अपितु ऐसी घटना का ना तो कोई तार्किक साक्ष्य उपलब्ध है, वरन् ऐसी घटना के घटित होना अभियोजन द्वारा प्रमाणित साक्ष्य के

परिप्रेक्ष्य में संभव भी नहीं है। इस स्तर पर उनका यह कथन इसलिए भी मान्य नहीं है, क्योंकि अभियुक्तगण ने विचारण न्यायालय के समक्ष अपने धारा 313 दं०प्र०सं० के बयान में इस तथ्य के संबंध में कोई उल्लेख नहीं किया है।

छ- अभियोजन साक्षियों के बयानों से स्पष्ट है कि मृतक प्रशान्त कुमार को अभियुक्तगण द्वारा बुलाकर ले जाते हुए अभियोजन साक्षियों द्वारा प्रत्यक्ष रूप से देखा गया है, तथाकथित घटना के दिनांक एवं समय पर ही मृतक की मृत्यु कारित की गयी है, मृतक के शव विच्छेदन आख्या से भी अभियोजन कथानक की पुष्टि होती है।

ज- घटनास्थल पर ट्रैक्टर की रोशनी होना तथा उसमें अभियुक्तगण को पहचानना अभियोजन साक्षियों के बयानों से स्पष्ट है, मृतक एवं अभियुक्तगण पहले से एक दूसरे से परिचित थे, साथ-साथ सड़क पर मिट्टी डालने का कार्य करते थे। मृतक एवं अभियुक्तगण के मध्य रूपयों के लेन देन की रंजिश थी, अभियुक्तगण द्वारा मृतक को पूर्व रंजिश के कारण मारने का हेतुक विद्यमान था।

झ- अभियोजन साक्षी सं० 1 व 2 के अनुसार चार अभियुक्त मोटरसाईकिल पर मृतक प्रशान्त को घर से लेकर चले गये और इसके बाद उसकी हत्या की सूचना प्राप्त हुयी, परन्तु हत्या से संबंधित घटना प्रत्यक्ष रूप से अभियोजन साक्षी सं० 3 राजेश कुमार द्वारा देखी गयी, इसलिए प्रश्नगत प्रकरण में अन्तिम दृश्य का सिद्धान्त लागू नहीं होता है, बल्कि प्रत्यक्ष रूप से घटना देखने का सिद्धान्त लागू होता है। इस प्रकरण में मृतक को अभियुक्तों के साथ देखने और इसके पश्चात उसकी लाश मिलने के आधार पर परिस्थितिजन्य साक्ष्य पर विचार किया जाना भी विधि सम्मत नहीं है।

ट- उपलब्ध साक्ष्य एवं अभियोजन साक्षियों के बयान से इस प्रकरण का तत्व एवं सार यही निकलता है कि सभी अभियुक्तों ने अपने सामान्य आशय की पूर्ति में मृतक के प्रति आपराधिक कृत्य किया और ट्रैक्टर चढ़ाने के समय सभी अभियुक्तगण मौके पर भौजूद थे, तथा सभी के सहयोग से मृतक पर ट्रैक्टर चढ़ाया गया।

ठ- अग्रिम विवेचनाधिकारी अभियोजन साक्षी सं० 10 जितेन्द कुमार सिंह के अनुसार अभियुक्त उमेश कुमार लगातार फरार रहा। इस अभियुक्त के विरुद्ध धारा 83 दण्ड प्रक्रिया संहिता के अन्तर्गत उद्घोषणा

प्राप्त की गयी, परन्तु यह अभियुक्त लगातार फरार चलता रहा, इसलिए इस अभियुक्त के विरुद्ध धारा 174ए भा०दं०सं० के अन्तर्गत आरोप पत्र प्रस्तुत किया गया और इस अभियुक्त ने दिनांक 09.01.2017 को न्यायालय में आत्मसमर्पण किया तथा अभियुक्त के विरुद्ध बाद में आरोप पत्र प्रेषित किया गया। अतः घटना के पश्चात सभी अभियुक्तों का घर से फरार होना उनकी अपराध में संलिप्तता को साबित करने के उद्देश्य से भारतीय साक्ष्य अधिनियम की धारा 8 के अन्तर्गत एक सुसंगत तथ्य है। नजीर **अनन्तचिंतामन बनाम बॉम्बे राज्य AIR 1960 सुप्रीम 500** में व्यवस्था दी गयी है कि घटना के पश्चात अभियुक्त का आचरण उसके विरुद्ध निर्दोष होने की अवधारणा को ध्वस्त कर देता है, सुसंगत होता है।

ड- इस प्रकरण में अपीलार्थीगण के विद्वान अधिवक्ता अपने तर्क एवं साक्ष्य से अभियोजन कथानक को संदेहास्पद साबित करने में असफल रहे हैं।

२१- इस प्रकार विचारण न्यायालय ने अभियुक्तगण अरूण कुमार यादव, उमेश कुमार, अरविन्द कुमार एवं रूचित सिंह को धारा 302 भा०दं०वि० सपठित धारा 34 भा०दं०वि० के विरुद्ध दोषसिद्ध एवं दण्डित किया है। विचारण न्यायालय द्वारा अपने निर्णय में साक्ष्य के समस्त बिन्दुओं पर विस्तृत चर्चा किया, माननीय उच्चतम न्यायालय की विभिन्न नजीरों के आधार पर समुचित निर्णय/आदेश पारित किया है, जिसमें किसी भी प्रकार के क्षेत्राधिकारी संबंधी या विधिक रूप से कोई त्रुटि परिलक्षित नहीं हो रही है एवं प्रश्नगत आदेश/निर्णय पुष्ट किये जाने योग्य है।

२२- तदुसार, यह दोनों दाण्डिक अपीलें **निरस्त** की जाती है तथा सत्र न्यायाधीश औरैया द्वारा पारित प्रश्नगत निर्णय/आदेश दिनांकित 22.06.2019 की पुष्टि की जाती है।

२३- अभियुक्तगण को इस न्यायालय की अन्य न्यायपीठ द्वारा पारित आदेश दि० 10.08.2022 के द्वारा जमानत पर मुक्त किया गया है, उनकी जमानत निरस्त की जाती है।

२४- संबंधित न्यायालय को निर्देशित किया जाता है कि अभियुक्तगण अरूण कुमार यादव, उमेश कुमार, अरविन्द कुमार एवं रूचित सिंह को नियमानुसार अभिरक्षा में लेकर उन्हें प्रश्नगत निर्णय/आदेश, दिनांकित 22.06.2019 का अनुपालन सुनिश्चित

करने हेतु कारागार में निरूद्ध कर दिया जाये तथा प्रतिभूओं को नियमानुसार उन्मोचित कर दिया जाए।

२५- कार्यालय को निर्देश दिया जाता है कि विचारण न्यायालय को अभिलेख वापस भेज दिया जाय तथा इस आदेश की एक प्रतिलिप संबंधित विचारण न्यायालय को अनुपालन हेतु अविलंब प्रेषित करना सुनिश्चित किया जाय।

(2025) 1 ILRA 657

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.01.2025

BEFORE

**THE HON'BLE SIDDHARTH, J.
THE HON'BLE SUBHASH CHANDRA
SHARMA, J.**

Crl. Misc. Writ Petition No. 4818 of 2022
With

Crl. Misc. Writ Petition Nos. 4820 of 2022, 4870
of 2022 & 3586 of 2022

Firoj Malik **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri J.B. Singh, Sri Rajiv Lochan Shukla

Counsel for the Respondents:
G.A.

Criminal Law-The Uttar Pradesh Police Regulation-228 to 252 - The Constitution of India, 1950-Article 14, 19 & 21-Opening of HISTORY SHEET-Before opening of history sheet of Class-A or Class-B against any citizen of the St., he should be given one opportunity to submit his objection before it is accepted by higher official of the police and before such officer directs opening of any Class of history sheet against a citizen---While directing opening of history sheet of Class -A and Class -B, the higher police authority shall record his reasons for directing opening of history sheet of any Class after considering the objection of the citizen filed against the report of the police station.---Impugned history sheet/sheets quashed---Directions issued to St. govt. to look

into the procedure of opening of history sheet and make/ issue necessary amendments/guidelines for providing opportunity of objection to the person, against whom, the police submits report recommending the opening of history sheet of Class-A or Class-B before the Senior Police Official---St. Government will also provide for review of the history sheets opened against the citizen, every year, so that, in the cases where implication of persons against whom history sheet was opened and who have been subsequently exonerated/acquitted of the criminal charges, their history sheets are closed and shadow of surveillance by police on their life and liberty gets removed. (Para 26, 27 & 28)

Petitions allowed. (E-15)

List of Cases cited:

1. Criminal Misc. Writ Petition No.9174 of 2022, Aftab Alam Vs St. of U.P. & ors.
2. Mangi Lal Vs St. of M.P., (2004) 2 SCC 447
3. Munna Lal Gupta Vs St. of U.P. & ors., reported in 2016 SCC Online All 3023

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri J.B. Singh and Sri Rajiv Lochan Shukla, learned counsel for the petitioner; Ms. Manju Thakur, learned A.G.A.-1 for the State-respondents and perused the material on record.

2. The petitioners in Criminal Misc. Writ Petition No. 4818 of 2022 (Firoz Malik), in Criminal Misc. Writ Petition No. 4820 of 2022 (Sajid Malik), and Criminal Misc. Writ Petition No. 4870 of 2022 (Imran Malik) are sons of Nizam Malik, the petitioner, in Criminal Misc. Writ Petition No. 3586 of 2022. History sheets have been opened against all of them on the basis of implication in common cases. Hence the above noted writ petitions preferred by three sons and their father

named above are being decided by this common judgement.

3. The above noted writ petitions have been filed by all the petitioners praying for quashing the impugned order dated 16.6.2021 passed by respondent no.3, Deputy Commissioner of Police, Greater Noida, District Gautam Budh Nagar, whereby approval for opening history sheet of Category-B against the petitioners has been granted. Further prayer has been made for directing the respondents to stop surveillance of the petitioners in pursuance of the aforesaid order passed by respondent no.3.

4. The brief facts pleaded in the writ petition no.4818 of 2022 are that the petitioner is a businessman and has established his firm/ company in the name of Auctus E-recycling Solution Private Limited, M/s Hindustan Metals and is running his business and paying income tax to the government. A politically motivated Case Crime No.336 of 2019, Police Station – Site-5, Greater Noida, was registered against the father of the petitioner and others under Section 2 of U.P. Gangsters and Anti – Social Activities (Prevention) Act, 1986, on 30.12.2019 without there being any prior criminal history of his father (Nizam Malik) against which he approached this Court whereby Criminal Misc. Writ Petition No. 140 of 2020 and interim order was passed in his favour. After counter affidavit was called in the aforesaid writ petition, the police realized that it would be difficult to resist the challenge to the FIR lodged under Gangsters Act before this Court hence Case Crime No.408 of 2020, under Section 386 IPC was got registered against the petitioner, his brothers and father, named above, on 30.7.2020 with the help of one,

Azad Kumar, at Police Station – Bit-2, District Gautam Budh Nagar. Petitioner, his father and brothers were enlarged on anticipatory bail in the aforesaid case, but subsequently charge-sheet was filed and it was challenged before this Court by means of Criminal Misc. 482 Cr.P.C. No. 11237 of 2021. On the basis of aforesaid FIR dated 30.7.2020, the petitioners were implicated in a case under Gangsters Act, being Case Crime No. 710 of 2020, Police Station – Kasna (Now Bit-2), District Gautam Budh Nagar on 10.11.2020 and they were enlarged on bail by Special Judge, Gautam Budh Nagar, on 10.3.2021. On the basis of aforesaid criminal cases registered against the petitioner, his father and brothers, Station House Officer, Police Station – Bit-2, District Gautam Budh Nagar, submitted report before the respondent no.3 on 17.4.2021 for opening Class-'B' history sheet of the petitioner, his father and brothers. The respondent no.3 by the impugned order dated 16.6.2021 has accepted the same and directed opening of history sheet bearing H.S. No. 21(B), which is subject matter of challenge before this Court. The petitioners made number of representations against the same before the respondent no.3 and higher authorities, but in vain.

5. Learned counsel for the petitioners has submitted that prior to lodging of first information dated 30.7.2020, registered as Case Crime No.408 of 2020, under Section 386 IPC, Police Station Kasna (Now Bit-2), District Gautam Budh Nagar, there were no criminal antecedents of the petitioners. The police has tried to connect the petitioners with Sunder Bhati Gang or Navin Bhati Gang, with whom the petitioner (Nizam Malik) had no connection. Rather the aforesaid gang had threatened the petitioner

and his family members and his brother, Imran Malik, lodged FIR against three members of Sunder Bhati Gang on 20.7.2018 registered as Case Crime No.203 of 2018, under Sections 386, 392 IPC and the police submitted charge-sheet against the accused on 19.9.2018. There are only two cases registered against the petitioner being Case Crime No.408 of 2020, under Section 386 IPC and Case Crime No.710 of 2020, under Section 2/3(1) of U.P. Gangsters Act, Police Station – Bitra-2, District Gautam Budh Nagar and opening of history sheet of Category-B on their basis is absolutely unjustified. According to Section 228 of U.P. Police Regulation, the history sheet of criminals has been described in two parts, Class-A and Class-B; Class-B history sheets is opened for “confirmed and professional criminals, who commit crime other than dacoity, burglary, cattle-theft and theft from railway goods, wagons, e.g., professional cheats and other experts for whom criminal personal files are maintained by the Criminal Investigation Department. Class - B history sheets are opened for criminals involved in cases of offences other than these covered under Class-A. Opening of Class-B history sheet against the petitioners is unjustified and order passed against them deserves to be quashed.

6. Counter affidavit has been filed on behalf of State-respondents stating therein that vigil over the activities of the petitioner is required in the interest of society. The petitioner alongwith his father and brothers have formed a gang which is involved in number of crimes. Hence opening of history sheet against the petitioners is justified. They are habitual and professional criminals.

7. Rejoinder affidavit has been filed by learned counsel for the petitioner

wherein he has denied averments made in the counter affidavit.

8. A Division Bench of this Court in ***Criminal Misc. Writ Petition No.9174 of 2022, Aftab Alam Vs. State of U.P. and two others*** at the occasion of considering the object behind opening of history sheets as follows:-

“3. When the term "history-sheeter" is mentioned, it conjures an image of a seasoned criminal with an extensive record. The question arises: who exactly are these history-sheeters, and how does the police categorize someone as such? What disadvantages does a criminal face after being labeled a history-sheeter, and what consequences does it entail? These queries find answers in the following exploration.

4. In essence, a history sheeter is a designation employed by the police to identify individuals with a significant criminal history. This label is affixed to those who have been implicated in numerous offenses, with the details of their criminal activities duly recorded by the police. Before initiating the history sheet for any offender, the police verify the individual's current criminal status.

5. The process begins when an individual, already proven guilty in multiple cases and/or consistently engaging in criminal activities, attracts the attention of the police station's SHO. A report is subsequently sent to the SSP or SP, and upon receiving the necessary orders, the history sheet is opened. This comprehensive document

contains detailed information about the criminal, including a criminal profile, associates, and known relatives. In certain scenarios, where individuals hesitate to report crimes related to organized rackets or extortion, the police, relying on local sources, maintain surveillance on such potential threats to society. The opening of history sheets is guided by calls, daily entries in the police control room, and the ongoing assessment of those posing a danger to society.

6. The presence of a history sheet serves as a deterrent, as it subjects the criminals to constant police scrutiny. Once a history sheet is opened, the criminals are required to regularly register their presence at the police station; failure to comply prompts the police authorities to visit their residences. Furthermore, a history sheet aids in tracing the source of income for criminals, enabling authorities to determine whether they have transitioned to legitimate means of earning. This scrutiny helps identify instances where an individual, previously engaged in illegal activities, displays signs of leading a luxurious lifestyle despite being unemployed.

7. The process of opening "History Sheet" is governed by the Police Rules of the concerned State or the Act governing habitual offenders.

8. Criminals often attempt to evade capture by frequently changing addresses. To counter this, the police communicate with other districts or States, sharing information about potential areas

of relocation and requesting vigilant monitoring. Employing various strategies like crime mapping and identifying hot spots, law enforcement aims to curb criminal activities and maintain public safety.

9. History sheets are analogous to our criminal intelligence databases, but are more subject to legal constraints. At the same time, they are more vulnerable to public disclosure because they call for intensive and frequently conspicuous monitoring both by police and civilian leaders.

10. Since the days of the British regime, Indian police departments have created history sheets for persons believed to pose a risk of future criminality. The "history-sheeters" may have been convicted, or have criminal charges pending. History sheeters are subject to monitoring and surveillance. In India, the system of maintaining criminal record varies from State to State. All States require automatic creation of a history sheet for persons with certain criminal records. For example, Tamil Nadu requires creation of a history sheet for a person convicted once of a serious violent crime, twice for house breaking, three times for theft and certain other offenses. The police generally also have discretion to create a history sheet on an individual who has not been convicted, but whom police consider "addicted to crime" or a threat to public order. The police must have an articulable reason for creating a history sheet and they

must notify the record-subject that a history sheet has been opened.

11. The police, with the assistance of the village officials are obliged to surveil and record information about the activities and movements of history-sheeters who reside in their jurisdiction. There are court restrictions and police best practise guidelines, varying from State to State, on the level of permissible monitoring and surveillance. There are many factors regulating when a history sheet can be opened, how long it can be kept and the intensity of surveillance that it authorizes. Courts have held that surveillance of history-sheeters must not be excessive. For example, some State courts and some police agencies have issued guidelines stating that first-time history-sheeters should be especially closely watched; surveillance should be discrete; domiciliary visits are not permitted; family members must not be harassed; police officers should make periodic and routine inquiries about the history-sheeter's habits, associations, income, expenses and occupation; the police officers shall record history-sheeter's movements and absences from his domiciliary home or area where he lives, and the like guidelines.

12. The history sheet has been subject to constitutional challenge on privacy grounds. The Supreme Court has recognized that police surveillance based upon a history sheet implicates a limited right to privacy implicit in the Constitutional right to life and

personal liberty. According to the Court, every individual's autonomy should be respected; there is a right to be left alone. However, the right to privacy is not absolute and the creation of a history sheet and surveillance of the history-sheeter is not unconstitutional if carried out in compliance with legal standards or, in the absence of standards, if conducted reasonably. In one case, the Hon'ble Supreme Court struck down home visits as infringing on the right to personal liberty and freedom of movement.

13. Police is supposed to update the file periodically with both favorable and unfavorable information gathered via routine police patrols and enquiries. Such information should be recorded impartially, not with an eye toward compiling a negative case against the record-subject. The history sheet, including a photo of the history-sheeter, is a confidential record. The police is not authorized to disclose to public or private employers whether a job applicant or employee is a history-sheeter, much less what information the history sheet contains. However, the surveillance/crime control purpose of the history sheet requires that police officers have easy access to the history sheet. Local police can only monitor and surveil record-subjects if they know who they are. The history sheet is supposed to be shared with the Railway Police. If the history-sheeter moves to another jurisdiction, the history sheet is transferred to the new jurisdiction's police department. Moreover, for

proper reasons, the police may show the public a history-sheeter's photos, when necessary, to capture a fugitive or solve a crime.

14. In sum, Indian law and policy recognize that police records, though necessary for crime control, implicate privacy and individual autonomy. The courts have struggled to regulate the history sheet system by providing court review for individuals objecting to their history sheet designation and by limiting police discretion to open, maintain and conduct surveillance.

15. When above is the situation and philosophy behind opening of history sheets and to keep the history sheeters on surveillance depending on the circumstances, can it be said that opening of history sheet or continuing with the surveillance is stigmatic in so far as the individual is concerned and whether permanent closure of history sheet or its quashing by a court of law would at all be justified? The answer would be – No. The reason is that the police needs a mechanism to control the crime, both individual and organized. Surveillance of suspects, habitual and potential offenders, may be necessary and so the maintenance of history sheet and surveillance register for the purpose of prevention of crime. Permissible surveillance is only to the extent of a close watch over the movements of the person under surveillance and no more. Further, transfer of police officials from one place to other on frequent basis is a normal

phenomenon in India. During their short tenure at a particular place of posting, concerned police officers may have some inputs about a criminal but after they leave that particular place and new officer joins, as to what would be the data available with the new incumbent to know about the criminal activities in a particular area, village or city, is a matter of significance. Past record, including a history sheet as well as record of keeping a history sheeter under surveillance, therefore, would then be a guiding factor. A history sheet, therefore, is simply a sacrosanct idea to have inputs and information about criminals and their past record for a better police administration.”

9. Provisions concerning history sheets, as contained under U.P. Police Regulations are reproduced as under:-

“228. Part V consists of history sheets. These are the personal records of criminals under surveillance. History-sheets should be opened only for persons who are or likely to become habitual criminal or abettors of such criminals. There will be two classes of history-sheets:

(1) Class A history-sheets for dacoits, burglars, cattle-thieves, railway-goods wagon thieves, and abettors thereof.

(2) Class B history-sheets for confirmed and professional criminals who commit crimes other than dacoity, burglary, cattle-theft, and theft from railway goods wagons, e.g., professional cheats

and other experts for whom criminal personal files are maintained by the Criminal Investigation Department, poisoners, cattle poisoners, railway passenger thieves, bicycle thieves, expert pick-pockets, forgers, coiners, cocaine and opium smugglers, hired ruffians and goondas, telegraph wire-cutters, habitual illicit distillers and abettors thereof.

History-sheets of both classes will be maintained in similar form, but those for class B will be distinguished by a red bar marked at the top of the first page. No history-sheet of class B may be converted into a history-sheet of class A, though should be the subject of a history-sheet of class B be found to be also addicted to dacoity, burglary, cattle-theft or theft from railway goods wagons. A class, as well as B class, surveillance may under paragraph 238 be applied to him. In the event of a class A history-sheet man becoming addicted to miscellaneous crime his history-sheet may be converted into a class B history-sheet with the sanction of the Superintendent.

229. This classification of history-sheets as A and B is based on the principle that, whereas there is always hope of a dacoit, burglar, or cattle thief or railway goods wagons thief mending his ways, the expert miscellaneous criminal is as a general rule incapable of reform. The classification, therefore, solely on the kind of crime to which suspects are addicted and is designed to regulate only-

(1) the length of time for which a suspect should ordinarily remain, under surveillance in the absence of complaints against him, (2) the kind of surveillance which his activities require.

The degree of surveillance of the appropriate kind to be exercised over a suspect will depend not on his classification, but on the extent to which he is believed to be active at any particular time.

230. If the subject of an A class history-sheet is thought to be so dangerous or incorrigible as to require more protracted surveillance than the generality of his class, he may be "started" by the order of the Superintendent. Here, again, the fact that a history-sheet man is started will necessarily indicate only that he is to be kept under continuous surveillance for a longer period. It will not necessarily indicate that his surveillance while it lasts is to be more intense. The aim is to concentrate the most intense surveillance on the criminal, whether starred or unstarred, who is believed to be temporarily active.

Superintendent of district police may not give orders for the starring of or discontinuance of surveillance over any history-sheeter of a railway police suspect without the concurrence of the Superintendent of Government Railway Police.

231. The subjects of history-sheets of class A will unless they are "starred" remain under surveillance for at least two consecutive year of which they

have spent no part in jail. When the subject of a history-sheet of class A whose name has not been "starred" who has never been convicted of cognizable offence and has not been in jail or suspected of any offence or absented himself in suspicious circumstances for two consecutive years his surveillance will be discontinued, unless for special reasons to be recorded in the inspection book of the police station the Superintendent decides that it should continue.

When the subject of a history-sheet of class A is "starred" he will remain starred for at least two consecutive years during which he has not been in jail or been suspected of a cognizable offence or had any suspicious absence recorded against him. At the end of that period if he is believed to have reformed he will cease to be "starred" but will remain subject to surveillance will be discontinued only if during that period no complaints have been recorded against him.

In closing the history-sheets of an "unstarring" ex-convicts and especially ex-convict dacoits great care should be exercised.

232. 'B' Class History Sheets- History-sheet of 'B' class will be continuously open records and the subjects of these sheets will, except for very special reasons remain under surveillance until death. This being so it is unnecessary to 'star' suspects of this class.

233. The discontinuance of surveillance of the subject of a

history-sheet does not entail closing that history-sheet. A history-sheet which is only a record of information need never be considered closed. In the case of persons whose surveillance is discontinued a note should be made to this effect in the history-sheet, and thereafter no periodical or other entries need be made unless something comes to notice which it is desirable to enter in the sheet. Sheets persons whose surveillance has been discontinued should remain in these village crime-note book but if the number is as much as to make the volume too bulky, they should be kept in a separate volume attached to the note-book. They will only be destroyed on the death of the subject of the sheet, or if, on opinion of the Superintendent their further retention is not likely to be of any value.

234. No history-sheet of class A may be discontinued without the sanction of the Superintendent of Police. If it is denied to discontinue the surveillance of the subject of a history sheet of class B, the sanction of the Deputy Inspector-General or Superintendent, Railway Police, must be obtained. Proposals from station officers for the discontinuance of history-sheets and for the "starring or unstarring" of a class suspects must be made through the circle inspector unless dealt with directly by a gazetted officer in the course of an inspection.

240. History-sheets of both classes may be opened (1) on suspicion or (2) on conviction or

acquittal. No history-sheet may be opened without the orders of the Superintendent of Police.

(1) On suspicion.- Whenever as a result of investigation into a case of dacoity, burglary, cattle theft from railway goods wagons or into a case of miscellaneous crime of a professional type, the officer-in-charge of a police station applies for the name of any person to be entered in the crime register as reasonably suspected, he must at the same time report whether the suspect is under surveillance, and if not, whether a history-sheet should in his opinion be opened for him. Should the gazetted officer-in-charge of a subdivision on receiving such a report and after such further inquiry as he may think necessary consider that a history-sheet is required he will forward the report to the Superintendent who if he accepts the proposal will define the class of history-sheet to be opened and pass orders as to whether the suspect should be 'starred'. Similarly whenever an officer-in-charge of a police station finds reason to believe, otherwise than in the course of an investigation, that any resident of his circle is addicted to crime, or whenever a gazetted officer or circle inspector for any reason believes that a history-sheet for any person is necessary a report must be submitted to the Superintendent, who will pass orders on it as laid down above.

(2) On conviction or acquittal.- Whenever any person is sent for trial on a charge of

dacoity, burglary, cattle theft or theft from a railway goods wagons or of miscellaneous crime of a professional type, the officer-in-charge of the police station must state in his diary whether the accused has a history-sheet and if not, whether he recommends that a history-sheet should be opened for him. It will be the duty of the public prosecutor, if the accused is acquitted to inform the Superintendent, in his report on the acquittal or otherwise, whether in his opinion a history-sheet is required. On this the Superintendent will pass any orders to the station officer that may be necessary. If the accused is convicted, the public prosecutor must, in the remarks column of the daily report of convictions and acquittals (Form No. 107) enter in red ink the words, 'On H.S.' if a history-sheet is already open, or the letters 'H.S.' if he recommends that one should be prepared. In either case he must prepare and attach to the daily report of convictions and acquittals a P.R. slip (Form No. 313). If a history-sheet is already open or if the Superintendent agrees that a history-sheet should be opened he will sign this P.R. slip and initial the letters 'H.S.' or 'On H.S.' on the daily report of convictions and acquittals. The public prosecutor will then communicate the Superintendent's orders for the opening of a history-sheet to the police station concerned and will forward the P.R. slip to the Superintendent of Jail. If no history-sheet is opened and if the

Superintendent does not agree that one should be prepared, he will not sign the P.R. slip, which will be cancelled.

10. It is clear from the pleadings on record that the father of the petitioners, Nizam Malik, was implicated in Case Crime No.336 of 2019, under Section 2 of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986, Police Station Kasna (Bita-2), District Gautam Buddh Nagar and on its basis, petitioner and his brothers, namely, Sajid Malik and Imran Malik and his father were subsequently implicated in Case Crime No. 408 of 2020, under Section 386 IPC by the same police station and at the time of filing of writ petitions and exchange of affidavits, charge-sheet had been submitted against the petitioners named above. Subsequently, the petitioner and his brothers were implicated in Case Crime No.710 of 2020, under Sections 2/3(1) of U.P. Gangsters Act. There are no other criminal antecedents of the petitioners on record. In Case Crime No.336 of 2019, under Section 2 of Gangsters Act, only father of the petitioners, namely, Nizam Malik, was implicated and therefore, against three petitioners, namely, Firoz Malik, Sajid Malik and Imran Malik, there was only one case registered at that time under Section 386 IPC. Aforesaid case shows that FIR was lodged by two private persons, namely, Azad Kumar, s/o Dharmvir Singh and Rajkumar, s/o late Balraj, residents of village Dadupur, Police Station Dankaur, District Gautam Buddh Nagar. There is allegation in the FIR against the petitioners and five named and 9-10 unknown accused regarding commission of offence of extortion. On the basis of above implication, the petitioner and his brothers were implicated in Case Crime No.710 of

2020, under Sections 2/3(1) of U.P. Gangsters Act. The implication of the father of the petitioners, namely, Nizam Malik, under Section 2 of U.P. Gangsters and Anti Social Activities Prevention Act, 1986 was without any base case. 54 persons were implicated in the aforesaid case alongwith the father of the petitioners and the arrest of the father of the petitioner was stayed by this Court in Criminal Misc. Writ Petition No. 140 of 2020 vide order dated 10.1.2020.

11. To arrive at a just and proper conclusion, it is necessary to consider what are the parameters that should be followed by the police before opening history-sheet of a person.

12. There is a whole chapter in the Police Regulation, namely, Chapter XX with a Heading called "REGISTRATION AND SURVEILLANCE OF BAD CHARACTERS". The entire Chapter consists of Regulation 223 to Regulation 276. Relevant Regulations for our purpose would be Regulations 223 to 252. A perusal of these regulations shows that the entire tone and tenor of these regulations reflect the then colonial state of mind as it speaks of "Criminal Tribe Act", (an Act, which has already been repealed in the year 1956) and further provisions are also reflective of a bygone colonial era where a group or individuals or castes were recorded as "criminal tribes" and put under surveillance. It speaks of "habitual criminals" and not only this it goes on to say that there are certain types of criminals, who are "incapable of reform".

13. The challenge here is limited, but legality of the various provisions of the "Police Regulations", appear to be draconian. Reference to the seemingly

repulsive provisions of the Police Regulations is to give an idea of the time and era when such Regulations were framed under the Police Act, 1861.

14. Regulation 228 of the Police Regulations speaks about two classes of history-sheets "Class-A" and "Class-B". Class A is a history-sheet for dacoits, burglars, cattle-thieves, railway-goods wagon thieves, and abettors thereof and Class B is history-sheet for confirmed and professional criminals who commit crimes other than dacoity, burglary, cattle-theft, and theft from railway goods wagons, e.g., professional cheats and other experts for whom criminal personal files are maintained by the Criminal Investigation Department.

15. For the authors of this Police Regulations, the two set of crimes (i.e. Class "A" and Class "B") are of entirely different nature. Regulation 228 of the U.P. Police Regulations further states that though the manner in which the records of surveillance and manner in which the history-sheet is to be opened in Class "A" or in Class "B" is the same, yet where a Class "B" history-sheet is opened it has to be opened with a red bar mark at the top of the first page and never can Class "B" history-sheeter be converted into a Class "A" history-sheeter, though in case, a person, who is under Class "B" is also seen of indulging in crime relating to history Class "A" then surveillance of both types of crimes have to be opened against him. However, it is possible that the history-sheeter of Class "A" is converted into a history-sheeter of Class "B".

16. Normally one has to assume that since history-sheet of Class "A" carries with it crimes of greater magnitude such as

dacoity, burglary etc., the history-sheet opened in such cases is of a more serious nature. But this is not true, in fact reverse is the truth. As per Regulation 229 of the U.P. Police Regulations the classification of history-sheet as "Class A" and "Class B" are based on the principle that whereas there is always hope of a dacoit, burglars, or cattle thieves or railway-goods wagons thief mending his ways, the expert miscellaneous criminal (of Class "B" history-sheet) is as a general rule "incapable of reform". The classification, therefore, is solely on the kind of crime to which suspects are addicted to and it is designed to regulate. Regulation 229 of the Police Regulations reads as under:-

"229. This classification of history-sheets as A and B is based on the principle that, whereas there is always hope of a dacoit, burglar, or cattle thief or railway goods wagons thief mending his ways, the expert miscellaneous criminal is as a general rule incapable of reform. The classification, therefore, solely on the kind of crime to which suspects are addicted and is designed to regulate only- (1) the length of time for which a suspect should ordinarily remain, under surveillance in the absence of complaints against him. (2) the kind of surveillance which his activities require. The degree of surveillance of the appropriate kind to be exercised over a suspect will depend not on his classification, but on the extent to which he is believed to be active at any particular time."

17. There is a further classification of history-sheeter of Class "A". The more

serious nature of the persons under surveillance is the "starred" category. Their surveillance is more vigorous and have a greater length of time whereas since a history-sheeter of Class "B" is "incapable of reform", as per the authors of the Police Regulations. The Regulations 232 of the Police Regulations says that it is not necessary to star suspects of Class "B". Regulation 232 of the Police Regulations reads as under:-

"232. History-sheet of B class will be continuously open records and the subjects of these sheets will, except for every special reasons remain under surveillance until death. This being so it is unnecessary to star suspects of this class."

18. Director General of Police, U.P., vide communication dated 03.11.2022, has framed guidelines under the U.P. Police Regulation to be followed by the respective Police Officers while opening/reviewing the History Sheet Class A category.

The guidelines reads as thus:

"ज्ञातव्य है कि उ०प्र० पुलिस रेगुलेशन के पैरा-228 में अभ्यासिक अपराधियों एवं उसके दुष्प्रेरक शीर्षक के अन्तर्गत दोनों वर्गों की हिस्ट्रीशीट को वर्गीकृत किया गया है। वर्ग "क" की हिस्ट्रीशीट में डकैत, संधमार, पशुचोर, रेल के डिब्बों के माल चोर और उसके दुष्प्रेरक वर्णित हैं, परन्तु दोनों वर्गों के लिए शीर्ष पर जो महत्वपूर्ण विश्लेषित है, वह अभ्यासिक अपराधी शब्द है। वर्ग "क" की हिस्ट्रीशीट को पुलिस रेगुलेशन के पैरा-231 के अन्तर्गत 02 वर्ष बाद पुनर्विलोकित किये जाने की प्रक्रिया अपनाए जाने का प्राविधान है, अतः मा० उच्च न्यायालय द्वारा निर्गत

आदेश के आलोक में हिस्ट्रीशीट खोले जाने की कार्यवाही को अधिक न्यायसंगत एवं वस्तुपरक बनाये जाने हेतु निम्नलिखित दिशा-निर्देश निर्गत किये जा रहे हैं-

1- 18 वर्ष से कम आयु के किसी भी व्यक्ति की हिस्ट्रीशीट नहीं खोली जायेगी।

2- हिस्ट्रीशीट खोलने के लिए उ०प्र० पुलिस रेगुलेशन के पैरा 228 से 240 तक का गहन अध्ययन करके उसी के अनुरूप कार्यवाही की जाये।

3- हिस्ट्रीशीट ऐसे व्यक्तियों की खोली जाये जिनके बारे में यह विश्वास करने का युक्तियुक्त आधार हो कि आदतन अपराधी है या हो सकता है। रूटीन में हिस्ट्रीशीट न खोली जाये।

1- हिस्ट्रीशीट ऐसे व्यक्तियों की खोली जाये जिनकी गहन निगरानी (Intense Surveillance) की आवश्यकता हो।

ii- जो ऐसे अपराधियों के दुष्प्रेरक हों अथवा उनका ऐसा होना सम्भावित हो।

iii- निजी रंजिश में दर्ज अभियोगों अथवा अन्य असंगत आधारों पर किसी व्यक्ति की हिस्ट्रीशीट न खोली जाये।

iv- उत्तर प्रदेश गिरोहबंद और समाज विरोधी क्रियाकलाप अधिनियम/उ०प्र० गुण्डा नियंत्रण अधिनियम के अन्तर्गत की गयी कार्यवाहियों को हिस्ट्रीशीट खोलने का आधार न बनाया जाये।

v- चूँकि हिस्ट्रीशीट जनपद के पुलिस अधीक्षक के आदेश से खोली जाती है, अतः वे पूर्णतया आधारों से संतुष्ट होने पर ही हिस्ट्रीशीट खोलने का अनुमोदन करें।

vi- थाना प्रभारी द्वारा प्रेषित हिस्ट्रीशीट का सम्बन्धित क्षेत्राधिकारी एवं अपर पुलिस अधीक्षक द्वारा सघन परीक्षण करने के उपरान्त ही वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक द्वारा हिस्ट्रीशीट खोलने अनुमोदित किया जाये।

4- उत्तर प्रदेश पुलिस रेगुलेशन के पैरा 228 में 276 में वर्णित प्रावधानों के अन्तर्गत 18 वर्ष से अधिक तथा 21 वर्ष तक के अपराधियों की हिस्ट्रीशीट खोलने से पूर्व वरिष्ठ अधीक्षक / पुलिस अधीक्षक द्वारा सूचनार्थ पुलिस महानिरीक्षक, सी.बी.सी.आई.डी. को इस आशय से प्रेषित की जायेगी कि उन्हें कोई आपत्ति हो तो पत्र प्राप्ति के दिनांक

15 दिवस के अन्दर वह अपनी टिप्पणी सहित सम्बन्धित जिला मुख्यालयों को भेजेंगे।

5- पुलिस महानिरीक्षक, सी.बी.सी.आई.डी. द्वारा यदि कोई आपत्ति व्यक्त की जाती है, तो जनपद के वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक द्वारा प्रकरण का परीक्षण किया जायेगा एवं यदि अब भी हिस्ट्रीशीट खोलने के लिए उपयुक्त पाया जाता है तो उसकी हिस्ट्रीशीट खोलकर इसकी सूचना पुलिस महानिरीक्षक, सी.बी.सी.आई.डी. को प्रेषित की जायेगी।

6- यदि पत्र की प्राप्ति के 15 दिनों के अन्दर पुलिस महानिरीक्षक, सी.बी.सी.आई.डी. द्वारा उक्त प्रकरण में कोई आपत्ति नहीं की जाती है तो यह मान लिया जायेगा कि उनको वरिष्ठ पुलिस अधीक्षक / पुलिस अधीक्षक द्वारा संस्तुत की गयी आख्या पर कोई आपत्ति नहीं है।

अतः आप सभी को निर्देशित किया जाता है कि उ०प्र० पुलिस रेगुलेशन के उपरोक्त पैरा एवं मुख्यालय स्तर से निर्गत निर्देशों/परिपत्रों का पुनः गहनता से अध्ययन कर लें एवं जनपद स्तर पर कार्यशाला का आयोजन कर अपने अधीनस्थ राजपत्रित अधिकारियों को विस्तार से अवगत करा दें और यह भी सुनिश्चित करें कि इन निर्देशों का कड़ाई से अनुपालन किया जाए।

19. A bare perusal of Regulation 228 would show that the language used therein is unambiguous and there is a clear mandate that history sheet can be opened only for persons who are or likely to become habitual criminal or abettors of such criminals. Classification of history sheets in Class 'A' and Class 'B' is also clearly spelt out and since challenge in the present writ petition has been laid to history sheet of Class 'B', sub-regulation (2) of Regulation 228 needs a look that clearly provides that such history sheet can be opened for 'confirmed and professional criminals' who commit crimes other than dacoity, burglary, cattle-theft etc etc, as described in the said sub-regulation.

20. Regulation 232, however, casts an obligation upon the authorities to keep history sheet continuously open and to keep the history sheet under surveillance until death. However, for such an action, the authorities have to record special reasons. Regulation 233 clearly provides that discontinuance of surveillance of the subject of a history sheet does not entail closing of the history sheet itself and the history sheet which is only a record of information need never be considered as closed. It casts a further obligation on the authorities to make a note as regards discontinuance of surveillance on the history sheet and, thereafter, no periodical or other entries need be made unless something comes to the notice of the authorities which is desirable to be entered in the sheet.

21. After perusal of the guidelines of Director General of Police, U.P. mentioned hereinabove, it is clear that as per sub clause (iii) the history sheet is not required to be opened, in Class- 'A' where the case has been lodged due to personal rivalry. In the present case, case under Section 386 IPC has been registered by private persons on account of business rivalry of sale/purchase of scrap with petitioners. In sub clause (iv) of the above guidelines, it is mentioned that implication in a case under U.P. Gangsters and Anti – Social Activities (Prevention) Act, cannot be basis of opening history sheet of Class - 'A'. Therefore it is clear that the history sheet has been opened against the petitioners by the impugned order dated 16.6.2021, which is against the clause (iii) and (iv) guidelines framed by Director General of Police, U.P. on 03.11.2022, but it applies to history sheet of Class- 'A' only and not to Class- 'B' history sheets. Hence it is of no help for the petitioners against

whom history sheet of Class - 'B' has been opened.

22. Further, the impugned order of Deputy Commissioner of Police, Greater Noida, Gautam Buddh Nagar, in this case does not show any application of mind. It only accepts the report of S.H.O. in-charge, Police Station Bitta-2, Gautam Buddh Nagar and District Committee. No reasons have been assigned for accepting the report aforesaid.

23. Police regulation is a pre-independence regulation when the Constitution of India had not come into existence, yet the requirements of Article 14 of the Constitution of India do not appear to have been observed in the acceptance of the report aforesaid and direction of opening history sheet against the petitioners. Even in the statute/regulation/rule/ law where the application of principle of natural justice has not been provided, the mandate of Article 14 of the Constitution of India is required to be read in such provisions.

24. The Apex Court in the case of **Mangi Lal Vs. State of M.P., (2004) 2 SCC 447**, has held in paragraph no.10 regarding the observance of mandate of Article 14 of the Constitution of India as follows:-

“Even if a statute is silent and there are no positive words in the Act or Rules made thereunder there could be nothing wrong in spelling out the need to hear the parties whose rights and interest are likely to be affected, by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides

otherwise. The principles of natural justice must be read into unoccupied interstices of the statute, unless there is clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand. Even in the absence of a provision in procedural laws, power inheres in every Tribunal/Court of a judicial or quasi-judicial character, to adopt modalities necessary to achieve requirements of natural justice and fair play to ensure better and proper discharge of their duties. Procedure is mainly grounded on principles of natural justice irrespective of the extent of its application by express provision in that regard in given situation. It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary intendment. (See Swadesi Cotton Mills etc. etc. v. Union of India etc. etc., AIR 1961 SC 818). Its aim is to secure justice or to prevent miscarriage of justice. Principles of natural justice do not supplant the law, but supplement it. These rules operate only in areas not covered by any law validly made. They are means to an end and not an end in themselves. The principles of

natural justice have many facets. Two of them are: notice of the case to be met, and opportunity to explain.

“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. [...] (emphasis supplied)”

25. In the context of Article 19 of the Constitution of India, this Court has considered the effect of opening of Class-‘B’ history sheets in the case of **Munna Lal**

Gupta Vs. State of U.P. and others, reported in 2016 SCC Online All 3023 as follows:-

“9. It is apparent that there exists no justification for continuance of his name being mentioned in history-sheet. It is also pertinent to know that four cases mentioned in history-sheet relate to year 1982, 1987 and 1988, but according to the counter affidavit, this Class-B history-sheet was opened in year 1979. None of the contentions of affidavit of petitioner filed alongwith the writ petition was denied in counter affidavit and only this much was mentioned that :

"However it is submitted that the history-sheet was opened by the Superintendent of Police on the basis of report submitted before him regarding involvement of petitioner in criminal case."

10. Thus it is apparent that without being involved in overt-act or any criminal activity, the Class-B history-sheet was opened for the petitioner in year 1979. It is evident that this history-sheet was opened without verifying the facts and without application of mind. Therefore, we are satisfied that there were no sufficient grounds for the Superintendent of Police to entertain a reasonable belief that the surveillance was required in the case of petitioner and there existed no evidence to support the fact that surveillance of the petitioner was necessary.

11. Article 19(1)(a) of the Constitution of India protects the fundamental right of a citizen when

it provides that 'all citizens shall have the right to freedom of speech and expression.' Article 19(1)(d) of the Constitution provides that 'all citizens shall have the right to move freely throughout the territory of India.' Article 21 of the Constitution protects the fundamental right of a citizen regarding his life and personal liberty when it reads that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. These fundamental rights are subject to reasonable restrictions.

12. This leads us to the question as to whether the petitioner's fundamental right under Art. 19 (1) (d) is also infringed by history sheet and surveillance. What is the content of the said fundamental right ? It is argued for the State that it means only that a person can move physically from one point to another without any restraint. This argument ignores the adverb "Freely" in clause (d). If that adverb is not in the clause there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom. Mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are

obviously constricted. He can move physically, but it can only be a movement of an automaton. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in clause (d) therefore must be a movement in a free country, i.e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do.

13. Assuming that Art. 19(1)(d) of the Constitution must be confined only to physical movements, its combination with the freedom of speech and expression leads to the conclusion we have arrived at. The act of surveillance is certainly a restriction on the said freedom? It cannot be suggested that the said freedom is also bereft of its subjective or psychological content, but will sustain only the mechanics of speech and expression. An illustration will make our point clear. A visitor, whether a wife, son or friend, is allowed to be received by a prisoner in the presence of a guard. The prisoner can speak with the visitor; but, can it be suggested

that he is fully enjoying the said freedom. It is possible for him to express his real and intimate thoughts to the visitor as fully as he would like. But the restrictions on the said freedom are supported by valid law. To extend the analogy to the present case is to treat the man under surveillance as a prisoner within the confines of our country and the authorises enforcing surveillance as guards, without any low of reasonable restrictions sustaining or protecting their action. So understood, it must be held that the petitioner's freedom under Art. 19(1)(a) of the constitution is also infringed.

14. In A.K. Gopalan v. State of Madras, AIR 1950 SC 27 Hon'ble Apex Court had held :

"If a man's person is free, it is then and then only that he can exercise a variety of other auxiliary rights, that is to say, he can within certain limits, speak what he likes, assemble where he likes, form any associations or unions, move about freely as his 'own inclination may direct', reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently attached to the person"

15. The petitioner under the shadow of surveillance is certainly deprived of this freedom. Due to presence of such history-sheet, the petitioner is deprived of his freedom of movement as well as right of privacy under the shadow of surveillance by police. He can move physically, but he could not

do so freely for all his activities because he is watched and noted. After knowledge of this history-sheet he could not act as freely as he would like to do in absence of such history-sheet.

16. Where the police officer has not given any reason for his belief that the petitioner was a desperate character, and a habitual offender, the history-sheet opened against him is not in accordance with the mandate of the relevant rules, and as such it would be just to order closure of such history-sheet. The exercise of the power by the police under the cover of surveillance which invades into personal liberty of the petitioner as regards his free movement in day to day life, when there is no material to continue the history-sheet for him, is violative of Article 21 of the Constitution of India.

17. For the reasons discussed above, we hold that Class-B history-sheet for the petitioner Munna Lal Gupta was an erroneous act done without the facts being verified and without reasonable satisfaction being reached or mind being applied by the then Superintendent of Police. This history-sheet was never reviewed because rules provided that Class-B history-sheet shall continue till death."

26. When the police regulations regarding opening of history sheets were made for the "subject Indians" by colonial rulers, no requirements of observance of principles of natural justice were incorporated because the State at that time was not a democratic State and therefore,

whatever the State decided was final. After promulgation of Constitution of India, the requirements of observations of the rules of natural justice, enshrined in the Article 14 of the Constitution of India, has become imperative. Its observance is more required where the right to life, livelihood and liberty of an individual is involved. The order of opening of history sheet is passed by the Senior Officer of Police by only approving the report of the police station. The opening of history sheet is not the same as implication of an individual in a criminal case because of committing some crime. By opening history sheet the police gets the right of surveillance of the history sheet. Whether the police report submitted before the higher police authority for approval is correct or not is not considered nor the person sought to be made a history sheet is ever afforded opportunity to put his version against the police report. After opening of Class-B history sheet, the history sheet remains under surveillance for life and his right to liberty is severely effected in the name of surveillance. He is vulnerable to police dictate, threat and coercion throughout his life. In such a situation subjecting a citizen of a sovereign democratic State to surveillance cannot be said to be in accordance of Articles 14 and 21 of the Constitution of India. Such a person is condemned unheard. The concept of equality of law and equal protection of law provided under Article 14 of the Constitution of India is brutally violated. The offence enumerated for opening Class-A history sheet are dacoity, burglary, cattle-theft railway-goods wagon theft and abetment thereof. It is notable that the offences enumerated in the Class-A of his history sheet are not much committed now. Therefore, the police has unfettered power to implicate anyone on the basis of any

offence by making a report to the higher police authority for opening Class-B history sheet. Considering the present state of affairs, rampant false implications, because of personal and political rivalry, provisions regarding opening of history sheets need to be reviewed. State has realized that the police regulations regarding opening of history sheets are being misused and therefore the guidelines dated 3.11.2022 were framed by Director General of Police, U.P. providing for opening/reviewing of history sheets of Class-A only while no such guideline has been issued for opening/review of Class-B history sheet. Therefore, we find that the police has absolute powers of opening Class-B history sheet against any citizen of the country on any pretext, like implication in single case under Gangsters Act and implication of other petitioners in one case of exhortation on account of personal/business rivalry with the informant and implication in another case under Section 2/3 (1) of Gangsters Act on its basis. The police is clearly acting against the mandate of the Constitution of India laid down under Articles 14, 19 and 21 of the Constitution of India on the basis of pre-independence regulations. It is high time that this practice should be stopped and before opening of history sheet of Class-A or Class-B against any citizen of the State, he should be given one opportunity to submit his objection before it is accepted by higher official of the police and before such officer directs opening of any Class of history sheet against a citizen. While directing opening of history sheet of Class -A and Class -B, the higher police authority shall record his reasons for directing opening of history sheet of any Class after considering the objection of the citizen filed against the report of the police station.

27. Accordingly the impugned history sheet/sheets opened with regard to the petitioners noted above by the order of respondent no.3, Deputy Commissioner of Police, Greater Noida, Gautam Buddh Nagar, dated 16.6.2021 are hereby quashed. The surveillance of petitioners shall be stopped forthwith.

28. The State Government is directed to look into the procedure of opening of history sheet and make/ issue necessary amendments/guidelines for providing opportunity of objection to the person, against whom, the police submits report recommending the opening of history sheet of Class-A or Class-B before the Senior Police Official. The State Government will also provide for review of the history sheets opened against the citizen, every year, so that, in the cases where implication of persons against whom history sheet was opened and who have been subsequently exonerated/acquitted of the criminal charges, their history sheets are closed and shadow of surveillance by police on their life and liberty gets removed.

29. The Registrar (Compliance) of this Court is directed to communicate this order to the Principal Secretary (Home) State of U.P., Lucknow, within a period of one week.

30. The Principal Secretary aforesaid will submit compliance report to this Court, within a period of three months, which shall be kept on record by the Registrar (Compliance) of this Court. If the report is not received from the Principal Secretary aforesaid, the Registrar (Compliance) will put this matter before the Court again after expiry of period of three months.

31. The record of these writ petitions shall be retained by the office till compliance report of Principal Secretary aforesaid is received by this Court.

32. All the criminal writ petitions are **allowed**.

(2025) 1 ILRA 675

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 08.01.2025

BEFORE

**THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.**

THE HON'BLE PRASHANT KUMAR, J.

Crl. Misc. Writ Petition No. 22470 of 2024

**Vuenow Infotech Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Petitioner:

Sri Anubhav Singh, Sri Mohd. Haider, Sri Akshay,
Sri G.S. Chaturvedi (Sr. Advocate)

Counsel for the Respondents:

G.A.

**Criminal Law —Constitution of India,1950
- Article 226- Bharatiya Nyaya Sanhita,
2023 - Sections 316(2), 318(4) & 61(2)-
Foreign Exchange Management Act, 1999-
Prevention of Money Laundering Act,
2002, Section 66- FIR — Quashing of —
Allegation of fraudulent investment
scheme through sale and leaseback of
cloud particles — Petitioner company and
its affiliates accused of inducing public to
invest in non-existent cloud data assets —
No complaint from individual investors —
FIR lodged based on ED's report —
Allegation of Ponzi scheme where investor
returns paid from new investments —
Held, economic offences involving public
interest require deeper investigation —
Absence of complaint from investors not
fatal where prima facie allegations**

disclosing cognizable offence exist — No case made out for interference under Article 226 — Writ petition dismissed. (Paras 24, 25, and 26)

HELD:

Even as per the FIR, the business of the petitioner and its associate entities is non-functional. There is rotation of money and the business model appears ambiguous and unsustainable. The Investigating Agency has come out with a case that petitioner is running a ponzi business, which would burst like a bubble and the investment made by the gullible investors, who at the present time is not coming up as complainant as they are receiving regular income, would be lost. The investors lured to extraordinary returns is typically attributed to something that sounds impressive but is intentionally vague, such as hedge fund in land, resorts, tours and travel plans, high yield investment programs. The allegations levelled in the FIR cannot be denied at this stage. Even petitioner has not placed any document to demonstrate that they are running a sustainable business and have earned substantial income from the customers. (Para 24)

The law laid down in the case of Lalita Kumari (supra) and Delhi Race Club (supra) would also not benefit the petitioner inasmuch as this Court is of the prima facie opinion that there appears commission of cognizable offence. Detailed search and seizure has been conducted by the E.D. and the same has resulted in lodging of FIR and the police authorities are not bound to conduct the preliminary inquiry, when prima facie there appears commission of cognizable offence. There are allegations of alluring the investors for investing huge chunk of money to get monthly regular income, which cannot be negated at this stage, more so, when the business model is unsustainable. The Court must be cautious while dealing with the economic offences, which would affect the public at large. (Para 25)

Writ Petition dismissed. (E-14)

List of Cases cited:

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

2. R.P. Kapur Vs St. of Pun., AIR 1960 SC 866

3. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah., (2021) 19 SCC 401

4. Lalita Kumari Vs Govt. of U.P., (2014) 2 SCC 1

5. Delhi Race Club (1940) Ltd. Vs St. of U.P., 2024 0 Supreme (SC) 689

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Prashant Kumar, J.)

1. Heard Shri G.S. Chaturvedi, learned Senior Advocate assisted by Mr. Mohd. Haider, learned counsel for the petitioner alongwith Shri Akshay, Advocate and Shri Shashi Dhar Pandey, learned A.G.A. for the State.

2. The present writ petition is preferred inter-alia with following reliefs:-

(a) Call for records and issue order, direction or writ in the nature of certiorari or any other similar writ, thereby quashing the impugned FIR dated 24.11.2024 registered as Case Crime No.463 of 2024 under Sections 318(4), 61(2) and 316(2) BNS 2023 registered at P.S. Sector 58, Noida District Commissionerate.

(b) Issue any other writ, order or direction which this Hon'ble Court may deems fit and proper in the circumstances of the case.

(c) Award the cost of the writ petition to the petitioner.

Facts of the Case:

3. A First Information Report was lodged on 24.11.2024 in P.S. Noida Sector-

58, District Gautam Buddh Nagar under Section 318(4), 61(2), 316(2) BNS 2023. As per the FIR, against the petitioner- M/s Vuenow Infotech Pvt. Ltd. and other related companies and individuals, the Enforcement Directorate conducted a search and seizure on 17.10.2024 at various places including the premises of petitioner as well as related companies, which are M/s Vuenow Marketing Services Pvt. Ltd.¹, M/s Zebyte Infotech Pvt. Ltd.² and M/s Zebyte Rental Planet Pvt. Ltd.³ and persons associated with the said entities. During the course of investigation, it was revealed that M/s VMSL under its MyCloudParticle brand, was offering various customers an investment opportunity by which the investors were induced to invest by buying Data Centre Asset or Cloud Particle servers through Sale and Lease Back model, whereby, a customer buys a cloud particle, which is a storage space in cloud and the same would be leased back for a term of 10 years to M/s ZRPPL and M/s ZIPL, which are marketing affiliates of M/s VMSL, and in response the customers/buyers were offered minimum guaranteed rent for ten years. Each Cloud Particle comprises of 1 TB of cloud storage space.

4. The FIR further discloses that the business model of these companies was that M/s VIPL used to purchase Servers (Data Storage Facility) and IT equipments, M/s VMSL, who thereafter sell it to different individuals/investors and M/s ZIPL and M/s ZRPPL were the marketing companies for lease back policy, however, M/s ZIPL and M/s ZRPPL receives money from M/s VIPL and not from its end customers and the same is being paid to the investors/individuals in the form of rent. During the search it was found that as on 18.10.2024 the total storage capacity for cloud with the petitioners was only 553 TB

and out of which only 1.9 TB was being used and the balance 551.1 TB remained unused. In the premises there were 1119 servers, which were not connected to any power source, which means they were not in working condition. It was also found that M/s ZRPPL had earned Input Tax Credit (ITC) by purchasing goods and services from bogus suppliers. The total invoice value of such purchase transactions is Rs.66,23,58,209/-.

5. In the FIR it is mentioned that during the Course of investigation, the statement of members of M/s VIPL were recorded, wherein, it is stated that total live data storage capacity is 2701 TB across various data centres. The total quantum data facility provided by ZRPPL to its clients is substantially low in comparison with the quantum of cloud particle leased by M/s ZRPPL to individuals/investors. The Statement of Nitin Srivastav, Director of M/s VIPL reveals that individual investors were being paid from the investments received from new investors. As per the balance sheet of M/s VMSL, the total revenue received by the Company was Rs.5,33,38,06,158/- and M/s VMSL has received the total amount of Rs.2236.07 crores as credit. Perusal of different tables goes to show that M/s VMSL has sold cloud particles to individuals/investors beyond the actual capacity. M/s VMSL only had server capacity of 2701 TB in all its data centres. Against this available capacity, they have already sold 1,29,294 TB of cloud space.

6. It is alleged in the FIR that the business model followed by the petitioner and associate companies is that the money collected from the individuals/investors is being rotated and paid to them as monthly assured income. Money received from the

new individuals/investors is paid to old one as monthly assured rental income. Further it is alleged in the FIR that this business model is a fraudulent investment scheme as it is a non sustainable business model. Such type of business collapses when the new investment stops coming, therefore, there is all likelihood that investors will be cheated and their investment is at risk. The accused have dishonestly induced various individuals/investors to invest in cloud particles, which do not exist and, therefore, they have cheated the investors and clearly there is breach of trust. It is clear that the accused have committed an offence under Sections 318(4), 316(2) and 61(2) BNS 2023.

Argument of Counsel for the petitioner

7. Shri G.S. Chaturvedi, learned Senior Advocate submitted that it is alleged in the FIR, the petitioner alongwith its sister concern sold or leased out the cloud space. The Enforcement Directorate⁴ took information under the Foreign Exchange Management Act 1999⁵, conducted search, formed an opinion that suspectedly some offence under BNS 2023 has taken place and drafted a report to bypass the proceeding, as they have no jurisdiction and they are trying to do indirectly what they cannot do directly. In the present matter there is no complaint of any investor/individual and the Authorities have proceeded on their own.

8. Shri Chaturvedi vehemently contended that there is no siphoning of money. The money invested by the investors in the Company, is Company's money to use. If investors have made investment and the Company failed to get benefit of it, it cannot be said that there is

offence of cheating. He argued that Section 316(2) BNS pertains to criminal breach of trust and if there is no investor stating otherwise, the question of criminal breach of trust does not arise. In this case there is no indication as to who has been cheated. Moreover, it is evident from the order dated 02.12.2024 passed in Writ Petition (Crl) No.3765 of 2024 by the Delhi High Court that the Assistant Director of E.D. has admitted that there is no complaint against the petitioner company by any investor. The FIR has been filed mechanically and without application of mind. There is not a single investor/constituent in the entire conspectus of facts to suggest that any cheating or criminal breach of trust has ever taken place.

9. Shri Chaturvedi, learned Senior Advocate asserted that the FIR has been registered in total violation of the ratio laid down by the Supreme Court in *Lalita Kumari vs. Govt. of U.P.*⁶, wherein, it has been held that if the information received does not disclose any cognizable offence, then a preliminary inquiry may be conducted to ascertain if any cognizable offence is disclosed or not. A bare perusal of the FIR shows that no cognizable offence is made out. The wordings of the FIR suggests that the respondent no.3 is not sure about the commission of any offence. The information under Section 66 Prevention of Money Laundering Act 2002 shared by E.D. uses words 'likelihood' and 'appears' and when the E.D. itself is not sure, then how a drastic step of registration of FIR can be sustained. Even the police has not conducted any inquiry before registration of FIR.

10. Shri Chaturvedi, learned Senior Advocate further contended that the contents of the FIR fails to fulfill the basic

ingredients of Section 316(2), 318(4), 61(2) BNS. As per Section 318 BNS, the offence of cheating happens when someone deceives another person to fraudulently induce them to deliver property or act against their interest, potentially causing harm to the victim, however, the entire FIR fails to disclose even a single instance of inducement being made by the petitioner or any of the other entities.

11. He submitted that if no complaint is made can a third person say the investment is at risk in future and an FIR can be lodged under Section 318 BNS since there is no deceitful representation. He has placed reliance on the judgement of Supreme Court in *Delhi Race Club (1940) Ltd. and others vs. State of U.P. and another*⁷, wherein, the Supreme Court has held that “In case of cheating, the intention of the accused at the time of inducement should be looked into which may be judged by a subsequent conduct, but for this, the subsequent conduct is not the sole test. Mere breach of contract cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction i.e. the time when the offence is said to have been committed. Therefore, it is this intention, which is the gist of the offence. Whereas, for the criminal breach of trust, the property must have been entrusted to the accused or he must have dominion over it. The property in respect of which the offence of breach of trust has been committed must be either the property of some person other than the accused or the beneficial interest in or ownership’ of it must be of some other person. The accused must hold that property on trust of such other person. Although the offence, i.e. the offence of breach of trust and cheating involve dishonest intention, yet they are

mutually exclusive and different in basic concept.

12. He lastly submitted that there is a distinction between criminal breach of trust and cheating. For cheating, criminal intention is necessary at the time of making a false or misleading representation i.e., since inception. In criminal breach of trust, mere proof of entrustment is sufficient. Thus, in case of criminal breach of trust, the offender is lawfully entrusted with the property, and he dishonestly misappropriated the same. Whereas, in case of cheating, the offender fraudulently or dishonestly induces a person by deceiving him to deliver any property. In such a situation, both the offences cannot co-exist simultaneously.” He vehemently contended that from bare reading of the FIR no offence under Section 318(4), 61(2), 316(2) BNS 2023 is made out. In this backdrop, he contends that the FIR is only based on assumption and the same is liable to be quashed.

Argument of Counsel for the respondent

13. Per contra Shri Shashi Dhar Pandey, learned A.G.A. appeared for the State and submitted that the petitioner and its promoters are accused of sharing information of the company and other related persons and operating investment schemes through Data Center Cloud by giving wrong information to the investors and manipulating/cheating the investors’ money by making them invest, in respect of which investigation is underway. During the investigation statements of various officials of the petitioner company were recorded regarding the evaluation of hardware installed in the premises. In the statement of these officials, currently only

1.9 TB space is utilized and storage capacity of 551.1 TB is available or vacant. No service, like customer care service, is being provided by the petitioner company. There were 1119 servers in the premises, which were not connected to any power source, even then it was sold at various people. During the search conducted at a different data center in Mohali, Punjab between 17.10.2024 to 18.10.2024, it was found that the total live data storage capacity of all the data centers is 2701 TB. He submitted that the essence of the matter is that the amount of data storage facility is much less than the space sold to individuals. The total server capacity is 2701 TB cloud space and the petitioner company and others have already sold 1,29,294 TB as per MCA data or to a total capacity of 5,42,274 TB as per bank account deposits, excluding 18% GST.

14. He asserted that the model used by the said entities is apparently a cycle circulation ponzy scheme and a non-sustainable business model. Such a scheme depends on a continuous flow of fresh investments to sustain itself. Therefore, it is established that M/s Vuenow Marketing Services Ltd., in connivance with other entities i.e. M/s Viewnow Infotech Pvt. Ltd., M/s Zebyte Infotech Pvt. Ltd. and M/s Zebyte Rental Planet Pvt. Ltd. have dishonestly induced various individuals/investors to invest in Cloud Particles by selling them Cloud Particles, which do not exist and thereby defrauded these individuals/investors and breached their trust.

15. He further submitted that as far as the proceedings of E.D. is concerned, the same has been challenged by the petitioner by means of Civil Misc. Writ Petition No.30014 of 2024 before Hon'ble the

Panjab and Haryana High Court. Apart from it, one of the sister concerned of the petitioner namely M/s ZIPL has also filed writ petition before the Hon'ble High Court of Delhi seeking quashing of the entire seizure proceedings carried out by respondent no.3 on 07.10.2024, which is still pending consideration. He asserted that the petitioners are running ponzi scheme. The entire business model, as suggested and professed by the accused persons, is based on principle of fraud and cheating. The Company has no substantial earning as reflected from the balancesheet but on a contrary the accused persons are taking huge investments from the gullible investors promising them high return.

16. He lastly submitted that the petitioner and other entities are continuing the said business knowing fully well that this is not a sustainable business, as the money paid to the earlier investor is from the money received from the new customers. The entire business is, therefore, a big bubble. The day it would burst, thousands of people/investors will loose all their investments. He further submitted that the genesis of the business model and transactions are with a pre-planned intention to defraud with dishonest intention, which is present right from the very beginning. He further submitted that the judgement passed by the Supreme Court in the Delhi Race Club (supra) would not be attracted in the present case, as there are credible evidence of manipulating act of fraudulent misappropriation and in such case, breach of trust would be applicable being a penal offence. The entire business of the accused comes under the ambit of fraud under Section 316(2), 318(4), 61(2) BNS. It is a befitting case where the investigation should be carried out so that the hard earned money of investors may not be manipulated.

Discussion

17. Heard rival submissions and perused the record.

18. In order to appreciate the rival contentions of the parties, it would be necessary to revisit the relevant laws.

19. Law relating to quashing of FIRs has already been well-settled, as reiterated by Hon'ble Supreme Court in State of *Haryana and Ors. vs. Bhajan Lal and Ors.*⁸, in which it is held that:

“102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

xxxxxxxxxx (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.

20. It is to be noted that while considering these aspects, the Court does

not have to go in detail by way of minute examination about the correctness or otherwise of the facts alleged and the Court has to examine the same by taking a prima facie view of the matter based on the materials on record. If on consideration of the factual matrix of the allegations, no prima facie case is made out of commission of any offence of which cognizance can be taken, the Court would be within its power to intervene and quash any such complaint or FIR.

21. Similar view is also taken by the Hon'ble Supreme Court in *R.P. Kapur v. State of Punjab*⁹, wherein, Hon'ble Supreme Court has cautioned the High Courts in interfering with the criminal proceeding at the stage of investigation but at the same time also given leverage to the extent that for preventing abuse of process of any Court or otherwise to secure the ends of justice, the Court can quash the criminal proceedings. The Hon'ble Supreme Court in the judgement in *Neeharika Infrastructure Private Limited v. State of Maharashtra & Ors.*¹⁰ had also carved out certain exceptions. For ready reference, the same are reproduced as under:-

“(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may, for instance, furnish cases under this category.

(ii) Where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no

question of 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.

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial Magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained." (emphasis supplied)

22. The main plank of argument raised by learned Senior Counsel appearing on behalf of petitioner is that petitioner and its associate entities has not committed any fraud as no individual/investor made a complaint and the entire search and lodging of FIR is based on mere assumption.

23. For ready reference Section 316 and 318 of the BNS 2023 is reproduced as under:

316. Criminal breach of trust

(1) 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".

Explanation 1

A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2

A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

(2) Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

(3) Whoever, being entrusted with property as a carrier, wharfinger or warehousekeeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

(4) Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to

seven years, and shall also be liable to fine.

(5) Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

318. Cheating

(1) Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation

A dishonest concealment of facts is a deception within the meaning of this section.

(2) Whoever cheats shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

(3) Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the

transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

(4) 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.

24. Even as per the FIR, the business of the petitioner and its associate entities is non functional. There is rotation of money and the business model appears ambiguous and unsustainable. The Investigating Agency has come out with a case that petitioner is running a ponzi business, which would burst like a bubble and the investment made by the gullible investors, who at the present time is not coming up as complainant as they are receiving regular income, would be lost. The investors lured to extraordinary returns is typically attributed to something that sounds impressive but is intentionally vague, such as hedge fund in land, resorts, tours and travel plans, high yield investment programs. The allegations levelled in the FIR cannot be denied at this stage. Even petitioner has not placed any document to demonstrate that they are running a sustainable business and

have earned substantial income from the customers.

25. The law laid down in the case of Lalita Kumari (supra) and Delhi Race Club (supra) would also not benefit the petitioner inasmuch as this Court is of the prima facie opinion that there appears commission of cognizable offence. Detailed search and seizure has been conducted by the E.D. and the same has resulted in lodging of FIR and the police authorities are not bound to conduct the preliminary inquiry, when prima facie there appears commission of cognizable offence. There are allegations of alluring the investors for investing huge chunk of money to get monthly regular income, which cannot be negated at this stage, more so, when the business model is unsustainable. The Court must be cautious while dealing with the economic offences, which would affect the public at large.

26. In view of the above deliberation made on the basis of material placed on record, we are of the considered opinion that the allegation made in the FIR in question against the accused company and its associates are required to be thoroughly investigated.

Conclusion

27. In view of the discussion as well as the catena of judgements cited above, no case has been made out for interference with the impugned first information report.

28. The writ petition stands **dismissed**. No order as to costs.

(2025) 1 ILRA 685
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2025

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 2 of 2017

Sabhapati Verma ...Appellant
Ved Prakash ...Respondent

Counsel for the Appellant:
Mohammad Aslam Khan

Counsel for the Respondent:

Vikas Vikram Singh, Ankit Pande, Rajeshwar,
Sharad Nandan Ojha, Virendra Bhatt

Civil Law – Civil Procedure Code, 1908 - Sections 99 & 100, - Indian Evidence Act, 1860- Section 68 - Indian Registration Act, 1908 - Section 68, - Indian Succession Act, 1925 - Section 63 - Consolidation of Holdings Act, 1950 - Section 171 - Second appeal - against the judgments and decrees - passed in Regular Suit and Civil Appeal - the appeal raises several substantial questions of law, including whether the will, which was sought to be cancelled on the grounds of fraud, was proved in accordance with Section 68 of the Evidence Act, and whether the lower courts were justified in dismissing the suit without considering the ample evidence on record – Suit – for permanent injunction – during pendency of suit, a will was got executed by the defendant-respondent from their father - subsequently, a prayer for cancellation of Will was added by an amendment - The plaintiff-appellant argued that the will was executed fraudulently, as the father of the parties was an educated person but only his thumb impression was on the will - the will was not proved in accordance with Section 68 of the Evidence Act - The trial court, dismissed the suit on the grounds that the plaintiff-appellant failed to prove ownership and possession of the land in dispute – Civil Appeal - The lower appellate court upheld the trial court's

decision – Second Appeal – court finds that, (i) the will was proved by the attesting witness and the plaintiff-appellant failed to prove the grounds of challenge to the will and further, the will was executed with free will and without any influence or coercion – (ii) the plaintiff-appellant was not the real son of the deceased father and was not entitled to a share in the ancestral property in view of section - 171 of the Act, 1950 – held, . the concurrent findings recorded by the two courts below cannot be set aside by this court in second appeal unless the findings are perverse and without jurisdiction which is not the case herein – hence, impugned the judgments and decrees cannot be reversed or modified in view of Section 99 of the CPC – Second appeal is liable to be dismissed.(Para – 27, 38, 39)

Special Appeal Dismissed. (E-11)

List of Cases cited:

1. Guro (Smt) Vs Atma Singh & ors.; (1992) 2 SCC 507,
2. Sri Devi & ors. Vs Jayaraja Shethy & ors.; 2005 All. C.J. 631,
3. Benga Behera & anr. Vs Braja Kishore Nanda & ors.; 2007 All. C.J. 2249,
4. Santosh Hazari Vs Purushottam Tiwari (Deceased) By LRs.; (2001) 3 SCC 179,
5. Dhirajlal Girdharilal Vs Commissioner of Income-tax, Bombay; A.I.R. 1955 S.C. 271,
6. Dhannulal & ors. Vs Ganeshram & anr.; (2015) 12 SCC 301,
7. Committee of Management, Gangadin Ram Kumar Inter College, Ramgarh Barwan, District Jaunpur Vs Deputy Director of Education & ors.; 2006 (24) LCD 1328,
8. Daya Shankar Singh Vs Deputy Director of Consolidation, Faizabad & ors.; 2014 (32) LCD 2167,
9. (Smt.) Savitri & ors. Vs Surendra Mohan Mohana; 1987 (5) LCD 137,

10. Jhuri Singh Vs Ram Kumar Singh & anr.; 2002 (20) 4 LCD 663,

11. Ram Adhar & ors. Vs Baij Nath; 2002 (20) LCD 701,

12. Savitri Bai & anr. Vs Savitri Bai; (2024) 4 SCC 282,

13. Ratnagiri Nagar Parishad Vs Gangaram Narayan Ambekar & ors.; (2020) 7 SCC 275,

14. St. of Har. Vs Harnam Singh (Dead) through LRs. & ors.; 2022 (156) RD 177,

15. Moinuddin Vs Smt. Kanti & ors.; 2018 (9) ADJ 141,

16. Madhusudan Das Vs Smt. Narayani Bai & ors.; 1983 (1) SCC 35,

17. Faggan (Deceased) & ors. Vs Bhagwan Sahai (Deceased) & anr.; 2008 (7) ADJ 46,

18. Jagdish Singh Vs Nathu Singh; 1992 (1) SCC 647,

19. Hafazat Hussain Vs Abdul Majeed & ors.; (2001) 7 SCC 189.

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

1. Heard Shri Mohd. Arif Khan, learned Senior Advocate assisted by Shri Mohd. Shadab Khan, Advocate holding brief of Shri Mohammad Aslam Khan, learned counsel for the appellant and Dr. R. S. Pandey, learned Senior Advocate assisted by Shri Ankit Pande, learned counsel for the respondent.

2. This second appeal has been preferred under Section 100 of Civil Procedure Code, 1908 (hereinafter referred to as "C.P.C.") against the judgment and decree dated 01.11.2013 passed in Regular Suit No. 1132 of 1988; Sabhapati Verma vs. Ram Kishore (Dead) substituted by legal representative Ved Prakash by First

Additional Civil Judge (Junior Division), Ambedkar Nagar and judgment and decree dated 03.10.2016 passed in Civil Appeal No. 66 of 2013; Sabhapati Verma vs. Ved Prakash by Additional District Judge, Court No. 3, Ambedkar Nagar.

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

" A. Whether the will which was sought to be cancelled by the appellant on the ground of fraud, having not been proved by the respondent in accordance with provisions of Section 68 of the Evidence Act, the learned courts below were justified in law in dismissing the suit?

B. Whether the learned courts below ignoring the ample evidence on record as mentioned in the judgment passed by the Trial Court and even without discussing the same were justified in law in dismissing the suit?

C. Whether Ram Kishore who was a Gazetted Officer and the will bearing his thumb impression does not create a suspicion about the due execution of the will in favour of the respondent and the respondent having not proved the will in accordance with the provisions of Section 68 of the Evidence Act, the learned courts below were justified in law in dismissing the suit?

D. Whether from the ample evidence on record including the sale deed, copies of the judgments, high school certificate wherein the parentage of the appellant was mentioned as Ram Kishore, the

said evidence could be ignored and the learned courts below merely by relying upon the statement of Smt. Sursati mother of the appellant and respondent who was win over, were justified in law in dismissing the suit?

E. Whether it was not incumbent upon learned courts below to have discussed and dealt with the oral and documentary evidence on record filed by the parties while dismissing the suit?

F. Whether substantial documentary evidence which has been placed before the Trial Court including certified copies of certain public records besides the copy of the judgment of earlier suit and the oral evidence it was not the duty of lower appellate court sitting as a court of first appeal to deal with all issues and the evidence lead by the parties before recording its findings and dismissing the appeal ignoring that the appeal is a valuable right and the parties have a right to be heard both on questions of law and facts?

G. Whether the judgment and decree passed by the learned courts below is not only against the facts and circumstances of the case but also the evidence on record?"

4. Learned counsel for the plaintiff-appellant submitted that the father of the parties was trying to sell the ancestral property without consent of the plaintiff-appellant, who was a co-tenure holder, therefore, the suit for permanent injunction was filed. During pendency of the suit, a will was got executed by the defendant-respondent from the father Ram Kishore in a fraudulent manner, which is

apparent from the facts that the father of the parties was an educated person but only his thumb impression was put on the will and he expired after two days of execution of will, therefore, there is sufficient shroud of suspicion, which could not be removed by the defendant-respondent, therefore, the learned courts below wrongly and illegally dismissed the suit and the appeal filed by the plaintiff-appellant. Even otherwise the will has not been proved by the defendant-respondent in accordance with the provisions of Section 68 of the Indian Evidence Act. The learned courts below have passed the judgment and decree without considering the evidence and material on record. The lower appellate court also without considering the questions of law and facts as a trial court, as appeal is a valuable right of the appellant, dismissed the appeal. He further submitted that the judgments relied by the parties had not been considered by the lower appellate court and without considering the same, the appeal has been dismissed on the ground that they are not applicable on the facts and circumstances of the case. Thus, learned counsel for the plaintiff-appellant submitted that the judgment and decrees passed by the learned courts below are liable to be set aside and the suit filed by the plaintiff-appellant is liable to be allowed. Learned counsel for the plaintiff-appellant relied on **Guro (Smt) vs. Atma Singh and others; (1992) 2 SCC 507, Sri Devi and others vs. Jayaraja Shethy and others; 2005 All. C.J. 631, Benga Behera and another vs. Braja Kishore Nanda and others; 2007 All. C.J. 2249, Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs.; (2001) 3 SCC 179, Dhirajlal Girdharilal vs. Commissioner of Income-tax, Bombay; A.I.R. 1955 S.C. 271, Dhannulal and others vs. Ganeshram and another;**

(2015) 12 SCC 301, **Committee of Management, Gangadin Ram Kumar Inter College, Ramgarh Barwan, District Jaunpur vs. Deputy Director of Education and others**; 2006 (24) LCD 1328, **Daya Shankar Singh vs. Deputy Director of Consolidation, Faizabad and others**; 2014 (32) LCD 2167, (Smt.) **Savitri and others vs. Surendra Mohan Mohana**; 1987 (5) LCD 137, **Jhuri Singh vs. Ram Kumar Singh and another**; 2002 (20) LCD 663 and **Ram Adhar and others vs. Baij Nath**; 2002 (20) LCD 701.

5. Per contra, learned counsel for the defendant-respondent submitted that a suit for permanent injunction was filed by the plaintiff-appellant, which was amended during pendency of the suit and the prayer for cancellation of will deed executed in favour of the defendant-respondent was added but neither the possession of the plaintiff-appellant has been proved nor he could prove the grounds of challenge to the will. The will was proved by the attesting witness in accordance with Section 68 of the Indian Evidence Act. The reason for execution of will has been disclosed in the will itself, therefore, the alleged fraud and suspicious circumstances in execution of will does not exist and the same stands removed. The reason for thumb impression on the will has been disclosed and proved by the defendant-respondent. He further submitted that the learned courts below have passed the judgment and decrees after considering the pleadings, evidence and material on record. There is no illegality or error in the impugned judgment and decrees passed by the courts below. The appeal has been filed on misconceived and baseless grounds and it lacks merit. The substantial questions of law formulated in this appeal are not involved in this appeal. He relied on **Savitri Bai and another vs.**

Savitri Bai; (2024) 4 SCC 282, **Ratnagiri Nagar Parishad vs. Gangaram Narayan Ambekar and others**; (2020) 7 SCC 275, **State of Haryana vs. Harnam Singh (Dead) through LRs. and others**; 2022 (156) RD 177, **Moinuddin vs. Smt. Kanti and others**; 2018 (9) ADJ 141, **Madhusudan Das vs. Smt. Narayani Bai and others**; 1983 (1) SCC 35 and **Faggan (Deceased) and others vs. Bhagwan Sahai (Deceased) and another**; 2008 (7) ADJ 46.

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

7. The plaintiff-appellant filed a suit for permanent injunction with the allegation that the father of the plaintiff-appellant i.e. the defendant-respondent namely Ram Kishore, who was the original defendant-appellant, is angry with him as he has opened a clinic in Makhdoom Nagar, therefore, he is not able to give most of his time at home, on account of which, without any reason, he is threatening to sell the land in dispute only to destroy the part of property of the plaintiff-appellant. During pendency of the suit, Ram Kishore died on 27.01.1991, therefore, the defendant-respondent, who is the legal representative of Ram Kishore and brother of the plaintiff-appellant was substituted. Subsequently, the suit was amended adding a prayer for cancellation of will deed dated 25.01.1991 on the ground that the will had been got executed by the defendant-respondent playing fraud with the deceased Ram Kishore, which has been registered on 30.01.1991 in the office of the Sub-Registrar, Akbarpur. It was further alleged that the deceased was an educated person as he had retired from the post of a Gazetted Officer but his thumb impression

had been put on the will. Since the plaintiff-appellant was looking after his father, therefore, there was no need of any will. The plaintiff-appellant and defendant-respondent were born from his mother Smt. Sursati Devi and father Ram Kishore.

8. The suit was contested by the defendant-respondent alleging therein that after death of the married wife of his deceased father Ram Kishore, he married to Smt. Sursati, who had come to house of his father after death of his first husband Ram Achal Verma resident of Mauza Ganeshpur, Pargana and Tehsil Akbarpur with his son born from Ram Achal Verma namely Pudai alias Sabhapati and since Ram Kishore was looking after his education etc., therefore, his name was also recorded as father as he was treating him as his son. On the request of mother Smt. Sursati, the deceased Ram Kishore had purchased 11 biswa land for Sabhapati in Mauza Salahpur Razore, Pargana and Teshil Tanda, Ambedkar Nagar and also gave the house in the said village to the plaintiff-appellant. After some time, 7.25 bigha agricultural property and two biswa abadi land was also purchased by the father of the defendant-respondent Ram Kishore for Sabhapati and his wife on the ground that he would not claim any share in the ancestral property of the defendant-respondent. Subsequently, he started threatening to take half share in whole land, on account of which, the quarrel started between the father of the defendant-respondent and the plaintiff-appellant, therefore after consultation with his wife Sursati, he executed a will in favour of the defendant-respondent and accordingly, he is in possession and title holder of the land in dispute, thus, the suit is liable to be dismissed.

9. On the basis of pleadings of parties, following 5 issues were framed:-

"अ. क्या वादी विवादित सम्पत्ति का स्वामी एवं आधिपत्यधारी है?

ब. क्या वाद अवमूल्यांकित है तथा प्रदत्त न्यायशुल्क अपर्याप्त है?

स. क्या उभय पक्ष एक ही परिवार के सदस्य हैं तथा विवादित सम्पत्ति में वादी का 1/2 हिस्सा है?

द. क्या वादी किसी अन्य अनुतोष को पाने का अधिकारी है?

य. क्या वादपत्र में वर्णित कारणों के आधार पर दस्तावेज वसीयतनामा निरस्त किये जाने योग्य है?"

10. After framing of the aforesaid issues, documentary as well as oral evidence was adduced by the parties. In oral evidence, the plaintiff-appellant appeared himself as P.W. 1 and got examined Phool Chandra as P.W. 2. On behalf of the defendant-respondent, he himself appeared as D.W. 1, Smt. Sursati Devi as D.W. 2 and Rajmani i.e. attesting witness of the will deed as D.W. 3

11. After considering the pleadings of the parties, evidence and material on record, the trial court dismissed the suit on the grounds that the plaintiff-appellant has failed to prove himself to be the owner and in possession of the land in dispute and the plaintiff-appellant was born from previous husband of his mother Smt. Sursati, therefore, he could get the share in the land of deceased Ram Kishore only on the basis of will and the will in favour of the predecessor-in-interest of the defendant-respondent has been proved by the attesting witness in accordance with law and the reasons for execution of the will have been disclosed in will, therefore, the will is neither forged nor liable to be set aside. Being aggrieved, civil appeal was filed before the lower appellate court, in which the following point of determination was

made by the lower appellate court in the impugned judgment and decree while deciding the appeal;-

"क. क्या अधीनस्थ न्यायालय द्वारा पक्षकारों के अभिवचन तथा उनके द्वारा प्रस्तुत अभिलेखीय एवं मौखिक साक्ष्य के विश्लेषण में कोई त्रुटि की गयी है?"

12. The learned lower appellate court, after considering the pleadings, evidence and material on record, dismissed the appeal as it could not find any illegality or error in the judgment and decree passed by the trial court.

13. In view of the pleadings of the parties and arguments advanced before this Court and the aforesaid substantial questions of law involved in this appeal, the first question for consideration is as to whether the will deed executed by the deceased Ram Kishore, who was original defendant in the suit, in favour of the defendant-respondent has been proved in accordance with law or not. The will is required to be proved in accordance with Section 68 of the Indian Evidence Act, which provides the proof of execution of document required by law to be attested, which is extracted hereinbelow:-

"68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

14. According to the aforesaid Section 68, a will is required to be proved at least by one attesting witness, which has been registered in accordance with the provisions of the Indian Registration Act, 1908. Section 63 of the Indian Succession Act provides the manner in which a will is required to be executed, which is extracted hereinbelow:-

"63. Execution of unprivileged Wills.—

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator

sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator; or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator; but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. "

15. The Hon'ble Supreme Court, in the case of **Guro (Smt.) vs. Atma Singh and others (Supra)**, has held that the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Indian Succession Act. The relevant paragraph 3 of the said judgment is extracted hereinbelow:-

"3. WITH regard to proof of a will the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. Where, however there were suspicious circumstances, the onus

would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit. The presence of suspicious circumstances makes the initial onus heavier and the propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator. (S. Venkalachala lyengar v. B.N. Thimmajamma¹, Rani Purnima Devi v. Kumar Kilagendra Narayan Dev², Jaswant Kaur v. Amrit Kaur³).

16. Similar view has been taken by the Hon'ble Supreme Court, in the case of **Sri Devi and others vs. Jayaraja Shetty and others (Supra)**. In this case, the executor of the will was 80 years of age and he died within 15 days of the execution of the will and court found that except this nothing has been brought on record to show that the testator was not in good health or not possessed of his physical or mental faculties and the appellants have failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the testator to execute the will and dismissed the appeal.

17. The Hon'ble Supreme Court, in the case of **Benga Behera and another vs. Braja Kishore Nanda and others (Supra)**, has held that the requirement of the proof of execution of a will is the same as in the case of certain other documents,

for example Gift or Mortgage and at least one attesting witness has to be examined to prove execution and attestation of the will and it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. It has further been held that existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that the execution of the will has not duly been proved.

18. The Hon'ble Supreme Court, in the case of Dhannulal and others vs. Ganeshram and another (Supra), has held that the proof of a will stands in a higher degree in comparison to the other documents. The relevant paragraph 19 is extracted hereinbelow:-

"19. Proof of a Will stands in a higher degree in comparison to other documents. There must be a clear evidence of the attesting witnesses or other witnesses that the contents of the Will were read over to the executant and he, after admitting the same to be correct, puts his signature in presence of the witnesses. It is only after the executant puts his signature, the attesting witnesses shall put their signatures in the presence of the executant."

19. This Court, in the case of **Daya Shanker Singh vs. Deputy Director of Consolidation, Faizabad and others (Supra)**, after considering several judgments of the Hon'ble Supreme Court, held that attestation of the will in the manner stated in Section 63 of the Succession Act is not an empty formality. It

means signing a document for the purpose of testifying the signatures of the executant. The attesting witness should put his signature on the will *animo attestandi*. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act, which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document. The attesting witness should speak not only about the testator's signature or fixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator. Similar view has been taken by the Hon'ble Supreme Court, in the case of **Savitri Bai and another vs. Savitri Bai (Supra)**.

20. Adverting to the facts of the instant case, the will was executed by the deceased Ram Kishore in favour of the defendant-respondent disclosing therein that the present wife of the deceased was earlier married to Ram Achal Verma resident of Mauza Ganeshpur, Pargana and Tehsil Akbarpur, District-Faizabad. Smt. Sursati, after his death, came to the house of Ram Kishore. She came with Pudai @ Sabhapati, who was born from her first husband. There is one son Ved Prakash born from deceased Ram Kishore and Smt. Sursati. Ram Kishore has purchased the land for Sabhapati and his wife. House has also been given so that there may not be any quarrel in future. He has executed the will deed in favour of Ved Prakash. The will was challenged on the ground that there was no free will by the executor and the will was forged and fabricated. The will was executed in unconscious mind and there are thumb impressions on the will,

while executant of the will was a retired doctor. As such, the reasons and circumstances for execution of will has been disclosed in the will itself. It has also been disclosed that the will is being executed with free will and without any influence or coercion.

21. Rajmani, one of the attesting witnesses appeared as D.W. 3. The attesting witness stated in his examination-in-chief that the whole document was written in his presence, thereafter, all presented before the Registrar, where thumb impressions were got put wherever required. He stated that Ram Kishore was ill but he used to stand up on his own. He was able to see and hear. He was also able to read. He was asked by Ram Kishore for witness on the will. Ram Kishore had read the will. At the time, the will was signed, his hand used to shake and Radhe Shyam was second witness to the will. The will was executed in favour of Ved Prakash. Ram Kishore had told that he is making a will of his land in favour of his younger son Ved Prakash. The will was written on the asking of Ram Kishore. Ram Kishore had put his thumb impression. The will was read over. In the Registry Office, the thumb impression of Ram Kishore and others got put. It is wrong to say that Ram Kishore had not executed the will with his consent. It is also wrong to say that the Ram Kishore was not able to see and hear at the time of execution of will. Thus, the execution of will was proved by the attesting witness D.W. 3 in accordance with the Section 68 of Indian Evidence Act read with Section 63 of the Indian Succession Act. Merely because it has not been said by the attesting witness as to out of the two witnesses, who had put first, it cannot be said that the will is not proved because he stated that all were present in the Registry Office, when they put signatures. It has also been

stated that Ram Kishore used to come to his shop at Araiya. He had told that Pudai @ Sabhapati has filed a suit claiming right for his share, whereas, he has given to Sabhapati and his wife 8 bigha land and abadi and executed the registered will so that there may not be any dispute of ancestral property. Nothing could be extracted in cross-examination, which may create any doubt about his testimony or that the will was not executed in accordance with law.

22. Learned trial court, after considering the evidence of the attesting witness and the evidence of the plaintiff-appellant Sabhapati, who admitted in his evidence that the photo on the will is of his father, photo is original but stated that the thumb impressions are forged, however the same has not been proved by any documentary evidence or expert opinion, came to the conclusion that the will is neither forged nor liable to be set aside as the plaintiff-appellant has failed to prove his grounds of challenge to the will. The learned lower appellate court recorded a finding that the attesting witness Rajmani, who has been examined as D.W. 3, has proved the execution of the will.

23. Now the question arises as to whether the plaintiff-appellant is the real son of the deceased Ram Kishore or not and he is entitled for half of the share of the ancestral property in dispute or not. Deceased Ram Kishore, while executing the will had disclosed in it that the plaintiff-appellant was born out of the wedlock of Ram Achal Verma and Smt. Sursati, who had come to his house after death of his first husband with her first son Pudai @ Sabhapati i.e. the plaintiff-appellant.

24. Smt. Sursati appeared as D.W. 2. She admitted in her evidence that her

first marriage was solemnized with Ram Achal Verma, resident of Mauza Ganeshpur, Pargana and Tehsil Akbarpur. Out of the said wedlock, one son namely Pudai @ Sabhapati was born. After death of her first husband, she was married to Ram Kishore resident of Salahpur Razore. One son and three daughters were born from her and Ram Kishore. Sabhapati was born in Ganeshpur and he has his farming in Ganeshpur. She had brought Pudai @ Sabhapati with her to the house of Ram Kishore. On her request, her husband Ram Kishore got Sabhapati educated. She further stated that on her request, her husband also purchased 11 biswa land in the name of Pudai @ Sabhapati in Mauza Salahpur Razore, Pargana and Teshil Tanda, District Ambedkar Nagar and also gave house and on her request, he also purchased eight bigha land in Araiya and Salahpur Razore and two biswa land for abadi in the name of Pudai @ Sabhapati and his wife so that there may not be any quarrel in regard to his ancestral property in future. Sabhapati filed a suit for rights, therefore, for protection of his property her husband executed a registered will deed. She also stated that after death of her husband, her younger son Ved Prakash is the owner and in possession of the land in dispute and doing farming on the same. In cross-examination, she stated that her husband was ill for one-two month prior to his death. During illness, he used to walk. When he died, she was with her in the hospital. Her husband was admitted in hospital for 15 days. He was able to stand up with the help of his stick. He had problem of eyesight and hearing. Thus, the mother of the plaintiff-appellant admitted that the plaintiff-appellant was born out of her wedlock with her previous husband Ram Achal Verma and she has brought him to the house of her second husband Ram

Kishore. Therefore, once the mother of the plaintiff-appellant admitted that he was born out of wedlock with Ram Achal Verma, it cannot be said that he was the real son of the deceased Ram Kishore, merely because he has been shown his father in High School Certificate and other documents, which may have been because after death of his father, he came with his mother to the house of the deceased Ram Kishore, who treated him as his son and also purchased land etc. for him as told by the witnesses, which has not been disputed.

25. The learned trial court, after considering the evidence of the mother of the plaintiff-appellant, who is D.W. 2, and also copy of Parivar Register 89ga, in which Smt. Sursati has been shown as wife of Ram Achal and Pudai @ Sabhapati as son of Ram Achal, has recorded a finding that the plaintiff-appellant was not the real son of the deceased Ram Kishore, thus, Sabhapati cannot be co-tenureholder of the property of the deceased Ram Kishore and his name is also not recorded as such in record of rights. Thus, in absence of any will in his favour, it cannot be said that the plaintiff-appellant is entitled for 1/2 share in the property of the deceased Ram Kishore.

26. In view of above, since the plaintiff-appellant is not the real son of the deceased Ram Kishore, he is legally not entitled for share in the ancestral property in dispute of the deceased Ram Kishore and he was not co-tenureholder of the land in dispute. The learned trial court, after considering the Khatauni of the land in dispute in paper 51ga and 54ga, has recorded a finding that the name of the defendant Ram Kishore son of Dalthamman, Mauja Salahpur Rajore Haal Vaarid Araiya is recorded and the name of

the plaintiff-appellant is not recorded, therefore, he has failed to prove that he is owner and in possession of the land in dispute. He has also failed to give any evidence in regard to possession on the land in dispute in his evidence, thus, he is not entitled for injunction.

27. Learned trial court and the lower appellate court, after considering the evidence, material and findings recorded by the trial court and that 'Maternity is certainty and paternity is surmise' and in view of the admission of Smt. Sursati, mother of the plaintiff-appellant, held that the claim of the plaintiff-appellant that he is son of the deceased Ram Kishore instead of Ram Achal, is not tenable. Besides it, his name is also recorded in the paper 89ga as son of Ram Achal and name of Ram Kishore is recorded in the Khatauni, thus, the courts below have passed the judgment and decrees, after considering the pleadings, evidence and material on record in accordance with law. Thus, there is no illegality or error in the findings recorded by the learned courts below.

28. Learned counsel for the plaintiff-appellant relying on the case of **Dhirajlal Girdharilal vs. Commissioner of Income-tax, Bombay (Supra)** argued that the mind of the lower appellate court was affected by the irrelevant material. The Hon'ble Supreme Court has held in the case that it is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say as to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises. It cannot be disputed that issue of law may arise on use of inadmissible material.

However, in a second appeal unless the said issue of law is substantial on the basis of pleadings, evidence and material on record, it cannot be said that it is a substantial question of law involved in the second appeal and the second appeal can be entertained, heard and decided only on the substantial question of law involved in the second appeal. Learned counsel for the plaintiff-appellant has failed to point out any inadmissible material in this appeal, which may have been considered by the courts below. The said judgment has been relied by a Division Bench of this Court in the case of **Committee of Management, Gangadin Ram Kumar Inter College, Ramgarh Barwan, District Jaunpur vs. Deputy Director of Education and others (Supra)**. However, the said judgments are not applicable on the facts and circumstances of the case in hand.

29. The Hon'ble Supreme Court, in the case of **Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs. (Supra)**, has dealt with the power of the High Court under Section 100 Code of Civil Procedure, 1908 in a second appeal and the phrase "substantial question of law" as occurring in amended Section 100 as it has not been defined in the Code, held that the word substantial, as qualifying "question of law", means of having substance, essential, real and of sound worth, important and considerable. It has further been held that substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. The relevant paragraph Nos. 10 to 12 are extracted hereinbelow:-

"10. At the very outset we may point out that the memo of second appeal filed by the plaintiff-

appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on substantial question of law involved in the case. An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court

records reasons for its such satisfaction.

11. Even under the old Section 100 of the Code (pre-1976 amendment), a pure finding of fact was not open to challenge before the High Court in second appeal. However the Law Commission noticed a plethora of conflicting judgments. It noted that in dealing with second appeals, the Courts were devising and successfully adopting several concepts such as, a mixed question of fact and law, a legal inference to be drawn from facts proved, and even the point that the case has not been properly approached by the Courts below. This was creating confusion in the minds of the public as to the legitimate scope of second appeal under Section 100 and had burdened the High Courts with an unnecessarily large number of second appeals. Section 100 was, therefore, suggested to be amended so as to provide that the right of second appeal should be confined to cases where a question of law is involved and such question of law is a substantial one. (See Statement of Objects and Reasons). The Select Committee to which the Amendment Bill was referred felt that the scope of second appeals should be restricted so that litigations may not drag on for a long period. Reasons, of course, are not required to be stated for formulating any question of law under sub-section(4) of Section 100 of the Code; though such reasons are to be recorded under proviso to sub-section (5) while exercising power to hear on any other

substantial question of law, other than the one formulated under sub-section(4).

12. *The phrase substantial question of law, as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying question of law, means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the Legislature has chosen not to qualify the scope of substantial question of law by suffixing the words of general importance as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta & Anr. Vs. T. Ram Ditta, AIR 1928 Privy Council 172, the phrase substantial question of law as it was employed in the last clause of the then existing Section 110 of the C.P.C. (since omitted by the Amendment Act, 1973) came up for consideration and Their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. Vs. The Century Spinning and Manufacuring Co., Ltd., (1962) Supp.3 SCR 549, the Constitution*

Bench expressed agreement with the following view taken by a Full Bench of Madras High Court in Rimmalapudi Subba Rao Vs. Noony Veeraju, ILR 1952 Madras 264:-

"[W]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law."

and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in

determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

30. Learned counsel for the plaintiff-appellant also relied on the judgment in the case of **(Smt.) Savitri and others vs. Surendra Mohan Mohana (Supra)** in regard to the person, who sets up a title to property by purchase must prove that his vendor had a title in the property sold. It is not applicable in the facts and circumstances of the case in hand.

31. In the case of **Ram Adhar and others vs. Baij Nath (Supra)**, a co-ordinate Bench of this Court has held that where the findings by the court of facts was vitiated by non-consideration of relevant evidence or by erroneous approach into the matter, the High Court is not precluded from recording proper findings as held by the Hon'ble Apex Court in **Jagdish Singh vs. Nathu Singh; 1992 (1) SCC 647**.

32. A co-ordinate Bench of this Court, in **Jhuri Singh vs. Ram Kumar Singh and another (Supra)**, after considering the facts and circumstances of the case, has remanded the matter for issuing fresh commission and thereafter deciding the appeal in accordance with law, considering the judgment of the Hon'ble Apex Court to the effect that the rule of non-interference in concurrent findings of the lower courts is not an absolute rule of universal application. What must be examined is whether its conclusions are justifiable according to the parameters of consideration for interference in second appeal as held in **Hafazat Hussain vs. Abdul Majeed and others; (2001) 7 SCC 189**.

33. The Hon'ble Supreme Court, in the case of **Ratnagiri Nagar Parishad vs. Gangaram Narayan Ambekar and others (Supra)**, held that the initial burden of proof was on the plaintiffs to substantiate their cause, which they had failed to discharge. In such a case, the weakness in the defence cannot be the basis to grant relief to plaintiffs and to shift the burden on the defendants, as the case may be. Thus, understood, the findings and conclusions reached by the first appellate court will be of no avail to the plaintiffs.

34. The Hon'ble Supreme Court, in the case of **State of Haryana vs. Harnam Singh (Dead) through LRs. and others (Supra)**, has held that a detailed factual inquiry to come to its finding by the High Court was impermissible while hearing an appeal under Section 100 of the Code of Civil Procedure, 1908. It has further been held that the finding of the trial court and the first appellate court ought not to have been interfered with by the High Court as we do not find perversity in the impugned judgment of the first two courts of facts. It has also held that the factual finding recorded by the two courts below cannot be interfered by the High Court unless the same is without jurisdiction and perverse.

35. A co-ordinate Bench of this Court, in **Moinuddin vs. Smt. Kanti and others (Supra)**, has held that the finding of the lower appellate court is based on the proper appreciation of the material on record and the relevant law and the Hon'ble Apex Court has held that this Court cannot interfere even in the wrong finding of the facts recorded by the lower appellate court unless it is shown to be perverse.

36. The Hon'ble Supreme Court, in the case of **Madhusudan Das vs. Smt. Narayani Bai and others (Supra)**, has

held that in an appeal against the trial court decree, when the appellate court considers an issue turning on oral evidence, it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony, therefore, the appellate court can interfere only on very clear proof of mistake by the trial court. The relevant paragraph 8 is extracted hereinbelow:-

"8. The question whether the appellant was in fact adopted by Jagannathdas and Premwati has been determined essentially on the basis of oral testimony, and reference has been made to a few documents only in supplementation of the oral evidence. At this stage, it would be right to refer to the general principle that, in an appeal against a trial Court decree, when the appellate Court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial Court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In this connection,

reference may usefully be made to W.C. Macdonald v. Fred Latimer, AIR 1929 Privy Council 15, 18 where the Privy Council laid down that when there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial Court's findings as to the truth of the oral evidence, the appellate Court can interfere only on very clear proof of mistake by the trial Court. In Watt v. Thomas, 1947 AC 484, 486 it was observed : it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given". This was adverted to with approval by the Privy Council in Sara Veeraswami v. Talluri Narayya (deceased), AIR 1949 Privy Council 32 and found favour with this Court in Sarju Parshad v. Raja Jwaleshwari Pratap Narain Singh, 1950 SCR 781, 783. It seems to us that this approach should be placed in the forefront in considering whether the High Court proceeded correctly in the evaluation of the evidence before it when deciding to reverse the findings of the trial court. The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of

the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact. Our attention has been drawn by the respondents to The Asiatic Steam Navigation Co. Ltd., v. Sub-Lt. Arbinda Chakravarti, (1959) Supp 1 SCR 979 but nothing said therein detracts, in our opinion, from the validity of the proposition enunciated here."

37. A co-ordinate Bench of this Court, in **Faggan (Deceased) and others vs. Bhagwan Sahai (Deceased) and another (Supra)**, has observed that the Apex Court deprecated the liberal construction and generous application of provisions of Section 100, C.P.C. as the Hon'ble Supreme Court was of the view that only because there is another view possible on appreciation of evidence that cannot be sufficient for interference under Section 100, C.P.C. The relevant paragraph 18 is extracted hereinbelow:-

"18. The Apex Court depreciated the liberal construction and generous application of provisions of Section 100, C.P.C. Hon'ble Supreme Court was of the view that only because there is another view possible on appreciation of evidence that cannot be sufficient for interference under Section 100, C.P.C. For ready reference, extract of paragraph 7 of the case of Veerayee Ammal v. Seenii Ammal, (2002) 1 SCC 134 is quoted below:

."7..... We have noticed with distress that despite amendment, the provisions of Section 100 of the Code have been liberally construed and generously applied by some Judges of the High Courts with the result that objective intended to be achieved by the amendment of Section 100 appears to have been frustrated. Even before the amendment of Section 100 of the Code, the concurrent finding of facts could not be disturbed in the second appeal. This Court in Paras Nath Thakur v. Mohani Dasi held: (AIR p. 1205 para 3).

'It is well settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on second appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the Courts of fact may be. It is not necessary to cite those decisions. Indeed, the learned Counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two Courts of fact'."

38. In view of above, since it has been proved that the plaintiff-appellant was not the real son of deceased Ram Kishore and his name was not recorded as co-tenureholder in the record-of-rights, therefore, he is not entitled for half of the share as claimed by him. The will has also been executed by the deceased Ram kishore in favour of the predecessor-in-interest of the defendant-respondent, which was proved, however, even if there is any

discrepancy in the findings recorded by the courts below, it will not make any difference because since the plaintiff-appellant has failed to prove that it has not been executed in accordance with law. Even otherwise he is not entitled for any share in the ancestral property of the deceased Ram Kishore, therefore he could not have challenged the will deed executed in favour of the father of the defendant-respondent and even if it is set aside, the plaintiff-appellant would not get any right over the property of the deceased Ram Kishore in view of Section 171 of the Act of 1950.

39. It is also settled law as disclosed above that the concurrent findings recorded by the two courts below cannot be set aside by this Court in second appeal unless the findings are perverse and without jurisdiction, which is not the case herein because the learned courts below have passed the judgment and decrees in accordance with law after considering pleadings, evidence and material on record by passing a reasoned and speaking orders and dealing the same and the same are not perverse and without jurisdiction. Even otherwise any defect in the findings recorded by the courts below in regard to the will which does not affect the merits of the case regarding claim of half share in the property in dispute or the jurisdiction of the court because the plaintiff-appellant has also failed to prove the title and possession on the land in dispute, cannot be a ground for interference by this Court. Thus, impugned judgment and decrees cannot be reversed or modified in view of Section 99 of CPC. The aforesaid substantial questions of law formulated in this appeal are answered accordingly. Thus, the appeal has been filed on misconceived and baseless grounds and is liable to be dismissed.

40. The second appeal is dismissed. No order as to costs.

(2025) 1 ILRA 701

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 16.01.2025

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 12 of 2018

Prem Chand & Ors. ...Appellants
Versus
Charat Kumar Bansal ...Respondent

Counsel for the Appellants:

Sri Jagdish Prasad Mishra, Sri Prem Prakash Chaudhary

Counsel for the Respondent:

Sri Nipun Singh, Sri Sumit Daga

Civil Law – Code of Civil Procedure, 1908 – Section 100 - Order XLI Rule 5 - Order XLII Rule 1 - Order XLIII Rule 1 - Code of Civil Procedure (UP Amendments) – Section 115, 115(4)- Second Appeal – Appeal is pending at admission stage - issue of Summoning VIS-À-VIS Retaining or Returning the Original Record - The respondent's counsel raised an issue regarding the return of the original record of the first Appellate Court and the trial court, which had been summoned by the High Court without admitting the appeal - **Legislative Mandate on Stay of Proceedings** - The court discussed the legislative mandate under Order XLI Rule 5 of the Code of Civil Procedure and U.P. amendments in Section 115 of C.P.C., which St. that mere filing of an appeal or revision does not operate as a stay against the proceedings – court finds that, - the Supreme Court, in the case of Asian Resurfacing of Road Agency P. Ltd., directed that photocopies or scanned copies of records should be summoned instead of the original records – However, the Supreme Court's decision in Asian Resurfacing was later reversed by the Constitution Bench in a case of High Court Bar Association, Allahabad Vs St. of

Uttar Pradesh, but the directions regarding summoning photocopies/scanned copies of records remained unaffected – held, - the office is directed to summon only photocopies/scanned copies of records unless specifically directed otherwise and to remit back any original records previously summoned – directions are also issued to the Registrar General to issue necessary Circular / communication to the office of this court as well as all the district judgeships to act as per directions - Appeal is pending. (Para – 9, 10, 11, 12, 13)

Second Appeal Pending. (E-11)

List of Cases cited:

1. Asian Resurfacing of Road Agency P. Ltd. Vs Central Bureau of Investigation - Supreme Court Order dated 25.04.2018 - (2018) 16 SCC 299),
2. High Court Bar Association, Allahabad Vs St. of U.P. & ors. (2024) 6 SCC 267.

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

**ON THE ISSUE OF SUMMONING
VIS-A-VIS RETAINING OR
RETURNING THE ORIGINAL
RECORD**

1. Shri Sumit Daga, learned counsel for the respondent, raised an issue which prima facie appears to be quite small, but has a significant value. The matter is being treated as of general importance qua a limited issue that is coming up before this Court in many cases.

2. The case was mentioned in the morning, not for the purposes of its hearing as the time constraints otherwise do not allow hearing of the matter today, but making a prayer as regards return of the original record of the first Appellate Court and the trial court which, earlier, had been summoned by this Court without admitting the appeal.

3. Referring to the order dated 19.01.2018, it is contended that, till today, the instant appeal has not been admitted but the Court had summoned the original record seven years ago, and, on 07.03.2019, an order was passed to the effect that mere pendency of appeal would not mean passing of any interim order staying execution of decree. Submission is that the matter is being adjourned for last several years and though the appeal has not been admitted, since the original record is lying before this Court for hearing on admission, the execution proceedings are held up. He requests the Court to remit back the original record to the District Judgeship.

4. It is quite common and part of proceedings of this Court that whenever this Court summons the record of the proceedings of sub-ordinate court, particularly those decided finally, it is done so as to facilitate consideration of the matter before it, either for admission or for final hearing. Reason is that the Court wants to peruse the documents forming part of the record of sub-ordinate Court. Therefore, irrespective of the fact that the appeal or revision has or has not been admitted, summoning the original record would create some unforeseen problems.

5. Legislative mandate contained under Order XLI Rule 5 of Code of Civil Procedure or U.P. amendments made in Section 115 of C.P.C. is clear to the effect that mere filing of an appeal or revision would not operate as stay against the proceedings. The said provisions are quoted for a ready reference:-

Order XLI Rule 5 of
Code of Civil Procedure
"5. Stay by Appellate
Court- (1) An appeal shall not
operate as a stay of proceedings

under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree."

Sub-section (4) of Section 115 of Code of Civil Procedure (U.P. Amendment)

"(4) A revision shall not operate as a stay of suit or other proceedings before the court except where such suit or other proceedings is stayed by the superior court."

6. By virtue of **Order XLII Rule 1** of Code of Civil Procedure, 1908, provisions of Order XLI are also made applicable to **appeals from appellate decrees** and, hence, Rule 5 of Order XLI would also apply to second appeals. It is quoted hereunder:-

"1. Procedure- The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees."

7. Similarly, vide **Order XLIII Rule 1** of Code of Civil Procedure, 1908, provisions of Order XLI are also made applicable to appeals from orders and, hence, Rule 5 of Order XLI, as quoted above, would also apply to appeals from orders.

8. In this regard, this Court called for relevant circular/notification etc. from the office of this Court so as to understand as to on what basis original/photostat copy

of the record is summoned. The officials concerned placed before the Court a copy of order dated 25.04.2018 passed by the Supreme Court in *Asian Resurfacing of Road Agency P. Ltd. and another vs. Central Bureau of Investigation*, and submitted that it is pursuant to the directions contained in the said order that now the **photostat copy** of the record is being summoned and not its original. For a ready reference, the order dated 25.04.2018 is quoted hereunder:-

"1. Heard learned counsel for the parties.

2. In view of judgment of three Judge Bench dated 28th March, 2018 and after considering the material on record, we do not find any ground to interfere with the order framing charge.

3. Accordingly, the trial court is directed to proceed with the matter pending before it. All contentions of the parties are left open which may be gone into by the trial court. Parties are directed to appear before the trial court on 14th May, 2018.

4. **To give effect to directions in judgment of this Court dated 28th March, 2018, noted above, we direct that wherever original record has been summoned by an appellate/revisional court, photocopy/scanned copy of the same may be kept for its reference and original returned to the trial courts forthwith.**

5. We also direct that if in future the trial court record is summoned, the trial courts may send photocopy/scanned copy of the record and retain the original so

that the proceedings are not held up. In cases where specifically original record is required by holding that photocopy will not serve the purpose, the appellate/revisional court may call for the record only for perusal and the same be returned while keeping a photocopy/scanned copy of the same.

6. A copy of this order be sent to all the High Courts. The appeals are disposed of."

9. The aforesaid order was passed by the Supreme Court in the matter of *Asian Resurfacing* (supra) and, later on, a judgment was passed in same matter reported in (2018) 16 SCC 299 containing directions in paragraphs 36 and 37 of it regarding automatic vacation of interim orders after expiry of six months. The said directions were, later on, set aside by the Constitution Bench of the Supreme Court in *High Court Bar Association, Allahabad vs. State of Uttar Pradesh and others*, (2024) 6 SCC 267. This Court finds that reversal of previous decision in *Asian Resurfacing* by the subsequent decision in *High Court Bar Association* (supra) is an authority on the issue as to whether stay order granted by the High Court would automatically lapse after expiry of six months period. The judgment of the Supreme Court, with great respect, would not affect the directions contained in the order dated 25.04.2018 insofar as summoning of the photostat/scanned copy of the record of subordinate court is concerned nor did the said issue form subject matter of deliberations or consideration before the Apex Court.

10. In view of the above, since, even after reversal of the decision in *Asian*

Resurfacing (supra), the Registry is summoning the photostat/scanned copy of the records of the courts subordinate to this Court, **following directions** are issued to the office of this Court:-

(a) Henceforth, the **original record** shall not be summoned by the office, unless otherwise specifically directed by this Court in a particular case and only **photostat/scanned copy** of the same shall be summoned.

(b) Whenever, in the past, original record has been summoned by this Court, office shall remit back the same to the concerned District Judgeship with a direction to the concerned District Judgeship to immediately send photostat/scanned copy of the said record to this Court and, thereafter, it is the said photostat/scanned copy that shall be kept for the purpose of consideration of the matter by this Court pursuant to previous directions issued by it.

11. Insofar as the present case is concerned, since the Court has already summoned the original record for hearing on admission, this Court is of the view that photostat copy of the record would serve the purpose.

12. Office is directed to remit back the original record of the courts below to the District Judgeship within two weeks. The District Judgeship, after receipt of record, shall get photostat copy of the same and shall forthwith send the same to this Court. It shall, then, be placed before this Court whenever the matter is listed for hearing on admission.

13. **The Registrar General is directed to issue necessary**

circular/communication to the office of this Court as well as all the District Judgeships to act as per directions contained in paragraph No 10 of this order.

(2025) 1 ILRA 705

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 20.01.2025

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 400 of 2011

Zila Ganna Utpadak Sahkari Samiti Ltd.

...Appellant

Versus

Union of India & Ors.

...Respondents

Counsel for the Appellant:

Rajeev Kumar Sinha

Counsel for the Respondents:

Dr. Ravi Kumar Mishra, I H Farooqui, I S Farooqui

Civil Law - Code of Civil Procedure, 1908 - Sections 34 & 80 - General Rules (Civil), 1957 - Rule 6 - National Savings Certificate (Vith issue) Rules, 1981 - Rules 7, 8, 9, 11 - Government Savings Certificate Act, 1959 - Section 2(a), 12 - Maturity amount - Appellant invested amount of Rs.1,50,000/- on 27.09.1984 in NSC Vith issue and amount of Rs.3,02,250/- was to be paid on maturity on 19.09.1990, but amount was not paid on maturity - Appellant filed suit for recovery of amount , dismissed without considering pleadings, evidence and records - Appellant filed civil appeal, partly allowed and held holder not entitled for interest - The learned courts below failed to consider that NSC can be issued in name of society and appellant society rightly invested on behalf of its members in accordance with law. (Para 4)

Held, appellant can't be held guilty of issuance of NSCs in name of society in irregular manner and contravention of rules but respondents are also guilty of it, as issued without verifying properly as to whether it was in accordance with law or not, respondents didn't detect during whole period of NSCs but thereafter for long time and detected after correspondence by appellant and thereafter respondents no.2 called consent of appellant for payment of SB interest on Public Accounts on deposited amount, consent was not given, invested amount was not returned and thus appellant entitled for interest of 6% p.a applicable on SB Public Accounts from date of deposit till date payment. (Para 28)

Appeal partly allowed. (E-13)

List of Cases cited:

1. U.P. Forest Corporation Employees' Provident Fund Trust Vs U.O.I.& ors., Writ Petition No.4393 of 1990, order dated 10.9.1996
2. Mahesh Chandra Bansal Vs Krishna Swaroop Singhal & ors., reported in (1997) 10 SCC 681, (Para 4)
3. Municipal Board, Chandpur Vs U.O.I.& ors.; 2002 SCC OnLine All 323
4. Romeo Sam Arambhan Vs U.O.I.& ors.; 2004 (1) Mh.L.J. 56
5. Tyrreli Leth Lodge Vs U.O.I.; AIR 2004 Gujarat 340, (Para 6)
6. Arulmighu Dhandayudhapaniswamy Thirukoil, Palani, Tamil Nadu, thr. Its Joint Commissioner Vs The Director General of Post Offices, Department of Posts & Ors., Civil Appeal No.4995 of 2006, order dated July 13, 2011
7. Postmaster, Dargamitta H.P.O., Nellore Vs Raja Prameelamma (Ms), 1995 Legal Eagle (SC) 587 (1998 (9) SCC 706)
8. Superintendent of Post Offices & ors. Vs Helpline Grahak Mandal & anr.by National

Consumer Disputes Redressal Commission, New Delhi, Revision Petition No.12 of 2010, order dated 16th April, 2010

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

1. Heard, Shri Rajeev Kumar Sinha, learned counsel for the plaintiff-appellant and Dr. Ravi Kumar Mishra, learned counsel for the defendant-respondents.

2. This second appeal under Section 100 of Civil Procedure Code (here-in-after referred as CPC) has been filed against the judgment and decree dated 03.09.2011 passed in Civil Appeal No.52 of 2007 (Zila Ganna Utpadadak Sahkari Samiti Ltd. Hardoi Vs. Union of India and Another) by the Additional District Judge, Court No.6, Hardoi and Judgment and decree dated 10.04.1995 passed in Regular Suit No.144 of 1993 (Zila Ganna Utpadadak Sahkari Samiti Ltd. Hardoi Vs. Union of India and Another) by the Civil Judge, (Senior Division), Hardoi and to pay the maturity amount mentioned on the face of National Savings Certificate (here-in-after referred as NSC) i.e. Rs.3,02,250/- alongwith 14% interest during pendency of the suit and appeal with cost as claimed by the plaintiff-appellant. The defendant-respondents have also filed a cross objection alongwith C.M. Application No.56905 of 2013 in this second appeal for dismissing the appeal with cost and to set-aside the judgment and decree dated 03.09.2011, so for it relates to the payment of interest @ 6% per annum from the date of filing of the suit till the date of actual payment.

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

"I. Whether the learned lower court committed the

substantial error of law, not considering the law propounded in the case of U.P. Forest Corporation Vs. Union of India and other, in Writ Petition No.4393 of 1990 dated 10.9.1996. The said judgment also relates to VI Issue of National Saving Certificate which was issued in the name of Institution ignoring the court below even though the court below is duty bound to follow the judgment dated 10.9.1996, passed in Writ Petition No.4393 of 1990?

II. Whether the appellant made the specific plea in the plaint and claimed the interest 14% per annum for the entire period of Suit, was pending. The law propounded by the Hon'ble Apex Court in the case of Mahesh Chandra Bansal Vs. Krishna Swaroop Singhal, reported in (1997) 10 SCC 681. The learned court below should have awarded the interest of 14% and also awarded the amount mentioned in the National Saving Certificate but the court below committed the grave error not awarded the relief as claimed by the appellant ?

III. Whether the respondents promised to pay the amount mentioned in the National Saving Certificate, invested amount was utilised, respondents entered into the contract and the said mistaken credit account is bound to re-pay or return the amount in view of contract. They would be liable to pay the interest under the Interest Act till the date of filing the Suit and further pay interest till date of realisation under Section 34 C.P.C. The learned court below committed

the grave error not following the above principle and partly allowed the appeal ?"

4. Learned counsel for the plaintiff-appellant submitted that the plaintiff-appellant invested an amount of Rs.1,50,000/- on 27.09.1984 in VIth issue of NSCs. According to the maturity amount mentioned on the said NSCs an amount of Rs.3,02,250/- was to be paid on maturity on 19.09.1990, but the said amount was not paid on maturity, therefore, after notice under Section 80 CPC the plaintiff-appellant filed a suit for recovery of the said amount but the suit was dismissed without considering the pleadings, evidence and records, therefore, the plaintiff-appellant filed the civil appeal. The civil appeal has been partly allowed and decreed. But the learned courts below have failed to consider that NSC can be issued in the name of society and the plaintiff-appellant society had rightly invested in the same on behalf of its members in accordance with law and there was no illegality or error in it, therefore, the plaintiff-appellant is entitled for the maturity amount as per the terms and conditions of NSC.

5. He further submitted that the issue is covered by the judgment and order dated 10.09.1996 passed by a Division Bench of this Court in the case of U.P. Forest Corporation Employees Provident Fund Trust Vs. Union of India and Others (Writ Petition No.4393 of 1990) but the trial court failed to consider the same merely on the ground that the said judgment has been passed in writ proceedings, therefore, it is not applicable in the civil suit and the learned lower appellate court wrongly and illegally distinguished the same on the facts of the

present case, which is in violation of Rule-6 of General Rules Civil. Thus, the submission is that the judgment and decree passed by the trial court is liable to be said aside and judgment and decree passed by the lower appellate court is liable to be modified accordingly and the suit is liable to be allowed with cost. He relied on **Municipal Board, Chandpur Vs. Union of India and Others; 2002 SCC OnLine All 323, Romeo Sam Arambhan Vs. Union of India and Others; 2004 (1) Mh.L.J. 56, Judgment and order dated 10.09.1996 passed in U.P. Forest Corporation Employees' Provident Fund Trust Vs. Union of India and Others; Writ Petition No.4393 of 1990 and Mahesh Chandra Bansal Vs. Krishna Swaroop Singhal and Others; (1997) 10 SCC 681.**

6. Learned counsel for the defendant-respondents submitted that the plaintiff-appellant had purchased the NSCs VIth issue in its own name through Secretary, which were irregularly issued as the NSC VIth issue could not have been issued in the name of firm or institution, therefore, on presentation for payment, the holder i.e. the appellant was advised to take the payment at SB Public Accounts interest but the plaintiff-appellant refused to take the same. He further submitted that full maturity value given on the NSCs is not payable as the certificates were issued irregularly in the name of the plaintiff-appellant and no interest is payable on irregular NSCs in view of Rules 7 and 11 of the National Savings Certificate (VIth issue) Rules, 1981 (here-in-after referred as Rules of 1981). The learned trial court has rightly and in accordance with law dismissed the suit filed by the plaintiff-appellant but the lower appellate court erred in law allowing the interest for the

period of pendency of the suit, which could not have been allowed as no interest is payable in view of Rule- 11 of the Rules of 1981. The case law relied by the appellant is not applicable on the facts and circumstances of the case. He relied on **Tyrreli Leth Lodge Vs. Union of India; AIR 2004 Gujarat 340, Judgment and order dated July 13, 2011 passed in Civil Appeal No.4995 of 2006; Arulmighu Dhandayudhapaniswamy Thirukoli, Palani, Tamil Nadu, through its Joint Commissioner Vs. The Director General of Post Offices, Dapartment of Posts and Others and Postmaster, Dargamitta H.P.O., Nellore Vs. Raja Prameelamma (Ms); 1995 Legal Eagle (SC) 587 (1998 (9) SCC 706) and Judgment and order dated 16th April, 2010 passed in Revision Petition No.12 of 2010; Superintendent of Post Offices and others Vs. Helpline Grahak Mandal and Another by National Consumer Disputes Redressal Commission, New Delhi.**

7. On the basis of above, learned counsel for the defendant-respondents submitted that the appeal is liable to be dismissed with cost and the cross objection filed by the defendant-respondents is liable to be allowed with cost and the judgment and decree passed by the lower appellate court awarding the interest @ 6% per annum from the date of filing of the suit is liable to be set-aside and the suit filed by the plaintiff-appellant is liable to be dismissed with cost.

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

9. The plaintiff-appellant invested Rs.1,50,000/- on 27.09.1984 in the NSC VIth issue for a period of six years as per the terms

and conditions of the NSC. The 14% interest was payable and accordingly the double the amount of investment was to be paid on the maturity on 27.09.1990. Upon completion of the period of maturity the plaintiff-appellant presented it for payment but the defendant-respondents refused to make payment on the face value of NSCs on the ground that it has irregularly been issued in the name of the plaintiff-appellant, therefore, letters were written for payment and in response to letter no.755-56 dated 27.11.1991 of the plaintiff-appellant, the defendant-respondents requested to the plaintiff-appellant through letter dated 04.12.1991 to send it's consent to take payment with interest at the rate of SB Public Accounts but the plaintiff-appellant, instead of giving consent sent a notice under Section 80 of CPC through his advocate. The reply to the same was given but the payment was not made, therefore, the plaintiff-appellant filed Regular Suit No.144 of 1993 before the trial court for recovery of Rs.3,02,250/- with interest @ 14% and litigation cost. The suit was contested by defendant-respondents by filing written statement. After exchange of pleadings, following five issues were framed:-

"(1) क्या वादी राष्ट्रीय बचत पत्र जो तालिका में दर्शाये गये हैं, पर देय धनराशि प्राप्त करने का अधिकारी है?

(2) क्या दावा वादी पोषणीय नहीं है?

(3) क्या दावा वादी धारा 80 सी०पी०सी० से बाधित है?

(4) वादी किस अनुतोष को प्राप्त करने का अधिकारी है?

(5) क्या दावा वादी अल्पमूल्यांकित है एवं प्रदत्तन्याशुल्क अपर्याप्त है?"

10. After framing of issues, the documentary as well as the oral evidence was adduced by the plaintiff-appellant, in

which Shri Surendra Singh Verma was got examined as PW-1. The defendant-respondents had not filed any documentary evidence and in oral evidence Shri S.N. Singh was got examined. Thereafter considering the pleadings of the parties, evidence and material on records, the trial court decided the issue no.1 in negative and accordingly dismissed the suit by means of the judgment and decree dated 10.04.1995. Being aggrieved the appellant filed Civil Appeal No.144 of 1993 before the lower appellate court. On the basis of grounds in the appeal and the submissions of learned counsel for the parties, learned appellate court partly allowed the appeal formulating the following two points for determination:-

"1. क्या वादी दि० 27-09-84 को क्रय किये गये धनराशि राष्ट्रीय बचत पत्र (छठा निर्गम) मूल्य रू० 1,50,000/- की परिपक्वता धनराशि रू० 3,02,250/- प्राप्त करने का अधिकारी है?

2. क्या वादी उपरोक्त राष्ट्रीय बचनपत्रों की परिपक्वता पर देय धनराशि पर 14 प्रतिशत वार्षिक ब्याज प्राप्त करने का अधिकारी है?"

11. The lower appellate court, after considering the pleadings, evidence and material on records came to the conclusion that the NSCs were issued against the rules, on which no interest was payable but the defendant-respondent no.2 had not informed about it before the date of maturity or even thereafter and after several letters by the appellant, it was informed by means of letter dated 04.12.1991 that the NSCs were issued in irregular manner and the appellant was asked to give its consent for payment of interest on the SB Public Accounts, therefore, for issuance of NSC against the rules, the plaintiff-appellant only can not be held liable and the defendant-respondent no.2 is more guilty

and held that the appellant is entitled for refund of the invested amount and interest @ 6% per annum on it from the date of filing of the suit till the date of actual payment by means of the judgment and decree dated 03.09.2011. Hence this appeal has been filed, which has been admitted on the aforesaid substantial questions of law.

12. The Government Savings Certificate Act, 1959 (here-in-after referred as the Act of 1959) has been enacted in respect of Government Savings Certificates. Section 2(a) of the Act provides the definition of "holder", according to which, "holder" in relation to a savings certificate, means a person who holds the savings certificate issued in accordance with the provisions of this Act and of any rules made thereunder. Section 12 of the Act provides the power of Central Government to make rules to carry out the purposes of the Act including the conditions as to payment of interest or discount relating to any class of savings certificates and recovery of any interest paid on any amount held in excess of the maximum limits in the same manner as an arrears of land revenue or in any other manner and for any other matter which has to be, or may be, prescribed not given in the rule. Under Section 12 of the Act of 1959, Rules of 1981 were made vide notification dated 24.04.1981. Rule-7 of the said rules provides the purchase of certificates on behalf of others, which is extracted here-in-below:-

7. Purchase Of Certificates On Behalf of Others :-

A person or body specified in column I of the Table below may purchase certificate(s) on behalf of persons specified against his or its

name in the corresponding entry in column II of the said Table:

Provided that the persons specified in the said column II are eligible under these rules to purchase certificates.

<i>I</i>	<i>II</i>
<i>Persons or body who can purchase</i>	<i>On behalf of</i>
<i>(i) an adult</i>	<i>a minor</i>
<i>(ii) a co-operative society including a co-operative bank or a scheduled bank</i>	<i>its members, clients, employees or contractors whose moneys are held as a deposit or otherwise with such society or bank</i>
<i>(iii) a Gazetted Government Officer, an officer of a Government company or of a corporation or of a local authority, or an officer of a corporate body like a marketing committee established under a State Act and authorised by the State Government in this behalf, in his official capacity, or the Reserve Bank of India.</i>	<i>person whose moneys are held as deposit or otherwise with such officer or the Reserve Bank</i>

13. As per clause-2 in the aforesaid table given in Rule-7, a co-operative society can purchase NSC on behalf of its members, clients, employees or contractors whose moneys are held as deposit or otherwise with such society. Thus, a co-operative society could have purchased NSC with issue only on behalf of its members etc. as given under rules. In the present case the NSC with issue had been purchased by the appellant society in the name of secretary, Hardoi District Cane Grower co-operative Society Ltd., Hardoi and it does not indicate that it has been purchased on behalf of its members. Shri Surendra Singh Verma, an employee of the appellant society appeared as PW-1. He, in his evidence, stated that he was Assistant Accountant in the appellant society from 1975-1993 July and on 17.09.1984 Shri B.P. Tripathi, the then Secretary had talked to the Postmaster for purchase of NSC of the money of cane growers and on his advise the NSCs were got issued by the plaintiff-appellant. He also admitted that the NSCs were got made in the name of the Society, however, stated that it was done as the then Postmaster had informed after seeing the rule that it can be got made. In cross-examination PW-1 admitted that Rs.1,50,000/-, the NSC of which were got made, was of cane growers. No meeting was held for it and no proposal was also sent. The decision to purchase the NSC was taken by the Secretary but he has no knowledge as to whether he has taken decision to purchase six years NSC and no correspondence was made with the Postmaster before purchase of NSCs. He also admitted that the NSCs were purchased from the counter after filling the form by the Secretary. However, the payment has not been made as per the face value of the NSCs. Thus, admittedly, the NSCs were got purchased in the name of

the Secretary of the society. Though it has been stated that the NSCs were purchased from the money of cane growers but it has not been disclosed as to who were the cane growers, on whose behalf the NSC VIth issue were purchased and admittedly their names were not indicated even in the form. It has also not been stated that the said members were eligible to purchase NSC because the co-operative society can also purchase NSC on behalf of persons mentioned in column II of the aforesaid table; if he was eligible to purchase NSC under the said rules. Thus the NSCs VIth issue were purchased in contravention of the aforesaid rule. Rule-11 of the Rules of 1981 is about the irregular holding, which is extracted here-in-below:-

"11. Irregular holding-(1)

Any certificate purchased or acquired in contravention of these rule shall be encashed by the holder as soon as the fact of the holding being in contravention of these rules is discovered and no interest shall be paid on any holding in contravention of these rules.

(2) If any interest has been paid on any holding which is in contravention of these rules, it shall be forthwith refunded to the Government failing which the Government shall be entitled to recover the amount involved from any money payable by the Government to the investor or as an arrear of land revenue."

14. According to the aforesaid Rule-11, if any, certificate has been purchased or acquired in contravention of the rules, the same shall be encashed by the holder as soon as the fact of holding in

contravention of the rules is discovered and no interest shall be paid on any holding in contravention of the rules and, if any, interest has been paid on any holding in contravention of the rules, it shall be refunded to the Government forthwith, failing which the Government shall be entitled to recover as the arrears of land revenue. Thus in case any NSC VIth issue has been purchased or acquired in contravention of the rules, the same was required to be surrendered immediately on its discovery and no interest was payable on the same. In the present case, admittedly, it was not discovered during currency of the period of NSCs VIth issue purchased by the plaintiff-appellant and it was only after presentation for payment and repeated requests for payment by the appellant, it was intimated by the defendant-respondents that the NSCs have been got issued in an irregular manner in the name of the society.

15. As borne out from the pleadings, the NSCs in question matured on 29.09.1990 and it were presented for payment on 09.10.1990 but the payment was not made, therefore, a request was made again through letter dated 30.11.1990. On which the defendant-respondent no.2 asked to present on the counter for necessary action. Thereafter, the same were presented on the counter but the payment was not made, therefore vide letter dated 27.01.1991 and thereafter also request was made for payment and in response to the letter dated 27.11.1991, it was intimated vide letter dated 04.12.1991 that according to the departmental rules, NSC can not be issued in the name of the institution, therefore, the NSCs have been issued in irregular manner and no interest is payable on them. However, if the appellant is agreed to receive the payment with SB

interest on Public Accounts, then he may give his consent with photo copy of both sides so that a proposal may be sent to the Director General, Post Offices in this regard. Thus the NSCs were issued in an irregular manner by the defendant-respondents and the mistake was not detected even by the defendant-respondent no.2 during the period of NSCs and even thereafter and after a lapse of more than a year it was intimated that the NSCs have been issued in an irregular manner. Thus, the fault committed by the defendant-respondent no.2 in issuance of the NSCs and non-detection of the same for whole of the period during which the money was kept by the defendant-respondent and acquiring the benefits of the said money by the defendant-respondents can not be denied. It was duty of the defendant-respondent authorities to verify the application for purchase of NSC's on presentation properly in accordance with law and rules and only thereafter issue the NSCs. Rule-8 of the Rules of 1981 provides the modes of payment of purchase of certificates and the Rule-9 provides the issue of certificates.

16. According to sub-rule (3) of Rule-9, if for any reason certificate can not be issued immediately a provisional receipt shall be issued, which may be later exchanged for a certificate, thus, the rule provides sufficient safeguard for issuance of the certificate after verification of the application and eligibility etc. because it is not necessary that the certificate should be issued immediately and it could have been issued after verification but in the present matter not only the plaintiff-appellant is negligent of purchasing the certificate in own name in place of on behalf of its member, if the money of its members was invested, and without disclosing it but the

defendant-respondents are more guilty because the defendant-respondent no.2 issued NSC in an irregular manner without verifying properly as to whether the same are in accordance with law or not. Even before the Court's below or before this Court the plaintiff-appellant has failed to prove/show that the NSCs were purchased on behalf of which members, if it was so. Thus both are responsible for it. The court's below upon considering the pleadings, evidence and material on records and the aforesaid rules held that the NSCs have been issued in an irregular manner, therefore, the holder is not entitled for interest.

17. The learned trial court, after considering that the option sought by the defendant-respondents for giving consent for SB interest on Public Accounts has not been given by the plaintiff-appellant, held that the appellant is not entitled for any relief and dismissed the suit. However, the lower appellate court, after considering the same and the correspondence made between the parties, recorded a finding that it is established that before the date of maturity or even thereafter no information was given by the defendant-respondent no.2 in regard to the issuance of irregular NSCs and even after calling consent for SB interest payable on Public Accounts, no further action was taken by the defendant-respondent no.2 and even the money invested was not refunded, held that not only the plaintiff-appellant can be held guilty for issuance of the irregular NSCs but the defendant-respondent no.2 is more guilty and the defendant-respondent can not deny to make the payment of the invested amount stating the plaintiff-appellant responsible for everything and it was the duty of the defendant-respondent no.2 to refund the invested amount of

Rs.1,50,000/- immediately on coming to know about the irregular issuance of the NSCs, but it was not done and directed to refund the invested amount and interest @ 6% per annum w.e.f. the date of institution of suit till the date of payment.

18. The rule 11(1) of Rules of 1981 provides that any certificate purchased or issued in contravention of the rules shall be encashed by the holder as soon as the fact of the holding being in contravention of this rule is discovered. Sub-rule (2) provides that if any interest has been paid on any holding which is in contravention of the rules, it shall be forthwith refunded to the Government. Thus, once the NSCs were presented for encashment and it was discovered that the same have been issued in contravention of the rules, the same should have been encashed immediately and payment should have been made to the plaintiff-appellant but it was not done by the defendant-respondents. Thus, the plaintiff-appellant only can not be allowed to suffer on account of negligence on the part of both the parties. Even otherwise, the defendant-respondents themselves have offered for a consent for payment of SB interest payable on Public Accounts. The defendant-respondents in the written statement filed before the trial court and in the cross objection filed before this Court have stated that the plaintiff-appellant was requested to send his consent to take payment with interest payable on Savings Bank Accounts, for which holder was entitled. However the consent was not given by the plaintiff-appellant, therefore, the defendant-respondent no.2 has not even paid the invested amount.

19. This Court, in the case of **U.P. Forest Corporation Employees**

Provident Fund Trust Vs. Union of India and Others (Supra), which is in respect of six years NSC (VIth issue), considered the issue of denial of interest on maturity on the ground of violation of Rule 548(5) and 569 of the Post and Telegraph Manual, Vol.5, Part-2. This Court held that the scope of the rule is very limited as it provides only a ministerial work in the office itself and the petitioner has nothing to do with the said rule and in these circumstances it can not be said that after lapse of so many years that NSC has been issued wrongly in favour of the petitioner and when there is not even any suggestion of any fraud on the part of the petitioner, the interest can not be denied and allowed the petition and direction was issued to make the payment of NSC alongwith interest of the maturity value. However, this Court had observed that rule 13 of the Post Office Savings Certificate Rules, 1960 would show that it applied only to those cases where a certificate has been purchased in excess of prescribed limit or in contravention of the rules and in the case in hand there is no charge either on these two heads against the petitioner and as there was no fraud or misrepresentation on the part of the petitioner. Thus, this Court found that the NSC in the said case were not issued in contravention of the rules, whereas in the present case the NSCs have been issued in contravention of the rules, therefore, it is not applicable on the facts and circumstances of the present case.

20. The learned trial court, after considering the relevant rules and the judgment in the case of **Tyrreli Leth Lodge Vs. Union of India (Supra)**, held that it is not justified to give benefit of the judgment passed in the aforesaid writ petition at this stage. However, the same has been considered by the lower appellate

court and held that it is not applicable on the facts and circumstances of the present case. The Gujarat High Court, in the case of **Tyrreli Leth Lodge Vs. Union of India (Supra)**, has held that to purchase NSC is not a fundamental right vested in the petitioner. It is not function of this Court to widen or enlarge the scope of the scheme under the Rules of 1981 and once the petitioner is not entitled to purchase the aforesaid NSC, though the same have been issued by the Post Office concerned, as per Rule 11 of the Rules of 1981 for such type of irregular holder of the said NSC i.e. the petitioner shall not be entitled to the interest. The relevant paragraph-6 is extracted here-in-below:-

"6. From Rule 11 of Rules of 1981, it is crystal clear that if any certificate is purchased or acquired in contravention of these Rules shall be encashed by the holder as soon as the fact of the holding being in contravention of these Rules is discovered and such holder shall not be paid interest on the principal amount of the National Savings Certificates and interest earned thereon. The Rules of 1981 are not violation of fundamental rights of the petitioner. To purchase National Savings Certificate is not a fundamental right vested in the petitioner. The said scheme of National Savings Certificates has been floated by the Central Government for the purpose of certain persons. Purchase of National Savings Certificate has been made restrictive by specifying purchasers under Rules 4 and 7 of the Rules of 1981. It is not a function of this Court to widen or enlarge the

scope of the scheme under the Rules of 1981. Once the petitioner is not entitled to purchase the aforesaid National Savings Certificate though the same have been issued by the Post Office concerned, as per Rule 11 of the Rules of 1981 for such type of irregular holder of the said National Savings Certificate i.e. the petitioner shall not be entitled to the interest on the principal amount of National Savings Certificates. Learned advocate for the petitioner submitted that the petitioner has already received principal amount of Rs. 50,000/- of National Savings Certificates purchased by him and mainly this petition has been filed for getting interest on the principal amount."

21. Learned counsel for the plaintiff-appellant had argued that the learned trial court has wrongly and illegally not considered the aforesaid judgment passed by this Court in writ petition, whereas the same has been considered by the trial court and it has been held that no benefit of same can be given by the court at this stage and the learned lower appellate court considered the same and found that it is not applicable on the facts and circumstances of the present case because in the present case, the violation of Rule-6 and 11 of Rules of 1981 has been alleged and found. The learned trial court could not deny to follow the ruling of this Court, if it is in force and applicable on the facts and circumstances of the case. Rule-6 of the General Rules (Civil), 1957 provides that all subordinate Courts shall follow the rulings of the High Court which are in force. However, in the facts and circumstances of the present case and as

discussed above, it can not be said that the learned trial court has declined to follow and even if it can be said so, the lower appellate court, who has to deal with the case as trial court considered the same.

22. This Court, in the case of **Municipal Board, Chandpur Vs. Union of India and Others (Supra)**, which is in regard to the Vth issue of NSC, considered the entitlement of the president of the petitioner board to purchase the NSC and after considering Rule-6(a) of the National Savings Certificates (Vth issue), Rules, 1973 held that a local authority can purchase these certificates and the President of the Board is not debarred to purchase the National Savings Certificates on behalf of the Board and the allegation that it can be purchased only by an Officer of the Board is found untenable. It is not applicable on the facts and circumstances of the present case.

23. The Bombay High Court, in the case of **Romeo Sam Arambhan Vs. Union of India and Others (Supra)**, held that it has been repeatedly held by the Supreme Court that estoppel is a rule of equity flowing out a fairness striking on behaviour deficient in good faith, it is invoked and applied to aid the law in administration of justice; but for it great injustice may have been perpetrated and allowed the petition on the ground that the certificates were issued to the petitioner in the name of sole Proprietorship firm not in conformity with the Rules of 1989 as amended vide Notification dated 8th March, 1995 and as is contended by the respondents, by clerical oversight/ mistake and allowed interest @ 6% per annum.

24. The Hon'ble Supreme Court, in the case of **Arulmighu**

Dhandayudhapaniswamy Thirukoli, Palani, Tamil Nadu, through its Joint Commissioner Vs. The Director General of Post Offices, Department of Posts and Others (Supra), has held that though learned counsel for the appellant requested this Court to direct the 3rd Respondent to pay some reasonable amount for his lapse, inasmuch as such direction would go contrary to the Rules and payment of interest is prohibited for such Scheme in terms of Rule 17, we are not inclined to accept the same. We are conscious of the fact that a substantial amount had been kept with the 3rd Respondent till 03.01.1996 when the said amount was refunded without interest as no deficiency in service was found on the facts and circumstances of the case. However, the present case is not of deficiency of service.

25. The Hon'ble Supreme Court, in the case of **Postmaster, Dargamitta H.P.O., Nellore Vs. Raja Prameelamma (Ms) (Supra)**, which is in regard to the NSC (VIth), issue held that no doubt the sale of National Savings Certificates with the terms and conditions embodied thereon constitutes a contract between the Government of India as seller and the holders of the National Savings Certificates, but as this contract was contrary to the terms notified by the Government of India and this was due to inadvertence of the staff, it does not become a contract binding on the Government of India being unlawful and void. As such this is not a case of deficiency in service and set-aside the order passed by which it was held that the Government of India was bound to pay the unconnected maturity value as recorded in the order dated 16.04.2010 passed by the National Consumer Dispute Redressal Commission, New Delhi in the case of

Superintendent of Post Offices and others Vs. Helpline Grahak Mandal and Others. The savings bank interest has been paid as the Finance Ministry had agreed to pay the interest at the rate of 6% in a similar earlier matter.

26. The learned lower appellate court found that the trial court has wrongly and illegally dismissed the suit without passing an order for payment of interest during pendency of the suit and thereafter. Section 34 deals with the question of Interest in three stages, first is interest prior to the date of institution of suit, the second stage is interest from the date of institution of suit till the date of decree and the third stage is from the date of decree till the realization of decreetal amount. Thus, the court can award any interest adjudged on the principal sum for any period prior to the institution of the suit and interest at such rate deems reasonable on the principal sum adjudged from the date of institution of suit to the date of decree with further interest as such rate not exceeding six per cent per annum from the date of decree to the date of payment or to such earlier date as the court thinks fit. Thus the interest for the period prior to the date of filing of the suit and during pendency of the suit can be awarded as adjudged by the court but interest from the date of decree till the date of realization of decreetal amount can not exceed 6% per annum. Section 34 C.P.C. is extracted here-in-below:-

"34. Interest.— (1) *Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in*

addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, [with further interest at such rate not exceeding six per cent. per annum as the Court deems reasonable on such principal sum], from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

[Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent. per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions.

Explanation I.—In this subsection, "nationalized bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).

Explanation II.—For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.]

(2) Where such a decree is silent with respect to the payment of further interest [on such principal sum] from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie."

27. The Hon'ble Supreme Court, in the case of **Mahesh Chandra Bansal Vs. Krishna Swaroop Singhal and Others (Supra)**, has held as under in paragraph-4:-

"4. Shri Venkataramani, the learned counsel appearing for the appellant, has urged that the High Court was in error in proceeding on the basis that under Section 34(1) Civil Procedure Code interest pendente lite was to be awarded @ 6% per annum unless the matter is governed by the proviso to Section 34(1) Civil Procedure Code. The submission is that the proviso only refers to that part of sub-section (1) of Section 34 which prescribes that after the passing of the decree interest shall be awarded @ 6% per annum. The submission is that as regards interest pendente lite the main part of sub-section (1) of Section 34 Civil Procedure Code prescribes that interest has to be awarded at a reasonable rate. We find merit in the aforesaid contention of the learned counsel. The main part of sub-section (1) of Section 34 Civil Procedure Code laying down that during the period the suit was pending in Court interest is to be awarded at a reasonable rate and for the period subsequent to passing of the decree interest is to be awarded @ 6% per annum and future interest at a higher rate can be awarded if the proviso is attracted. The only question is what would be the reasonable rate of interest for the period the suit was pending in the Court. Since the appellant, in his plaint, has himself claimed interest @ 12% per annum for the entire

period including the period the suit is pending, we are of the view that pendente lite interest should be awarded @ 12% per annum."

28. In view of above and considering the overall facts and circumstances of the case, this Court is of view that since only the plaintiff-appellant can not be held guilty of issuance of the NSCs in the name of the appellant in an irregular manner but the defendant-respondents are also guilty of it, which could not be detected by the defendant-respondents also not only during the whole period of NSCs but even thereafter for a long time and it was only after correspondence made by the plaintiff-appellant it could be detected and thereafter the defendant-respondents no.2 had called consent of the appellant for payment of the SB interest on Public Accounts on the deposited amount, but the deposited amount was not returned even thereafter and in other matter the same has been paid as Finance Ministry had agreed to pay as recorded in the case of **Superintendent of Post Offices and others Vs. Helpline Grahak Mandal and Another (Supra)** by National Consumer Disputes Redressal Commission, New Delhi, which has not been disputed by the defendant-respondents while relying the said judgment and order, the plaintiff-appellant is entitled for the interest of 6% per annum applicable on SB Public Accounts from the date of deposit till the date payment.

29. The aforesaid substantial question of law nos.1 to 3 are decided accordingly. The plaintiff-appellant is entitled for the deposited amount alongwith interest @ 6% from the date of deposit up to the date of payment. The judgment and decree dated 03.09.2011 passed in Civil

Appeal No.52 of 2007 (Zila Ganna Utpadadak Sahkari Samiti Ltd. Hardoi Vs. Union of India and Another) by the Additional District Judge, Court No.6, Hardoi is accordingly modified. The suit filed by the appellant stands partly allowed and decreed accordingly.

30. With the aforesaid, this appeal is **partly allowed**. No order as to costs.

(2025) 1 ILRA 718
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2025

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Habeas Corpus Writ Petition No. 439 of 2023

Gurmel Singh & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
 Sri Akash Mishra

Counsel for the Respondent:
 G.A.

Criminal Law — Constitution of India, Article 226- Criminal Procedure Code, 1973 - Section 427- Narcotic Drugs and Psychotropic Substances Act, 1985- Habeas Corpus — Illegal detention — Convict undergoing sentence in two separate NDPS cases — Sentence in second conviction to run consecutively in absence of direction to run concurrently — Petitioner contended continued detention illegal since sentence served in first case — Held, Section 427 Cr.P.C. provides general rule of consecutive sentence unless otherwise directed — Discretion to order concurrent running of sentences not exercised by trial court — Convictions under NDPS Act are serious and against

society — No illegality found in continued custody — Habeas corpus petition liable to be dismissed. (Paras 9, 11,12, and 15)

HELD:

Section 427 Cr.P.C. provides that when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence. In other words, subsection (1) of Section 427 confers a discretion on the Court to direct that the subsequent sentence following a conviction shall run concurrently with the previous sentence. (Para 9)

It has been held that if the transactions related to the offences is not the same or the facts constituting the two offences are quite different in that case the subsequent sentence should run consecutively- Further, in absence of any direction as to running of subsequent sentence, as per general rule enunciated in Section 427(1), the subsequent sentence will not run concurrently but consecutively. (Para 11)

It has further been observed that even while exercising discretion under 427(1) Cr.P.C. to run subsequent sentence concurrently with the previous sentence, the discretion is to be exercised judiciously and depending upon the offence/offences committed. Therefore, considering that offences under the NDPS Act are very serious in nature and against the society at large, held, no discretion shall be exercised in favour of such accused who is indulging in multiple offences under the NDPS Act. (Para 12)

Upon hearing the learned counsel for the parties and from the perusal of the record and the two custody certificates, it transpires that the corpus Gurmel Singh is a repeat offender under the N.D.P.S. Act and has been convicted in two separate offences by different trial courts in two different transactions having different case crime numbers and the cases have been registered at different Police Stations in different

St.s and have been decided by two different judgments. Therefore, the petitioner is not entitled to any benefit of concurrent sentence under Section 427 of Cr.P.C. especially when there is no specific order or direction that the sentences shall run concurrently. He is in custody since 31.12.2005. His sentence in FIR No. 306/2005 at Punjab was completed on 17.09.2019 and thereafter his sentence in FIR No.89/2006 at Uttar Pradesh started on 18.09.2019 and is continuing till date. He has served approximately seven years of imprisonment with remission. (Para 15)

Writ petition dismissed. (E-14)

(Delivered by Hon'ble Vivek Kumar Birla, J. & Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Akash Mishra, learned counsel for the petitioners, Sri Rahul Asthana, learned Additional Government Advocate for the State and perused the record.

2. The present Habeas Corpus Writ Petition has been filed with a prayer to issue a writ, order or direction in the nature of Habeas Corpus directing the respondent no.2 to release the corpus/petitioner no.1.

3. The corpus, petitioner no.1 Gurmel Singh has filed the present writ petition through his son Harprit Singh, the petitioner no.2, seeking his release from District Jail, Etawah.

4. The main contention of the learned counsel for the petitioners is that the corpus Gurmel Singh, aged about 68 years is behind the bar since 31.12.2005. It has been contended that the respondent No.2 had illegally detained the corpus as the custody period of the corpus served out at District Jail, Mansa, Punjab vide judgment and order dated 27.08.2008 has not been calculated. It has also been

contended that the petitioner no.1 has already served out the sentence, which was awarded by the District Courts of Ludhiana and Etawah and yet he has been kept under illegal custody, which is in violation of Rules of Jail Manual and Article 21 of the Constitution of India. It has also been asserted that the conduct of the corpus in jail is good and there is no adverse remark against him by the Jail Superintendent. It has been emphasized that the District Court, Etawah while imposing the sentence of 10 years rigorous imprisonment in Case Crime No.89/2006 has not clarified whether the sentence in both the cases, shall run concurrently or not, despite recording the finding that the petitioner no.1 is being convicted by District Court Ludhiana, Punjab and therefore, the benefit of section 427 Cr.P.C. should be given to the petitioner.

5. From the perusal of records, it transpires that the corpus has been convicted in two separate offences under the N.D.P.S. Act at Punjab and Uttar Pradesh.

(i) Briefly stated, the corpus Gurmel Singh was a named accused in Case Crime No.187/2005 lodged at Punjab on 04.08.2005, under Section 15/61/85 of N.D.P.S. Act, Police Station Sadar Mansa, District Mansa, Punjab and was convicted by the learned Trial Court but was subsequently acquitted by the Punjab and Haryana High Court at Chandigarh vide judgment and order dated 06.07.2015.

(ii). Thereafter, the corpus was again implicated at Punjab in First Information Report bearing Case Crime No.306/2005, under

Section 15/25/60/61/85 of N.D.P.S. Act, Police Station Sidhwa Bet, District Ludhiana, Punjab and was arrested on 30.12.2005. The Special Court, Ludhiana vide its judgment and order dated 26.08.2008 had convicted the petitioner under Section 15 of N.D.P.S. Act awarding sentence to undergo rigorous imprisonment of 12 years and to pay fine of Rs.1,50,000/- and in default of payment of fine, to further undergo rigorous imprisonment of one and six months. Against the said order of conviction, the petitioner filed a Criminal Appeal No. CRA-D No.300-DB of 2019 (OM) before the High Court of Punjab and Haryana at Chandigarh, which was dismissed vide judgment and order dated 30.01.2014.

(iii). During his confinement at District Jail, Mansa, Punjab, another case was registered against the petitioner at Uttar Pradesh bearing Case Crime No. 89/2006 dated 16.11.2006, under Section 15/18/25 of N.D.P.S. Act at Police Station Badpura, District Etawah in which the petitioner was summoned through B-Warrant from District Jail, Mansa, Punjab to District Jail, Etawah on 28.04.2008 and remained in custody at Etawah as an under trial from 28.04.2008 upto 17.01.2010 and was convicted in the said matter by the Additional District and Sessions Judge, Fast Track Court No.1, Etawah by the judgment and order dated 18.01.2010 for an offence under Section 25(15) of N.D.P.S. Act for the term of 10 years rigorous imprisonment and fine of Rs.1 lac,

in default of payment of fine, two years additional rigorous imprisonment. Against the said order of conviction, the petitioner no.1 preferred a Criminal Appeal No.1373 of 2010 before this High Court, which was partly allowed by this Court on 09.06.2017 to the extent that the petitioner's conviction under Section 25(15) of N.D.P.S. Act was confirmed and sentence of 10 years of rigorous imprisonment and fine of Rs.1 lac was also maintained but the additional sentence of two years in default of payment of fine, was reduced to one year.

6. Per contra, learned Additional Government Advocate has refuted the contention by referring to the two Custody Certificates issued by the Superintendent District Jail, Mansa, Punjab dated 09.09.2019 and the Senior Superintendent District Jail, Etawah dated 06.07.2023.

A. Details of Custody Certificate, District Jail, Mansa, Punjab dated 09.9.2019

(i)	Name of the Convict	Gurmel Singh S/o Nachhatar Singh
(ii)	FIR No.	306/2005, U/s 15/25/60/61/85 NDPS Act, P.S. Sidhwa Bet, Punjab.
(iii)	Convicted by the Ld. Court	Special Court, Ludhiana, Punjab
(iv)	Date of Judgment	27.08.2008
(v)	Term of Sentence	20 years R.I. (which has been wrongly transcribed in the

		record. The correct term of sentence is 12 years R.I. and fine of Rs.1,50,000/- and in default thereof to further undergo R.I. for one year and six months)
(vi)	Custody as Under trial	31.12.2005 to 26.08.2008
(vii)	Custody after conviction	27.08.2008 to 17.09.2019
(viii)	Total sentence including remission	12 years

Note : The actual sentence awarded to said convict in above mentioned FIR No.306/2005 was completed on 17.09.2019 and with remaining one and half year of imprisonment in lieu of fine which will be started after completion of sentence or bail in FIR No.89/2006, U/s 15/18/25 NDPS Act, PS Badpura, District Etawah (U.P.).

B. Details of Custody Certificate, District Jail, Etawah (U.P.) dated 06.07.2023

(i)	Name of the Convict	Gurmel Singh S/o Nachhatar Singh
(ii)	FIR No.	89/2006, U/s 25/15 NDPS Act, P.S. Badpura, District Etawah (U.P.)
(iii)	Convicted by the Ld. Court	Additional District and Sessions Judge, Fast Track Court-1, Etawah
(iv)	Date of Judgment	18.01.2010

(v)	Term of Sentence	10 years R.I. & fine of Rs.1,00,000/-, in default of payment of fine, to further undergo one year imprisonment
(vi)	Custody as Under trial	28.04.2008 to 17.01.2010
(vii)	Custody after conviction	18.09.2019 to 06.07.2023
(viii)	Total sentence including remission	5 years, six months and 9 days as on 06.07.2023
(ix)	Pending conviction of Punjab	FIR No.306/2005, U/s 15/25/60/61/85 NDPS Act, P.S. Sidhwa Bet, Punjab.

7. It has been asserted by the learned State Counsel, that the corpus has been convicted by two different courts in two different trials, in two different transactions, therefore, the petitioners cannot avail the benefit of Section 427(1) Cr.P.C.

8. To appreciate the submissions made by the learned counsel for the parties, it will be appropriate to produce the provisions of Section 427 Cr.P.C., which reads as under :

“427. Sentence on offender already sentenced for another offence-(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the

imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence :Provided that where a person who has been sentenced to imprisonment by an order under Section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

9. Section 427 Cr.P.C. provides that when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence. In other words, sub-section (1) of Section 427 confers a discretion on the Court to direct that the subsequent sentence following a conviction shall run concurrently with the previous sentence.

10. Recently, the Hon'ble Apex Court has clarified the law on Section 427(1) Cr.P.C. and has also laid down the

principles of law in respect to concurrent and consecutive running of sentences in Mohd. Zahid vs. State through NCB, (2022) 12 Supreme Court Cases 426.

11. It has been held that if the transactions related to the offences is not the same or the facts constituting the two offences are quite different in that case the subsequent sentence should run consecutively- Further, in absence of any direction as to running of subsequent sentence, as per general rule enunciated in Section 427(1), the subsequent sentence will not run concurrently but consecutively.

12. It has further been observed that even while exercising discretion under 427(1) Cr.P.C. to run subsequent sentence concurrently with the previous sentence, the discretion is to be exercised judiciously and depending upon the offence/offences committed. Therefore, considering that offences under the NDPS Act are very serious in nature and against the society at large, held, no discretion shall be exercised in favour of such accused who is indulging in multiple offences under the NDPS Act.

13. Further, the principles of law laid down are as under:

"(i) if a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment, such subsequent term of imprisonment would normally commence at the expiration of the imprisonment to which he was previously sentenced;

(ii) ordinarily the subsequent sentence would commence at the expiration of the first term of imprisonment unless

the court directs the subsequent sentence to run concurrently with the previous sentence;

(iii) the general rule is that where there are different transactions, different crime numbers and cases have been decided by the different judgments, concurrent sentence cannot be awarded under Section 427 of Cr.PC;

(iv) under Section 427 (1) of Cr.PC the court has the power and discretion to issue a direction that all the subsequent sentences run concurrently with the previous sentence, however discretion has to be exercised judiciously depending upon the nature of the offence or the offences committed and the facts in situation. However, there must be a specific direction or order by the court that the subsequent sentence to run concurrently with the previous sentence."

14. Further it has been emphasized in paragraph-11 of the aforesaid judgment :

"Even otherwise as observed hereinabove under Section 427 (1) of Cr.P.C, the Court has the power and discretion to issue a direction that the subsequent sentence to run concurrently with the previous sentence in that case also, the discretion has to be exercised judiciously depending upon the nature of offence or the offences committed. In the present case the appellant – accused has been convicted for the offences under the NDPS Act. He has been

convicted in one case for recovery of 4 kg heroin and sentenced to undergo 12 years RI and in another case there is a recovery of 750 grams of heroin and considering the Section 31 (ii) of the NDPS Act, he has been sentenced to undergo 15 years RI. No leniency should be shown to an accused who is found to be guilty for the offence under the NDPS Act. Those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to a number of innocent young victims who are vulnerable. Such accused causes deleterious effects and deadly impact on the society. They are hazard to the society. Such organized activities of clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have a deadly impact on the society as a whole. Therefore, while awarding the sentence or punishment in case of NDPS Act, the interest of the society as a whole is required to be taken into consideration. Therefore, even while applying discretion under Section 427 of Cr.PC, the discretion shall not be in favour of the accused who is found to be indulging in illegal trafficking in the narcotic drugs and psychotropic substances. As observed hereinabove, even while exercising discretion under Section 427 of Cr.PC to run subsequent sentence concurrently with the previous sentence, the discretion is to be exercised judiciously and depending upon the offence/offences committed.

Therefore, considering the offences under the NDPS Act which are very serious in nature and against the society at large, no discretion shall be exercised in favour of such accused who is indulging into the offence under the NDPS Act.”

15. Upon hearing the learned counsel for the parties and from the perusal of the record and the two custody certificates, it transpires that the corpus Gurmel Singh is a repeat offender under the N.D.P.S. Act and has been convicted in two separate offences by different trial courts in two different transactions having different case crime numbers and the cases have been registered at different Police Stations in different States and have been decided by two different judgments. Therefore, the petitioner is not entitled to any benefit of concurrent sentence under Section 427 of Cr.P.C. especially when there is no specific order or direction that the sentences shall run concurrently. He is in custody since 31.12.2005. His sentence in FIR No. 306/2005 at Punjab was completed on 17.09.2019 and thereafter his sentence in FIR No.89/2006 at Uttar Pradesh started on 18.09.2019 and is continuing till date. He has served approximately seven years of imprisonment with remission.

16. The learned Additional District and Sessions Judge/Fast Track Court No.1, Etawah in its judgment and order of conviction dated 18.01.2010 has not passed any specific order or direction while imposing the subsequent sentence that the subsequent sentence shall run concurrently with the previous sentence. The petitioner/corpus having been convicted repeatedly for an offence under the NDPS Act, which is very serious in nature and against the society at large, therefore, no

discretion shall be exercised in favour of the petitioner. In the light of the Hon'ble Apex Court's judgment as discussed above, the petitioner shall have to serve the remaining sentence consecutively after the date of expiration of the previous sentence.

17. In view of the above and for the reasons stated above, the corpus has not been illegally detained by the respondent no. 2. The present Habeas Corpus Writ Petition fails and the same deserves to be dismissed and is accordingly, **dismissed**.

(2025) 1 ILRA 724

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 15.01.2025

BEFORE

**THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.**

Special Appeal (D) No. 10 of 2025

Saurabh Saxena ...Appellant
Versus
Union of India & Ors. ...Respondents

Counsel for the Appellant:
Rishi Raj, Garv Saxena

Counsel for the Respondents:
A.S.G.I., C.S.C., Gaurav Mehrotra, S M Singh Royekwar

A. Service Law – UP Government Industrial Training Institutes (Instructors and Foreman Instructors) Service Rules, 2021 – Post of Instructor in Sewing Technology – Qualification – Determination – Competence of the Court – Diploma in Garment Fabrication Technology/Costume Design & Dress making was required, but instead it, a qualification equivalent to it was claimed to be possessed – Permissibility – Held, any person claiming to possess any qualification equivalent to a required

Diploma, would not be eligible to apply against the advertisement – The question of equivalence of qualification in the matter of examining the eligibility for the purpose of employment, is to be decided by the employer and the Courts cannot treat any qualification to be equivalent to the qualifications prescribed in the Rules. (Para 15 and 16)

Special Appeal dismissed. (E-1)

List of Cases cited:

1. Sri Subir Sutradhar Vs St. of Tripura & ors.; 2023 SCC OnLine Tri 183
2. Shifana P.S. Vs St. of Kerala & ors.; (2024) 8 SCC 309
3. District Collector and Chairman Vijayanagaram Vs M. Tripura Sundari Devi; 1990 (3) SCC 655
4. Zahoor Ahmad Rather & ors. Vs Sheikh Imtiyaz Ahmad & ors.; (2019) 2 SCC 404

(Delivered by Hon'ble Attau Rahman Masoodi J. & Hon'ble Subhash Vidyarthi J.)

C.M. Application No.1 of 2025
(Application for condonation of delay in filing the Special Appeal)

1. Heard Sri Rishi Raj, the learned counsel for the appellant, Sri Prafulla Yadav, the learned Additional Chief Standing Counsel appearing on behalf of the State, Sri Anand Dwivedi, the learned counsel for Union of India, Sri S.M. Singh Royekwar, the learned counsel for the U.P. Subordinate Services Selection Commission and perused the records.

2. This is an application for condonation of delay in filing the Special Appeal. The learned Counsel for the respondent did not raise any objection against the application. We find that just

and plausible reasons have been disclosed by the applicant-appellant for seeking condonation of delay.

3. The application for condonation of delay is allowed and the delay in filing the Special Appeal is hereby condoned.

4. Let the Special Appeal be assigned a regular number.

Order on the Special Appeal: -

1. By means of the instant Intra Court Appeal filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 the appellant has challenged the validity of the judgment and order dated 21.02.2024, passed by an Hon'ble Single Judge Bench of this Court in Writ-A No.1327 of 2024, whereby the Writ Petition filed by the appellant challenging an order dated 15.02.2024 passed by Uttar Pradesh Subordinate Services Selection Commission, was dismissed. The appellant had filed an application for review of the aforesaid order which has been dismissed by an order dated 26.11.2024 and the appellant has challenged the validity of that order also.

2. Briefly stated, facts of the case are that Uttar Pradesh Subordinate Services Selection Commission had issued an advertisement for making appointments on various posts, including some posts of Instructors in Sewing Technology. The eligibility qualification for appointment to the post of Instructor is as follows: -

(i) having passed High School Examination conducted by the Intermediate Education Board, U.P. or any other examination recognized by the government as equivalent thereto,

(ii) eligibility qualification for different trades/subjects as provided in Column 4 of the Appendix and

(iii) National Craft Instructor Certificate in relevant trade under DGT and any other qualification prescribed in Column 4 of the Appendix.

The advertisement further provided that the candidate must possess the relevant experience, as provided in Column 4 of the Appendix.

3. The appellant had applied for the post of Instructor in Sewing Technology for which the essential qualification prescribed in Column 4 of the Appendix to the Uttar Pradesh Government Industrial Training Institutes (Instructors and Foreman Instructors) Service Rules, 2021 referred to in the advertisement, is as follows: -

33	Sewing Technology	[4	B. Voc/Degree in Fashion & Apparel Technology from U.G.C. recognized College/University with one-year experience in the relevant field. OR Diploma (Minimum 2

			years) in Garment Fabrication Technology/ Costume Design & Dress making from recognized board of technical education or relevant Advanced Diploma (Vocational) from D.G.T. with two years experience in the relevant field. OR TC/NAC passed in the trade of "Sewing Technology" earlier named as "Cutting & Sewing" with three years experience in the relevant field.

4. The appellant possess a three years' Diploma Certificate in Textile Technology granted by the U.P. Technical Education Board, Lucknow and he also possesses a National Craft Instructor Certificate issued by the National Council for Vocational Training in 'Cutting and Sewing' trade. His candidature was rejected on the ground that he does not possess any of the qualifications mentioned in Column 4 of the Appendix.

5. The appellant had submitted a representation for considering his candidature by treating his qualification of

Diploma in Sewing and Cutting Trade as equivalent to a Diploma in Costume Design and Dress Making. This representation has been rejected by an order dated 15.02.2024 passed by the U.P. Subordinate Service Selection Commission, which order was challenged before the Writ Court.

6. The Writ Court held that the appellant does not possess any of the eligibility qualifications for the post of Instructor in Sewing Technology Trade mentioned in the Appendix appended to the Uttar Pradesh Government Industrial Training Institutes (Instructors and Foreman Instructors) Service Rules, 2021. The appellant possesses a Diploma in Textile Technology which is not mentioned in Column 4 of the Appendix. The Writ Court further held that the certificate issued to the appellant by National Council for Vocational Training after undergoing one year training in Cutting and Sewing Trade is not a recognized qualification under the relevant rules.

7. The appellant filed a review application stating that after dismissal of the Writ Petition, he had obtained information from the Secretary, U.P. Technical Educational Board to the effect that Textile Technology and Costume Design and Dress Making are equivalent under the major discipline 'Textile Engineering'. The appellant claimed that he has pursued a three years' Diploma course in Textile Technology which is equivalent to 'Costume Design and Dress Making'.

8. While deciding the review application the Hon'ble Single Judge has held that the information provided by the Secretary of U.P. Technical Education Board is nothing but his own interpretation that it can be treated as equivalent to the

courses mentioned above and he has not said that it is equivalent.

9. While assailing validity of the orders passed by the Writ Court, the learned counsel for the appellant has submitted that the Secretary U.P. Technical Education Board has provided a copy of Annexure 7 to the Approval Process Handbook, 2022-23 issued by All India Council for Technical Education Board containing a list of Diploma courses and the relevant/appropriate branches and he has stated that those can be treated as equivalent. Annexure-7 appended to the information provided by the Secretary of U.P. Technical Education Board contains a list of numerous major disciplines, their corresponding courses and relevant/appropriate branch of Diploma in engineering and technology. Textile Engineering is mentioned as a major discipline in this annexure and numerous Diploma courses have been mentioned as permissible for merger, including Textile Technology and Costume Design & Dress Making. On the strength of this document the learned counsel for the appellant has submitted that as the appellant possesses a Diploma in Textile Technology, it should be treated as equivalent to a Diploma in Garment Fabrication Technology / Costume Design and Dress Making.

10. In support of his submission the learned counsel for the appellant has relied upon a decision rendered by an Hon'ble Single Judge of Tripura High Court in the case of **Sri Subir Sutradhar Vs. State of Tripura and two others**: 2023 SCC OnLine Tri 183, wherein it was held that a Degree of Bachelor of Engineering in Construction Technology and Management is equivalent to B.Tech Civil Engineering.

11. Per contra, Sri S.M. Singh Royekwar, the learned counsel for the U.P. Subordinate Services Selection Commission, has submitted that equivalence of qualification for the purpose of appointment is to be decided by the employer in accordance with the relevant Rules. The qualification held by the petitioner is not equivalent to the qualification mentioned in the advertisement as per the provisions contained in the Rules. He has placed reliance upon a judgment of the Hon'ble Supreme Court in the case of **Shifana P.S. Vs. State of Kerala and others:** (2024) 8 SCC 309 wherein the Hon'ble Supreme Court has referred to numerous precedents on the point and held as follows: -

“13. This Court in the case of Zahoor Ahmad Rather and Others v. Sheikh Imtiyaz Ahmad and Others: (2019) 2 SCC 404 held that judicial review can neither expand the ambit of the prescribed qualifications nor decide the equivalence of the prescribed qualifications with any other given qualification. Therefore, the equivalence of a qualification is not a matter that can be determined in the 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.

(emphasis in original)

14. In *Unnikrishnan CV and Others v. Union of India and Others:* (2023) 18 SCC 546, a three Judge Bench of this Court, while relying upon the earlier judgment in the case of *Guru Nanak Dev*

University v. Sanjay Kumar Katwal and Another: (2009) 1 SCC 610 held that equivalence is a technical academic matter; it cannot be implied or assumed. Any decision of the academic body of the University relating to equivalence should be by specific order or resolution, duly published.”

12. In **District Collector and Chairman Vijayanagaram Vs. M. Tripura Sundari Devi:** 1990 (3) SCC 655, the respondent was appointed on a post of post graduate teacher in Hindi but at the time of scrutiny of documents it was found that he did not possess the eligibility qualification mentioned in the advertisement and she was not allowed to join the service. Deciding the appeal, the Hon'ble Supreme Court held as follows: -

“6. It must further be realised by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. We are afraid

that the Tribunal lost sight of this fact.”

13. In *Shifana P.S.* (Supra), the Hon’ble Supreme Court relied upon an earlier judgment in the case of **Zahoor Ahmad Rather and Others v. Sheikh Imtiyaz Ahmad and Others**: (2019) 2 SCC 404, wherein the Hon’ble Supreme Court considered numerous precedents on the point and held as follows:

“26. We are in respectful agreement with the interpretation which has been placed on the judgment in Jyoti KK [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596] in the subsequent decision in Anita (supra) [State of Punjab v. Anita, (2015) 2 SCC 170]. The decision in Jyoti KK turned on the provisions of Rule 10(a)(ii). Absent such a rule, it would not be permissible to draw an inference that a higher qualification necessarily presupposes the acquisition of another, albeit lower, qualification. 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. The decision in Jyoti KK turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench of the High Court was justified in reversing the judgment of the learned Single Judge and in coming to the 10 id at page 177 conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision of the Division Bench.

27. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily. That is why the decision in Jyoti KK must be understood in the context of a specific statutory rule

(Emphasis added)

16. Further, as per the law settled by the Hon'ble Supreme Court, the question of

18. The Special Appeal lacks merit and the same is hereby **dismissed**.

A. Practice and Procedure – Allahabad High Court Rules, 1952 – Chapter VIII - Rule 5 – Special Appeal – Maintainability –

Expression 'Judgment' – Meaning and Scope – Order for completing the pleading alongwith staying the ceiling/demolition of a building was passed – Maintainability of appeal against it – Held, the order under challenge does not possess the characteristic of finality. It does not adversely affect any valuable right of the appellant, who does not claim that any of his personal rights are involved in the matter – It is not a 'judgment' and the Special Appeal is not maintainable for this reason. (Para 10)

B. Practice and procedure – Allahabad High Court Rules, 1952 – Chapter VIII - Rule 5 – Special Appeal – Maintainability – Order before writ court was passed in exercise of appellate power under UP Planning and Development Act – Held, the order under challenge in the Special Appeal has been passed in Writ Petition under Article 226 in respect of a judgment passed by the Divisional Commissioner in exercise of appellate powers u/s 28 A (4) of U.P. Urban Planning and Development Act, the Special Appeal filed against such an order is not maintainable. (Para 12)

C. Practice and procedure – Appeal was filed by a person not a party in the writ petition – No leave to file appeal was sought – Effect – Held, the Special Appeal filed without seeking leave of the Court is not maintainable. (Para 13)

D. Practice and procedure – Allegation of not filing the writ petition with clean hand was leveled by the appellant – Also allegations have been levelled against the officers/officials of Registry of the High Court for passing the writ petition in a cursory manner and the allegations have been levelled against the Court for granting permission for hearing the writ petition on the day of filing itself – Permissibility – Held, it is the normal practice prevalent in the Allahabad High Court that in matters regarding which the Court is satisfied that the same warrants an urgent hearing, the Court grants request for urgent hearing. The appellant has recklessly leveled misconceived,

vague and unsubstantiated allegations against the petitioners, the learned Counsel for the petitioners, the officers and officials of the Registry of this Court as well as the Hon'ble Judge who has passed the order, which are wholly unwarranted and unacceptable – High Court imposed a cost of Rs. 25,000/- against the appellant. (Para 15, 19 and 21)

Special Appeal dismissed. (E-1)

List of Cases cited:

1. Ashutosh Shrotriya Vs Vice-Chancellor, Dr. B.R. Ambedkar University; AIR 2015 All 187 : 2015 SCC OnLine All 8553

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

1. Heard Shri Sajjad Husain, learned counsel for the petitioner, Shri V.P. Nag, the learned Standing counsel appearing for the State of U.P., Shri Puneet Chandra, the learned counsel appearing for Awasth Vikas Parishad and Mohd. Altaf Mansoor, the learned counsel appearing for the opposite party Nos.6 & 7.

2. By means of the instant intra-Court Appeal filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, the appellant, who has described himself as "Kalamuddin; popularly known as Shanu, S/o Nasiruddin- Incharge, Vidhan Sabha (East); Bhartiya Kisan Union (Avadh) Raju Gupta Sangathan, U.P. Lucknow, Regional Office-529/17-C, Near State Bank, Khurram Nagar, Vikas Nagar, Lucknow-226022" has challenged an interim order dated 26.11.2024 passed by an Hon'ble Single Judge of this Court in Writ C No.10189 of 2024, which order reads as follows:-

"1. Heard Shri Mohd. Altaf Mansoor, learned counsel for the

petitioners and learned Standing counsel who accepts notice on behalf of respondent nos.1,2 and 5.

2. Shri Puneet Chandra, Advocate who appeared through video conferencing accepts notice on behalf of respondent nos.3 and 4. Shri Chandra opposes the petition, however, states that he wants to file counter affidavit to bring on record the essential facts.

3. Learned Standing Counsel may seek instructions and file counter affidavit within four weeks.

4. Rejoinder affidavit, may be filed within a week thereafter.

5. List this case on 22.1.2025.

6. Till the next date of listing, no further steps for ceiling/demolition shall be taken in pursuance to order dated 20.5.2004, contained in Annexure No.2 and consequential request made vide order dated 16.11.2024 contained in Annexure No.14.”

3. The learned counsel for the opposite parties have raised three fold preliminary objections against maintainability of the Special Appeal. The first preliminary objection is that the writ petition was filed challenging an interim order dated 30.09.2024 by which the opposite parties have been granted time to file counter affidavits and the petitioner has been granted time to file a rejoinder affidavit and the operation of a ceiling / demolition order has been stayed till the next date of listing of the Writ Petition, i.e. 22.01.2025. The Writ Court has not decided any point by the order under challenge in this Appeal and the order does not fall within the category of a ‘judgment’.

Therefore, the Special Appeal would not lie against such an order.

4. The second objection is that the Writ Petition was filed against an order passed by the Commissioner, Division, Lucknow in an Appeal under Section 28 A (4) of U.P. Urban Planning and Development Act, 1973 and, therefore, the Special Appeal is not maintainable as per the provisions contained in Chapter VIII Rule 5 of the Allahabad High Court Rules..

5. The third objection raised by the learned Counsel for the opposite parties is that the appellant was not a party to the Writ Petition and he can file a Special Appeal only after seeking leave of this Court. However, the Special Appeal has been filed without seeking leave of the Court and, therefore, it is not maintainable.

6. In reply to the aforesaid preliminary objections, the learned counsel for the appellant merely submitted that the petitioners had concealed certain relevant facts from the Writ Court and had obtained an ex-parte stay order hastily by making a mention for taking up the case on urgent basis. The learned counsel for the appellant stated that a Co-ordinate Bench of this Court had passed an order dated 20.09.2024 in Writ-C No.8129 of 2024, recording its concern that the authorities are proceedings against one particular building and not against several others and had directed Awas Vikas Parishad to file an affidavit regarding action, if any, taken against the owners of various buildings which are being used for commercial purposes including marriage halls, which have been allowed to go on with their business unrestricted. The submission of the learned counsel for the appellant is that the counsel for petitioner in Writ-C

No.8129 of 2024 and in Writ-C No.10189 of 2024 is the same and the Counsel has concealed the order dated 20.09.2024 from the Court while advancing submissions in Writ-C No.10189 of 2024 and has obtained the interim order dated 26.11.2024 which runs contrary to the order dated 20.09.2024 passed by a Division Bench.

7. The Learned counsel for the appellant did not give any reply to any of the three preliminary objections raised against the maintainability of the Special Appeal.

8. It will be appropriate to have a look at the provisions contained in Chapter VIII Rule 5 of the Allahabad High Court Rules, for a proper appreciation of the preliminary objections: -

“5. Special appeal: An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of the jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award-- (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the

Seventh Schedule to the Constitution, or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge.

(Emphasis added)

9. In **Ashutosh Shrotriya v. Vice-Chancellor, Dr. B.R. Ambedkar University**: AIR 2015 All 187 = 2015 SCC OnLine All 8553, a Full Bench of this Court formulated the following principles regarding what would constitute a ‘judgment’ as per the term used in Chapter VIII Rule 5 of the Allahabad High Court Rules: -

“30. We now formulate the governing principles:

(i) The expression ‘judgment’ was advisedly not defined in the Letters Patents of various High Courts which conferred a right of appeal against a judgment of a single Judge to a Division Bench of that Court;

(ii) The expression ‘judgment’ is not to be construed in the narrower sense in which the expression ‘judgment’, ‘decree’ or ‘order’ is defined in the CPC, but must receive a broad and liberal construction;

(iii) Every order passed by a trial Judge on the Original side of a High Court exercising original jurisdiction or, for that matter, by a learned single Judge exercising the writ jurisdiction, would not amount to a judgment. If every order were construed to be a judgment, that would result in opening a flood of

appeals and there would be no end to the number of orders which could be appealable under the Letters Patent;

(iv) Any interlocutory order, to constitute a judgment, must possess the characteristic of finality in the sense that it must adversely affect a valuable right of a party or decide an important aspect of the trial in an ancillary proceeding. In order to constitute a 'judgment', the adverse effect on a party must be direct and immediate and not indirect or remote;

(v) In order to constitute a judgment, an interlocutory order must : (a) decide a matter of moment; or (b) affect vital and valuable rights of the parties and must also work serious injustice to the party concerned:

(vi) On the other hand, orders passed in the course of the proceedings of a routine nature, would not constitute a judgment even if they result in some element of inconvenience or hardship to one party or the other. Routine orders which are passed by a single Judge to facilitate the progress of a case may cause some element of inconvenience or prejudice to a party but do not constitute a 'judgment' because they do not finally determine the rights or obligations of the parties. Procedural orders in aid of the progression of a case or to facilitate a decision are not judgments."

(Emphasis added)

10. An order granting time to the parties to complete the pleadings and staying ceiling / demolition of a building

till the next date of listing of the Writ Petition, does not decide any aspect of the controversy involved in the Writ Petition and it does not possess the characteristic of finality. It does not adversely affect any valuable right of the appellant, who does not claim that any of his personal rights are involved in the matter. Therefore, we are of the considered view that the order under challenge in the Special Appeal is not a 'judgment' and the Special Appeal is not maintainable for this reason.

11. A bare perusal of Chapter VIII Rule 5 makes it clear that no Special Appeal shall lie against an order passed in the exercise of the jurisdiction conferred by Article 226 of the Constitution in respect of any judgment, order or award of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any State Act of one Judge.

12. Since, the order under challenge in this Special Appeal has been passed in Writ Petition under Article 226 in respect of a judgment passed by the Divisional Commissioner in exercise of appellate powers under Section 28 A (4) of U.P. Urban Planning and Development Act, the Special Appeal filed against such an order is not maintainable.

13. Moreover, the appellant was not a party to the Writ Petition. He could have filed a Special Appeal only after seeking leave of the Court but neither any application seeking leave has been filed by the appellant, nor did the learned Counsel for the appellant seek time for filing an application for this purpose. Therefore, the Special Appeal filed without seeking leave of the Court is not maintainable.

14. Therefore, we are of the considered view that the present Special

Appeal filed against an interlocutory order passed in a writ petition directed against an order passed in Appeal under Section 28 A (4) of U.P. Urban Planning and Development Act, by a person who is not a party to the Writ Petition, is not maintainable for all the aforesaid three reasons and it is liable to be dismissed as such.

15. It has been alleged by the appellant that the petitioners had not approached this Court with clean hands while filing Writ-C No.10189 of 2024 and they have concealed material facts. The allegation of concealment of facts have been levelled against the learned counsel for the petitioners also and he has been repetitively named and blamed for filing the writ petition challenging the validity of sealing order. It has been alleged that as the same counsel had filed Writ-C No.8129 of 2024, wherein an order was passed on 20.09.2024. The appellant has contended that he should have not filed Writ-C No.10189 of 2024 or he should have disclosed the order dated 20.09.2024 passed in Writ-C No.8129 of 2024. The allegations have been levelled against the officers/officials of Registry of this Court for passing the writ petition in a cursory manner and the allegations have been levelled against the Court for granting permission for hearing the writ petition on the day of filing itself keeping in view the urgency involved in the matter. The Hon'ble Single Judge who has passed the interim order under challenge has been blamed for taking up the writ petition treating it to be urgent and for passing the impugned order.

16. These allegations have been seriously objected by the learned counsel appearing on behalf of the opposite parties

no.6 and 7 and he has submitted that the allegations are wholly misconceived, unfounded and malicious.

17. The appellant has concealed the fact that he had filed an application for impleadment in the Appeal before the Commissioner and that application had been rejected by the order dated 30.09.2024, which is under challenge in the Writ Petition at the instance of respondent Nos.6 & 7 (petitioners) only. The appellant has not challenged the order of rejection of his impleadment application. In these circumstances, he was not required to be impleaded in the Writ Petition. Sri. Altaf Mansoor, the learned Counsel for the private opposite parties no. 6 and 7 has informed the Court although the appellant has not been impleaded in the Writ Petition, since he had filed a caveat application, a copy of the Writ Petition was given to the learned Counsel for the appellant before it was filed.

18. So far as the submissions of the learned counsel for the appellant that the learned counsel for the petitioner had made a concealment of material facts in Writ-C No.10189 of 2024, the learned counsel for the appellant admitted that the petitioners in Writ-C No.8129 of 2024 are not parties to Writ-C No.10189 of 2024 or to present Appeal. Writ-C No.8129 of 2024 was filed by a person who had booked the marriage hall in question for the wedding of his sister whereas Writ-C No.10189 of 2024 has been filed challenging the validity of a ceiling order and the appellate order. The subject matters as well as parties to both the Writ Petitions are different. Merely because counsel for the petitioner in both the writ petitions happens to be the same, the counsel is not under any obligation to disclose the facts relating to any other case

filed on behalf of any other person in respect of a different order. The counsel in fact owes a professional duty to his client not to disclose the facts of his case to any other person. Therefore, the allegation of concealment of fact is misconceived and it has been leveled in a reckless and irresponsible manner.

19. Although the appellant has alleged that the registry has passed the Writ Petition in a cursory manner, the appellant has not alleged violation of the provisions of any specific Rule in filing the Writ Petition. There is no specific allegation of violation of any Rule by the officers/officials of the registry also. The Hon'ble Judge has been blamed for accepting the request for taking up the Writ Petition on urgent basis, whereas it is the normal practice prevalent in this Court that in matters regarding which the Court is satisfied that the same warrants an urgent hearing, the Court grants request for urgent hearing. The appellant has recklessly leveled misconceived, vague and unsubstantiated allegations against the petitioners, the learned Counsel for the petitioners, the officers and officials of the Registry of this Court as well as the Hon'ble Judge who has passed the order, which are wholly unwarranted and unacceptable. We strongly deprecate the conduct of the appellant in leveling such allegations.

20. The learned Counsel for the appellant is under a professional obligation to draft and file the appeal carefully and we deprecate the conduct of the learned Counsel for the appellant in putting in such baseless allegations while drafting the Special Appeal.

21. In view of the forgoing discussion, we are of the considered view

that filing of the present Special Appeal by making reckless and irresponsible allegations, without ascertaining its maintainability within the scope of provisions contained in Chapter VIII Rule 5 of the Allahabad High Court Rules amounts to a gross abuse of the process of law taxing upon the valuable time of the Court. Therefore the Special Appeal is **dismissed** with a cost of Rs.25,000/- which shall be deposited by the appellant with the Registry of this Court within a period of 30 days from today, failing which the Senior Registrar shall initiate proceedings for recovery of the amount by sending a recovery certificate to the Collector concerned, who shall recover the amount as arrears of land revenue and shall remit the same to this Court within a period of three months from the date of issuance of the recovery certificate. The Senior Registrar of this Court is directed to transmit the amount of cost to Children's Home (Girls), Lucknow, which is being run and maintained under the Department of Women and Child Development, Government of U.P.

(2025) 1 ILRA 736

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 16.01.2025

BEFORE

**THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.**

Special Appeal No. 969 of 2024

Naveen Kumar Srivastava & Ors.

...Appellants

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Appellants:

Siddharth Khare, Sr. Adv.

Counsel for the Respondents:

Archana Singh, C.S.C.

6. Special leave to Appeal (C) No(s). 10912 of 2024 Radha Vs St. of U.P. & ors.

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

Civil Law- The Allahabad High Court Rules, 1952-Chapter VIII Rule V---Intra Court Appeal---

In the memorandum of petition or appeal, several points may be taken but at the time of arguments only some of those points may be pressed. In such a situation the court concerned would deal only with the points which are argued and there would be a presumption that the party concerned gave up the challenges based on the other points. There is general presumption in law that a Judge deals with all the points which have been argued before him, and in case the party seeks to contend that he had pressed certain points which have not been considered, it would be open to him to file an application before the same learned Judge which delivered the judgment, and seek an order of review. It would ordinarily be not open to the party concerned to argue a point in appeal, which even if taken in the petition before the court below, was neither argued nor pressed before the court of first instance---Even if the grounds which are now sought to be urged on behalf of the appellants are taken into consideration the controversy involved in the present case is fully covered in terms of the judgment dated 28.02.2024 passed in Special Appeal Defective No.159 of 2024 (Shradha Yadav Vs St. of UP through Secretary, Department of Basic Shiksha). (Para 15, 16 & 23)

Petition dismissed. (E-15)**List of Cases cited:**

1. Mohd. Akram Ansari Vs Chief Election Officer & ors. (2008) 2 SCC 95
2. Union of India & ors. Vs N.V. Phaneendran (1995) 6 SCC 45
3. WritA No.15163 of 2023 Shradha Yadav & ors. Vs St. of U.P. & ors.
4. Special Appeal No.61 of 2024 Smt. Radha Vs St. of U.P. & ors.
5. Special Appeal Defective No.159 of 2024 Shradha Yadav Vs St. of U.P. through Secretary, Department of Basic Shiksha

1. Heard Shri Ashok Khare, learned Senior Counsel assisted by Shri Siddharth Khare, learned counsel appearing for the Appellants, Ms. Archana Singh, learned counsel who has put in appearance on behalf of Respondent Nos. 3 and 4 as well as Sri Tej Bhanu Pandey, learned Standing Counsel for the State-Respondent Nos. 1 and 2 .

2. The instant appeal is listed alongwith Special Appeal No.998 of 2024 (Manoj Kumar and another Vs. State of UP and others); however, since the appeals have been argued independently, the same are being decided by separate orders.

3. The present intra-court appeal is directed against the judgment and order dated 05.01.2024, passed by a learned Single Judge, in Writ-A No.20779 of 2023 [Naveen Kamal Srivastava And 2 Others Vs. State Of U.P. and Others], praying for modification of the judgment and order and to allow the writ petition in toto with a further prayer for a direction that the petitioner-appellants would be entitled to avail all benefits flowing from sanction orders dated 26.06.2023 sanctioning their transfers.

4. The records of the case before us indicates that the writ petition had been filed praying for quashing of notices dated 23.09.2023 issued by the District Basic Education Officer, Jhansi, and the subsequent orders dated 29.11.2023 directing relieving of all the petitioners-appellants from District Jhansi with

direction to report back to the original district Chitrakoot. The petitioners had also sought quashing of the Circular Letter dated 28.06.2023 issued by the Secretary, Board of Basic Education, U.P. Prayagraj, and a further direction to the respondents not to interfere in their functioning as teachers in District Jhansi and to pay their regular salary including arrears from July 2023.

5. The writ petition was finally disposed of with certain observations/directions in terms of an order dated 05.01.2024, which is being reproduced below:

**“Order on Amendment
Application No. 02 of 2023.**

Heard Shri Ashok Khare, learned senior counsel assisted by Shri Siddharth Khare, learned counsel for petitioner and Ms. Archana Singh, learned counsel for respondent nos. 3 and 4.

The amendment application is allowed.

Order on Writ Petition.

Learned senior counsel fairly submits that on the issue of clause 5 of a circular issued by the Secretary Basic Shiksha Parishad in pursuance of the transfer policy 2023-2024, this Court has reserved a judgement.

Learned senior counsel further submits that in peculiar circumstances of the present case that in pursuance of transfer orders passed by the respondents, petitioners were relieved from district Chitrakoot, and submitted their joining before the Basic Shiksha Adhikari, Jhansi, respectively on 03.07.2023,

07.07.2023 and later on they were allotted their respective institutions and they have joined their also on 14.09.2023, 15.09.2023 respectively.

Learned senior counsel further submits that subsequently by the independent impugned order dated 29.11.2023 petitioners' transfer order was set aside which was brought on record by way of an amendment application and challenged, and they were directed to report to their original district Chitrakoot.

Learned senior counsel submits that at mid session of the present educational year, impugned orders will adversely affect studies of students and prayed that it may be set aside and at least kept in abeyance till end of present academic session so that they may file a fresh application for their interstate transfer if situation so warrant.

Ms. Archana Singh, learned counsel for respondents has opposed the aforesaid prayer, however, she has not disputed that normally no transfer is allowed in mid session.

In the aforesaid circumstances, without going into the merits of the case in regard to the effect of clause 5 of a circular issued by the Board, I find merit in argument of learned senior counsel for the petitioners that it would be adverse to the interest of students to allow petitioners to relieve from their transferred place in mid session in this regard reliance placed of clause 18 of the transfer

policy dated 02.06.2023 is also taken note of.

Therefore, the impugned orders dated 29.11.2023 are kept in abeyance till end of present educational session and the petitioners will be at liberty to file a fresh application in terms of prevailing transfer policy for next academic session if so advice.

This writ petition is disposed of with aforesaid observation/directions.”

6. The principal ground which is sought to be taken in support of the appeal is that by submitting that the orders passed by the District Basic Education Officer, in terms of which the petitioners were relieved for rejoining their original place of posting at District Chitrakoot, having been challenged by amending the writ petition, there existed no justification for the aforesaid controversy not to be adjudicated on merits by the learned Single Judge while deciding the writ petition. The orders passed by the District Basic Education Officer relieving the petitioners are being sought to be challenged by asserting that the said orders are based upon a Circular dated 28.06.2023 issued by the Secretary, Board of Education, and therefore there was no justification for passing the said orders on the basis of conditions which were not part of the order passed by the State Government.

7. Learned counsel appearing for the State respondents and also the counsel appearing for the Board of Education have pointed out that Clause 5 of the Circular dated 28.06.2023 issued by the Secretary, U.P. Basic Education Board which forms the basis of the orders which were impugned in the writ petition, were subject

matter of challenge in a batch of writ petitions, leading being Writ – A No. - 15163 of 2023 [Shraddha Yadav and 6 Others Vs. State of U.P. and 10 Others], which had been heard at length, and the Court had reserved its judgment.

8. It is pointed out that before the writ court, the learned Senior Counsel after making a fair submission in this regard had submitted that in the mid-session of the current academic session the impugned orders would adversely affect the studies of the students and accordingly made a prayer that the impugned orders by means of which the petitioners' transfer orders had been set aside, and they were directed to join their original place of posting, be set aside or at least be kept in abeyance till the end of the current academic session.

9. In the aforesaid circumstances, the learned Single Judge without going into the merits of the case in regard to the effect of Clause-5 of the Circular issued by the Basic Education Board held that there was merit in the argument of the petitioners and it would be adverse to the interest of the students to allow the petitioners' transfer from their present place of posting in the mid session. In this regard, Clause-18 of the transfer policy dated 02.06.2023 was also taken note of. Accordingly, the writ petition was disposed of with a direction that the impugned orders dated 29.11.2023 be kept in abeyance till the end of the current academic session and the petitioners were set at liberty to file fresh applications in terms of the prevailing transfer policy for the next academic session, if so advised.

10. Counsel for the appellant has sought to advert to certain grounds taken in the memo of appeal to contend that the

transfer policy of the teachers for the year 2023-2024 was determined as per the Government Order dated 02.06.2023, and the orders dated 29.11.2023 issued by the District Basic Education Officer, Jhansi, which were based on a Circular Letter dated 28.06.2023, cannot be legally supported. It was sought to be argued that there was no justification for passing of the orders impugned on the basis of conditions which were not part of the Government Order dated 02.06.2023.

11. Counsel appearing for the State respondents as also the counsel for the respondent Nos. 3 and 4 have controverted the aforesaid submissions by pointing out that the aforesaid grounds which are sought to be canvassed on behalf of the appellants were neither raised nor pressed before the learned Single Judge and as such the appellants cannot support the appeal by raising the said grounds at this stage.

12. It is pointed out that a bare reading of the order under appeal would indicate that the learned counsel appearing for the petitioners before the writ court had fairly submitted that on the issue of validity of Clause-5 of the circular issued by the Secretary, Basic Shiksha Parishad, the Court had already reserved its judgment. It was in the said backdrop that the counsel appearing before the learned Single Judge had made a submission that the impugned orders dated 29.11.2023, in terms of which the transfer orders of the petitioners had been cancelled would adversely affect the studies of the students, and a prayer was made that the said orders may be set aside or at least kept in abeyance till the end of the current academic session. It is submitted that the grounds which are now sought to be urged in the present appeal, have been duly examined in the batch of

writ petitions, leading petition being Writ – A No. - 15163 of 2023 [Shraddha Yadav And 6 Others Vs. State of U.P. And 10 Others], which were subsequently decided in terms of the judgment dated 09.01.2024, and similar contentions which were raised were repelled.

13. The question as to whether the points allegedly raised but not dealt with in the judgment impugned can be pressed in support of an appeal thereagainst, was adverted to in the decision of **Mohd. Akram Ansari Vs. Chief Election Officer and others**¹, and it was held that there is a presumption in law that a Judge deals with all the points which have been pressed before him and that a party who has grievance must approach the same court which passed the judgment and to urge that other points were pressed but not dealt with. The relevant observations made in the judgment, in this regard, are as follows:-

“14. In this connection we would like to say that there is a presumption in law that a Judge deals with all the points which have been pressed before him. It often happens that in a petition or appeal several points are taken in the memorandum of the petition or appeal, but at the time of arguments only some of these points are pressed. Naturally a Judge will deal only with the points which are pressed before him in the arguments and it will be presumed that the appellant gave up the other points, otherwise he would have dealt with them also. If a point is not mentioned in the judgment of a Court, the presumption is that that point was never pressed before the learned Judge and it was given up.

However, that is a rebuttable presumption. In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an application before the same learned Judge (or Bench) which delivered the impugned judgment, and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the concerned Court to pass appropriate orders, including an order of review. However, it is not ordinarily open to the party to file an appeal and seek to argue a point which even if taken in the petition or memorandum filed before the Court below, has not been dealt with in the judgment of the Court below. The party who has this grievance must approach the same Court which passed the judgment, and urge that the other points were pressed but not dealt with.

15. Since no other point except the point of office of profit has been dealt with in the impugned judgment of the High Court, the presumption is that no other point was pressed before the High Court, even though the point may have been contained in the election petition. Hence we do not allow these points to be raised here.”

14. Taking similar view in a case where several points were raised in the application but arguments were confined to, and therefore decision was given by the Tribunal on only one point, the Supreme Court in the case of **Union of India and**

others Vs. N.V. Phaneendran², held that the appellants were not entitled to seek opportunity to agitate the remaining questions before the Tribunal. It was observed as follows:-

“4. It is next contended that though several contentions have been raised on merits, the Tribunal had only dealt with on this issue and, therefore, an opportunity may be given to the respondent to agitate those questions by remitting the matter to the Tribunal. We find it difficult to accept this contention. It is true that though several points appear to have been raised, but before the Tribunal the only contention argued for the respondent was as extracted in paragraph 4 of the order of the Tribunal. It says:

"The only point that was urged before us by the learned counsel appearing for the applicant is that the Divisional Railway Manager not being the appointing authority is not competent to impose a punishment of removal from service on the applicant who is a Travelling Ticker Examiner in the pay scale of Rs.425-640."

Since the controversy was only limited to this point before the Tribunal, we do not find any justification to remit the matter.”

15. In the present case, the grounds which are sought to be urged in support of the appeal, may have been stated in the writ petition, but the judgment impugned does not indicate that any such ground was pressed. It is not the case of the appellants that the aforesaid grounds which are now sought to be taken in the appeal were

argued before the learned Single Judge and the same have not been accorded consideration.

16. It is commonly observed that in the memorandum of petition or appeal, several points may be taken but at the time of arguments only some of those points may be pressed. In such a situation the court concerned would deal only with the points which are argued and there would be a presumption that the party concerned gave up the challenges based on the other points. There is general presumption in law that a Judge deals with all the points which have been argued before him, and in case the party seeks to contend that he had pressed certain points which have not been considered, it would be open to him to file an application before the same learned Judge which delivered the judgment, and seek an order of review. It would ordinarily be not open to the party concerned to argue a point in appeal, which even if taken in the petition before the court below, was neither argued nor pressed before the court of first instance.

17. In an intra Court appeal, the appellate court would not normally reassess the material and seek to reach a conclusion different from the one reached by the court of first instance, if the one reached by that court was reasonably possible on the material available. This would be more so in a case where the grounds which are sought to be urged were never pressed before the court of first instance.

18. The judgment of the learned Single Judge clearly records that the learned counsel appearing for the petitioners had submitted that Clause-5 of the circular dated 28.06.2023 issued by the Secretary, U.P. Basic Education Board,

which forms basis of the orders which were impugned in the writ petition, was subject matter of challenge in a batch of writ petitions, wherein the Court had reserved its judgment. It was in the said background that the learned counsel submitted before the writ Court that in the midst of the current academic session, the impugned orders would adversely affect the studies of the students and accordingly prayed that the same may be set aside or at least kept in abeyance till the end of the academic session. Finding merit in the aforesaid argument that it would be adverse to the interest of the students to allow the petitioners to be relieved from their transferred place in the mid-session, the learned Single Judge disposed of the writ petition with a direction that the impugned order dated 29.11.2023 be kept in abeyance till the end of the current academic session. The judgment under appeal does not indicate that any other ground was urged before the learned Single Judge, and therefore we are of the view that it would not be open to the appellants to press any other ground which had not been argued before the learned Single Judge.

19. Even otherwise, the grounds which are now sought to be urged in support of the present appeal have been duly considered in the batch of writ petitions with leading petition being **Writ-A No.15163 of 2023 (Shraddha Yadav and others Vs. State of UP and others)** which were decided in terms of judgment dated 09.01.2024 and similar contentions which had been raised, were repelled. The observations made in the judgment in the case of **Shraddha Yadav (supra)**, in this regard, are as follows:-

"१३. याचिकाकर्तागण की सेवायें 'नियमावली १९८१' के प्रावधानों के अधीन हैं। जिसके

नियम २१ में 'स्थानान्तरण' का प्रावधान है जो सामान्यतः स्थानान्तरण की अनुमति नहीं देता है और स्थानान्तरण, यदि होता है तो वो, परिषद के अनुमोदन के बिना नहीं हो सकता है।

१४. पूर्व में उल्लेखित निर्णयों से यह भी निर्विवादित है कि स्थानान्तरण नीति मात्र एक प्रशासनिक नीति है, जिसकी पृष्ठभूमि में कोई वैधानिक प्रावधान नहीं है। किसी भी कर्मचारी को अपनी पसंद के स्थान पर स्थानान्तरण का दावा करने का कोई मौलिक या निहित अधिकार प्राप्त नहीं होता है।

१५. शिक्षकों व शिक्षिकाओं के वर्ष २०२३-२०२४ की अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण नीति को उत्तर प्रदेश शासन के शासनादेश दिनांक ०२, जून, २०२३ द्वारा निर्धारित की गई। इसके खण्ड १६, १७ व १८ पूर्व में उल्लेखित किये जा चुके हैं, के अनुसार परिषद को इस स्थानान्तरण नीति के 'तकनीकी चरण एवं प्रक्रिया के निर्धारण का दायित्व सौंपा गया और उसी क्रम में, और स्थानान्तरण नीति के क्रम में अग्रतर कार्यवाही हेतु सचिव, उ.प्र. बेसिक शिक्षा परिषद ने परिपत्र दिनांक १६.०६.२०२३ व २८.०६.२०२३ को निर्गत किया, जिसके अनुसार ऑनलाइन आवेदन के सत्यापन व परीक्षण की प्रक्रिया को निर्धारित किया। इन परिपत्रों के माध्यम से एकल अभिभावक, दिव्यांगता, असाध्य या गंभीर रोग, सरकारी सेवा का लाभ, निलम्बन की स्थिति आदि के विषय में प्रावधान बनाये गये। इसी क्रम में परिपत्र दिनांक २८.०६.२०२३ द्वारा अन्तर्जनपदीय स्थानान्तरण प्रक्रिया के अन्तर्गत स्थानान्तरित शिक्षक एवं शिक्षिका (१६,१६४ शिक्षक एवं शिक्षिका) को कार्यमुक्त किये जानें की कार्यवाही की, विस्तृत प्रक्रिया को भी निर्धारित किया। इसी परिपत्र के खण्ड (५) को निरस्त करने की प्रार्थना याचिकाकर्तागण ने की है। उक्त खण्ड पुनः निम्न उल्लेखित किया जा रहा है:-

"५. प्रोन्नति पद पर कार्यरत शिक्षक एवं शिक्षिका के स्थानान्तरित जनपद में बैच की पदोन्नति वर्ष/मौलिक नियुक्ति तिथि के आधार पर कार्यमुक्त करने की कार्यवाही की जायेगी।"

१६. स्थानान्तरण नीति के खण्ड १६, १७ व १८ के अन्तर्वस्तु से स्पष्ट है, जो परिषद के उक्त परिपत्रों को, जो उक्त नीति के 'तकनीकी चरण व

प्रक्रिया के निर्धारण', इसकी समय सारिणी व कार्यमुक्त कराने के सम्बन्ध में है, निर्गत करने के लिए स्पष्ट रूप से परिषद के सचिव को अधिकृत करते है। अतः उक्त परिपत्रों को निर्गत करने का अधिकार सचिव, उ.प्र. बेसिक शिक्षा परिषद को पूर्ण रूप से था। अतः परिपत्र वैधानिक है व विधिक रूप से संधारणीय भी है। यह परिपत्र स्थानान्तरण नीति के क्रम में उसके कार्यवाहन के लिए है, न कि उसकी प्रकृति के विरोध में निर्गत किये गये है। स्पष्टता व संदर्भ के लिए स्थानान्तरण नीति के खण्ड १६, १७ व १८ पुनः निम्न उल्लेखित किये जा रहे है:-

"(१६) अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के लिए निर्गत शासनादेश के अनुसार उ०प्र० बेसिक शिक्षा परिषद द्वारा अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के तकनीकी चरण एवं प्रक्रिया का निर्धारण किया जायेगा तथा शासनादेश के क्रम में अग्रतर कार्यवाही की जायेगी।

(१७) अन्तर्जनपदीय स्थानान्तरण हेतु समय-सारिणी सचिव, बेसिक शिक्षा परिषद द्वारा अपने स्तर से पृथक से निर्गत की जायेगी।

(१८) अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के उपरान्त शिक्षक/शिक्षिका को कार्यमुक्त करने तथा कार्यभार ग्रहण करने की कार्यवाही मध्य शैक्षिक सत्र में नहीं की जायेगी। शिक्षक/शिक्षिका को कार्यमुक्त करने तथा कार्यभार ग्रहण करने की कार्यवाही अवकाश के दौरान ही की जायेगी।"

१७. अब न्यायालय को यह निर्धारित करना है कि परिपत्र दिनांक २८.०६.२०२३ के खण्ड (५) में उल्लेखित 'स्थानान्तरित जनपद में बैच की पदोन्नति वर्ष/मौलिक नियुक्ति तिथि के आधार पर' कार्यमुक्त करने की कार्यवाही का कोई न्यायोचित कारण है अथवा नहीं। यहां यह ध्यान रखना होगा कि याचिकाकर्तागण के संबंध में अंतर्जनपदीय स्थानान्तरण का आदेश पारित हो गया था परन्तु उपरोक्त खण्ड (५) के कारण उनको कार्यमुक्त नहीं किया गया है।

१८. उपरोक्त वर्णित खण्ड (५) के अन्तःवस्तु के मात्र परिशीलन से स्पष्टता प्रतीत नहीं होती है परन्तु परिषद के द्वारा दायर प्रतिउत्तर पत्र व उसके विद्वान अधिवक्ता के कथन से स्पष्टता प्रतीत होती है, कि अगर याचिकाकर्तागण जो पदोन्नति पद पर है स्थानान्तरित जनपद, जहां उनके बैच के शिक्षकों की

पदोन्नति नहीं हुयी है, कार्यभार ग्रहण कराया जाता है तो वो अपने संवर्ग में निम्नतम वरिष्ठता पर रहें। फिर भी वो उनके बैच में कार्यरत शिक्षक/शिक्षिका जिनको पदोन्नति नहीं की गई है, से वरिष्ठ हो जायेंगे और उनके पदोन्नति होने के बाद भी याचिकाकर्तागण ही वरिष्ठ रहेंगे। जिससे असमंजसता की स्थिति उत्पन्न हो जायेगी, चाहे वरिष्ठता सूची मूल जनपद के स्तर पर ही क्यों न हो। यह स्थिति सहकर्मी को साथ कार्य करने के लिए प्रतिकूल होगी। उपरोक्त वर्णित कारण एक नीतियुक्त कारण है जो उपरोक्त खण्ड (५) को वैधानिकता प्रदान करता है। अगर परिषद उक्त खण्ड (५) के अन्तःवस्तु में और स्पष्टता ला पाते तो अच्छा होता। अग्रिम स्थानान्तरण नीति में स्पष्टता का ध्यान रखना चाहिये।

१९. मा० उच्चतम न्यायालय के एक नवीन निर्णय जो देवेश शर्मा प्रति भारत संघ व अन्य: २०२३ एस.सी.सी. ऑनलाइन एस.सी. ९८५, के प्रकरण में पारित किया गया है, में पुनः यह प्रतिपादित किया कि:-

“ ७३. हमारे मस्तिष्क में निश्चित रूप से कोई संदेह नहीं है, कि साधारणतः राज्य के नीतिगत निर्णयों में संवैधानिक न्यायालयों द्वारा उसके पुनः निरीक्षण अधिकारो के अंतर्गत हस्ताक्षेप नहीं किया जा सकता है। इसी के साथ अगर नीतिगत निर्णय स्वयं में ही विधि के विरुद्ध और वो मनमाना व तर्कहीन हो तो पुनः निरीक्षण के अधिकार का उपयोग करना ही चाहिये।”

२०. मा० उच्चतम न्यायालय द्वारा एक अन्य प्रकरण सत्यदेव बागुर प्रति राजस्थान शासन व अन्य (२०२२)५ एस.सी.सी. ३२४, के प्रकरण में पूर्व में पारित कृष्णन् कक्कनाथ प्रति केरल राज्य:(१९९७)९ एस.सी.सी. ४९५ व शेर सिंह प्रति भारत संघ: (१९९५)६ एस.सी.सी. ५१५ के निर्णयों का संदर्भ लेते हुए यह निर्णीत किया कि:-

“१५. यह अतिसामान्य है कि न्यायालय नीतिगत मामलो में हस्तक्षेप करने में मन्द रहेंगे, जब तक कि नीति स्पष्ट रूप से पक्षपाती और मनमानी न स्थापित हो जाये। यह न्यायालय राज्य की नीतिगत निर्णय में हस्तक्षेप नहीं करेगा, जब राज्य यह इंगित कर सके कि नीति के कार्यावहन में युक्तियुक्त अंतर है और वो युक्तियुक्त अंतर, उसके उद्देश्य की प्राप्ति से संबंध रखता है।”

२१. जैसा ऊपर विश्लेषण किया गया है कि खण्ड (५) के अन्तःवस्तु का आधार न्यायोचित एवं न्याय संगत है, जो एक युक्तियुक्त अन्तर है, जिसका संबंध उद्देश्य की प्राप्ति के लिये है कि अगर याचिकाकर्ता गणो को स्थानान्तरित जनपद, जहां उनके बैच के सह शिक्षको की पदोन्नति नहीं हुई है, स्थानान्तरित कर दिया जाये तो वहां अव्यवस्था हो जायेगी और सहकर्मी को साथ काम करने में असहजता होगी। अतः इसको निरस्त करने की प्रार्थना अस्वीकार की जाती है। और यह याचिका बलहीन होने के कारण निरस्त की जाती है।”

20. It has been brought to our notice that several writ petitions seeking similar reliefs were dismissed, and against one of such orders, **Special Appeal No.61 of 2024 [Smt. Radha Vs. State of U.P. And 4 Others]**, was filed, and the same was dismissed by a co-ordinate Bench, by means of an order dated 16.02.2024. The aforesaid order is being reproduced below:

“1. Following orders were passed on 06.02.2024:-

“1. Appellant was transferred in terms of the Inter District Transfer Policy from Mirzapur to Lucknow. She was however not allowed joining on the ground that though she was promoted to the post of Head Mistress at Mirzapur but persons senior to the appellant were still working as Assistant Teacher at Lucknow. The cadre of Assistant Teacher is otherwise a district level cadre. The authorities accordingly have refused to allow joining to the appellant at Lucknow and have also cancelled her transfer.

2. A representation was made by the appellant stating that she is willing to give up her claim of promotion and she would accept

her transfer to Lucknow on the post of Assistant Teacher in a primary institution. It is submitted that this aspect of the matter has not been bestowed any consideration and therefore, the order of the authority rejecting petitioner's representation is unsustainable.

3. Learned counsel representing the respondents seeks a week's time to obtain instructions in the matter.

4. Put up on 16.02.2024, as fresh."

2. Ms. Archana Singh, appearing for the Basic Shiksha Board, states that in the past also such claims have been put forward by the teachers, who gave preference to their posting at the place of their liking by giving up their previous promotion on the post of Headmistress. Such claims were rejected by the Board. It is also submitted that during the academic session it would not be in the academic interest to consider any personal for transfer. It is also urged that the claim of the appellant, if allowed, may result in large number of other persons coming up with similar pursuits, which would adversely affect the functioning of these institutions. Learned counsel then states that as and when posts are available on the post of Headmistress at Lucknow and the claim of seniority would not be breached, the claim of appellant for promotion be accorded consideration in terms of the policy.

3. We find substance in the objection of the respondents, inasmuch as transfer cannot be

insisted upon by a teacher as a matter of right. Consideration regarding smooth functioning of the educational institutions would be of paramount importance. It is otherwise not disputed that persons senior to the appellant since are continuing at Lucknow as Assistant Teacher, her claim of transfer as Headmistress would create unnecessary heart burn. Giving up claim of promotion also creates complications as very often such claims are revived. It may otherwise lead to more similar claims being raised by other teachers. It is otherwise undisputed that the cadre of teacher/headmistress under the Rules is a district cadre post and transfer, outside the district, can only be allowed in terms of the policy.

4. In that view of the matter, we find no good ground to interfere in the matter and, consequently, the present appeal is consigned to records. It goes without saying that as and when fresh transfer policy is floated by the department, it shall be open to the appellant to apply and her claim would be examined in accordance with the policy."

21. It has been further pointed out that subsequently one of the petitioners in the leading writ petition in the batch of writ petitions decided in terms of the judgment under appeal, preferred a special appeal, being **Special Appeal Defective No.159 of 2024 [Shradha Yadav Vs. State of U.P. through Secretary, Department of Basic Shiksha]**, which too was dismissed by means of an order dated 28.02.2024,

following the order passed in the appeal of Smt. Radha (supra). The aforesaid order dated 28.02.2024 passed in the special appeal is as follows:

**“(Ref: Civil Misc. Delay
Condonation Application)”**

1. Heard.

2. Delay in filing the present appeal is explained to the satisfaction of the Court. Delay is, accordingly, condoned. Office is directed to allot a regular number to the present appeal.

3. Application stands allowed.

Ref: Appeal

4. Heard learned counsel for the petitioner and learned counsel for the respondents

5. It is pointed out that similar controversy, as is raised in this petition, has been adjudicated by this Court in Special Appeal No.61 of 2024 (Smt. Radha vs. State of U.P. and others) vide following order passed on 16.2.2024:-

"1. Following orders were passed on 06.02.2024:-

"1. Appellant was transferred in terms of the Inter District Transfer Policy from Mirzapur to Lucknow. She was however not allowed joining on the ground that though she was promoted to the post of Head Mistress at Mirzapur but persons senior to the appellant were still working as Assistant Teacher at Lucknow. The cadre of Assistant Teacher is otherwise a district level cadre. The authorities accordingly have refused to allow joining to the

appellant at Lucknow and have also cancelled her transfer.

2. A representation was made by the appellant stating that she is willing to give up her claim of promotion and she would accept her transfer to Lucknow on the post of Assistant Teacher in a primary institution. It is submitted that this aspect of the matter has not been bestowed any consideration and therefore, the order of the authority rejecting petitioner's representation is unsustainable.

3. Learned counsel representing the respondents seeks a week's time to obtain instructions in the matter.

4. Put up on 16.02.2024, as fresh."

2. Ms. Archana Singh, appearing for the Basic Shiksha Board, states that in the past also such claims have been put forward by the teachers, who gave preference to their posting at the place of their liking by giving up their previous promotion on the post of Headmistress. Such claims were rejected by the Board. It is also submitted that during the academic session it would not be in the academic interest to consider any personal for transfer. It is also urged that the claim of the appellant, if allowed, may result in large number of other persons coming up with similar pursuits, which would adversely affect the functioning of these institutions. Learned counsel then states that as and when posts are available on the post of Headmistress at Lucknow and the claim of seniority would not be breached, the claim of

appellant for promotion be accorded consideration in terms of the policy.

3. *We find substance in the objection of the respondents, inasmuch as transfer cannot be insisted upon by a teacher as a matter of right. Consideration regarding smooth functioning of the educational institutions would be of paramount importance. It is otherwise not disputed that persons senior to the appellant since are continuing at Lucknow as Assistant Teacher; her claim of transfer as Headmistress would create unnecessary heart burn. Giving up claim of promotion also creates complications as very often such claims are revived. It may otherwise lead to more similar claims being raised by other teachers. It is otherwise undisputed that the cadre of teacher/headmistress under the Rules is a district cadre post and transfer, outside the district, can only be allowed in terms of the policy.*

4. *In that view of the matter, we find no good ground to interfere in the matter and, consequently, the present appeal is consigned to records. It goes without saying that as and when fresh transfer policy is floated by the department, it shall be open to the appellant to apply and her claim would be examined in accordance with the policy."*

6. *For the reasons recorded in the order dated 16.2.2024 and the controversy being identical, this*

writ petition is also disposed of on same terms."

22. Against the judgment in the Special Appeal in the case of **Smt. Radha** (supra), a special leave petition being **Special Leave to Appeal (C) No(s). 10912 of 2024 [Radha Vs. State of U.P. & Others]** was preferred, which stood dismissed by an order dated 13.05.2024.

23. Accordingly, even if the grounds which are now sought to be urged on behalf of the appellants are taken into consideration the controversy involved in the present case is fully covered in terms of the judgment dated 28.02.2024 passed in Special Appeal Defective No.159 of 2024 (Shradha Yadav Vs. State of UP through Secretary, Department of Basic Shiksha).

24. We are not inclined to take a different view in the matter.

25. The special appeal, therefore, stands **dismissed**.

(2025) 1 ILRA 747
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2025

BEFORE

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

Writ A No. 4769 of 2022

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

Counsel for the Petitioner:
Rajesh Yadav, Ruchi Mishra

Counsel for the Respondents:
C.S.C., Jagannath Maurya

Civil Law- The Constitution of India, 1950- Article 226 - The Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974-Rule 5(1) -

Petitioner claimed compassionate appointment on account of his mother's demise as well as payment of the ex gratia sum of Rs.50 lacs which was directed to be provided by the St. Government to the dependents of employees, engaged in the prevention, control and treatment of the Covid19 disease, who died in consequence of contracting the virus--- A deceased government servant's dependent is eligible for a consideration for appointment under the Rules of 1974, if the deceased's spouse is not a government servant or already employed under the Central Government or a St. Government or a Corporation, owned or controlled by the Central Government or the St. Government.

The respondents have by one stroke of pen, changed all entries of 'P's in the attendance register for the petitioner's mother from 15th April to 26th to 'A's. It is a case of unmistakable forgery to the naked eye. There is not even an initial made to show if this is some kind of correction with a note indicating by which authority and under what circumstances, the correction, if any, was done. The inescapable inference, therefore, is that the petitioner's mother attended her duty in the month of April until 26th, when she was taken ill and admitted to the hospital--- The petitioner's mother was similarly exposed, contracted the virus and apparently died of the deadly disease--- Mandamus is issued to the respondents to pay the petitioner due compensation for his mother's death, treating it to be death for which compensation is payable under the Government Orders dated 11.04.2020, 22.06.2021 and 26.07.2021. (Para 10, 52 & 54)

Petition allowed. (E-15)

List of Cases cited:

1. Reepak Kansal Vs U.O.I. & ors., (2021) 9 SCC 251
2. Mayuri Krishna Jabare Vs General Manager, BEST & anr., 2022 DGLS (Bom) 3782

3. Nisha & anr. Vs St. of U.P. through Additional Chief Secretary, Panchayat Raj Department, 2022:AHC-LKO:27037

4. Sunita Prajapati Vs St. of U.P. through Principal Secretary (Home) & ors., 2023:AHC-LKO:33575

5. Priyanka Vs St. of U.P. through Principal Secretary, Finance Department, Lucknow & ors., 2024:AHC-LKO:69440.

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

1. The Covid-19 pandemic, that ravaged humanity during the years 2020-21 across the world, is unprecedented for its destruction, death, loss of livelihood, business and many such things in the history of mankind. While it brought on immense tragedy for those who lived on to see another day, the misery was sought to be alleviated by the Government of India and the State Governments, lending a helping hand to support the survivors. Whatever could serve as measures of relief were taken by Governments to bring life back on track for various classes of people. There were certain classes of men and women, according to their profession, who had to work for others by the nature of their calling, even when most others, for the sake of dear life, were virtually confined to their homes due to lock-downs. These classes of persons, who had to still work on for humanity's sake, comprised not only of a certain category of government servants, but also employees of corporations, the private sector and the self-employed. They shared a common genre to their calling, whosoever was their employer. They were generally doctors, health workers other than doctors, policemen, and, particularly, workers engaged in the task of maintaining cleanliness, like sweepers by whatever name called. These classes of persons were at the time called 'Corona Warriors'. They

were so called because they worked at a time for the sake of others when the larger part of humanity stayed away. They risked their lives. As a token of acknowledgment and to keep up their morale, they were hailed as Corona Warriors.

2. At the centrestage of the cause in this writ petition is Smt. Asha, a Sweeper with the Nagar Panchayat, Khaga, District Fatehpur. She is the petitioner Anand Kumar's mother, who died on 27.04.2021, during the peak of the Covid-19 pandemic. According to the petitioner, she died in consequence of the Covid-19 disease that she contracted while discharging her duties in the Nagar Panchayat office. It is the petitioner's case that Smt. Asha discharged her duties up to 24.04.2021 in the office, going about her task as a sweeper, when she was suddenly taken ill. She was otherwise healthy. She experienced chest pain and discomfort. She was taken to the nearby clinic for medical aid. The doctor gave her first aid, but that did not bring relief. The following day, she showed symptoms of Covid-19 and was admitted on 26.04.2021 to the L2 Facility Raisina Hospital, Allahabad Institute of Medical Sciences, Purein Mod, Khaga, Fatehpur. She was admitted on 26.04.2021 to the said hospital at 5:00 p.m. and died on 27.04.2021 at 10 minutes past eight in the morning hours. The death summary/ death certificate issued for the petitioner's mother, annexed at page No.20 of the paper-book, in the column of diagnosis, says, “? Covid 19 Pneumonitis”. The column, that reads death summary, is blank. The certificate is signed by the Medical Officer on duty at L2 Facility Raisina Hospital, Allahabad Institute of Medical Sciences, Fatehpur.

3. The petitioner's case is that his mother died of Covid-19. After the

petitioner's mother passed away, as he says, on account of the Covid-19 pandemic, he lodged two claims with the respondents. The first was one, seeking compassionate appointment for himself, and the other for the payment of *ex gratia* sum of Rs.50 lacs, that was directed to be provided by the State Government to the dependents of employees, engaged in the prevention, control and treatment of the Covid-19 disease, who died in consequence of contracting the virus. The petitioner claimed compassionate appointment on account of his mother's demise as well as payment of the *ex gratia* sum of money by an application dated 08.07.2021, accompanied by ten documents in support of the claim. The petitioner, in the said application, referred to an earlier application dated 28.06.2021 that he had made to the Nagar Panchayat, Khaga, claiming the *ex gratia* sum of Rs.50 lacs. He said that the application was withheld for a week and then rejected. The petitioner, in his application dated 08.07.2021 under reference, which was addressed to the Director, Local Bodies, U.P., Lucknow, claimed both payment of the *ex gratia* sum of Rs.50 lacs and appointment on compassionate grounds as a dependent of the deceased, Smt. Asha.

4. When the petitioner's twin claims, as aforesaid, were not decided, he instituted Writ-A No.11949 of 2021 before this Court, seeking a direction to the respondents to consider his claim for compassionate appointment. This Court disposed of the last mentioned writ petition vide order dated 20.09.2021, directing respondent No.4 to that writ petition to decide the petitioner's application for grant of compassionate appointment expeditiously, preferably within a period of three months from the date of receipt of the

application along with a web-generated copy of the order. After the service of the said order, the Executive Officer, Nagar Panchayat, Khaga proceeded to reject the petitioner's twin claim to compassionate appointment as well as payment of the *ex gratia* sum of Rs.50 lacs, for reasons indicated in the order dated 11.11.2021 passed by the said Officer.

5. Aggrieved, this writ petition has been instituted.

6. On 25.11.2022, a counter affidavit was filed on behalf of the Executive Officer and the Chairman of the Nagar Panchayat, Khaga, District Fatehpur, to which the petitioner filed a rejoinder on 09.08.2023. In compliance with this Court's order dated 31.10.2023, when the petition was admitted to hearing and certain directions issued, asking the District Magistrate, Fatehpur to file her personal affidavit, a personal affidavit of the District Magistrate, dated 15.11.2023 has been filed. In compliance with the further order dated 12.12.2023 passed by this Court, the Additional Chief Secretary, Revenue Department, Government of U.P., Lucknow, filed a personal affidavit on 18.01.2024, reiterating the Government's stand. A counter affidavit was then put in on behalf of respondent No.3, the District Magistrate, Fatehpur on 29.04.2024.

7. During the course of hearing, on 29.04.2024, it was pointed out by the Court that the stand taken by the Additional Chief Secretary, Revenue Department in his affidavit was not *prima facie* tenable. However, since the matter appeared to be sensitive and one relating to the award of *ex gratia* sum of money to a Covid-19 victim, a Safai Karmi, where an event against the State, would entail substantial

financial consequences, the Court thought it appropriate to grant opportunity to the Principal Secretary to appear in person and explain matters. On 25.07.2024, Guru Prasad, Principal Secretary, Revenue, Government of U.P., Lucknow appeared in person and explained the conditions attending the policy for grant of *ex gratia* relief to Covid-19 victims at the relevant period of time. We have noted in our order dated 25.07.2024 whatever the Principal Secretary had to say, and to which, necessary allusion would be made during the course of this judgment. On 25.07.2024, the learned Counsel for all the parties were heard finally and judgment reserved.

8. Heard Mr. Rajesh Yadav, learned Counsel for the petitioner and Mr. Jagan Nath Maurya, learned Chief Standing Counsel assisted by Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of the State.

9. We have duly considered the submissions advanced by learned Counsel for the parties and examined the records.

10. So far as one limb of the petitioner's claim, to wit, his request to be granted compassionate appointment as a dependent of his deceased mother is concerned, it was rejected by the respondent–Nagar Panchayat on ground that the petitioner's father, that is to say, the deceased's husband, Gopal Das, was a *Naib Moharrir* with the Nagar Panchayat. The attention of the Court was invited to Rule 5(1) of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (for short, 'the Rules of 1974'), as amended up to date, to point out that a deceased government servant's dependent is eligible for a

consideration for appointment under the Rules of 1974, if the deceased's spouse is not a government servant or already employed under the Central Government or a State Government or a Corporation, owned or controlled by the Central Government or the State Government. Here, the deceased's spouse, her husband being employed with the Nagar Panchayat as a Naib Moharrir, the claim under the Rules of 1974 for a compassionate appointment was not maintainable. A bare reading of Rule 5 of the Rules of 1974 does not brook doubt that the petitioner's father and the deceased's husband being in the employ of the Nagar Panchayat on the date of the petitioner's mother's demise, he does not possess a valid candidature at all for compassionate appointment. This part of the petitioner's claim was, therefore, rightly rejected by the respondents. No exception can be taken to it.

11. During the course of hearing, learned Counsel for the parties candidly said that the real issue in this petition is about the petitioner's entitlement to receive the *ex gratia* sum of Rs.50 lacs on account of her mother's demise in harness while detailed to duty for the prevention, control and treatment of the Covid-19 infection.

12. It is true that being essentially a fiscal matter, and a fortiori, a pure policy decision for the State Government in such cases, it was for the Government to take stock of their resources before extending relief to victims of the Covid-19 pandemic, even of the petitioner's class. This Court cannot direct the State Government to provide financial relief by way of *ex gratia* or pay a particular sum of money *ex gratia* to the dependents of victims, who perished on account of Covid-19 while detailed to duty for the prevention, control and

treatment of the Covid-19. This is not a case where the Court is called upon to judge a case of negligence against the employers or a failure to protect the employee's right to life, the employers being functionaries of the State, entitling the dependents to damages or compensation. It is about the grant of *ex gratia* sum of money to a particular class of employees, to which the petitioner claims to belong, who have been extended that benefit under the Government's policy. It is in this context said that the Court cannot thrust a policy upon the Government, burdening the exchequer.

13. The position is, however, different if a State Government indeed formulates a policy to compensate the Covid-19 victims of a particular class and subjects it to certain conditions, which are then applied by the officers of the State Government responsible to implement the policy or the Government themselves in a manner that makes application of the policy, either arbitrary or discriminatory, or may be even whimsical. If that is the case, this Court can certainly step in to ensure that the benefit of the policy is made available to all victims of the scourge, free from arbitrariness, discrimination or the whim and caprice of officers charged with the responsibility to extend benefits under the policy. This should take us straight to what this policy of the State Government is about the payment of *ex gratia* sum of money to the dependents of employees, who have perished in the Covid-19 pandemic, contracting the virus after being detailed to duty in aid of prevention, control and treatment of the Covid-19 disease.

14. The policy, that provides for the payment of an *ex gratia* sum of Rs.50

lacs to the dependents of such employees, has been introduced by the State Government through Government Orders; and, through subsequent Government Orders, it has evolved to more definitive terms for its application, involving procedure. The most in regard to the policy applicable for the payment of Rs.50 lacs ex gratia relief to the dependents of employees of the Government, autonomous bodies etc., is to be found in the personal affidavit of the District Magistrate, Fatehpur as well as the Additional Chief Secretary, Revenue Department, Government of U.P., Lucknow. Both these affidavits carry a copious detail of the Government Orders issued from time to time, introducing and refining the policy as also copies of the relevant Government Orders, annexed as annexures to these affidavits. We would, for the most, rely on the District Magistrate's personal affidavit.

15. The policy to compensate dependents of victims of the class of employees under consideration was introduced vide Government Order No.249/एक-11-2020-04(जी)/2015-टी0सी0 dated 11.04.2020. The Government Order dated 11.04.2020 reads:

"उपर्युक्त विषय पर मुझे यह कहने का निदेश हुआ है कि वर्तमान में वैश्विक महामारी कोविड-19 से प्रभावित सम्पूर्ण प्रदेश में इस महामारी की रोकथाम, उपचार एवं उससे बचाव के लिये चिकित्सा विभाग के अलावा भारी संख्या में विभिन्न विभागों के कार्मिक दिन-रात ड्यूटी में लगे हुए हैं।

2. कोविड-19 की रोकथाम, उपचार व उससे बचाव के लिये कार्यरत कार्मिकों में कोविड-19 के संक्रमण की आशंका सदैव बनी रहती है। कोविड-19 की रोकथाम, उपचार व उससे बचाव के लिये कार्यरत कार्मिक की कोविड-19 के संक्रमण से मृत्यु की दशा में उसके आश्रितों को सामाजिक सुरक्षा देने के

लिये राज्य द्वारा उस मृतक के आश्रितों को 50.00 लाख की एकमुश्त अनुग्रह धनराशि स्वीकृति किये जाने का निर्णय लिया गया है।

3. उपर्युक्त स्वीकृति हेतु संबंधित जनपद के जिलाधिकारी अधिकृत होंगे। इस हेतु कार्यालयाध्यक्ष का इस आशय का प्रमाण-पत्र कि संबंधित कार्मिक कोविड-19 की रोकथाम, उपचार व उससे बचाव के कार्यों के लिये नियुक्त था तथा साथ ही पोस्टमार्टम रिपोर्ट के आधार पर मुख्य जिकित्साधिकारी का इस आशय का प्रमाण-पत्र कि संबंधित कार्मिक की मृत्यु कोविड-19 के संक्रमण से हुई है, अपेक्षित होगा।

4. उक्त व्यवस्था का लाभ चिकित्सा अनुभाग-1 के शासनादेश संख्या-533/पांच-1-2020-आर0(533)/2020 दिनांक 07.04.2020 से आच्छादित कार्मिकों से भिन्न समस्त विभागों, निगमों स्वायत्तशासी संस्थाओं प्राधिकरणों आदि अन्य सभी सरकारी, अर्द्ध-सरकारी, संविदा कर्मी, दैनिक वेतन भोगी, आउटसोर्स स्थायी/अस्थायी कार्मिकों के आश्रितों को अनुमन्य/देय होगी, जो कोविड-19 रोकथाम, उसके उपचार व उससे बचाव के लिये कार्यरत हैं।

5. उक्त व्यय वित्तीय वर्ष 2020-2 के आय-व्यय के अनुदान संख्या-51 के अंतर्गत लेखाशीर्षक "2245-प्राकृतिक विपत्ति के कारण राहत-05-स्टेट डिजास्टर रेस्पांस फण्ड-800-अन्य व्यय-06-स्टेट डिजास्टर रेस्पांस फण्ड से व्यय-09-राज्य सरकार द्वारा घोषित अन्य आपदाओं हेतु स्टेट डिजास्टर रेस्पांस फण्ड से व्यय-41 अन्य व्यय" के नामे डाला जायेगा।

उपर्युक्त आदेश वित्त विभाग के अशासकीय संख्या-646/दस-5-2020 दिनांक 11 अप्रैल 2020 में प्राप्त उनकी सहमति से जारी किये जा रहें हैं।"

16. The Government Order dated 11.04.2020 was promptly amended by Government Order No.249(2)/एक-11-2020-04(जी)/ 2015-टी0सी0, also dated 11.04.2020. The amending Government Order dated 11.04.2020, in its material part, provides:

“2. इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि उक्त शासनादेश संख्या-249/एक-11-2020-04(जी)/2015-टी0सी0 दिनांक 11 अप्रैल, 2020 के प्रस्तर-3 को निम्नानुसार संशोधित किया जाता है:-

उपर्युक्त स्वीकृति हेतु संबंधित जनपद के जिलाधिकारी अधिकृत होंगे। इस हेतु कार्यालयाध्यक्ष का इस आशय का प्रमाण-पत्र कि संबंधित कार्मिक कोविड-19 की रोकथाम, उपचार व उससे बचाव के कार्या के लिये नियुक्त था तथा साथ ही मुख्य चिकित्साधिकारी का इस आशय का प्रमाण-पत्र कि संबंधित कार्मिक की मृत्यु कोविड-19 के संक्रमण से हुई है, अपेक्षित होगा।”

17. The next Government Order, that further evolved the policy for payment of the ex gratia sum to dependents of employees of the specified class, was issued on 22.06.2021. The material part of the Government Order dated 22.06.2021 reads:

“2. इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि विर्तमान वित्तीय वर्ष 2021-22 में भी कोविड-19 के रोकथाम, बचाव व उपचार में चिकित्सा विभाग के कार्मिकों के अलावा ऐसे कार्मिकों को जिनकी ड्यूटी कार्यालयाध्यक्ष/जिलाधिकारी द्वारा कोविड की रोकथाम, बचाव अथवा उपचार में लगायी गयी है, को कोविड संक्रमण से मृत्यु की दशा में उनके आश्रितों को रु0 50.00 लाख की एकमुश्त अनुग्रह धनराशि दिये जाने का निर्णय लिया गया है।

3. जिलाधिकारी द्वारा सम्बन्धित कार्मिक की कोविड संक्रमण से मृत्यु पर उसके आश्रितों को अनुग्रह धनराशि की स्वीकृति करके सभी अभिलेखों सहित धनराशि अवमुक्त करने हेतु शासन को संस्तुति प्रेषित की जायेगी। जिलाधिकारी द्वारा केवल उन्हीं कार्मिकों के आश्रितों को अहेतुक सहायता राशि (रु0 50.00 लाख) स्वीकृत की जायेगी, जिनकी ड्यूटी कार्यालयाध्यक्ष/जिलाधिकारी द्वारा कोविड की रोकथाम, बचाव अथवा उपचार में लगायी गयी है एवं कोविड संक्रमण से उनकी मृत्यु हुई है। इस हेतु

कार्यालयाध्यक्ष द्वारा संलग्न प्रारूप-1 पर इस आशय का प्रमाण-पत्र उपलब्ध कराया जायेगा कि संबंधित कार्मिक कोविड-19 की रोकथाम, बचाव अथवा उपचार के कार्यों के लिये नियुक्त था एवं मुख्य चिकित्साधिकारी द्वारा संलग्न प्रारूप-2 पर इस आशय का प्रमाण-पत्र उपलब्ध कराया जायेगा कि सम्बन्धित कार्मिक की मृत्यु कोविड-19 के संक्रमण से हुयी है। सम्बन्धित कार्मिक की सेवा पुस्तिका में दर्ज सभी आश्रितों को बराबर-बराबर अहेतुक सहायता की धनराशि जिलाधिकारी द्वारा वितरित करायी जायेगी। यदि सेवा पुस्तिका में आश्रितों के नाम दर्ज नहीं है तो मृतक कार्मिक के उत्तराधिकारियों में अहेतुक सहायता की धनराशि बराबर-बराबर जिलाधिकारी द्वारा वितरित करायी जायेगी।

4. उक्त व्यवस्था का लाभ चिकित्सा अनुभाग-1 के शासनादेश संख्या-533/पांच-1-2020-आर0(533)/2020 दिनांक 07.04.2020 से आच्छादित कार्मिकों से भिन्न समस्त विभागों, निगमों स्वायत्तशासी संस्थाओं, प्राधिकरणों आदि अन्य सभी सरकारी, अर्द्ध-सरकारी, संविदा कर्मी, दैनिक वेतन भोगी, आउटसोर्स, स्थायी/अस्थायी कार्मिकों के आश्रितों को अनुमन्य/दिय होगी, जिनकी ड्यूटी कार्यालयाध्यक्ष/जिलाधिकारी द्वारा कोविड-19 की रोकथाम, बचाव व उपचार में लगायी गयी हो।

5. कोविड-19 की द्वितीय लहर के दौरान अब तक मृत सरकारी कार्मिकों का विवरण एवं संगत अभिलेखों को राहत आयुक्त कार्यालय की वेबसाइट rahat.up.nic.in पर दिनांक 30 जून, 2021 तक अनिवार्य रूप से फीड एवं उपलोड करा दिया जाय और भविष्य में भी उक्त वेबसाइट पर कोविड से मृत सभी कार्मिकों का विवरण फीड किया जाता रहेगा।

6. उक्त व्यय वित्तीय वर्ष 2021-22 के आय-व्यय के अनुदान संख्या-51 के अन्तर्गत लेखाशीर्षक "2245-प्राकृतिक विपत्ति के कारण राहत-05-स्टेट डिजास्टर रेस्पांस फण्ड-800-अन्य व्यय-06-स्टेट डिजास्टर रेस्पांस फण्ड से व्य-09-राज्य सरकार द्वारा घोषित अन्य आपदाओं हेतु स्टेट डिजास्टर रेस्पांस फण्ड से व्यय-42 अन्य व्यय" के नामे डाला जायेगा।

उपर्युक्त आदेश वित्त विभाग के अशासकीय
संख्या-591/दस-5-2021 दिनांक 18 जून,
2021 में प्राप्त उनकी सहमति से जारी किये जा रहे
हैं।"

18. Forms-1 and 2, appended to
the Government Order dated 22.06.2021,
are set out hereinbelow:

**"शासनादेश संख्या-411/एक-11-
2021-04(जी)/2015 टी0सी0, दिनांक 22
जून, 2021 का संलग्नक-1**

प्रारूप-1

प्रमाण पत्र संख्या- दिनांक

कोविड-19 ड्यूटी प्रमाण-पत्र

प्रमाणित किया जाता है कि श्री/श्रीमती
..... की ड्यूटी कोविड-19 की रोकथाम बचाव
अथवा उपचार के कार्यों में लगायी गयी थी। उक्त
कार्मिक की कोविड संक्रमण से दिनांक
को असामयिक मृत्यु हो गयी है।

कार्मिक का विवरण निम्नवत है:-

1- मृतक कार्मिक का नाम

.....

2- विभाग का नाम

3- पदनाम

4- कोविड की रोकथाम, बचाव अथवा
उपचार से सम्बन्धित कार्य का विवरण

.....

5- कोविड से सम्बन्धित कार्य का ड्यूटी
स्थल

6. कोविड से सम्बन्धित कार्य की अवधि
दिनांक से तक कोविड ड्यूटी
आदेश दिनांक की छायाप्रति संलग्न है।

दिनांक:-

हस्ताक्षर जिलाधिकारी/कार्यालयाध्यक्ष

नाम

विभाग का नाम

जनपद का नाम

(सील मुहर)

संलग्नक-"

"शासनादेश संख्या-411/एक-11-
2021-04(जी)/2015 टी0सी0, दिनांक 22 जून,
2021 का संलग्नक-2

प्रारूप-2

प्रमाण पत्र संख्या- दिनांक

कोविड-19 मृत्यु प्रमाण-पत्र

प्रमाणित किया जाता है कि श्री/श्रीमती
..... की मृत्यु कोविड-19 के संक्रमण से दिनांक
..... को हुयी है।

1- मृतक कार्मिक का नाम

.....

2- पिता का नाम

3. मृतक का पता

4- अस्पताल का नाम (भर्ती की दशा में)

.....

5- RTPCR/एण्टीजनेन टेस्ट का
दिनांक, जिससे कोविड की पुष्टि हुयी

.....

6. कोविड टेस्ट लैब/अस्पताल का नाम

.....

7. यदि कोविड की जांच उपरोक्त क्रमांक5
में वर्णित पद्धति से नहीं की गयी तो कोविड प्रमाणित
करने का अन्य स्रोत (विवरण अंकित करें)

.....

दिनांक:-

हस्ताक्षर

मुख्य चिकित्साधिकारी का नाम

जनपद

(सील मुहर)

संलग्नक-"

19. The last to be issued on the
subject is a Government Order dated
26.07.2021. This further details
requirements for the grant of benefit under
the policy and specifies what documents
would be required to be furnished to extend
the necessary ex gratia relief to the
dependents of an employee of the specified
class, becoming a victim of the Covid-19.

The Government Order dated 26.07.2021, in its material part, reads:

"उपरोक्त विषयक कृपया राजस्व अनुभाग-11 के शासनादेश सं0-411/एक-11-2021-4(जी)/2015 टी0सी0 दिनांक 22 जून का संदर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा वित्तीय वर्ष 2021-22 में कोविड-19 की रोकथाम, बचाव व उपचार में लगाये गये कार्मिकों की कोविड संक्रमण से मृत्यु की दशा में उनके आश्रितों को रू0 50.00 लाख की एकमुश्त अनुग्रह धनराशि दिये जाने के संबंध में विस्तृत दिशा-निर्देश जारी किये गये हैं।

2- जनपदों द्वारा आनलाईन अपलोड किये गये प्रस्तावों की समीक्षा में यह पाया गया है कि <https://rahat.up.nic.in> पर जिलाधिकारियों द्वारा अपलोड किये गये प्रस्ताव अपूर्ण हैं तथा शासनादेश दिनांक 22 जून 2021 के साथ प्रेषित प्रारूपों पर सूचना यथा अधिकांश कार्मिक का ड्यूटी आदेश, जिलाधिकारी की संस्तुति आदि अभिलेख अपलोड नहीं किया गये है, सभी अपर जिलाधिकारी, वित्त एवं राजस्व से जूम मीटिंग एवं कंट्रोल रूप के माध्यम से सभी वांछित अभिलेख अपलोड करने हेतु कई बार निर्देश दिये गये हैं।

3- उक्त के संबंध में मुझे यह कहने का निदेश हुआ है कि उपरोक्त शासनादेश दिनांक 22.06.2021 के क्रम में निम्नलिखित अभिलेख राहत आयुक्त कार्यालय की वेबसाइट <https://rahat.up.nic.in> पर दिनांक 07.08.2021 तक अपलोड कराना सुनिश्चित करें:-

1. सक्षम अधिकारी द्वारा निर्गत मृत्यु पंजीकरण प्रमाण पत्र।

2. मृतक कार्मिक की आर0टी0पी0सी0आर0/एंटीजन/सी0टी0 स्कैन की पठनीय प्रति।

3. कोविड ड्यूटी आदेश की पठनीय प्रति।

4. जिलाधिकारी/कार्यालयाध्यक्ष का कोविड ड्यूटी प्रमाण पत्र (शासनादेश दि0 22.06.2021 में निर्धारित प्रारूप -1 पर)

5. मुख्य चिकित्सा अधिकारी द्वारा निर्गत कोविड मृत्यु प्रमाण पत्र (शासनादेश दि0 22.06.2021 में निर्धारित प्रारूप -2 पर)।

6. अपर जिलाधिकारी वित्त एवं राजस्व का उपरोक्त सभी अभिलेखों के सत्यानोपरान्त अभिलेख सत्यापन प्रमाण पत्र (संलग्न प्रारूप-3 पर)।

7. जिलाधिकारी का संस्तुति पत्र।

अपर जिलाधिकारी क्रमांक 01 से 05 तक के सभी प्रमाण पत्रों/अभिलेखों की सत्यता का प्रमाणित करके ही वेबसाइट पर उपलोड करेंगे। सभी वांछित अभिलेखों पर सक्षम अधिकारी के हस्ताक्षर, सील/मोहर तथा निर्गत करने वाले कार्यालय का पत्रांक भी स्पष्ट अंकित होना चाहिए। सम्बन्धित अपर जिलाधिकारी सभी अभिलेखों की सत्यता की जांच स्वयं करने के उपरान्त ही वेबसाइट पर अपलोड कराना सुनिश्चित करें।"

20. Now, the District Magistrate says in her personal affidavit that after this Court made the order dated 31.10.2023, requiring her to put in her personal affidavit, she, with a view to ascertain the correct facts, vide her order dated 10.11.2023, constituted a three-member committee, headed by the Additional District Magistrate (Judicial), Fatehpur along with the Chief Medical Officer, Fatehpur and the Chief Treasury Officer, Fatehpur, directing them to submit an inquiry report within two days. It is said in paragraph No.9 of the District Magistrate's personal affidavit that the Committee as aforesaid, constituted by her, submitted their report, after receiving reports from the Executive Officer, Nagar Panchayat Khaga, Fatehpur, the Chief Medical Officer, Fatehpur and a written statement dated 14.11.2023 from the petitioner. In paragraph No.9 aforesaid, as regards the petitioner's claim for the ex gratia sum of Rs.50 lacs, the report of the Executive Officer, Nagar Panchayat, Khaga, that was

taken into consideration by the Committee appointed by the District Magistrate, is quoted for the material part of it. The quoted portion of the report in paragraph No. 9(a) of the District Magistrate's personal affidavit reads:

"इस प्रकार नगर पंचायत, खागा के अधिशासी अधिकारी/कार्यालय अध्यक्ष की हैसियत से मृतक श्रीमती आशा देवी पत्नी गोपालदास, सफाई कर्मी, नगर पंचायत, खागा की डियूटी कोविड-19 की रोकथाम, उपचार व उससे बचाव के कार्यों में डियूटी नहीं लगायी गयी थी तथा कोविड-19 के संक्रमण से मृत्यु होने का साक्ष्य एल-02 सी0एच0सी0 के चिकित्सा प्रभारी द्वारा अथवा याची आनानंद कुमार द्वारा भी नहीं उपलब्ध कराया गया है।

उक्त के क्रम में निर्गत शासनादेश संख्या: 411/एक-11-2021-04(जी)/2015-टी0सी0 दिनांक 22.06.2021 में दिये गये दिशा-निर्देशों के आलोक में मृतक श्रीमती आशा देवी के परिवारिक जनों को मु0 50.00 लाख रु0 की सहायता राशि देय नहीं है।"

21. The Chief Medical Officer's report, on the basis of which the Additional District Magistrate (Judicial)'s Committee submitted their report, also quoted in paragraph No.9(b) of the District Magistrate's personal affidavit, reads:

"उक्त प्रकरण को संज्ञान लेते हुये मुख्य चिकित्सा अधिकारी द्वारा 03 चिकित्सकों की संयुक्त टीम को गठित कर जांच कर जांच आख्या 03 दिवस के अन्दर प्रस्तुत करने के निर्देश दिये गये थे। जांच समिति द्वारा प्रकरण की जांच कर मृतका आशा पत्नी राम गोपाल के उपचार सम्बन्धित सभी अभिलेख सामु0स्वा0 केन्द्र हरदो, खागा से प्राप्त करके जांच समिति द्वारा अभिलेखों का अवलोकन किया गया, जांच में जो तथ्य प्रकाश में आये वह बिन्दुवार निम्नवत है-

1. मृतिका आशा देवी पत्नी गोपालदास निवासी न्यूनगढी खागा फतेहपुर उम्र लगभग 55 वर्ष

दिनांक 26.04.2021 को समय सांय 5.00 बजे एल0-2 फैशलिटी, रायसीना हॉस्पिटल, इलाहाबाद इन्स्टिट्यूट मेडिकल साइन्सेज पुराईन मोड खागा फतेहपुर में भर्ती हुई थी उसकी मृत्यु दिनांक 27.04.2021 को सुबह 8.10 बजे उपरोक्त हास्पिटल में हुई थी। मृतिका महिला पिछले एक सप्ताह से बिमार थी किन्तु उसका कोविड-19 एण्टीजन टेस्ट भी नहीं कराया गया था जबकि एण्टीजन टेस्ट जनपद में सभी चिकित्सा इकाईयों व मोबाइल टीम द्वारा घर पर भी हो रहा था, फिर भी मृतिका महिला के परिजनों द्वारा एण्टीजन जांच नहीं करायी गयी और इस प्रकरण में आर0टी0पी0सी0आर0 जांच/सी0टी0 स्कैन चेस्ट भी नहीं कराया गया है। जिस कारण मुख्य चिकित्सा अधिकारी द्वारा प्रारूप-2 पर इस आशय का प्रमाण पत्र उपलब्ध नहीं कराया जा सकता की कार्मिक की मृत्यु कोविड-19 के संक्रमण से हुई है। जो कि इस प्रकरण में अनुग्रह राशि का लाभ लेने हेतु अतिआवश्यक है।

2. मृतिका महिला पहले से ही मधुमेह रोग से ग्रसित थी जिसमें शरीर की प्रतिरोधक क्षमता कम हो जाती है जिससे मरीज के अन्य रोगों से संक्रमित होने की सम्भावना बढ़ जाती है जिससे मरीज की मृत्यु हो भी सकती है।

3. मृतिका आशा देवी की भर्ती फाइल (केश सीट) पर DIAGNOSIS सम्भावित Covid 19 PNEUMONITIS लिखा गया है किन्तु मृतिका महिला का सी0टी0 स्कैन चेस्ट नहीं हो सका, जिस कारण मृतिका महिला के कोविड-19 PNEUMONITIS से ग्रसित होने की पुष्टि नहीं की जा सकती है।

4. मृतिका आशा की भर्ती फाइल के अनुसार उक्त मृतिका आशा एक हफ्ते से बुखार से पीडित थी तथा उसे सांस लेने में कठनाई हो रही थी यह लक्षण अन्य बीमारियों जैसे- सी0ओ0पी0डी0, न्यूमोनिया, सांस नली का संक्रमण आदि रोगों में भी हो सकता है।

5. चूँकि उस समय कोविड-19 की लहर चल रही थी ऐसी स्थिति में कोई भी मरीज जिसको बुखार आ रहा हो और सांस लेने में दिक्कत हो और आक्सीजन सैचुरेशन कम हो तो ऐसे सभी मरीजों को कोविड-19 से ग्रसित मानकर एल0-2 हॉस्पिटल में भर्ती करके उनका इलाज किया जाता था किन्तु

कोविड-19 इन्फेक्शन आर0टी0पी0सी0आर जांच/सी0टी0 स्कैन / एण्टीजन की रिपोर्ट के आधार पर पॉजिटिव माना जाता था।

6. अपर मुख्य सचिव शासन के शासनादेश संख्या-1394/एक-10-2021-33 (08)/2021 लखनऊ दिनांक 26 जुलाई 2021 के द्वारा वर्ष 2021-22 में कोविड-19 की रोकथाम बचाव व उपचार में लगाये गये कार्मिकों की कोविड संक्रमण से मृत्यु की दशा में उनके आश्रितों को 50.00 लाख की एकमुश्त अनुग्रह धनराशि दिये जाने के सम्बन्ध में योजना के लाभ करने हेतु शासनादेश बिन्दु संख्या-2 पर अंकित मृतक कर्मी की आर0टी0पी0सी0आर0/ एण्टीजन/ सी0टी0 स्कैन की रिपोर्ट की पठनीय प्रति आवश्यक है जो इस प्रकरण में उपलब्ध नहीं है।

निष्कर्ष- मेरे द्वारा गठित जाँच समिति द्वारा उपलब्ध करायी गयी जाँच आख्या का अवलोकन किया गया। मैं जाँच समिति की आख्या/निष्कर्ष से सहमत हूँ। मेरा भी यही मानना है कि यह सुनिश्चित नहीं किया जा सकता है कि मृतिका महिला की मृत्यु कोविड-19 से हुई थी। मृतिका महिला पहले से ही मधुमेह रोग से ग्रसित थी जिस रोग में मरीज की प्रतिरोधक क्षमता कम हो जाती है जिससे मरीज में अन्य संक्रमण होने की सम्भावना अधिक रहती है और संक्रमण तेजी से बढ़ता है और रोगी की मृत्यु भी हो सकती है। उपरोक्त प्रकरण में मृतिका महिला की न तो आर0टी0पी0सी0 आर0 जाँच / एण्टीजन टेस्ट / सी0टी0स्कैन चेस्ट कराया गया जिस कारण से शासनादेश दिनांक 22.06.2021 के साथ संलग्न प्रारूप-02 पर मुख्य चिकित्साधिकारी, फतेहपुर द्वारा इस आशय का प्रमाण पत्र भी उपलब्ध नहीं कराया जा सकता कि कार्मिक की मृत्यु कोविड-19 के संक्रमण से हुई है।"

22. The statement of the petitioner dated 14.11.2023 before the Inquiry Committee, that the District Magistrate appointed, has been quoted in the District Magistrate's personal affidavit in paragraph No.9(c), which reads:

"प्रार्थी की माता आशा देवी पत्नी गोपालदास, नगर पंचायत खगा में सफाई कर्मचारी के पद पर कार्यरत थी। कोविड-19 के दौरान डियूटी करते समय बीमार हो गयी थी। इलाज हेतु कोविड-19 L-2 हास्पिटल छिमी पुरइन में दिनांक 26.04.2021 को भर्ती करायी गयी थी। दिनांक 27.04.2021 को L-2 हास्पिटल में ही उनकी मृत्यु हो गयी। मृत्यु उपरान्त शासन से मिलने वाले 50.00 लाख अनुदान राशि के लिये मेरी माता के पक्ष में जो अभिलेख थे। मेरे द्वारा स्थानीय निकाय, लखनऊ जिलाधिकारी, फतेहपुर अधिशाषी अधिकारी, नगर पंचायत, खगा तथा मा0 उच्च न्यायालय, इलाहाबाद को प्रस्तुत किये जा चुके हैं।"

23. The Committee, that the District Magistrate appointed, headed by the Additional District Magistrate (Judicial), submitted its report, also dated 14.11.2023, whose findings as to the petitioner's claim for the ex gratia sum of money on account of his mother's death, extracted in paragraph No.10 of the District Magistrate's affidavit, read:

"(2) अनुग्रह राशि दिये जाने के सम्बन्ध में समिति का निष्कर्ष

याची को अनुग्रह राशि दिये जाने के सम्बन्ध राजस्व अनुभाग-11 शासनादेश संख्या-249/एक-11-2020-04 (जी) / 2015-टी0सी0 दिनांक 11.04.2020 शासनादेश संख्या-411/एक-11-2021-04 (जी)/ 2015-टी0सी0 दिनांक 22 जून 2021 तथा उ0प्र0 राजस्व लखनऊ अनुभाग-10 से निर्गत शासनादेश संख्या-1394/एक-10-2021-33 (08)/2021 दिनांक 26 जुलाई 2021 में अनुग्रह राशि दिये जाने की व्यवस्था दी गयी है तथा शासनादेश संख्या -411/एक-11-2021-04 (जी) / 2015-टी0सी0 दिनांक 22 जून 2021 में स्पष्ट उल्लेख है कि "कि चिकित्सा विभाग के कार्मिकों के अलावा ऐसे कार्मिकों को जिनकी डियूटी कार्यालयाध्यक्ष / जिलाधिकारी द्वारा कोविड की

रोकथाम, बचाव अथवा उपचार में लगायी गयी है की कोविड संक्रमण से मृत्यु की दशा में उनके आश्रितों को ₹0 50.00 की एकमुश्त अनुग्रह धनराशि दिये जाने का निर्णय लिया गया है।

जिलाधिकारी द्वारा सम्बन्धित कार्मिक की कोविड संक्रमण से मृत्यु पर उसके आश्रितों को अनुग्रह धनराशि की स्वीकृति करके सभी अभिलेखों सहित धनराशि अवमुक्त करने हेतु शासन को संस्तुति प्रेषित की जायेगी। जिलाधिकारी द्वारा केवल उन्हीं कार्मिकों के आश्रितों को अहेतुक सहायता राशि (₹0 50.00 लाख) स्वीकृत की जायेगी, जिनकी डियूटी कार्यालयाध्यक्ष / जिलाधिकारी द्वारा कोविड की रोकथाम, बचाव अथवा उपचार में लगायी गयी है एवं कोविड संक्रमण से उनकी मृत्यु हुई है। इस हेतु कार्यालयाध्यक्ष द्वारा संलग्न प्रारूप-1 पर इस आशय का प्रमाण पत्र उपलब्ध कराया जायेगा। कि सम्बन्धित कार्मिक कोविड-19 की रोकथाम, बचाव अथवा उपचार के कार्यों के लिए नियुक्त था एवं मुख्य चिकित्साधिकारी द्वारा संलग्न प्रारूप 02 पर इस आशय का प्रमाण पत्र उपलब्ध कराया जायेगा कि सम्बन्धित कार्मिक की मृत्यु कोविड-19 के संक्रमण से हुई है।"

1. इस सम्बन्ध में मुख्य चिकित्साधिकारी, फतेहपुर की जाँच आख्या दिनांक 13.11.2023 में स्पष्ट किया गया है कि मृतिका आशा देवी पत्नी गोपालदास निवासी न्यूनगढी खागा फतेहपुर उम्र लगभग 55 वर्ष दिनांक 26.04.2021 को समय सांय 5:00 बजे एल0-2 कैशलिटी, रायसीना हॉस्पिटल, इलाहाबाद इन्स्टिट्यूट मेडिकल साइन्सेज पुराईन मोड खागा फतेहपुर में भर्ती हुई थी उसकी मृत्यु दिनांक 27.04.2021 को सुबह 8:10 बजे उपरोक्त हास्पिटल में हुई थी। मृतिका महिला पिछले एक सप्ताह से बीमार थी किन्तु उसका कोविड-19 एण्टीजन टेस्ट भी नहीं कराया गया था जबकि एण्टीजन टेस्ट जनपद में सभी चिकित्सा इकाईयों व मोबाइल टीम द्वारा घर पर भी हो रहा था, फिर भी मृतिका महिला के परिजनों द्वारा एण्टीजन जांच नहीं करायी गयी और इस प्रकरण में आर0टी0पी0सी0आर0 जांच/सी0टी0 स्कैन चेस्ट भी नहीं कराया गया है तथा मृतिका महिला पहले से ही मधुमेह रोग से ग्रसित थी, जिसमें शरीर की प्रतिरोधक क्षमता कम हो जाती है। जिससे मरीज के अन्य रोगों से संक्रमित होने की सम्भावना बढ़ जाती है, जिससे मरीज

की मृत्यु भी हो सकती है। मृतिका आशा की भर्ती फाइल के अनुसार उक्त मृतिका आशा एक हफ्ते से बुखार से पीडित थी तथा उसे सांस लेने में कठनाई हो रही थी यह लक्षण अन्य बीमारियों जैसे- सी0ओ0पी0डी0, न्यूमोनिया, सांस नली का संक्रमण आदि रोगों में भी हो सकता है। चूंकि उस समय कोविड-19 की लहर चल रही थी ऐसी स्थिति में कोई भी मरीज जिसको बुखार आ रहा हो और सांस लेने में दिक्कत हो और आक्सीजन सैचुरेशन कम हो तो ऐसे सभी मरीजों को कोविड-19 से ग्रसित मानकर L-2 हस्पिटल में भर्ती करके उनका इलाज किया जाता था। किन्तु कोविड-19 इन्फेक्शन आर0टी0पी0सी0आर0 जांच/सी0टी0 स्कैन / एण्टीजन की रिपोर्ट के आधार पर पॉजीटिव माना जाता था। जिस कारण मुख्य चिकित्सा अधिकारी द्वारा प्रारूप-2 पर इस आशय का प्रमाण पत्र उपलब्ध नहीं कराया जा सकता कि कार्मिक की मृत्यु कोविड-19 के संक्रमण से हुई है तथा मृतक कार्मिक की डियूटी न तो जिलाधिकारी द्वारा और न ही कार्यालयाध्यक्ष (अधिशायी अधिकारी नगर पंचायत, खागा) द्वारा कोविड-19 के रोकथाम, बचाव अथवा उपचार के कार्यों के लिए डियूटी लगायी गयी थी, जिससे इस आशय का भी प्रमाण पत्र प्रारूप-01 पर निर्गत नहीं किया गया है। राजस्व अनुभाग-11 शासनादेश संख्या-411/एक-11-2021-04 (जी) / 2015-टी0 सी0 दिनांक 22 जून 2021 में अनुग्रह राशि प्राप्त करने हेतु प्रारूप-01 तथा प्रारूप-02 पर प्रमाण-पत्र उपलब्ध कराया जाना जिलाधिकारी द्वारा कोविड संक्रमण से मृत्यु पर उनके आश्रितों को अनुग्रह धनराशि की स्वीकृति करके सभी अभिलेखों सहित धनराशि अवमुक्त करने हेतु शासन को संस्तुति प्रेषित करने हेतु आवश्यक है।

इस प्रकार मुख्य चिकित्साधिकारी, फतेहपुर की जाँच आख्या दिनांक 13.11.2023 तथा अधिशायी अधिकारी नगर पंचायत, खागा की जाँच आख्या दिनांक 11.11.2023 एवं शासनादेशों में दिये गये दिशा-निर्देशों में दी गयी विधि व्यवस्थाओं के आधार पर मृतिका आशा देवी पत्नी गोपालदास सफाई कर्मी नगर पंचायत, खागा की मृत्यु के सम्बन्ध में - उनके आश्रितों को अनुग्रह राशि के रूप में मु0 50.00 लाख ₹0 की सहायता नियमानुसार देय नहीं

है। परन्तु मृतक महिला आशा नगर पंचायत, खागा में सफाई कर्मी के रूप में कार्यरत था तथा चिकित्साधिकारी द्वारा कोविड-19 मानते हुए मृतका आशा देवी का उपचार किया जा रहा था। ऐसी स्थिति में मानवीय दृष्टिकोण अपनाते हुए मृतका के पारिवारिक जनों को अनुग्रह राशि दिये जाने के सम्बन्ध में शासन से उचित मार्ग दर्शन प्राप्त किया जाना भी उचित प्रतीत होता है।"

24. The stand of the District Magistrate in paragraph Nos.12, 13, 14 and 15 of her personal affidavit to negate the petitioner's claim, in the first place, is that there is no evidence to show, such as a certificate of the Office Superintendent concerned, that the deceased was detailed to any duty for the prevention, control and treatment of the Covid-19 disease; and, in the second, there is no lab report/ test report or certification by the Chief Medical Officer, Fatehpur, that the deceased, Smt. Asha died of Covid-19 infection. In the absence of these documents, there is no fulfillment of the conditions stipulated in the Government Orders dated 11.04.2020, as amended on the selfsame date, the Government Order dated 22.06.2021 and the Government Order dated 26.07.2021, entitling the petitioner to receive the ex gratia sum of Rs.50 lacs on account of his mother's demise. The Additional Chief Secretary (Revenue), Government of U.P., Lucknow has refuted the petitioner's claim more or less on the same grounds as those set forth in the District Magistrate's personal affidavit. In addition, the Additional Chief Secretary has appended along with his affidavit a copy of the order dated 16.12.2023 passed by the District Magistrate, Fatehpur, rejecting the petitioner's claim for payment of the ex gratia sum of Rs.50 lacs on grounds already indicated. The order dated 16.12.2023 has been brought into existence pending this

writ petition. If the stand of the respondents is not accepted by us, the order dated 16.12.2023, annexed as Annexure No.8 to the Additional Chief Secretary's affidavit filed on 18.01.2024, would have to be quashed, notwithstanding the fact that this order has not been challenged by the petitioner through an amendment. The order is one that has come into existence pendente lite after we passed orders dated 31.10.2023. It would be too technical to insist upon pain of fatal consequences to the petitioner's claim that the petition ought have been amended to challenge the District Magistrate's order dated 16.12.2023. The validity of this order would have to be judged within the frame of the writ petition that the petitioner originally instituted.

25. Since the matter involved financial consequences and it was about the application of the Government's policy to pay ex gratia uniformly, we gave opportunity to the Principal Secretary (Revenue) to come forward in person and explain the Government's stand, if he so desires. Guru Prasad, Principal Secretary (Revenue), Government of U.P., appeared before this Court in person and explained the conditions of the policy for award of ex gratia compensation to the dependents of Covid-19 victims at the relevant period of time. He highlighted that feature of the policy, which says that ex gratia compensation is to be awarded to those employees who were detailed to duty in connection with prevention, control and treatment of Covid-19. He said before us that the petitioner's mother, though a Safai Karmi, was not assigned to duty in connection with prevention, control and treatment of the Covid-19 disease. He explained at length features of the policy,

which are more or less the same, that have been said on affidavit.

26. Now, as is apparent, the petitioner's claim has been rejected on two counts substantially. The first is the lack of evidence to show that his mother was detailed either by the Head of Office or the District Magistrate to any duty involving the prevention, control and treatment of the Covid-19 disease; and, secondly, the lack of evidence to show in the manner prescribed or by other evidence aliunde that she died of Covid-19 infection. As already remarked, it is not our province to formulate policies for the Government, particularly, those entailing financial burden on the exchequer. If the State Government had not formulated the policy carried in the Government Orders dated 11.04.2020, 22.06.2021 and 26.07.2021, it would be no business of ours to say that a policy be framed for extending financial aid ex gratia even to those dependents of victims of the Covid-19 pandemic, who were detailed to duty for the prevention, control and treatment of the Covid-19 disease and died in consequence. But, once the State Government have come up with a policy to extend this aid, as already remarked in this judgment, it is our bounden duty to ensure that the policy is applied in an evenhanded, fair and reasonable manner. We have to ensure that no one entitled under the policy is arbitrarily or whimsically excluded by resort to any irrational demand or standard, or in any other similar fashion, when substantially entitled in terms of the policy.

27. It is true that in the successive Government Orders, the application of the policy has been honed through progressive refinement of standard paper work, including documents required to support a

claim for the ex gratia sum of Rs.50 lacs for a dependent of an employee, covered by the policy. It would, in our clear opinion, be very arbitrary to exclude genuine and bona fide claims from consideration, merely because the necessary documents or papers in punctilious detail are not available. Of course, it has to be ascertained if indeed the deceased fulfilled the substantial criteria prescribed by the three Government Orders, entitling his/ her dependents to the ex gratia monetary relief. The twin substantial requirements for the entitlement are the facts that the employee concerned was detailed to duty regarding prevention, control and treatment of the Covid-19 disease and that he/ she, while discharging such duty, contracted the virus, leading to his/ her death.

28. There are two prescribed forms appended to the Government Order dated 22.06.2021. The first relates to the Covid-19 Duty Certificate, either signed by the District Magistrate or the Head of Office of the deceased, and the other is Form-2, appended to the said order, which is the Covid-19 Death Certificate required to be issued by the Chief Medical Officer of the District, where the deceased was posted. These requirements have been further enlarged and refined by the Government Order dated 26.07.2021, making it a total of seven documents to be annexed to any claim by the dependent(s) of a deceased for award of the ex gratia sum payable under the Government Order dated 11.04.2020. The Government Order dated 11.04.2020, as amended by the subsequent order of the selfsame date, required the production of a certificate issued by the Head of Office that the employee concerned was engaged in the prevention, control and treatment of the Covid-19 disease and a certificate from the Chief Medical Officer that he/ she died of

Covid-19 infection. Though, certificates in Forms 1 and 2 could have been granted after the Government Order dated 22.06.2021 came to be issued and even documents drawn up for the deceased Asha, that are the requirement of the Government Order dated 26.07.2021, later on, but these could not have been there at the time when Asha died. She died on 27.04.2021, that is to say, after the issue of the Government Order dated 11.04.2020 and its amendment of the same date. The later orders had not yet come into existence. Still, that may not be very decisive, as already remarked.

29. It has been mooted with great emphasis on behalf of the State that in the absence of a duty certificate from the Head of Office to show that the deceased was assigned to duty relating to prevention, control and treatment of the Covid-19 and the other certificate regarding her death issued by the Chief Medical Officer, caused by Covid-19 infection, there is absolutely no way that the benefit of the policy can be given to the petitioner. It has to be remembered that the policy that the State Government framed was a beneficial measure introduced at a time when uncertainty about life was in the winds. This was time when the deadly Delta variant of the Covid-19 had struck our country and people perished without a clue about of how they got infected. It was in the air, a truly virulent and deadly infection. We take judicial notice of these facts as all of us have lived through it. This was time when doctors were doing their best to cure everyone brought to hospital in distress, but not much was known how to manage the patient. Some survived; others died. We also take judicial notice of the fact, and the respondents too have not denied it, that patients were admitted to hospital, who were in distress with symptoms of Covid-

19 on the presumption that they have been struck by the deadly virus. In the deceased Asha's death summary/ death certificate, it is written by the Medical Officer on duty at the L2 Facility Raisina Hospital, Khaga, Fatehpur for a diagnosis that she was a suspected case of Covid 19 Pneumonitis. Now, the Chief Medical Officer has not certified in Asha's death certificate that she died on account of Covid-19 infection.

30. We are dealing with the second requirement of the Government Orders first, that is to say, the certification if Asha indeed died on account of the Covid-19 infection. We have already indicated the circumstances that prevailed at the time when Asha died. We also must take notice of the report dated 19.08.2021 submitted by the Medical Officer, In-charge, L2 Facility Raisina Hospital, Allahabad Institute of Medical Sciences, Fatehpur (Superintendent, Community Health Centre, Khaga, Fatehpur) quoted in the order impugned dated 11.11.2021 passed by the Executive Officer, Nagar Panchayat, Khaga, District Fatehpur, rejecting the petitioner's claim, which reads:

"आशा देवी दिनांक 26.04.2021 समय 5:00 PM को सांस लेने की तकलीफ एवं ऑक्सीजन लेवल कम होने के कारण L-2 हास्पिटल में भर्ती करायी गयी थी। उनका इलाज कोविड-19 का केस मानकर किया गया। दिनांक 27.04.2021 को R.T.P.C.R. सेम्पल लेने से पूर्व 8:10 AM पर मृत्यु हो गयी, फलस्वरूप कोविड-19 से सम्बन्धित जांच नहीं की जा सकी।"

31. Now, the stand in the impugned order dated 11.11.2021, rejecting the petitioner's claim, reasons on this count that since no sample for the RT-PCR test could be taken before Asha died, it cannot be inferred that she died on account of

disease, caused by the Covid-19 infection. There are similar remarks recorded by the District Magistrate, Fatehpur in the latter's order dated 16.12.2023, that she made during the pendency of the writ petition, rejecting the petitioner's claim. It is said there that from the report of the Executive Officer, Nagar Panchayat, Khaga, District Fatehpur dated 11.11.2021 and the inquiry report dated 14.11.2023 submitted by the Joint Committee, comprising the Additional District Magistrate (Judicial), Fatehpur, the Senior Treasury Officer, Fatehpur and the Chief Medical Officer, Fatehpur, it is evident that Asha was admitted to the hospital on 26.04.2021 at 5:00 p.m. with breathing difficulty and poor oxygen level. It is, particularly, said that she was admitted to the L2 Facility Raisina Hospital, Khaga, Fatehpur (Community Health Centre, Khaga, Fatehpur). She was treated, assuming her to be a patient of Covid-19 disease. But, on 27.04.2021, before her sample for the RT-PCR test could be taken, she died in the morning hours at 8.10.

32. There is often, if not always, a decisive difference between a mathematical inference from facts and a legal one. The respondents have gone by the letter of the Government Orders under reference to find against the petitioner on this count, as there is no certificate issued by the Chief Medical Officer of the District, saying that she died on account of Covid-19 infection. The Government Order issued later on would require the fact to be verified by the Chief Medical Officer in the prescribed proforma based on the RT-PCR or the Rapid Antigen test with its date; or else certify the fact on the basis of some other source, which the Chief Medical Officer would have to mention in the certificate. The other source, as suggested in paragraph No.23 of the counter affidavit filed on

behalf of the District Magistrate, Fatehpur (in her personal affidavit) would indicate that it could be a CT Scan of the chest. This too has apparently not been done. The Chief Medical Officer has, therefore, not issued the required certificate that Asha died on account of disease caused by Covid-19 infection.

33. There are two robust and sound lines of reasoning, on the basis of which, one would reach the inescapable conclusion that Asha indeed died of Covid-19 disease. The first is the fact that Asha, according to the report of the Medical Officer, L2 Facility Raisina Hospital, Khaga, Fatehpur, where she breathed her last, was admitted on 26.04.2021 at 5:00 p.m. with breathing difficulty and a low oxygen level. She was treated as a Covid-19 patient, assuming her to be so. She died on 27.04.2021 at 8.10 a.m., before her RT-PCR test sample could be secured. Now, this description of Asha's condition, together with the fact that the month of April, 2021 was time when the Delta variant had wreaked havoc with a widespread Covid-19 disease and death, would lead anyone, even a doctor in those times, to infer, short of a tangible medical test, that she most probably died of Covid-19 infection. The symptom of respiratory distress with low oxygen levels, followed by death within a few hours of her admission to the hospital, are unmistakable symptoms of the Covid-19 disease.

34. It is true that the standard set by the three Government Orders and strict medical protocol would require verification by means of the RT-PCR test or the Rapid Antigen, or may be a CT Scan of the chest, but that was not done. In the absence of the prescribed medical tests, the clinical condition of the deceased at the time when she fell sick and died, would lead any man

of ordinary prudence and even a doctor to infer that she most probably, as we remarked above, died of Covid-19.

35. Now, the other reason, on the foot of which we may conclude that the respondents are indeed liable to compensate the petitioner under the Government Orders, is the fact that Asha was admitted to the hospital with all symptoms of Covid-19 disease and a suspected case thereof. She was treated also as a patient of Covid-19, going by the protocol then in force. It then defies all understanding that if Asha was admitted to hospital on 26.04.2021 at 5:00 p.m., where she lived to see only the next day i.e. 27.04.2021, passing away at 8:10 a.m., what prevented the doctors at the L2 Facility Raisina Hospital, Khaga, Fatehpur, a dedicated Covid-19 Government facility, from doing her Rapid Antigen test or taking a sample for the RT-PCR test, or still more, doing a CT Scan of her chest. Once, in the care of the Government Covid-19 dedicated hospital, it was the first duty of the doctors there to test her for Covid-19 infection according to the prescribed protocol. In not doing the requisite test for the next 15 hours or more, the doctors not only neglected their duty by not adhering to the prescribed medical protocol, but have led the State and the respondents into a position, where burden would rest upon them to show that Asha did not die of Covid-19 disease. After all, the petitioner or the other members of the family conveyed the deceased to the government medical facility for Covid-19 patients with extreme symptoms of respiratory distress and poor blood oxygen level. She was treated as a Covid-19 patient, but never tested for it. What else could the deceased or her attendants have done in the circumstances? It was for the doctors at the

Government Covid-19 dedicated L-2 Hospital to test Asha for the virus. This case is not about medical negligence, but about the State's answerability in paying ex gratia (according to their policy) to the petitioner, for Asha's death, in a fair and evenhanded manner. A lapse of this kind by doctors at a Government Covid-19 Facility Hospital would certainly saddle the respondents with the burden to show that Asha did not die of Covid-19 disease. Else, in the totality of circumstances, it has to be inferred that Asha indeed died of Covid-19 infection.

36. We have already remarked that the policy carried in the Government Orders dated 11.04.2020, 22.06.2021 and 26.07.2021 is a welfare measure of the State to bring succor to the dependents of a certain class of citizens, that is to say, employees of the Government, the Public Sector Undertakings, the Local Bodies, detailed to duty in connection with prevention, control and treatment of the Covid-19, who contracted the virus during the course of their duty and died. In applying a policy of this kind, which is essentially a keen welfare measure adopted by the State, a purposive approach has to be adopted. It cannot be a literal, mathematical or a precise one, like that while interpreting a fiscal statute. If circumstances do suggest strongly that the death of an employee, otherwise entitled, happened on account of the Covid-19 disease, a strict adherence to the necessary certificates, would be utterly out of place. More often than not, it is difficult in such trying times for the dependents of a genuine victim to secure the necessary documents or ensure every medical test. If the approach of literal insistence on every detail of the three Government Orders is countenanced, the most genuine claims, which appear to be

the case with the petitioner, in all likelihood, would be defeated. We think that the Government, the District Magistrate and the Executive Officer of the Nagar Panchayat, ought to have drawn a reasonable inference from the report of the Medical Officer, L2 Facility Raisina Hospital, Allahabad Institute of Medical Sciences, Khaga, Fatehpur dated 19.08.2021, to find for the petitioner that his mother (Asha) indeed died of Covid-19 disease.

37. There are some other reasons as well to reach the same conclusion, that is to say, in addition to the 'two lines of reasoning', adverted to hereinbefore.

38. We must remark in connection with the certification of death and its cause, apart from all that we have said above about the breach of medical protocol in testing Asha for her suspected infection, that it was the duty of the Medical Officer, L2 Facility Raisina Hospital, Khaga, Fatehpur or the Chief Medical Officer of the District to issue an accurate and correct death certificate, clearly certifying the fact if she died due to Covid-19 disease. If there was any other cause, that too should have been mentioned clearly in Asha's death certificate. In not doing that also, the Medical Officer, L2 Facility Raisina Hospital, Khaga, Fatehpur and the Chief Medical Officer have failed to discharge their duties, further making the State liable under their existing policy for the payment of ex gratia sum of money on ground that Asha died due to Covid-19. The duty of the appropriate authority of the State, which we think, in this case, would both be the Medical Officer, L2 Facility Raisina Hospital, Khaga, Fatehpur and the Chief Medical Officer in certifying the cause of death being on account of Covid-19 disease

or some other cause, in cases where Covid-19 relief is expected, has been laid down by the Supreme Court in **Reepak Kansal v. Union of India and others, (2021) 9 SCC 251**, where it is observed:

“48. Now so far as the prayer to issue appropriate direction to the respondent State Governments to issue an official document stating Covid-19 related as cause of death, to the family members of the deceased who died due to Covid-19 is concerned, it is required to be noted that it is the duty of the every authority to issue accurate/correct death certificates stating the correct and accurate cause of death, so that the family members of the deceased who died due to Covid-19 may not face any difficulty in getting the benefits of the schemes that may be declared by the Government for the death of the deceased, who died due to Covid-19. In the death certificate also, if a person has died due to Covid-19 and/or any other complications/disease due to Covid-19, it should be specifically mentioned in the death certificate.

49. We have gone through the counter-affidavit filed on behalf of the Union Government on the aforesaid and the guidelines issued by the ICMR as well as the format and the guidelines issued to the Registering Authorities of the State Governments concerned. However, we feel that the procedure should be as simplified as it can be. Therefore, a simplified procedure/guidelines is/are required to be issued by the Central Government and/or appropriate

authority for issuance of an official document/death certificate stating the exact cause of death i.e. “Death due to Covid-19”, to the family members of the deceased who died due to Covid-19. For guidance, such guidelines may provide if a person has died after he was found Covid positive and he has died within two to three months, either in the hospital or outside the hospital or at home, the death certificate/official document must be issued to the family members of the deceased who died due to Covid-19 stating the cause of death as “Died due to Covid-19”. He/she might have died even due to other complications, however, due to Covid-19. In the guidelines, it may also be provided that if the family member(s) of the deceased who died due to Covid-19 has/have any grievance that in the death certificate/official document the correct/exact cause of death is not mentioned, he/she must be provided with some remedy to approach the appropriate authority to get the death certificate/official document corrected.”

39. There is yet another aspect of the matter. It is not a case, where the petitioner’s claim, on the basis of record, whatever available, has been considered by a designated committee of doctors and other officers of the State, to take a decision on behalf of the primary decision maker, which is invariably done in such cases. After all, a claim under the Government Orders dated 11.04.2020, 22.06.2021 and 26.07.2021 should have been objectively considered by a committee with doctors and some officers of the State,

who could review the entire material and take an informed decision, if the petitioner was entitled to the benefit of the ex gratia sum of money. Here, what has happened is that the petitioner’s claim has been rejected by two Authorities, to wit, the Executive Officer of the Nagar Panchayat, where the deceased served, and pending this petition, by the District Magistrate, holding it virtually not maintainable – not maintainable because the requisite certificates were not appended or produced by the petitioner. We have already shown that the grant or issue of the requisite certificate or necessary action to form the basis of those certificates, had to be undertaken by doctors, serving the respondents’ establishment themselves. If they have not issued those certificates, a committee ought have been there, to review the entire material and circumstances, to judge if the petitioner’s case was indeed one, where he was entitled to the ex gratia sum.

40. The standard that a forum, if created by the State Government to review such claims, would have to apply, is preponderance of probability. If certificates necessary under the Government Orders were not there, not on account of the petitioner’s fault or the deceased’s, there are a number of other circumstances that we have already noticed, which a committee appointed for the purpose, or in the absence of a committee of that kind, the officers of the respondents, who passed the impugned order, ought have considered to reach a definitive conclusion, if the deceased, in fact, died on account of Covid-19 infection. This would include the symptoms of the deceased, when admitted to hospital, the time of death, the fact if there was anything to show that she died of some other disease, the contemporary time

during which the deceased fell sick and died with reference to proliferation of the Covid-19 infection and like factors. Absent a committee that we have spoken of to decide such claims, the Authorities, who passed the orders impugned, ought have reviewed the entire evidence about the petitioner's claim, whatever available on merits, and, not thrown it out mechanically for the want of supporting certificates prescribed under the Government Orders. In this connection, reference may be made to a Bench decision of the Bombay High Court in **Mayuri Krishna Jabare v. General Manager, BEST and another, 2022 DGLS (Bom) 3782**. The facts necessary to understand the principle in **Mayuri Krishna Jabare** (supra) can best be recapitulated in the words of their Lordships of the Division Bench:

“1. The petitioner is the daughter of late Krishna Daulat Jabare (hereafter “Krishna”, for short). Krishna had been employed by the Brihanmumbai Electricity Supply and Transport Undertaking (hereafter “BEST”, for short) as a bus conductor since 1998. After serving BEST for about 22 years, Krishna breathed his last on 6th August, 2020. That was the time when the first wave of COVID 19 was wreaking havoc in the country. Krishna, prior to his death, had been regularly attending his duty as bus conductor. The “cause of death certificate” issued by Dr. R. V. Metkari of Brihanmumbai Mahanagarpalika (hereafter “MCGM”, for short) clearly suggests that an acute respiratory distress syndrome together with influenza like illness led to Krishna’s death. Dr. Metkari also

certified that it was a suspected case of COVID 19 death and such certificate was being issued as per Circular dated 9th April, 2020 of the Government of Maharashtra (GoM) detailing “Medical Guidelines for death declaration and procedural methods in diagnosed Suspected COVID 19 cases, brought dead cases, unknown and unclaimed bodies, and inquest procedures.

2. To mitigate the hardship of family members of Government employees and other public servants who died of COVID 19 while being on active duty, the GoM conceived and brought into force through Government Resolution dated 29th May, 2020 certain benevolent measures. One of these was payment of one-time ex gratia compensation of Rs.50 lakh to the bereaved family members of the employee. One other was accelerated compassionate appointment to any one eligible family member, notwithstanding that there exists the normal procedure for compassionate appointment in terms whereof the petitioner is required to stand in the long queue.

3. It is not in dispute that after the death of Krishna, the petitioner applied for accelerated compassionate appointment together with a prayer for ex gratia compensation of Rs.50 lakh. The petitioner’s application was rejected by BEST by the impugned order dated 25th November, 2021 on the ground that the Committee of doctors constituted by the MCGM did not certify clearly that

Krishna's death was caused by COVID 19. We find from the report of the Committee that there is a reference to absence of any RT-PCR test having been conducted by Krishna while he was alive.

5. To appreciate to what extent the contents of paragraph 11 are trustworthy, we did have the occasion to look into the attendance record of Krishna during July, 2020, i.e., the month preceding his death forming part of Exhibit D. It is evident therefrom that except for the weekly off days and a couple of other days, Krishna was present to discharge his duties as bus conductor. It is also evident from other documents forming part of the paper-book that Krishna had attended duty for the last time on 1st August, 2020 and had ultimately left for his heavenly abode in the very early hours of 6th August, 2020. These were the days of nationwide restrictions which each and every citizen was required to abide by. The inference that can legitimately be drawn from paragraph 11 as well as the relevant documentary evidence is that Krishna was quite fit to discharge his duty during the one-month period preceding his death notwithstanding innumerable deaths being recorded in the State of Maharashtra which was running neck and neck with the State of Kerala. The dreaded pandemic brought about by COVID 19 was the reason which threw normal life out of gear, yet, employees like Krishna were called upon to answer the call of duty and report. The time gap between the last date

he attended duty and the date of his untimely death together with the cause of death as certified by Dr. Metkari is something which could not have been brushed aside by BEST only on the ground that the Committee of doctors constituted by the MCGM had not conclusively declared that Krishna died as a result of COVID 19 infection.

8. Cause of death can be ascertained upon an autopsy being conducted on a cadaver, which is known in common parlance as the post-mortem examination. No postmortem examination on the cadaver of Krishna could be conducted since the circular dated 9th April, 2020 issued by the Directorate of Medical Education and Research prohibited any post-mortem in suspected COVID 19 deaths. The 'cause of death certificate' issued by Dr. Metkari clearly refers to the said circular dated 9th April, 2020 and also makes a note that no post-mortem had been conducted. In the absence of any post-mortem, the real cause of death of Krishna may not surface at all. The petitioner cannot, therefore, be blamed for absence of a 'post mortem' report. However, what was required in the circumstances was strict adherence to the circular dated 9th April, 2020."

41. In Mayuri Krishna Jabare, the claim for ex gratia was considered by a committee of doctors, who were experts, but they opined against the claim on account of the absence of an RT-PCR test done while Krishna, the deceased, in that case was alive. Therefore, it seems that in

the case under reference, the committee almost did the same kind of a rejection as the two Authorities have done here in passing the impugned order, to wit, the insistence on formal certificates or medical test reports, comprising the RT-PCR test etc. Upon these facts, it was held by the Bombay High Court in **Mayuri Krishna Jabare**:

“10. Having read the aforesaid clauses together with the ‘cause of death certificate’ issued by Dr. Metkari, what can reasonably be inferred is this. Dr. Metkari did not consider it necessary to obtain nasopharyngeal swab from the cadaver because he suspected Krishna to have died of COVID 19. That apart, what is significant is the absence of any noting made by Dr. Metkari in the ‘cause of death certificate’ about any history of suspected foul play as mentioned by the relatives or bystanders. If indeed Dr. Metkari had suspected any foul play on the part of Krishna’s family members for setting up a fraudulent claim of benefits not otherwise due, we would have expected him to say so in clear words in the ‘cause of death certificate’. Absence of any such note goes a long way to suggest that he had no reason to suspect any foul play and based on external examination of the cadaver of Krishna in terms of the provisions of the Circular dated 9th April, 2020, he was of the view that Krishna had died of acute respiratory distress syndrome together with influenza which, at that period of time, was closely associated with COVID 19

infection being contracted by an individual.

12. The Committee consisted of expert doctors. We cannot sit in appeal over their decision. But certainly, in exercise of the power of judicial review, we can and should examine the manner in which such decision was arrived at.

13. The Committee met on 24th August 2021. Krishna had died more than a year back. We discern from the minutes of the meeting not a very serious approach on the part of the members thereof. Judicial notice can be taken of what the situation was in Mumbai in July and August, 2020. Social distancing and other restrictive measures enforced by the Government of India as well as the GoM made it mandatory for citizens not to leave their residences except for urgent nature of work. Hospitals were packed and unable to admit patients. Doctors were not readily available. Even for RTPCR tests, one had to wait for his turn to arrive. In such abnormal circumstances, what was required is taking into consideration all relevant factors. The minutes of the Committee’s meeting, which was signed nearly 40 (forty) days after the meeting, does not reveal any consideration of the relevant factors at all. Obviously, it had not been taken into consideration that Krishna attended duty on 1st August, 2020 and died in the early hours of 6th August, 2020, i.e., only 4 (four) days thereafter which was quite normal for COVID 19 death cases. That apart, Krishna

suddenly died after having rendered duty almost for the entirety of July, 2020. At least, there was no material to suggest prior history of Krishna suffering from respiratory distress. He was yet to attain 50 years of age. Having regard to the lapse of time since the death of Krishna, the minimum that was required of the Committee was to either accept or reject the 'cause of death certificate' issued by Dr. Metkari on the basis of their collective wisdom instead of being ambivalent. The Committee ought to have realized that much depended on their report. However, its report is such that much left to be desired. We are conscious that the members of the Committee, as doctors trying to save lives of other COVID 19 affected patients, might have also been hard-pressed for time and, therefore, did not assign sufficient reasons. Nonetheless, without being too critical of the Committee's deliberations, what emerges clearly is that the Committee at least did not proceed to specifically record that Krishna did not die of COVID 19 infection. In the absence of any such clear finding, the reasonable course for the Committee could have been to accept the report of Dr. Metkari who was the only doctor having the occasion to externally examine the cadaver of Krishna. The 'cause of death certificate' issued by Dr. Metkari not having been disbelieved, it is considered creditworthy. We are of the view, bearing in mind the preambular promise of securing, inter alia, social and economic justice to all our citizens, that benefit has to be

given in case of a real doubt in favour of the weaker class for whom the policy decisions to provide ex gratia compensation and accelerated compassionate appointment were conceived by the authorities.

14. Krishna, despite the first wave of COVID 19 being at its peak in Mumbai, had been discharging his duty as a bus conductor without having any prior history of respiratory distress. No material has been annexed by BEST in its counter affidavit to disprove the contents of paragraph 11 of the petition memo. In such circumstances, the scales would obviously tilt in favour of the petitioner for us to conclude that Krishna, in all probability, died of COVID 19. The standard of proof applicable in a case of this nature cannot be 'proof beyond reasonable doubt' but the 'preponderance of probability' tending to draw an inference that the fact of death of Krishna due to COVID 19 must be more probable. Thus, merely because there was no RT-PCR report or adequate medical documentation could not have afforded ground to refuse the benefits flowing from the Government Resolution dated 9th May 2020. It would indeed be inhuman on our part if we refrain from interfering in this case and fold our hands to decline relief to the heirs of Krishna who died while answering the call of duty."

(emphasis by Court)

42. In **Nisha and another v. State of U.P. through Additional Chief Secretary, Panchayat Raj Department, 2022:AHC-LKO:27037**, the first

petitioner's husband, Ramesh Kumar Yadav was an Assistant Teacher. He had joined service on 08.12.2020 at a Primary School in the district of Sultanpur. He was detailed to training for election duty on 10.04.2021. He did election duty on 18.04.2021 and 19.04.2021. Immediately, thereafter, he fell sick. On 21.04.2021, he was treated at the Community Health Centre, Baldirai in District Sultanpur for fever and breathing difficulty. As his condition worsened, he was referred to the District Hospital, Sultanpur for emergency treatment. At the Sultanpur District Hospital, a sample for doing Yadav's RT-PCR test was taken. While the lab report had yet to arrive, Yadav died in the night intervening 23/24.04.2021. He died at the young of age of 28 years, just after about four months of joining service. The lab said in their report that they had never received the sample. It is for the said reason that Yadav was not treated as a Covid-19 patient and the petitioner there refused compensation, as it seems under a Government Order dated 01.06.2021, relating to persons, who died within 30 days of Covid-19 infection, while detailed to election duty. The Government Order provided for the payment of an ex gratia sum of money to the dependents. The moot point was if in the absence of the RT-PCR test result, said to be necessary to consider the dependent's claim of a Covid-19 victim, detailed to election duty, ex gratia could be granted under the Government Order dated 01.06.2021. The State said that it could not be. In rejecting the State's contention in **Nisha** (supra), Vivek Chaudhary, J. held:

“5. Clause-12 of the Government Order dated 01.06.2022 specifically provides that any person who has expired on election duty within 30 days from

Covid-19 would be entitled for ex-gratia payment. The facts of the case clearly shows that deceased was suffering from Covid-19 symptoms and initially treated as normal patient of cold and fever. Later due to breathlessness and developing emergency situation he was referred to district hospital, Sultanpur where he expired. Symptoms of the deceased itself shows that he was suffering from Covid-19. Merely non receiving of sample from the lab would not make any difference whatsoever.”

43. The principle in **Nisha** was followed by another Single Judge of this Court at Lucknow in **Sunita Prajapati v. State of U.P. through Principal Secretary (Home) and others, 2023:AHC-LKO:33575**, where too, the RT-PCR report was not there. On similar principle, there was a remand for reconsideration of the claim to the State Authorities in **Priyanka v. State of U.P. through Principal Secretary, Finance Department, Lucknow and others, 2024:AHC-LKO:69440**.

44. Here, in addition to whatever that we have remarked above, we must come back to the death summary/ death certificate, where the diagnosis is apparently ‘suspected Covid-19 pneumonitis’. Also, we must hark back to the report dated 19.08.2021 submitted by the Medical Officer, In-charge, L2 Facility Raisina Hospital, Khaga, Fatehpur, which says that the deceased was admitted to the hospital on 26.04.2021 at 5:00 p.m. with breathing difficulty and low oxygen level and treated presuming her to be a Covid-19 patient. Also, the report says that on 27.04.2021, before an RT-PCR test sample

could be taken, the deceased died at 8:10 a.m., in consequence whereof, her Covid-19 test could not be done. These symptoms and the fact that the doctors presumed her to be a Covid-19 patient, clinically assessing and treating her as such, can reasonably give rise to the inference that in all probability, Asha died of Covid-19. The diagnosis too was suspected Covid-19 pneumonitis. The cause of death is not mentioned in the relevant column of the death summary. There, the certificate is in breach of the principle laid by the Supreme Court in **Reepak Kansal** (supra).

45. We also think on the same lines as the reasoning of their Lordships of the Division Bench of the Bombay High Court in **Mayuri Krishna Jabare** that the fact that the Medical Officer, who admitted the deceased Asha on 26.04.2021, surely diagnosed her clinically to be a Covid-19 patient and treated her accordingly, and that for the said reason, did not do an RT-PCR test promptly. It is quite another matter that he ought have taken an RT-PCR test sample immediately and his inaction in not doing the same would also go against the State, ultimately, about non-fulfillment by the petitioner of the criteria to produce a Covid-19 death certificate, supported by an RT-PCR or Rapid Antigen test report. Apparently, the medical officer, attending on Asha in the month of April, 2021, considering the clinical presentation of the disease, thought that Asha needed immediate attention to treat her Covid-19 disease, rather than waste time in doing an RT-PCR test, because it was too obvious to him. The conditions prevalent at the time, the symptoms that Asha presented and the course of treatment undertaken by the Medical Officer at L2 Facility Raisina Hospital, Khaga, Fatehpur, regarding or presuming her to be a Covid-19 patient, is

evidence enough, by any standard of preponderance of probability, to accept the petitioner's case that Asha died of Covid-19 infection. To throw out the claim merely on account of the absence of an RT-PCR or Rapid Antigen test, going by strict letter of the Government Orders, providing for the ex gratia sum of money, betrays an approach on the respondents' part, that is both arbitrary and perverse. Also, to insist on fulfillment of the technical requirements of furnishing the necessary certificates, based on the RT-PCR test report etc., would be to permit the respondents to place premium on their wrong, as it was they, under the circumstances, who could have secured the necessary RT-PCR test, for which there was ample time between the deceased's admission to the dedicated hospital and her demise on the following morning.

46. This would take us to the next and the only surviving question of seminal importance, to wit, if the deceased was detailed to Covid-19 duty. It must be remembered that the month of April, 2021 was time when there was widespread lockdown and all offices were closed. The trains were offtrack and planes away from the skies. All business had closed down and the country was staggering under the scourge. Those, who were detailed to any kind of duty, like doctors, policemen, sweepers, the professionals and volunteers apart, were certainly assigned duties to act in aid of prevention, control and treatment of the Covid-19. The petitioner's mother was a Sweeper, employed with the Nagar Panchayat. The job of sweepers at that time was inextricably connected, wherever they were serving, with prevention and control of Covid-19 proliferation, if not cure. It was this class of workers, who would come in contact with all kind of waste, garbage

and dust, that would carry the deadly virus. It is for this reason that sweepers were hailed as Corona warriors.

47. The only question, that is one of fact, is if the petitioner's mother was detailed to duty in connection with control and prevention of Covid-19 infection. If she was assigned her routine duties as a sweeper and worked during the time, to which the event relates, it matters little, given the nature of the petitioner's job, if an order was made, expressly saying that she was assigned to render duty in connection with Covid-19 control and prevention. After all, a sweeper's work, as already remarked, would inherently involve her exposure to the cleaning and sanitation of all that, which, at that time, carried the Coronavirus virus. It was carried on aerosol, sat on metallic surfaces and all other kinds of objects and surfaces, that a sweeper would, but per necessity, have to clean as an inherent part of the job. There is, thus, no point in the case of a sweeper to insist upon the production of a formal order, assigning an employee of this class to duties in connection with Covid-19 prevention and control. The requirement in the Government Order, that postulates production of an order assigning duties in connection Covid-19 prevention and control, has to be understood in the context of a sweeper's job. For a sweeper, the formal order, whether issued by the competent Authority, that is to say, the Head of Office or the District Magistrate, may not matter at all, so long as it can be shown that the sweeper concerned was rendering duty.

48. Now, it was argued at this stage by Mr. J.N. Maurya, the learned Chief Standing Counsel that a Sweeper, who was voluntarily rendering service, would not

satisfy the requirement of the Government Order. This was time, which we have noticed earlier in the judgment, as one when all life had come to a standstill. No one was asked to attend office or do any work, except those required in connection with prevention, control or cure of Covid-19 infection. This, of course, does not include volunteers and it is not the respondents' case that the petitioner's mother had volunteered to do her duty. If this was their case, they would have to produce some evidence about it, which is utterly not there. Therefore, the irresistible conclusion is that if the petitioner's mother was rendering duty at the time she fell sick or within the short span of a few days or a week or so before she fell ill, it was under the directions of the respondents and in connection with control and prevention of Covid-19 infection. There is another aspect of the matter. The stipulation in the Government Orders dated 11.04.2020, 22.06.2021 and 26.07.2021, requiring production of a Covid duty order from the Head of Office or the District Magistrate in one form or the other, which underwent change with successive Government Orders, if insisted upon, would defeat the policy. The ill-fate, that befell the petitioner's mother, was at a time when the scourge of Covid-19 was at its peak, with people perishing all around. In a scenario such as this, it would be overzealous, if not fantastic, to expect that a Sweeper would proceed to duty, after securing a Covid-19 duty order from the Head of Office or the District Magistrate. It was a time when duties were being assigned and workers detailed to their task in the frontline of Covid control, like an emergency. There was little time for all this kind of paper work, which we think in each subsequent Government Order, has been introduced as a requirement, based more on hindsight.

These are matters, again, of which judicial notice must be taken in order to render justice to the dependant(s) of a Covid-19 victim. After all, the very limited things, of which judicial notice can be taken, cannot blind the Court's vision to what happened all around and with everyone witnessing the fearsome face of the Covid-19 pandemic between the years 2020-21. What we, therefore, conclude is that all that an employee of the class of a Sweeper, or for that matter, a Paramedic, a Doctor or a Policeman, would have to show is that they were on active duty at the time when there was a Covid-19 peak and they got infected. The requirement of producing a Covid-19 duty order cannot be strictly insisted upon, if there is evidence that a worker of the class engaged in frontline control and prevention of Covid-19 was in fact doing his/ her duty. The absence of a Covid-19 duty certificate cannot be regarded as fatal to the petitioner's cause for this reason.

49. All that now remains to be seen is, if the petitioner's mother, in fact, attended duty at the time when she fell sick or a short time before that. This, again, is of seminal importance, because it seems that in order to further the respondents' case that the petitioner's mother was not assigned to duties in connection with prevention, control and treatment of the Covid-19, she has been attempted to be marked absent from 15.04.2021 to 26.04.2021 in the attendance register, maintained by the Nagar Panchayat, a photostat copy of which is annexed as Annexure No.10 to the writ petition. In paragraph No.13 of the writ petition, the petitioner has asserted that his mother expired on account of contracting the Coronavirus and that he was surprised to find that by practice of forgery, the respondents marked her absent in the

attendance register, interpolating an 'A' for 'P'. This assertion about the allegation of forgery done in the attendance register in paragraph No.13 of the writ petition, relating to the marking of the deceased's attendance has not been denied specifically in paragraph No.13 of the counter affidavit filed on behalf of respondent Nos.4 and 5 by the Executive Officer of the Nagar Panchayat. He has not pleaded to the said fact specifically at all.

50. In the counter affidavit filed on behalf of the District Magistrate too, contents of paragraph No.13 of the writ petition have not been specifically denied in paragraph No.27. In the preceding paragraphs of the said affidavit also, this particular plea about forgery has not been pleaded to by the District Magistrate. In the rejoinder affidavit, nevertheless, a better photostat copy of the attendance register has been annexed as Annexure No. RA-3. There is no case by any of the respondents that the copy of the attendance register, annexed as Annexure No.10 to the writ petition, is not a copy of the Nagar Panchayat's attendance register, where the deceased would mark her attendance. A perusal of the document at Annexure No.10 and the other copy thereof annexed as Annexure No. RA-1 to the rejoinder affidavit, shows that it is an attendance register of employees relating to the Nagar Panchayat (as the fact has not been denied) for the month of April, 2021. There are, in all, names of ten employees mentioned serially. The name of the petitioner's mother finds mention at serial No.7. It shows that up to the 14th of April, all employees, including the petitioner's mother, have signed this register. From the 15th onwards, the petitioner's mother, who was marked present, has been marked absent by some interpolation, as it seems.

The employees at serial No.6, Nand Lal, one at serial No.5, Soordas and others from 1 to 4, 8, 9 and 10, have been marked present with a 'P'. After 15th, there are no signatures of employees on the register, except for the employee at serial No.1.

51. There was no satisfactory answer given by the learned Counsel appearing for the respondents, particularly the Nagar Panchayat, why after 14th, except for the employee at serial No.1 of the register, others were not signing their attendance of the day, and instead, marked present with a 'P'. Since this system was followed in a case of number of employees, the only possible explanation could be that the establishment were trying to prevent employees from touching the attendance register or coming in contact with it, as it would be handled by the clerical staff and officers as well. This seems to be a measure to eschew contagion or infection of Covid-19. In any event, this is not of much consequence. What, however, is relevant is that a perusal of the attendance register makes it evident to the naked eye that the petitioner's mother was marked present from 15th to 26th with a 'P', but this 'P' was changed to an 'A' by very crudely extending a line from the curve of the 'P' to make it look like 'A'.

52. We have no doubt in our mind that the respondents have by one stroke of pen, changed all entries of 'P's in the attendance register for the petitioner's mother from 15th April to 26th to 'A's. It is a case of unmistakable forgery to the naked eye. There is not even an initial made to show if this is some kind of correction with a note indicating by which authority and under what circumstances, the correction, if any, was done. The inescapable inference, therefore, is that the petitioner's mother

attended her duty in the month of April until 26th, when she was taken ill and admitted to the hospital. Even if one were to assume that the respondents did not forge the attendance records, showing that the petitioner's mother did not attend duties after 14th April, there is no denial of the fact that she was on duty until 14th April. If she contracted the virus on about 13th or 14th or a couple of days earlier and fell sick after 15th, there was just a period of 12 days until her admission to the hospital and her death the following day i.e. 27.04.2021. Unmistakably, therefore, the petitioner's mother was actively doing her duties as a Sweeper with the Nagar Panchayat until the 26th of April, the day she was admitted to the hospital, or for the worst, until 14th April, 2021, after which she fell sick and admitted to hospital with respiratory distress and low oxygen level, dying the following day. We have already remarked in ample measure that the duties of a Sweeper profoundly exposed him/ her at the relevant time to the deadly virus. The petitioner's mother was similarly exposed, contracted the virus and apparently died of the deadly disease, like the multitude of people, who met the same fate at the time.

53. In the perspective of whatever we have found, this petition deserves to succeed.

54. In the result, this petition succeeds and is **allowed**. The impugned order dated 11.11.2021 passed by the Executive Officer, Nagar Panchayat, Khaga, Fatehpur and the order of the District Magistrate, Fatehpur dated 16.12.2023, annexed as Annexure No.8 to the personal affidavit of the Additional Chief Secretary, Revenue Department, Government of U.P., Lucknow are hereby **quashed**. A mandamus is issued to the

respondents to pay the petitioner due compensation for his mother's death, treating it to be death for which compensation is payable under the Government Orders dated 11.04.2020, 22.06.2021 and 26.07.2021. This mandamus shall be carried out by the respondents within six weeks of the date of communication of this order.

55. There shall be no order as to costs.

56. Let a copy of this order be communicated to the Secretary, Local Bodies, Government of U.P., Lucknow, the Additional Chief Secretary, Finance Department, Government of U.P., Lucknow, the Director, Local Bodies, U.P., Lucknow, the District Magistrate, Fatehpur and the Executive Officer, Nagar Panchayat Khaga, District Fatehpur by the Registrar (Compliance).

(2025) 1 ILRA 775
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.01.2025

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ A No. 10247 of 2024

Smt. Anju Srivastava **...Petitioner**
Versus
U.P. State Agro Indus. Corp. Ltd. & Ors.
...Respondents

Counsel for the Petitioner:
 Birendra Kumar Yadav, Amit Kumar

Counsel for the Respondents:
 Rajeeva Kumar Sinha, Akhilesh Pratap Singh

(A) Service Law - Payment of Gratuity - Payment of Gratuity Act, 1972 - Section 4

- Gratuity is payable to an employee on the termination of his employment after he has rendered service for not less than five years either on his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease. (Para -19,22)

(B) Service Law - Payment of Gratuity Act, 1972 - Section 4(6) - An employee's gratuity can be fully or partially forfeited if their services are terminated due to - (i) Willful damage or loss to employer's property, (ii) Riotous or disorderly conduct, (iii) Acts or violence or (iv) Offences involving moral turpitude - Termination of service is required for gratuity forfeiture - Termination of service is the sine-qua-non to forfeiture, fully or partly, of the gratuity.(Para -20)

Petitioner's husband, a storekeeper in the respondent corporation - died in harness - Employer sought to recover Rs. 6,20,101.56 from his gratuity - alleging a shortage in stores - petitioner challenged the deduction - arguing that gratuity could not be withheld as her husband was never terminated - no disciplinary proceedings were ever initiated - failed to pay the Employees' Deposit Linked Insurance (EDLI) amount to the petitioner - hence petition. (Para - 2 to 17)

HELD: - Employer cannot withhold gratuity unless the employee was terminated . As the deceased was never terminated but died in harness, recovery from gratuity is impermissible. Orders impugned, forfeiting /making deductions from gratuity of the petitioner's husband, are legally not tenable in the eyes of law and merit to be quashed. Employer must pay the full gratuity within eight weeks with interest and must also decide on the EDLI payment within the same period. **(Para -21,23,26,27)**

Petition allowed. (E-7)

List of Cases cited:

1. Bankey Bihari Chauhan Vs St. of U.P. & ors. Special Appeal Defective No.101 of 2015

2. Secy., ONGC Ltd. & anr. Vs V.U. Warriar, AIR 2005 SC 3039

4. For the sake of convenience, the order dated 11.11.2024 is reproduced below:-

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

1. Heard learned counsel for the petitioner, Shri Rajeev Kumar Sinha, learned counsel appearing on behalf of respondents No.1 to 3 and Shri Akhilesh Pratap Singh, learned counsel appearing on behalf of respondent No.4.

2. The instant petition has been filed praying for the following reliefs:

"(i). To issue a writ, order or direction in the nature of certiorari quashing the letter / order No. 28/EPF/24-25 dated 16.05.2024 and letter No. 175/DEL- sthapna/ 2023-2024 dated 30.03.2024 for recovery / adjustment of Rs.6,20,101.56/- from gratuity and other dues of the petitioner's deceased husband, copies of which are annexures 1 & 2 to the writ petition.

(ii). To issue a writ, order or direction in the nature of mandamus commanding the respondents to release the gratuity amount along with interest @12% and further directing the respondent No.4 to release the employees deposit link insurance amount (EDLI) along with interest at the market rate."

3. Learned counsels for the parties state that the facts of the case have already been set forth in detail in the order dated 11.11.2024.

"1. Heard learned counsel for the petitioner, Shri Rajeeva Kumar Sinha, learned counsel for respondents and Shri Akhilesh Kumar Singh, learned counsel for respondent No.4.

2. Under challenge is the order dated 16.05.2024, a copy of which is Annexure-1 to the petition, whereby the respondents No.1 to 3 have indicated about recovering of a certain amount from the gratuity payable to the petitioner in the capacity of being the widow of Late Sarvesh Srivastava, who died on 10.04.2021.

3. The contention is that there cannot be any occasion for the respondents to withhold the amount of gratuity in order to make recovery of certain amounts which might be payable by the deceased employee.

4. Shri Sinha, learned counsel appearing for respondents No.1 to 3 states that certain amount is sought to be recovered from the gratuity payable to the petitioner in the capacity of being widow of the deceased employee on account of there being shortage of stores that were noted in the stores which were required to be maintained by the husband of the petitioner inasmuch as he was working as Store Keeper in-charge at the time of his death and thus it has been found feasible to withhold the aforesaid amount.

5. Shri Sinha has referred to the provisions of sub section 6 of Section 4 Payments of Gratuity Act,

1972 to contend that in respect of any loss, willful omission or negligence causing any damage or loss or destruction of the property belonging to the employer the gratuity can be withheld.

6. The contention is that once the Act, 1972 itself empowers the respondents to make deduction from the amount of gratuity consequently there is no error in the order impugned.

7. However, bare perusal of the Sub Section 6 of Section 4 of the Act, 1972 indicates that prima facie withholding of gratuity would only be there in case of termination of an employee in certain circumstances and not otherwise. Even otherwise alleged shortage of stores is sought to be recovered from the gratuity of the deceased employee that too without affording any opportunity of hearing inasmuch as once the employee is already deceased there cannot be any occasion for issuance of any notice. However, Shri Sinha prays for and is granted 10 days' time to file a short counter affidavit to which reply may be filed within next three days.

8. List thereafter as fresh.

9. Meanwhile, learned counsel for respondent No.4 shall seek instructions as to why Employee Deposit Link Insurance (EDLI) has not been paid to the petitioner and in case there is no legal impediment in payment, the said amount should be paid to the petitioner.

10. Whenever the case is next listed, name of Shri Akhilesh

Pratap Singh, Advocate be shown as Counsel for Respondent."

5. From perusal of the aforesaid order, it emerges that the petitioner-widow is before this Court raising a claim for being paid the Gratuity under the provisions of the Payment of Gratuity Act, 1972 (**hereinafter referred to as "Act, 1972"**) on account of her husband having died in harness on 10.04.2021. The respondents have passed an order dated 16.05.2024, a copy of which is annexure 1 to the petition, whereby they have indicated about recovering of certain amount from the Gratuity payable to the petitioner in the capacity of being the widow of Late Sarvesh Srivastava i.e. the husband of the petitioner. Also, by means of order dated 30.03.2024, a copy of which is annexure 2 to the petition, the respondents have indicated that an amount of Rs.6,20,101.56/- worth stores / material being found less.

6. Learned counsel for the petitioner has placed reliance on the provisions of the Sub-section (6) of Section 4 of the Act, 1972 to contend that a recovery from gratuity can only be made in case of termination of an employee.

7. The contention is that services of the husband of the petitioner were never terminated rather he died in harness on 10.04.2021 and consequently, the respondents are not within their right of passing the order impugned for withholding of the certain amount which is allegedly due to be recovered from the husband of the petitioner towards shortage in stores, which was the alleged responsibility of the husband of the petitioner.

8. In this regard, reliance has also been placed on the judgment of Division Bench of this Court passed in the case of

Bankey Bihari Chauhan vs. State of U.P. & Ors. in Special Appeal Defective No.101 of 2015 decided on 06.02.2015.

9. It is thus contended that the respondents have patently erred in passing the orders impugned and for adjusting the amount as specified in the order impugned.

10. The further contention is that the respondent No.4 has failed to pay the Employees' Deposit Linked Insurance (EDLI) amount to the petitioner.

11. On the other hand, Shri Sinha, learned counsel appearing for respondents No.1 to 3 has stated that once there was a shortage in stores found subsequent to the death of the husband of the petitioner, consequently, the respondents are within their right of recovering the said amount from the Gratuity which is payable to the petitioner under the provisions of the Act, 1972.

12. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of Secretary, **ONGC Ltd. and Anr. vs. V.U. Warrior AIR 2005 SC 3039.**

13. It is contended that once the respondents are within their right of recovering the amount of shortage in stores which stores were the responsibility of the husband of the petitioner consequently, in case shortage is found they can very well recover the said amount from the Gratuity which is payable to the petitioner in the capacity of being the widow of Late Sarvesh Srivastava.

14. On the other hand, Shri Akhilesh Pratap Singh, learned counsel appearing on behalf of respondent No.4

states that regular amount was not deposited by the respondent-establishment towards the EDLI. The records are being traced out and every endeavour would be made to pay the aforesaid amount, as due to the petitioner, and a final decision in this regard would be taken within the shortest possible time.

15. Heard the learned counsels for the parties and perused the record.

16. From a perusal of the record, it emerges that the husband of the petitioner, who was working under the respondents No.1 to 3, died in harness on 10.04.2021. The respondents have passed the order impugned dated 16.05.2024 whereby the petitioner has been informed that the amount of Gratuity, as due to her, is Rs.4,83,000/- and odd but there is a shortage in stores of approximately Rs.6,20,000/-, which were the responsibility of the husband of the petition, which is sought to be recovered.

17. Raising a challenge to the aforesaid orders, the instant petition has been filed.

18. The sheet anchor of the argument of the learned counsel for the petitioner is Sub-section (6) of Section 4 of the Act, 1972. For the sake convenience, Section 4 of the Act, 1972 is reproduced below:

"Section 4. Payment of Gratuity.

(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

-

- (a) on his superannuation,
or
(b) on his retirement or
resignation, or
(c) on his death or
disablement due to accident or
disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

[Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.] [Substituted by Act 22 of 1987, Section 4 (w.e.f. 1.2.1991).]

Explanation.-- For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of [an employee who is employed in a seasonal establishment and who is not so employed throughout the year] [Substituted by Act 25 of 1984, Section 3, for " an employee employed in a seasonal establishment" (w.e.f. 1.7.1984).], the employer shall pay the gratuity at the rate of seven days' wages for each season.

[Explanation.-- In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen. [Inserted by Act 22 of 1987, Section 4 (w.e.f. 1.2.1991).]

(3) The amount of gratuity payable to an employee shall not exceed [such amount as may be notified by the Central Government from time to time]. [Substituted 'ten lakh rupees' by Act No. 12 of 2018, dated 28.3.2018.]

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during

that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee receive better terms of gratuity under any award or agreement or contract with the employer.

(6) 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] [Substituted by Act 25 of 1984, Section 3, for " shall be wholly forfeited" (w.e.f. 1.7.1984).]—

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

[Sub-Section (7) omitted by Act 34 of 1994, Section 3 (w.e.f. 24.5.1994).]"

19. A perusal of Section 4 of the Act, 1972 indicates that Gratuity is payable

to an employee on the termination of his employment after he has rendered service for not less than five years either on his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease.

20. Sub-section (6) of Section 4 of the Act, 1972 provides that notwithstanding anything contained in Sub-section (1), which pertains to payment of Gratuity, the Gratuity of an employee whose services have been terminated for any act, willful 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 and that the gratuity payable to an employee may be wholly or partially be forfeited if the services of such employee have been terminated for his riotous or disorderly conduct for any act or violence on his part or if the services of the employee have been terminated for any act which constitutes an offence involving moral turpitude. Thus, termination of service is the sine-qua-non to forfeiture, fully or partly, of the gratuity.

21. Admittedly, the services of the husband of the petitioner were never terminated rather he died in harness on 10.04.2021. Thus the only provision per which the respondents could have forfeited the gratuity, i.e. Sub-section (6) of Section 4 of the Act, 1972, is clearly not attracted in the instant case as the services of the husband of the petitioner were never terminated rather he died in harness after having rendered continuous service of more than five years. Thus, the petitioner clearly became entitled for gratuity.

22. This aspect of the matter has also been considered by the Division Bench

of this Court in the case of **Bankey Bihari Chauhan (supra)** wherein the Division Bench has held as under:

"Section 4 (6) of the Act provides for the circumstances in which the gratuity of an employee, whose services have been terminated, can be forfeited. Section 4 (6) is in the following terms:

"4. Payment of gratuity. -

(1)

(6) Notwithstanding anything contained in sub-section (1), -

(a) the gratuity of an employee, whose services have been terminated for any act, willful 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 an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

In the present case, it is not in dispute that the services of the appellant were never terminated. The appellant continued to be in service and retired on attaining the

age of superannuation. In the circumstances, the basic pre-condition for the forfeiture of gratuity under Section 4 (6) of the Act was not fulfilled."

23. From a perusal of the provision of Sub-section (6) of Section 4 of the Act, 1972 and the Division Bench's judgment of this Court passed in the case of **Bankey Bihari Chauhan (supra)**, it is apparent that the gratuity of the petitioner's husband could only have been forfeited had he been terminated from service, may be for shortage of stores. However, the services were never terminated rather the petitioner's husband died in harness on 10.04.2021 and no disciplinary proceedings were ever initiated against him while he was in service and thus, the sine-qua-non for forfeiture of gratuity or making deductions from gratuity, as specified in Sub-section (6) of Section 4 of the Act, 1972, never arose and thus the orders impugned, forfeiting / making deduction from gratuity of the petitioner's husband, are legally not tenable in the eyes of law and merit to be quashed.

24. So far as the judgment of the Hon'ble Supreme Court in the case of **V.U. Warriar (supra)** is concerned, it would be suffice to state that the Hon'ble Supreme Court in the said judgment has clearly held that the services of the retired employee in that case were not governed by the provisions of the Act, 1972 rather the Oil & Natural Gas Commission (ONGC), of which the person was an employee, had its own rules pertaining to recovery of dues. Thus, the said judgment would have no applicability in the facts of the instant case.

25. So far as the non payment of the EDLI is concerned, it has fairly been

stated by learned counsel appearing for the respondent No.4 that the respondents are examining the records and an endeavour would be made to take a final decision in the matter pertaining to the same. The aforesaid statement is recorded.

26. Accordingly, the writ petition is **allowed**. The order impugned dated 16.05.2024, a copy of which is annexure 1 to the petition, and the order dated 30.03.2024, a copy of which is annexure 2 to the petition, are **quashed**. The respondents No.1 to 3 are directed to pay the entire amount of gratuity due to the petitioner within a period of eight weeks from the date of receipt of certified copy of this order along with admissible interest.

27. The respondent No.4 shall also take a final decision pertaining to the payment of EDLI as due to the petitioner within the aforesaid period of time.

(2025) 1 ILRA 782

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 06.01.2025

BEFORE

**THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.**

Writ -A No. 12422 of 2024

**Union of India & Ors. ...Petitioners
Versus
Central Administrative Tribunal Lko. &
Anr. ...Respondents**

Counsel for the Petitioners:
Ajit Kumar Dwivedi

Counsel for the Respondents:
Praveen Kumar

**A. Service Law – Disciplinary Enquiry –
Sexual Harassment – Conspiracy – CCS**

(CCA) Rules, 1965 - Rule 11(i), 29 - The action (revisional power) could not have been set aside merely for want of the order having been passed by an authority other than the President. Petitioners have submitted that a bare perusal of the Rule 29 indicates that besides the President, the Head of Department and the appellate authority are also empowered to exercise the revisional power under the Rule. In the present case, the fresh action has been instituted by an order passed by the appellate authority. (Para 12)

B. None of the allegations levelled in the complaint make out a case "sexual harassment" as defined in the guidelines issued by the Government of India. (Para 18)

C. The complainant has already written to the Additional Director, G.S.I. stating that the dispute between her and the opposite party no. 2 stands settled. In these circumstances, **before directing any action to be taken against the opposite party no. 2, the authorities ought to have satisfied themselves whether any *prima facie* case of commission of sexual harassment by the opposite party no. 2 was made out.** The authorities have not recorded any satisfaction before instituting proceeding afresh against the opposite party no. 2. After examination of record, it can be concluded that no case for instituting any fresh proceeding on the allegation of sexual harassment is made out against the opposite party no. 2. (Para 19)

D.(i) The opposite party no. 2 has sent a complaint dated 07.05.2023 to the Director General, GSI against two officers, reproducing a transcript of a conversation showing that they had instigated the complainant to file a false complaint against the opposite party no. 2 and in response to this suggestion the complainant had stated that the opposite party no. 2 had not said anything to her. **The opposite party no. 2 has requested the Director General to take action against the aforesaid two officers but it appears that no action has been taken against those two officers.** (Para 20)

(ii) The Internal Complaints Committee had found opposite party no. 2 as well as the complainant guilty of aggravating their personal issues to the extent that the whole office suffered and the committee had recommended appropriate action to be taken against both but action has been taken against opposite party no. 2 only and no action has been taken against the complainant in spite of the recommendation of the internal complainants committee. It prima facie indicates that **the authorities have acted vindictively against the opposite party no. 2 while shielding the other erring persons.** (Para 20)

In these circumstances, no fresh proceedings can be drawn against the opposite party no. 2 on the ground that he has committed an act of sexual harassment against the complainant. (Para 21)

E. Jurisdiction - Although it is a general principle of law that the validity of an order is to be examined on the basis of the reasons mentioned in the order. It is equally well settled that even if an order suffers from some illegality, the High Court will not exercise its jurisdiction to quash the same if it would result in restoration of another illegality or if it would propagate an injustice. The High Court being a court record as mentioned in Article 215 of the Constitution of India, has all powers inherent in such a court so as to secure the ends of justice. Interfering in the impugned order passed by the tribunal for on the ground that the reason assigned by the Tribunal for setting aside the order is incorrect, would result in initiation of fresh disciplinary proceedings against the opposite party no. 2, which is not warranted for the reasons mentioned in this order and which would not be in the interest of justice. (Para 22)

Writ petition dismissed. (E-4)

Present petition seeks quashing of the judgment and order dated 08.05.2024, passed by the Central Administrative Tribunal, Lucknow Bench, Lucknow allowing Original Application No.

332/00365 of 2023 filed by the opposite party no. 2.

(Delivered by Hon'ble Attau Rahman Masoodi J. & Hon'ble Subhash Vidyarthi J.)

1. Heard Sri Ajit Kumar Dwivedi, the learned counsel for the petitioners-Union of India and its Officers and Sri Praveen Kumar the learned counsel for the opposite parties.

2. By means of this writ petition filed under Article 226 of the Constitution of India, the petitioners have sought quashing of the judgment and order dated 08.05.2024 passed by the Central Administrative Tribunal, Lucknow Bench, Lucknow allowing Original Application No. 332/00365 of 2023 filed by the opposite party no. 2 - Akash Goyal.

3. Briefly stated, facts of the case are that while the opposite party no. 2 was working as an Assistant in the office of the Geological Survey of India, Western Region, Jaipur, a lady co-worker filed a complaint against him. The complaint was referred to the Internal Complaints Committee, which held a detailed enquiry and submitted a report dated 21.11.2022. The Director (G) & HOD and Disciplinary Authority, G.S.I., Western Region, Jaipur issued an Office Memorandum dated 14.02.2023 stating that a disciplinary action was proposed against the opposite party no. 2 under Rule 16 of CCS (CCA) Rules, 1965. The statement of the imputation of misconduct was enclosed with the memorandum and the opposite party no. 2 was given an opportunity to make a representation against the proposal. The statement of the imputations of misconduct levelled the following two charges :-

ARTICLE-1

That the said Sh Akash Goyal, Assistant, Geological Survey of India, Western Region, Jaipur has breached the modesty of a woman in work place, as reported by the lady official in her written complaint on dated 23rd May 2027, during the proceedings of Internal Complaints Committee Meeting it is observed that the right to life with dignity and her right to secrecy of the complainant was breached by sharing her very personal data like whats app chat content and pregnancy report with others without her consent affecting the modesty of a woman by Sh. Akash Goyal, Assistant, GSI, WR, Jaipur.

Therefore, Sh Akash Goyal, Assistant, Geological Surety of India, Western Region, Jaipur indulged himself in gross misconduct, dereliction of duty in a manner unbecoming of a Government Servant in contravention of Rule 3(1)(ii) & (iii) and 3-C(1) of CCS(Conduct) Rules, 1964.

ARTICLE-II

That the said Sh Akash Goyal, Assistant, Geological Survey of India, Western Region, Jaipur during the proceedings of Internal Complaints Committee Meeting it is also observed that the natter was initiated from personal Issue and aggravated so much that the whole office suffered.

Therefore, Sh Akash Goyal, Assistant, Geological Survey of India, Western Region, Jaipur has failed to maintain devotion to duty and acted in a manner of unbecoming of Government

Servant in contravention of Rule 3(1) (ii) & (iii) of CCS(Conduct) Rule, 1964.

4. The opposite party no. 2 submitted his representation against the aforesaid memorandum on 15.02.2023 inter alia stating that the matter under consideration was personal in nature and it did not concern the office, as was clearly intimated to the office vide letter dated 01.04.2022 jointly signed by the opposite party no. 2 and the complainant. A copy of the letter dated 01.04.2022 jointly written by the opposite party no. 2 and the complainant was annexed with the reply. The opposite party no. 2 further stated in his reply that the allegations do not make out a case of sexual harassment. It was also stated in the reply that the opposite party no. 2 had already submitted a comprehensive representation dated 20.12.2022 stating that the complainant had exaggerated the matter and concocted the story to defame the opposite party no. 2 but the matter was resolved subsequently.

5. The opposite party no. 2 stated that his performance of duties was evident from the letters of appreciation issued on 15.06.2022 and 20.09.2022, copies whereof were enclosed with the reply. The opposite party no. 2 had been transferred from Jaipur to Lucknow and the complainant had been transferred from Jaipur to New Delhi. In these circumstances, no further action was warranted in the matter.

6. After taking into consideration the entire material, the Director(G) & HOD and Disciplinary Authority passed an order dated 28.02.2023 imposing a punishment of censure entry against the opposite party no. 2 in terms of the Sub-rule (i) of Rule 11 of CCS(CCA) Rules, 1965.

7. On 12.05.2023 the opposite party no. 2 lodged a First Information Report No. 0326 under Sections 384, 211, 120B I.P.C. in Police Station Jawahar Circle, District Jaipur City (East) against (i) Raj Kumar Chauhan, Deputy Director (Personal & Administration) GSI, Director General Camp Office, New Delhi and (ii) Ashok Kumar Singh, Assistant Director (Personal and Administration) GSI, New Delhi stating that the opposite party no. 2 had developed friendly relations with the complainant who was working as a Junior Clerk in the office. Their marriage got settled and Roka ceremony was performed on 25.10.2021. However, their marriage could not be solemnized but still, the opposite party no. 2 and the complainant continued to be good friends. The complainant wanted to get herself transferred to New Delhi and she had talked to the aforesaid two accused officers in this regard. They misled the complainant and persuaded her to file a false complaint against opposite party no. 2.

8. The opposite party no. 2 had submitted some conversations between the complainant and the accused officers recorded in a Pen-drive as the evidence in support of the allegations. A transcript of the conversations is a part of a complaint dated 07.05.2023 sent by opposite party no. 2 to the Director General, GSI, showing that Sri. Raj Kumar Chauhan, Deputy Director (Personal & Administration) GSI had instigated the complainant to file a false complaint against the opposite party no. 2 alleging that he was harassing and blackmailing her and in response to this suggestion the complainant had stated that the opposite party no. 2 had not said anything to her.

9. On 07.07.2023, the opposite party no. 2 submitted a representation to

the Director General, GSI praying for cancellation of the punishment order dated 28.02.2023. However, the record reveals that the Additional Director General & HOD and the appellate authority had already issued a direction on 20.06.2023 stating that the penalty of censure was imposed on the opposite party no. 2 without following due procedures as laid down vide DOPT O.M. dated 16.07.2015 and, therefore, the order dated 28.02.2023 was withdrawn so that further action can be initiated against the opposite party no. 2 in accordance with the O.M. dated 16.07.2015. A fresh charge-sheet dated 29.08.2023 containing the same two charges that had been levelled earlier, was issued to the opposite party no. 2 and the memorandum stated that an inquiry would be held under Rule 14 CCS(CCA) Rules, 1965. The opposite party no. 2 challenged the aforesaid orders before the Central Administrative Tribunal by filing Original Application No. 332/00365 of 2023, which has been allowed by the impugned order.

10. The Central Administrative Tribunal referred to the provisions contained in Rule 29 of the CCS (CCA) Rules, 1965, which provides as follows: -

***“PART VIII-REVISION
AND REVIEW***

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*

*(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;

may at any time, either on his or its own motion or otherwise call for the records of any inquiry and revise any order made under these rules or under the rules repealed by rule 34 from which an appeal is allowed, but from which no appeal has been preferred or from which no appeal is allowed, after consultation with the Commission where such consultation is necessary, and may-

(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:

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 Government Servant has been given an opportunity of representing against the advice of the Commission within the time limit specified in clause (b) of sub-rule (3) of rule 15,

Provided further that no power of revision shall be exercised by the Comptroller and Auditor-General, 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 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 revision shall be dealt with in the same manner as if it were an appeal under these rules. “

11. The Central Administrative Tribunal held that no order of the President had been produced by the authorities and in absence of the President's order, action of the revising authority, the appellate authority and the disciplinary authority based on observations of Ministry of Mines in withdrawing the penalty imposed and issuing a fresh memorandum of charges, are non-est.

12. The learned counsel for the petitioners has submitted that a bare perusal of the Rule 29 quoted above indicates that besides the President, the Head of Department and the appellate authority are also empowered to exercise the revisional power under the Rule. In the present case, the fresh action has been instituted by an order passed by the appellate authority and, therefore, the action could not have been set aside merely for want of the order having been passed by an authority other than the President. We agree with this

submission and the sole reason assigned by the Central Administrative Tribunal for passing the impugned order is not sustainable in the eyes of law.

13. However, we have gone through the documents brought on record with the Writ Petition, including the complaint made against opposite party no. 2 and the report submitted by the Internal Complaints Committee. The complainant is being reproduced below: -

“Geological Survey of India

WR, Jaipur

Kind attention I HoD WR, Jaipur

Subject :- Complaint against a person

Respected Sir,

I am writing this letter to inform you about the inappropriate behavior of a person in Geological Survey of India, WR, Jaipur. As the number from which I am facing harassment and defamation is 9468623803 which is from true-caller coming the name of Kushal Singh Hada (assistant APAR CELL) in the Geological Survey of India, WR, Jaipur.

I have attached some screenshots of the above contained and I sincerely hope that you will take the necessary action for his immediate cause and also I am looking forwarded to a positive response from your side as easily as possible.

Thanking you

Copy for information to

Internal Complaint

Committee Chairperson GSI, WR, Jaipur

Yours Sincerely

** * **

LDC”

14. The observations of the committee include the following observations;-

iii Both of them have the habit of recording the phone calls as well as one to one conversation which were later on submitted to the committee.

*vii The complainant Ms * * * had also misled the committee regarding the nature of relationship she was having with Shri Akash Goyal, on first occasion she denied, later on admitted that they were staying together. She also misled the committee regarding her place of stay while availing leave recommended by the IC. Moreover while checking the entry register at the gate of the GSI Colony to verify the entry of Akash Goyal, IC found that the copy received from the in-charge of the GSI Colony is very different from the copy submitted to the Office by Ms * * *. She also lied before the committee regarding her relationship with Ms. * * *, her room partner.*

viii She exaggerated many things related to the threatening and her safety and security as for example she got some anonymous phone calls for which she blamed the respondents without any proof. The committee made an effort to verify by calling those numbers, but got no response. The IC asked both of them on many occasions about the last interaction they had with

*each other, to which Akash Goyal informed the IC that the telephonic conversation with a conference call with her brother-in-law on 16.04.2022 was the last conversation he had with * * *, after which he had not interacted with her in the presence of * * *. Hence it seems that the allegations by Ms. * * * vide letter dated 23.05.2022 against Shri Akash Goyal that he called her and stalked her is false.*

xii She has put her signature on some of the statements and denied to sign the others. The committee allowed her to go through the statements repeatedly and counselled her, but she was not satisfied and refused to sign citing the reason that the statements should be in more detail as it would go to the court. She also told the committee to elaborate more on some incidences.

*xiii Ms. * * * has maligned the image of the Office by bringing the police to the Office in connection with the theft of her mobile phone without prior permission of the Office. Due to police complaints, most of the witnesses were scared, did not want to share any information.*

*xiv All the colleagues called to the proceedings as witnesses told that both * * * and Akash used to meet with each other in their respective Sections during the Lunch hours and used to have normal discussions and they have not noticed them quarreling or talking rudely. Shri Arun Yadav, LDC, Party bill Section informed the IC that * * * was very disturbed*

and stressed during the month of March, 2022 as noticed from the facial expression while talking over phone.

xv It seems that the matter was also aggravated due to some lapses in administrative actions. Had the Office administration acted upon the initial complaints based on the CCS Conduct Rules, the matter could have been sorted out early. After so many complaints sitting arrangement of both the complainant and the respondent could have been done in separate buildings or wings.

*xvii Action should have been taken against Ms. * * * under CCS Conduct rules for bringing Police to the Office, thereby Maligning the image of the.(Sic.) Despite the written complaint by the Security Officer regarding this, no action has been taken except the verbal warning.*

*xviii The committee everything (Sic.) that everything started from their personal issue. In due course of time their relationship worsened to such an extent that, the matter led to involve the Office and thereby wasting the valuable time of the Office and affecting the work hour productivity. Post termination of Roka and the relationship between Ms * * *, LDC and Shri Akash Goyal, Assistant it seems that there was blame game, allegations and counter allegation with maligned intention to take revenge on one another and defame the other. They also involved the Office in this matter unnecessarily, despite a letter submitted to the Office by*

*both of them dated 1st April, 2022 admitting that it was their personal matter and will not involve the office further. The act of Shri Akash Gyal, Assistant with a malign intention to defame Ms. * * * LDC by sharing her personal content and sensitive pregnancy report with others is an attempt to breach the modest of a woman.*

15. The Internal Complaints Committee had made the following recommendations :-

i The matter was initiated from personal issue and aggravated so much that the whole office suffered for which appropriate action may be taken on both the respondent and complainant as per the CCS, conduct rules.

ii The right to life with dignity and her right to secrecy of the complainant was breached by the respondent by sharing her very personal data like whats app chat content, pregnancy report with others without her consent affecting the modesty of a woman. Hence appropriate action as per CCS, conduct rules may be initiated against the respondent Shri Akash Goyal, for his act of harassing a woman and unbecoming of a government Servant.

*iii. Even though the complaint, Ms. * * * has been transferred out of GSI, Jaipur to DGCO, New Delhi, the committee also recommends the transfer out of Shri Akash Goyal, as he disturbed the Office environment through sharing information of a woman*

using the phone of other colleague without their consent and also tried to influence the committee through higher officials and leaked confidential content of proceedings to other Officials.

*iv. Ms. * * * has signed some of the statements and refused to sign the other despite all attempts made by the committee to attend her concerns, for which she needs to be counselled.*

16. The complainant had submitted an application dated 01.04.2022 jointly with the opposite party no. 2, to the Director (G) & Head of Office GSI, Western Region, Jaipur stating that the matter between them had been sorted out.

17. The record further reveals that the complainant was transferred to New Delhi as per her own wish and no action was taken against her in spite of the recommendations of the Internal Complaints Committee.

18. The Government of India has issued guidelines for dealing with the complaints of sexual harassment. The relevant passage from the guideline which deals “sexual harassment” provides as follows :-

What is Sexual Harassment?

2. “sexual harassment” includes any one or more of the following acts or behavior (whether directly or by implication), namely:—

(i) physical contact and advances; or

(ii) demand or request for sexual favours; or

(iii) sexually coloured remarks; or

(iv) showing any pornography; or

(v) any other unwelcome physical, verbal, non-verbal conduct of a sexual nature.

3. The following circumstances, among other circumstances, in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment:

-

• (i) implied or explicit promise of preferential treatment in employment; or

• (ii) implied or explicit threat of detrimental treatment in employment ; or

• (iii) implied or explicit threat about her present or future employment status; or

• (iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or

• (v) humiliating treatment likely to affect her health or safety.

A bare perusal of the complaint indicates that none of the allegations levelled in the complaint make out a case “sexual harassment” as defined in the guidelines issued by the Government of India.

19. The complainant has already written to the Additional Director, G.S.I. stating that the dispute between her and the opposite party no. 2 stands settled. In these circumstances, before directing any action to be taken against the opposite party no. 2, the authorities ought to have satisfied themselves whether any prima facie case of

commission of sexual harassment by the opposite party no. 2 was made out. The authorities have not recorded any satisfaction before instituting proceeding afresh against the opposite party no. 2. Upon examining the record, we have come to a conclusion that no case for instituting any fresh proceeding on the allegation of sexual harassment is made out against the opposite party no. 2.

20. The opposite party no. 2 has filed F.I.R. No. 0326 under Sections 384, 211, 120B I.P.C., Police Station Jawahar Circle, District Jaipur City (East) against two higher officers of the department alleging that they had conspired and instigated the complainant to file a false complaint and he has submitted evidence in support of the allegation in the form of conversations recorded in a pen-drive. The opposite party no. 2 has sent a complaint dated 07.05.2023 to the Director General, GSI against (i) Raj Kumar Chauhan, Deputy Director (Personal & Administration) GSI, Director General Camp Office, New Delhi and (ii) Ashok Kumar Singh, Assistant Director (Personal and Administration) GSI, New Delhi reproducing a transcript of the aforesaid conversation showing that they had instigated the complainant to file a false complaint against the opposite party no. 2 and in response to this suggestion the complainant had stated that the opposite party no. 2 had not said anything to her. The opposite party no. 2 has requested the Director General to take action against the aforesaid two officers but it appears that no action has been taken against those two officers. The Internal Complaints Committee had found opposite party no. 2 as well as the complainant guilty of aggravating their personal issues to the extent that the whole office suffered and the

committee had recommended appropriate action to be taken against both the opposite party no. 2 and the complainant but action has been taken against opposite party no. 2 only and no action has been taken against the complainant in spite of the recommendation of the internal complainants committee. It prima facie indicates that the authorities have acted vindictively against the opposite party no. 2 while shielding the other erring persons.

21. In these circumstances, no fresh proceedings can be drawn against the opposite party no. 2 on the ground that he has committed an act of sexual harassment against the complainant.

22. Although it is a general principle of law that the validity of an order is to be examined on the basis of the reasons mentioned in the order. It is equally well settled that even if an order suffers from some illegality, the High Court will not exercise its jurisdiction to quash the same if it would result in restoration of another illegality or if it would propagate an injustice. The High Court being a court record as mentioned in Article 215 of the Constitution of India, has all powers inherent in such a court so as to secure the ends of justice. Interfering in the impugned order passed by the tribunal for on the ground that the reason assigned by the Tribunal for setting aside the order is incorrect, would result in initiation of fresh disciplinary proceedings against the opposite party no. 2, which is not warranted for the reasons mentioned in this order and which would not be in the interest of justice.

23. In view of the aforesaid discussion, we do not find any good ground to interfere with the judgment and order

dated 08.05.2024 passed by the Central Administrative Tribunal, Lucknow Bench, Lucknow in Original Application No. 332/00365 of 2023 and to permit fresh disciplinary proceedings against the opposite party no. 2, although for reasons different from the reason mentioned by the tribunal in the impugned order.

24. Accordingly, the writ petition is dismissed. Costs made easy.

(2025) 1 ILRA 792
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.01.2025

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ -A No. 12938 of 2024

Smt. Pin Maya Kumal ...Petitioner
Versus
Govt. of India & Ors. ...Respondents

Counsel for the Petitioner:
 Ashok Kumar Srivastava

Counsel for the Respondents:
 A.S.G.I.

A. Service Law – Pension - Defence Service Regulation: Regulation 333; Hindu Marriage Act, 1955 - Second marriage can be contracted only in certain circumstances and that too after obtaining sanction from the competent authority and any violation of this provision may attract termination of service of concerned employee. (Para 16)

In the present case, Late Tek Bahadur Thapa was a Nepalese Gorkha and as per Regulation 333 quoted above, he could have remarried in the following circumstances: -

(i) When the wife suffers from incurable insanity (madness),

(ii) When there is no birth till ten years of marriage,
 (iii) When the wife is paralysed and cannot move,
 (iv) When the wife becomes blind of both the eyes.
 (v) When the wife is suffering from an infectious incurable sexually transmitted disease. (Para 7)

Late Tek Bahadur Thapa had four daughters and a son from his first marriage and it is nobody's case that his first wife Smt. Dalli Maya Kumal suffered from any disease/infirmity mentioned in Regulation 333(B)(a) of Army Regulations. Sri Tek Bahadur Thapa did not apply for sanction to contract plural marriages on any of the grounds mentioned in Regulation 333(B)(b). Service of the person who has contracted plural marriages without obtaining sanction from the competent authority can be terminated under the provisions contained in Regulation 333(B)(g) of Army Regulations, but the fact of Late Tek Bahadur Thapa having entered into plural marriages was not brought to the notice of the authorities during his service period or even thereafter during his life time. Therefore, no administrative action for termination of his service was taken. (Para 6, 8)

B. The petitioner could not point out any provision of law under which this marriage (1st marriage) was void. Therefore, it cannot be accepted that the marriage of late Tek Bahadur Thapa with Smt. Dalli Maya Kumal was void. (Para 14)

C. The submission that the petitioner is an illiterate person and she was not responsible for proper upkeep of the service records of her deceased husband and it was for the authorities to correctly maintain the service records of late Tek Bahadur Thapa and record the name of the petitioner therein as wife, does not hold any force as information about family members/dependents is given to the authorities by the concerned employee/officer himself. (Para 15)

The Armed Forces Tribunal dismissed the original application filed by the petitioner on the

ground that her name is not recorded in the service record of the deceased soldier. (Para 9)

Late Tek Bahadur Thapa had mentioned the name of Smt. Dalli Maya Kumal as his wife and it is admitted by the petitioner that Smt. Dalli Maya Kumal was in fact the wife of late Tek Bahadur Thapa. The petitioner's marriage with late Tek Bahadur Thapa was in contravention of the provisions of Regulation 333 and it would not confer any right on the petitioner so far as any benefits relation to or arising out of services rendered by late Tek Bahadur Thapa is concerned. (Para 16)

Writ petition dismissed. (E-4)

Precedent distinguished:

1. Vidhyadhari Vs Sukhrana Bai, (2008) 2 SCC 238 (Para 17)

2. Tulsa Devi Nirola Vs Radha Nirola, 2020 SCC OnLine SC 283 (Para 17)

3. Rameshwari Devi Vs St. of Bihar, (2000) 2 SCC 431 (Para 18)

(Delivered by Hon'ble Attau Rahman Masoodi J. & Hon'ble Subhash Vidyarthi J.)

1. Heard Sri Ashok Kumar Srivastava, the learned counsel for the petitioner, Sri S.B. Pandey, the learned Senior Advocate/Deputy Solicitor General of India assisted by Sri Varun Pandey, the learned counsel for the opposite parties and perused the material available on record.

2. By means of the instant petition filed under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs: -

“(i) Issue a writ, order or direction in the nature of Certiorari for quashing of impugned orders dated 20.11.2023 and 08 April 2024 passed by Armed Forces

Tribunal (RB), Lucknow annexed as Annexure No. 1 & 2 respectively to this petition and thereby grant her entitled Ordinary Family Pension w.e.f. 14 Jul 2016 i.e., pursuant to death of her husband on 13 Jul 2016.

(ii) Issue/pass an order or direction of appropriate nature to summon and quash/set aside orders leading to denial of petitioner's ordinary family pension w.e.f. 14.07.2016 i.e., after her husband's death on 13.07.2016.

(iii) Issue/pass an order or direction of appropriate nature to opposite parties to grant ordinary family pension, LTA and ensuing benefits to the petitioner w.e.f. 14.07.2016, i.e., after her husband's death on 13 Jul.2016.

(iv) Issue a writ, order of direction in the nature of mandamus commanding respondent to pay the arrears of all dues and arrears of ordinary family pension from the due date till actual disbursement of aforesaid arrear along with the interest of 12% per annum.

(v) Issue a writ, order of direction which this Hon'ble Court deems fit and proper under the facts and circumstances of the case in favour of the petitioner in the interest of justice.

(vi) Allow the writ petition with cost.”

3. Briefly stated, the facts of the case as pleaded on behalf of the petitioner are that the petitioner is the second wife of late Subedar Tek Bahadur Thapa (a Gorkha from Nepal). Late Tek Bahadur Thapa was enrolled in the Indian Army on 28.11.1961

and he was discharged from service with effect from 30.11.1989. He was paid pension till his death on 13.07.2016. The petitioner claims that she got married to late Tek Bahadur Thapa on 06.03.1969. After her marriage, the petitioner learnt that her husband was already married to Smt. Dalli Maya Kumal on 07.02.1953 and he had four daughters and a son out of that wedlock. At the time of death of Tek Bahadur Thapa, all five children from his first wife were above 25 years of age and married and they were not entitled to claim family pension. In the service record of late Tek Bahadur Thapa, the name of his wife is mentioned as Smt. Dalli Maya Kumal, but the photograph affixed shows the petitioner as wife of Late Tek Bahadur Thapa.

4. The petitioner made a claim for payment of family pension which was denied on the ground that her name was not entered in the service documents of late Tek Bahadur Thapa and also that late Tek Bahadur Thapa had married Smt. Dalli Maya Kumal prior to marrying the petitioner and thus he had married plural times without obtaining sanction from the competent authority.

5. Aggrieved against the denial of her claim, the petitioner filed Original Application No.989 of 2022 before the Armed Forces Tribunal, Regional Bench, Lucknow, which has been dismissed by means of a judgment and order dated 20.11.2023, which order has been assailed by means of the instant writ petition.

6. The Armed Forces Tribunal found that Late Tek Bahadur Thapa had married the petitioner during subsistence of his first marriage with Smt. Dalli Maya Kumal without taking permission from the competent authority and as per Regulation

333 of Defense Service Regulations, his second marriage with the petitioner was void. Regulation 333 of the aforesaid Regulations provide as follows: -

“333. PLURAL Marriages.— (A) *The Special Marriage Act 1954 and Hindu Marriage Act 1955 lay down the rule of ‘Monogamy’ that is, neither party has a spouse living at the time of marriage, these Acts also provide for decrees, of nullity of marriage, restitution of conjugal rights, judicial separation and divorce and also orders for alimony, and custody of children. The Hindu Marriage Act applies to all Hindus, Budhists, Jains and Sikhs and also applies to all other persons (with certain exceptions), who are not Muslims, Christians, Parsis or Jews by religion. Christians, Parsis and Jews are also prostituted under their respective personal laws from contracting a plural marriage. Thus no person who has solemnised or registered his/her marriage under the Special Marriage Act or who is a Christian, Parsi or Jew or to whom the Hindu Marriage Act 1955 applies, can now remarry during the life time of his or her, wife or husband. Sub-para (C) (a) to (c) below apply to such persons only. A Muslim or such other person to whom the Hindu Marriage Act does not apply and whose personal law does not prohibit Polygamy or Polyandry can marry during the life time of his or her, wife or husband and sub-para (B) (a) to (h) below apply to such persons only.*

(B) *Plural Marriage by persons in whose case it is permissible:—*

(a) *No person subject to the Army Act except Gorkha personnel of Nepalese domicile can marry again within the life time of his wife without prior sanction of the Government, **The circumstances under which such Gorkha personnel can contract a plural marriage are :—***

(i) *When the wife suffers from incurable insanity (madness),*

(ii) *When there is no birth till ten years of marriage,*

(iii) *When the wife is paralysed and cannot move,*

(iv) *When the wife becomes blind of both the eyes.*

(v) *When the wife is suffering from an infectious incurable sexually transmitted disease.*

(b) *An individual may, during the life time of his wife apply for sanction to contract a plural marriage on any one or more of the following grounds :—*

(i) *his wife has deserted him and there is sufficient proof of such desertion;*

(ii) *his wife has been medically certified as being insane;*

(iii) *infidelity of the wife has been proved before a court of law; and*

(iv) *any other special circumstances which in the opinion of the brigade or equivalent commander would justify contracting a plural marriage.*

(c) *Applications will state the law under which the subsisting marriage was solemnised,*

registered or performed and will include the following details where applicable :—

(i) *Whether the previous wife will continue to live with the husband;*

(ii) *if the previous wife does not propose to live with the husband, what maintenance allowance is proposed to be paid and in what manner; and*

(iii) *name, age and sex of each child by previous marriage and maintenance allowance proposed for each in case any such child is to live in the custody of the mother. In all the cases, the applicant will render a certificate to the effect that he is not a Christian, Parsi or Jew by religion, that he had not solemnised or registered his previous marriage under the Special Marriage Act 1954 and that the Hindu Marriage Act 1955 is not applicable to him.*

(d) *Applications will be forwarded through normal channels and each intermediate commander will endorse his specific recommendations. Such recommendations will be signed by the commander himself or be personally approved by him. Before making his recommendations a commander will satisfy himself that the reasons given for the proposed plural marriage are fully supported by adequate evidence.*

(e) *An individual whose marriage is alleged to have been dissolved according to any customary or personal law but not by a judicial decree will report, immediately after the divorce, the full circumstances leading to and*

culminating in dissolution of the marriage together with a valid proof of the existence of the alleged custom or personal law. The existence and validity of the alleged custom or personal law, if considered necessary, will be got verified from civil authorities and if it is confirmed by the civil authorities action will be taken to publish casualty for the dissolution of the marriage. The individual thereafter will not be required to obtain sanction for contracting the second marriage.

(f) An application which is not recommended by the Commanding Officer and an authority superior to him need not be sent to Army Head quarters, but may be rejected by the GOC-in-C of the Command concerned.

(g) Cases where it is found that an individual has contracted plural marriage without obtaining prior Government sanction as required in clause (a) above will be dealt with as under :—

(i) Cases of officers will be reported through normal channels to Army Headquarters (AG/DV-2) with the recommendations as to whether ex-post-facto sanction should be obtained or administrative action should be taken against the individual.

(ii) Cases of JCOs and OR will be submitted to the GOC-in-C Command who will decide whether ex-post-facto sanction should be obtained or administrative action should be taken against the individual. In cases, where it is decided that administrative action should be

taken against the individual, his service will be terminated under orders of the competent, authority. When reporting cases to higher authorities, intermediate commanders will endorse their specific recommendations with reasons thereof. Here too recommendations will be signed by the Commanders themselves or be personally approved by them. Also, an opportunity to 'show cause' against the order of termination of service will always be given to the individual concerned.

(h) In no circumstances will disciplinary action by way of trial by Court Martial or Summary disposal be taken against an individual who is found to have contravened the provisions of clause (a) above. If, however, the individual is also found to have committed another offence connected with his act of contracting a plural marriage, disciplinary action for the connected offence may be taken and progressed in the normal manner.

(C) Plural Marriage by persons in whose case it is not permissible—

(a) An individual whose marriage is alleged to have been dissolved according to any recognised custom or special enactment under the provisions of Sec 20(2), read with Sec 3 (a) of the Hindu Marriage Act, but not by a judicial decree will report immediately after the divorce, the full circumstances leading to and culminating in dissolution of marriage together with a valid

proof of the existence of the alleged recognised custom or special enactment. The existence and validity of the alleged custom or special enactment will be got verified from civil authorities and if it is confirmed by the civil authorities that the divorce is valid, action will be taken to publish the casualty for the dissolution of the marriage. The individual thereafter will not be required to obtain sanction for contracting the second marriage.

(b) A plural marriage solemnised, contracted or performed by any such person is null and void and may, on a petition presented to a court of law by either party thereto, be so declared by a decree of nullity. Not only is the plural marriage void but the offence of bigamy is also committed. This offence is, however, triable only on a complaint made to the civil authority by an aggrieved party. The punishment for the offence of a bigamy is prescribed in Sections 494 and 495 of the Indian Penal Code,

(c) When it is found, on receipt of a complaint from any source whatsoever, that any such person has gone through a ceremony of plural marriage, no disciplinary action by way of trial by Court Martial or Summary disposal will be taken against him, but administrative action to terminate his service will be initiated and the case reported to higher authorities in the manner laid down in sub-para (B) (g) above. In cases where cognisance

has been taken by civil court of competent jurisdiction the matter should be treated as sub judice and the decision of the court awaited before taking any action. When a person has been convicted of the offence of bigamy or where his marriage has been declared void by a decree of court on grounds of plural marriage, action will be taken to terminate his service under AA Section 19 read with Army Rule 14 or AA Section 20 read with Army Rule 17 as the case may be. No ex-post-facto sanction can be accorded as such marriages are contrary to the law of the land."

(Emphasis added)

7. Late Tek Bahadur Thapa was a Nepalese Gorkha and as per Regulation 333 quoted above, he could have remarried in the following circumstances: -

- (i) When the wife suffers from incurable insanity (madness),
- (ii) When there is no birth till ten years of marriage,
- (iii) When the wife is paralysed and cannot move,
- (iv) When the wife becomes blind of both the eyes.
- (v) When the wife is suffering from an infectious incurable sexually transmitted disease.

8. There is no allegation that any of the aforesaid five circumstances justifying the second marriage of Late Tek Bahadur Thapa with the petitioner. Late Tek Bahadur Thapa had four daughters and a son from his first marriage and it is nobody's case that his first wife Smt. Dalli Maya Kumal suffered from any

disease/infirmity mentioned in Regulation 333 (B) (a) of Army Regulations. Sri Tek Bahadur Thapa did not apply for sanction to contract plural marriages on any of the grounds mentioned in Regulation 333 (B) (b). Service of the person who has contracted plural marriages without obtaining sanction from the competent authority can be terminated under the provisions contained in Regulation 333 (B) (g) of Army Regulations, but the fact of Late Tek Bahadur Thapa having entered into plural marriages was not brought to the notice of the authorities during his service period or even thereafter during his life time. Therefore, no administrative action for termination of his service was taken.

9. Late Tek Bahadur Thapa did not get the name of the petitioner entered in the service records as his wife. The Armed Forces Tribunal dismissed the original application filed by the petitioner on the ground that her name is not recorded in the service record of the deceased soldier.

10. The petitioner has not come forward to put her signatures on the writ petition or the affidavit filed in its support and the same have been signed and verified by one Prem Bahadur who is said to be a cousin of late Tek Bahadur Thapa.

11. A certificate issued by Bhanu Municipality, 4 No. Ward Office, Tanahun, Gandaki Province, Nepal has been annexed with the writ petition wherein it has been certified that late Tek Bahadur Thapa had two wives, first wife being Mrs. Dalli and the second wife being Mrs. Pin Maya Kumal (the petitioner). The first wife Mrs. Dalli died on 15.03.2019. Late Tek Bahadur Thapa had five children from his first wife and he had three children from

his second wife (the petitioner), the youngest of whom was born on 16.05.1990.

12. Assailing the legality of rejection of the petitioner's claim for payment of family pension, the learned counsel for the petitioner has submitted that as per information available on record, Tek Bahadur Thapa was aged 11 years and Dalli Maya Kumal was aged 12 years at the time of their marriage and they were not of marriageable age. Therefore, the first marriage of late Tek Bahadur Thapa with Dalli Maya Kumar was void and the petitioner was the only legally wedded wife of Tak Bahadur Thapa.

13. Admittedly, the petitioner is a Nepalese citizen and late Tek Bahadur Thapa and his first wife Smt. Dalli Maya Kumal were also Nepalese citizens. Their marriage was solemnized on 07.02.1953.

14. The provisions of Hindu Marriage Act, 1955 extend to the whole of India and this Act does not extend to Nepal. Even this Act which was enacted in the year 1955 was not in existence at the time of marriage of Sri Tek Bahadur Thapa on 07.02.1953. Moreover, even the Hindu Marriage Act, 1955 does not provide that marriage of a person who has not completed the age of 21 years for the bridegroom and 18 years for the bride as mentioned in Section 5 (iii) of the Act, would be void. The learned counsel for the petitioner could not point out any provision of law under which this marriage was void. Therefore, we are unable to accept the submission of the learned counsel for the petitioner that the marriage of late Tek Bahadur Thapa with Smt. Dalli Maya Kumal was void.

15. The second submission of the learned counsel for the petitioner is that the petitioner is an illiterate person and she was not responsible for proper upkeep of the service records of her deceased husband. It was for the authorities to correctly maintain the service records of late Tek Bahadur Thapa and record the name of the petitioner therein as wife.

16. We do not find force in the second submission also as information about family members/dependents is given to the authorities by the concerned employee/officer himself. Late Tek Bahadur Thapa had mentioned the name of Smt. Dalli Maya Kumal as his wife and it is admitted by the petitioner that Smt. Dalli Maya Kumal was in fact the wife of late Tek Bahadur Thapa. The provisions contained in Regulation 333 of Army Regulations quoted above clearly provide that second marriage can be contracted only in certain circumstances and that too after obtaining sanction from the competent authority and any violation of this provision may attract termination of service of concerned employee. Admittedly, Late Tek Bahadur Thapa had not obtained any sanction from the competent authority for marrying the petitioner during subsistence of his first marriage with Smt. Dalli Maya Kumal. Therefore, the petitioner's marriage with late Tek Bahadur Thapa was in contravention of the provisions of Regulation 333 mentioned above and it would not confer any right on the petitioner so far as any benefits relation to or arising out of services rendered by late Tek Bahadur Thapa is concerned.

17. The learned Counsel for the petitioner lastly submitted that even if the marriage of the petitioner was not legal, she lived with Late Tek Bahadur Thapa as his

wife and she is entitled to receive pensionary benefits in view of the law laid down by the Hon'ble Supreme Court in **Vidhyadhari v. Sukhrana Bai**: (2008) 2 SCC 238 and **Tulsa Devi Nirola v. Radha Nirola**: 2020 SCC OnLine SC 283.

18. **Vidhyadhari v. Sukhrana Bai** (Supra) was a case arising out of a claim of the second wife for grant of a succession certificate and the question of effect of Regulation 333 of the Army Regulations was not involved therein. Even in that case, the Hon'ble Supreme Court followed an earlier decision in the case of **Rameshwari Devi v. State of Bihar**: (2000) 2 SCC 431, wherein it was held that even if a government servant had contracted second marriage during the subsistence of his first marriage, children born out of such second marriage would still be legitimate though the second marriage itself would be void. The Court held that such children would be entitled to the pension but not the second wife.

19. In **Tulsa Devi Nirola v. Radha Nirola** (Supra) the deceased had solemnized his second marriage with respondent no. 1 on 09.05.1987, while the Hindu Marriage Act had not been brought into force in the State of Sikkim. Rule 27 of 1963 Rules reads as follows: -

“27. Nothing contained in this Rule shall effect the validity of any marriage not solemnized under its provisions; nor shall this Rule be, deemed directly or indirectly to affect the validity of any mode of contracting marriage.”

No material was placed by the appellants that the second marriage was solemnized under

1963 Rules, and therefore, the Hon'ble Supreme Court held that it does not invalidate the second marriage of the deceased with respondent no. 1. The deceased had executed a settlement deed between his two wives, both with regard to his movable and immovable properties. Having accepted and acted upon the deed it was not open to the appellant no. 1 to now renegade from the same. The Hon'ble Supreme Court further held that: -

"9. Family pension undoubtedly is not part of the estate of the deceased and will be regulated by the Pension Rules which confer a statutory right in the beneficiary eligible to the same."

20. The cases relied upon by the learned Counsel for the petitioner do not apply to the facts of the present case and the same do not deal with the effect of Regulation 333 of the Army Regulations.

21. In view of the aforesaid discussions, we do not find any illegality in the order rejecting the claim of payment of family pension to the petitioner. The writ petition lacks merit and the same is dismissed accordingly.

(2025) 1 ILRA 800

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 15.01.2025

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ A No. 17483 of 2024

Ashish Yadav

...Petitioner

Versus

Managing Director, U.P.S.R.T.C. & Ors.

...Respondents

Counsel for the Petitioner:

Nikhil Kumar, Vagish Yadav

Counsel for the Respondents:

Mritunjay Mohan Sahai, S.M. Mishra

A. Service Law – Compassionate Appointment - U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 - The concept of compassionate ground appointments is a welfare measure taken by a model employer. However, an unjustified generous approach in compassionate ground which is not consistent with the applicable service rules will confer benefit to underserving and ineligible candidates, and simultaneously deny the rights and lawful claims of eligible and meritorious candidates from getting appointment to government posts. Treating compassionate ground appointments as an unconditional and vested right and making it a source of recruitment will shear the thin veil of legality which protects such appointments from the vice of unconstitutionality. The very concept of compassionate ground will then be exposed to the wrath of Articles 14, 15, 16 of the Constitution of India. (Para 14)

B. The purpose of grant of compassionate ground appointments can be subserved and their constitutionality can be saved only by strict compliance of the rules governing the grant of compassionate ground appointments. (Para 15)

Appointment on compassionate grounds seeks to relieve the immediate financial hardship faced by the dependants of the deceased. It acts as an exception to Articles 14 and 16 of the Constitution as the defendant are given preferential appointment ahead of other equally meritorious candidates similarly placed and hence it cannot be claimed as a right. This appointment must be done in accordance with the rules for such appointment. The

dependant seeking such appointment must be eligible for such consideration and facing financial hardship to the extent delineated by the rules. (Para 18)

C. One of the mandatory prerequisites for appointments on compassionate ground as contemplated in the Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 is that the application for employment should be made within five years from the date of death of the government servant. However, the said provision also empowers the St. Government to dispense with or relax the aforesaid time limit in appropriate cases. The said provision for condonation of delay by the St. Government/competent authority after due application of mind to relevant facts is mandatory in nature. Failure to condone the delay in making the application for compassionate appointment by the St. Government/competent authority after due application of mind to relevant factors will vitiate the appointment. (Para 21)

The mandatory prerequisite of condonation of delay in making the application for compassionate appointment by the competent authority under the Dying-in-Harness Rules, 1974 has been violated. The appointment of the petitioner as a contractual worker was not made under the Dying-in-Harness Rules, 1974. Consequently the petitioner cannot be treated as a regularly appointed employee and is not entitled to benefits claimed by him. Further, the petitioner cannot set up a claim for appointment on compassionate ground at this belated stage under the Dying-in-Harness Rules, 1974. (Para 29)

D. Appointments based on descent or claims of appointment which rest on heredity, are abhorred in the scheme of Articles 14, 15, 16 of the Constitution of India. Delay in making a claim for compassionate ground appointment dilutes the case of immediate financial penury, and consequently negates the entitlement for appointment on compassionate ground. **Appointments on compassionate ground cannot wait for the claimants to attain majority or to enable them to acquire**

additional qualifications and get a better deal in the said appointments. Infact, such grounds militate against claim for appointments on compassionate ground. (Para 23)

In the present case, the petitioner was a minor at the time of the death of his father. No post could have been reserved for him till he attained majority. The delay of almost seven years in making the application for appointment on compassionate ground was never condoned by the St. Government/competent authority under the Dying-in- Harness Rules, 1974. (Para 28)

In the facts of this case, **contractual employment of the said nature cannot be converted into an appointment under the Dying-in-Harness Rules, 1974.** If this course is made permissible it will become a novel device to breach specific statutory provisions. (Para 31)

Writ petition dismissed. (E-4)

Precedent followed:

1. Umesh Kumar Nagpal Vs St. of Har., (1994) 4 SCC 138 (Para 11)
2. Director of Education (Secondary Vs Pushpendra Kumar, (1980) 5 SCC 192 (Para 12)
3. Roopam Mishra Vs St. of U.P. & ors., Writ-A No. 15512 of 2019 (Para 13)
4. Director of Treasuries in Karnataka & anr.Vs Somyashree, Civil Appeal No. 5122 of 2021 (Para 16)
5. Ispita Chakrabarti Vs St. of W.B., (2018) 2 CAL LT 177 (HC) (Para 17)
6. Sri Bijon Mukherje Vs The St. of of W.B. & ors., (2018) 3 CAL LT 136 (HC) (Para 18)
7. Ankita Saha & anr.Vs The St. of W.B. & ors., WPA No. 12287 of 2019 (Para 19)
8. Sanjay Kumar Vs St. of Bihar & ors., 2000 (7) SCC 192 (Para 24)
9. Sonal Laviniya & anr.Vs U.O.I. & anr., 2003 (5) AWC 4070 (Para 25)

10. Shiv Kumar Dubey Vs St. of U.P., 2014 (2) ADJ 312 (Para 26)

Precedent distinguished:

Umesh Kumar Vs St. of U.P., 2017 (9) ADJ 327 (Para 30)

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

1. Counter affidavit filed by Shri S.M.Mishra, learned counsel for the respondents and the rejoinder affidavit filed by Shri Nikhil Kumar, learned counsel for the petitioner are taken in the record.

2. The petitioner claims that he is entitled to regular appointment and salary from the date of his appointment as a contractual employee on 25.08.2014.

3. Shri Nikhil Kumar, learned counsel assisted by Shri Vagish Yadav, learned counsel for the petitioner contends that the petitioner was appointed on 25.08.2014 as a contractual employee. In fact his appointment was made under the U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 (hereinafter referred to as "Dying-in-Harness Rules, 1974"). Hence he is entitled to regular appointment and salary from the aforesaid date of his appointment.

4. Per contra, Shri S.M.Mishra, learned counsel for the respondents submits that there was a delay of more than five years on part of the petitioner in making an application for grant of appointment on compassionate ground. The delay has not been condoned by the competent authority. The appointment of the petitioner is not made under the Dying-in-Harness Rules, 1974. The petitioner cannot be granted the relief claimed by him.

5. Heard Shri Nikhil Kumar, learned counsel assisted by Shri Vagish Yadav, learned counsel for the petitioner and Shri S.M.Mishra, learned counsel for the respondents.

6. The admitted facts of the case are these. The father of the petitioner died in harness on 10.02.2006. The petitioner turned 18 in the year 2013. He filed an application for grant of appointment on compassionate ground on 05.07.2013. The appointments on compassionate ground in the respondent-corporation are made under the Dying-in-Harness Rules, 1974 as made applicable to the respondent-corporation. Admittedly, the said application was filed more than five years after the death of the father. The aforesaid delay of more than five years has not been condoned by the competent authority in the instant case as contemplated in the Dying-in-Harness Rules, 1974. The petitioner was appointed as a contractual employee in the respondent-corporation on 25.08.2014.

7. The question that arises for consideration in this writ petition is whether the aforesaid contractual appointment of the petitioner was made under the Dying-in-Harness Rules, 1974 and consequently the petitioner is liable to be treated as a permanent employee with effect from the date of his appointment as a contractual employee on 25.08.2014?

8. Appointments to public posts, government services and to various instrumentalities of the State within the meaning of Article 12 of the Constitution of India are governed and regulated by comprehensive provisions contained in the Constitution. The constitutional scheme envisages an open recruitment and a transparent procedure which enables

maximum participation from all the eligible segments of the citizenry at large. The final appointments are made after a fair selection based on competitive merit. While making the said appointments the reservation policy or affirmative action under the Constitution for representation and empowerment of backward classes, SCs/STs and other sections of the society identified as per law have to be duly adhered to. The recruitment and appointment to government services and government undertakings were examined by constitutional Courts in the context of Articles 14, 15 and 16 of the Constitution of India. Holdings of the constitutional Courts have irretrievably entrenched the aforesaid modes and procedures for appointments to posts in the government and Article 12 instrumentalies in the body of the constitutional law.

9. The compassionate ground appointments to the contrary are not made through a transparent and public process of recruitment after inviting the applications from the open market. The appointments on compassionate ground entail deviation from regular processes of recruitment and other relaxations as well. Appointments under the Dying-in-Harness Rules, 1974, are an exception to the aforesaid constitutionally mandated scheme for appointments to posts in the government and in government undertakings. Compassionate appointments emanate from specific service rules holding the field and rationalized by service law jurisprudence evolved by Constitutional Courts.

10. The appointments on compassionate ground passed the test of constitutional validity by a slender margin. The sole justification to make compassionate ground appointments is that

the dependants of the deceased employee face unforeseen financial destitution after the death of the latter and need urgent succour. Compassionate appointments are provided to the family to immediately tide over the sudden financial crisis so caused by the death of the employee. This feature alone constituted the kin of a deceased employee into one class and on this sole footing the rationale of compassionate ground appointments was justified by Constitutional Courts.

11. The Supreme Court in **Umesh Kumar Nagpal Vs. State of Haryana**¹ explained the purpose of compassionate in following terms:

"2.The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of

livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such

posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

12. A similar sentiment was echoed by the Supreme Court in **Director of Education (Secondary) v. Pushpendra Kumar**² :

"8. The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment. Such a provision

makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependant of a deceased employee....."

13. This Court in **Roopam Mishra v. State of U.P. and 4 others**³ held as under:

"16. The purpose of compassionate appointments provides their justification. The death of a bread winner forces the family of the deceased into penury. The immediacy of the financial crisis creates the requirement for urgent redressal. The concept of compassionate appointments is created only to enable the bereaved family to tide over the immediate financial crisis".

14. The concept of compassionate ground appointments is a welfare measure taken by a model employer. However, there is a caution. An overliberal interpretation of the right to the appointments on compassionate ground will open a floodgate of such appointments and turn them into a veritable source of recruitment. An unjustified generous approach in compassionate ground which is not consistent with the applicable service rules will confer benefit to underserving and ineligible candidates, and simultaneously deny the rights and lawful claims of eligible and meritorious candidates from getting appointment to government posts. Treating compassionate ground appointments as an unconditional and vested right and making it a source of recruitment will shear the thin veil of legality which protects such appointments from the vice of unconstitutionality. The very concept of compassionate ground will then be exposed to the wrath of Articles 14, 15, 16 of the Constitution of India.

15. The purpose of grant of compassionate ground appointments can be subverted and their constitutionality can be saved only by strict compliance of the rules governing the grant of compassionate ground appointments.

16. The Supreme Court in the Director of **Treasuries in Karnataka & Anr. v. Somyashree**⁴ emphatically reiterated the well settled position of law of making compassionate appointments in conformity with the norms governing the grant of said appointments by summarizing the law as follows:

"7.....(i) that the compassionate appointment is an exception to the general rule;

(ii) that no aspirant has a right to compassionate appointment;

(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;

(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;

(v) the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment."

17. The necessity to strictly adhere to rules relating to compassionate grounds was succinctly summarized by the Calcutta High Court in **Ipsita Chakrabarti v. State of West Bengal**⁵. Ipsita Chakrabarti (supra) upon consideration of holdings of various Constitutional Courts held:

"(a) Appointment on compassionate grounds is an exception carved out to the general rule that recruitment to public services is to be made in a transparent and accountable manner providing opportunity to all eligible persons to compete and participate in the selection process.

(b) The right of a dependent of an employee who died in harness for compassionate appointment is based on the scheme, executive instructions, rules etc. framed by the employer and there is no right to claim

compassionate appointment on any other ground apart from the above scheme conferred by the employer.

(c) Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground it should be kept confined only to the purpose it seems to achieve, the idea being not to provide for endless compassion.

(d) Compassionate appointment has to be exercised only in warranting situations and circumstances existing in granting appointment and guiding factors should be financial condition of the family."

18. Furthermore, the Calcutta High Court in **Sri Bijon Mukherjee v. The State of West Bengal and others**⁶ again stated what is by now the settled position of law that the appointments on compassionate ground must be made only in consonance with the specific rules applicable to the employee :

"26. After observing the ratio and the legal positions contended by the Counsels appearing on behalf of the parties as well as the precedents examined above, I am persuaded to opine that appointment on compassionate grounds seeks to relieve the immediate financial hardship faced by the dependants of the deceased. It acts as an exception to Articles 14 and 16 of the Constitution as the defendant are given preferential appointment ahead of other equally

meritorious candidates similarly placed and hence it cannot be claimed as a right. With the object of appointment on compassionate grounds in mind, it is palpably clear to me that this appointment must be done in accordance with the rules for such appointment. The dependant seeking such appointment must be eligible for such consideration and facing financial hardship to the extent delineated by the rules."

19. The judgment rendered by the Calcutta High Court in **Ipsita Chakrabarti** (supra) and **Sri Bijon Mukherjee** (supra) were followed by the Calcutta High Court in **Ankita Saha and Anr. v. The State of West Bengal and Ors**⁷.

20. At this stage it would be apposite to extract the relevant provisions of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 as applicable to this case:

"Rule 5. Recruitment of a member of the family of the deceased. –

(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government

or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person-

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) When the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his service may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

21. One of the mandatory prerequisites for appointments on compassionate ground as contemplated in the aforesaid Dying-in-Harness Rules, 1974 is that the application for employment should be made within five years from the date of death of the government servant. However, the said provision also empowers the State Government to dispense with or relax the aforesaid time limit in appropriate cases. The said provision for condonation of delay by the State Government/competent authority after due application of mind to relevant facts is mandatory in nature. Failure to condone the delay in making the application for compassionate appointment by the State Government/competent authority after due application of mind to relevant factors will vitiate the appointment.

22. Rationale for strict enforcement of the aforesaid provision for condonation of delay by the competent authority is supplied by good authorities in point.

23. Appointments based on descent or claims of appointment which rest on heredity, are abhorred in the scheme of Articles 14, 15, 16 of the Constitution of India. Delay in making a claim for compassionate ground appointment dilutes the case of immediate financial penury, and

consequently negates the entitlement for appointment on compassionate ground. Appointments on compassionate ground cannot wait for the claimants to attain majority or to enable them to acquire additional qualifications and get a better deal in the said appointments. Infact, such grounds militate against claim for appointments on compassionate ground.

24. The Supreme Court in the case of **Sanjay Kumar Vs. State of Bihar and Others**⁸ reiterated the purpose of compassionate ground appointments to tide over the sudden crisis resulting from the death of the earner in a family. While in the same breath the reservation of a vacancy to enable such person to attain majority was negated by the Supreme Court by holding thus:

"3. We are unable to agree with the submissions of the learned Senior Counsel for the petitioner. This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the breadearner who had left the family in penury and without any means of livelihood. In fact such a view has been expressed in the very decision cited by the petitioner in *Director of Education v. Pushpendra Kumar* [(1998) 5 SCC 192 : 1998 SCC (L&S) 1302 : (1998) 2 Pat LJR 181] . It is also significant to notice that on the date when the first application was made by the petitioner on 2-6-1988, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There

cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

25. A Division Bench of this Court after citing authorities in point also concluded that financial penury ceases to exist in case an application was made long years after the death of the employee in the case of **Smt. Sonal Laviniya and another vs. Union of India and another**⁹:

"38. The purpose of providing such an employment has been to render the financial assistance to the family, which has lost the bread earner immediately after the death of the employee. If the application has been filed after expiry of 9½ years the element of immediate need stood evaporated and there was no occasion for the respondents to consider the case of the petitioner for such a relief. The observation made by the learned Tribunal are in consonance with the law laid down by the Hon'ble Apex Court and no exception can be taken out."

26. The need for strict compliance of Dying-in-Harness Rules, 1974 and consequences of delay in filing applications for appointment under Dying-in-harness Rules and allied issues were posed to a Full Bench of this Court in the case of **Shiv Kumar Dubey Vs. State of U.P.**¹⁰ For ease of reference, the relevant parts of **Shiv Kumar Dubey (supra)** are reproduced hereunder:

"29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

[emphasis supplied]

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

[emphasis supplied]

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the

family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

[emphasis supplied]

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

[emphasis supplied]

(viii) Provisions for the grant of compassionate appointment do not constitute a

reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family." (emphasis supplied)."

27. While condoning the delay in making of application for grant of appointment under the Dying-in-Harness Rules, 1974, the State Government (or the competent authority) is under a bounden obligation of law to consider the matter in light of the aforesaid holdings of constitutional courts.

28. The facts of the case enumerated earlier may now be seen in light of the authorities in point discussed above. The petitioner was a minor at the time of the death of his father. No post could have been reserved for him till he attained majority. The delay of almost seven years in making the application for appointment on compassionate ground was never condoned by the State Government/competent authority under the Dying-in-Harness Rules, 1974.

29. The mandatory prerequisite of condonation of delay in making the application for compassionate appointment by the competent authority under the Dying-in-Harness Rules, 1974 has thus been violated. The appointment of the

petitioner as a contractual worker was not made under the Dying-in-Harness Rules, 1974. Consequently the petitioner cannot be treated as a regularly appointed employee and is not entitled to benefits claimed by him. Further, the petitioner cannot set up a claim for appointment on compassionate ground at this belated stage under the Dying-in-Harness Rules, 1974.

30. Reliance placed on the judgement rendered by this Court in **Umesh Kumar v. State of U.P.**¹¹ is misconceived. The judgement is distinguishable on facts. In the case of Umesh Kumar (supra) this Court has specifically observed that the respondents had not taken a stand that more than five years had elapsed from the date of death of his father. In the instant case the petitioner has been non suited on the solely footing that there was a delay of more than five years in making the application for appointment and that the delay has not been condoned by the competent authority. Furthermore, the judgement in **Umesh Kumar (supra)** was rendered in the context of a ban purportedly imposed on appointments on compassionate ground by the Government Order dated 11.07.2003. The ban is not an issue in the instant case.

31. In the facts of this case, contractual employment of the said nature cannot be converted into an appointment under the Dying-in-Harness Rules, 1974. If this course is made permissible it will become a novel device to breach specific statutory provisions.

32. The Managing Director of the UPSRTC shall cause an enquiry to be conducted as to how appointments of this nature are being made only as a device to overreach and violate the provisions of the

Dying-in-Harness Rules, 1974. Appropriate action will be taken thereafter as per law.

33. The writ petition is dismissed.

(2025) 1 ILRA 811

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 22.01.2025

BEFORE

**THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE PANKAJ BHATIA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.**

Criminal Reference No. 1 of 2024

**In Re- Procedure To Be Followed In
Hearing Of Criminal Appeals ...Applicant
Versus
State of U.P. ...Respondent**

Counsel for the Applicant:

Suo Moto, Apoorva Tewari, Ayush Tandon, Alok Mishra, Nadeem Murtaza, Naved Ali, Rajat Gangwar, S M Singh Royekwar, Vikas Vikram Singh

Counsel for the Respondent:

G.A.

(A) Criminal Law – Criminal Procedure Code, 1973 – Sections 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 86, 341, 349, 372, 374, 377, 378, 390 & 446 - Allahabad High Court Rules, 1952 - Rule 18, 22 & 41 - Criminal Reference - in an appeal against acquittal while summoning the accused person under Section 390 Cr.P.C. coercive process even of the nature of bailable warrant or non-bailable warrant may be issued against the appellant having regard to the peculiar facts and circumstances of each case but it may not be construed to mean that in each and every appeal against acquittal the accused person must be summoned in variably by issuing bailable or non-bailable warrants and in an appropriate case summons may also be issued and in appeal against conviction wherein an

appellant has already been released on bail and his counsel is not appearing for arguing the appeal no warrant of arrest could be issued straightaway against him and only bailable warrant be issued at the first instance to ensure his representation.

(Para – 119)

(B) Criminal Law – Criminal Procedure Code, 1973 – Sections 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 86, 341, 349, 372, 374, 377, 378, 390 & 446 - Allahabad High Court Rules, 1952- Rule 18, 22 & 41 - Criminal Reference - where non-bailable warrants issued against an appellant - in appeal against conviction or against acquittal - and - as to whether such accused person or appellant against whom non-bailable warrants have been issued by High court, may be released on bail by the District Court or the Chief Judicial Magistrate concerned without any such stipulation occurring in the order of the High Court – held, they have no jurisdiction to release such person on bail – thus, observation & directions as contained in order dated 18.01.2024 passed in Government Appeal No. 454/2022 and the directions dated 19.01.2024 in Government Appeal No. 2552/1981 cannot be said to be a correct appreciation of law.

(Para – 120, 155)

(C) Criminal Law – Criminal Procedure Code, 1973 – Sections 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 86, 341, 349, 372, 374, 377, 378, 390 & 446 - Allahabad High Court Rules, 1952- Rule 18, 22 & 41 - Criminal Reference - Whether an appeal, either against acquittal or conviction, can be heard by appointing an Amicus Curiae for the accused-respondent or the convicted-appellant – an appellant who is avoiding his presence before the court and is not cooperating with hearing of the appeal may not be allowed to do-so – held, if the appellate court is satisfied that delaying tactics are being adopted by such an accused or appellant/convict, it may act in accordance with the law laid down by the Hon'ble Supreme Court in case of 'Bani Singh & ors. Vs St. of U.P.', Surya Baksh Singh Vs St. of UP, and 'K.S. Panduranga Vs St. of Karn.' and in 'Anokhilal Vs St. of MP' – answered accordingly.

(Para – 155)

Disposed of. (E-11)

List of Cases cited:

1. St. of U.P. Vs Geeta Devi & anr.- order dated 18.01.2024 - Govt Appeal No. 454 of 2022,
2. St. of U.P. Vs Shamsuddin Khan & ors. - order dated 19.01.2024 - Govt Appeal No. 2552 of 1981,
3. Raj Narayan, Criminal Appeal No.1817 of 2003, decided on 23.06.2023,
4. Rajoo @ Ramakant Vs St. of M.P., 2012 (8) SCC 553,
5. Raghuvansh Dewan Chand Bhasin Vs St. of Mah. & ors., 2012 (9) SCC 791,
6. Inder Mohan Goswami Vs St. of Uttaranchal, 2007 (12) SCC 1,
7. Dhananjay Rai @ Guddu Rai Vs St. of Bihar 2022 (14) SCC 95,
8. K. Muruganandam & ors. Vs St., 2021 (20) SCC 642,
9. Hussainara Khatoon Vs Home Secretary, St. of Bihar, Patna, 1981 SC 928 (4),
10. Anokhi Lal Vs St. of M.P., 2019 (20) SCC 196,
11. Zahira Habibullah Sheikh & anr.Vs St. of Guj., 2004 (4) SCC 158,
12. Mohammad Hussain Vs St. 2012 (9) SCC 408,
13. Niraj Devnarayan Shukla & ors. Vs St. of Gujarat, 2015 SCC OnLine Gujarat 6269,
14. Bani Singh Vs St. of U.P., 1996 (4) SCC 720,
15. Surya Baksh Singh Vs St. of U.P., 2014 (14) SCC 222,
16. K.S. Panduranga Vs St. of Karn., 2013 (3) SCC 721,

17. Dilip S Dahanukar Vs Kotak Mahindra Comp. Ltd., 2007 (6) SCC 528,
18. Satyendra Kumar Antil Vs C.B.I. 2022 (10) SCC 51,
19. Sarah Matthew Vs Institute of Cardiovascular Diseases, 2014 (2) SCC 62,
20. Dhanna Lal Vs Kalavati Bai, 2002 (6) SCC 16,
21. Dayal Singh Vs St. of Uttaranchal, 2012 (3) SCC 263,
22. Mohammed Firoz Vs St. of M.P., 2022 (7) SCC 443,
23. St. (NCT of Delhi) Vs Shiv Kumar Yadav, 2016 (2) SCC 402,
24. Somesh Chaurasia Vs St. of M.P., 2022 (19) SCC 480,
25. Abdul Basit Vs Mohammed Abdul Qadir Chaudhary, 2014 (10) SCC 754,
26. Purshottam Vs St. of T.N., 2023 SCC OnLine SC 1410,
27. Ashish Chaddha Vs Asha Kumari & anr., 2012 (1) SCC 680,
28. Madan Mohan Vs St. of Raj. & ors., 2018 (12) SCC 30,
29. Smt. Maya Dixit Vs St. of U.P., 2010 (83) ALR 664,
30. St. of U.P. & ors. Vs Anil Kumar Sharma & anr., 2015 (6) SCC 716,
31. Praneeta Prakash Navage Vs St. of Mah. & ors., 2012 SCC OnLine Bombay 1085,
32. Popular Muthaiah Vs St. represented by Inspector of Police, 2006 (7) SCC 296,
33. Sanjay Dubey Vs St. of M.P., 2023 SCC OnLine Supreme Court 610,
34. St. of U.P. Vs Poosu & anr., 1976 (3) SCC 1
31 Kabira Vs St. of U.P., 1982 SCC (Criminal) 144,
35. Mohammad Sukur Ali Vs St. of Assam 2011 (4) SCC 729,
36. A.S. Mohammed Rafi Vs St. of T.N.& ors., AIR 2011 SC 308,
37. Man Singh & anr.Vs St. of M.P. 2008 (9) SCC 542,
38. Bapu Limbaji Kamble Vs St. of Mah., 2005 (11) SC 412,
39. Balakrishna Mahadev Lad Vs St. of Mah., 2012 SCC OnLine Bombay 1490,
40. St. of Punjab Vs Davinder Pal Singh Bhullar & ors., 2011 (14) SCC 770,
41. Laxman Das Vs Resham Chand Kalia & anr., 2018 (3) SCC 187,
42. St. of Mah. Vs Mahesh Kariman Tirky & ors., 2023 (1) SCC (Criminal) 137,
43. Laxman Das Chagan Lal Bhatia & ors. Vs St. by the High Court of Bombay, AIR 1968 Bombay 400,
44. Imtiyaz Raza Khan Vs St. of Mah., 2018 (9) SCC 160,
45. Khatri & ors. Vs St. of Bihar & ors., (1981) 1 SCC 627,
46. Suk Das Vs UT of Arunachal Pradesh, (1986) 2 SCC 401,
47. Shyam Deo Pandey Vs St. of Bihar, (1971) 1 SCC 855,
48. Ram Naresh Yadav Vs St. of Bihar, AIR 1987 SC 1500,
49. Dharam Pal & ors. Vs St. of U.P., (2008) 17 SCC 337,
50. Christopher Raj Vs K. Vijayakumar, (2019) 7 SCC 398.

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J. & Hon'ble Pankaj Bhatia, J. & Hon'ble Mohd. Faiz Alam Khan, J.)

1. We have heard Shri Apoorva Tiwari, Shri Nadeem Murtaza, assisted by S/Shri Wali Nawaz Khan, Harsh Vardhan Kedia and Ms. Smigdha Singh, Shri S.M. Singh Royekwar, assisted by Shri Sumeet Tahilramani, Sri Vikas Vikram Singh, Sri Naved Ali, Sri Rajat Gangwar, Sri Alok Mishra, assisted by Shri Ajeet Kumar Mishra, Sri Ayush Tandon, learned Advocates, as also Dr. V.K. Singh, learned Government Advocate, Sri Umesh Chandra Verma, learned Additional Government Advocate-I, Shri Pawan Kumar Mishra, learned Additional Government Advocate, Sri Shivendra Shivam Singh Rathore, learned counsel for the State, Shri Bhavesh Chandel and Shri Shivang Tiwari, learned counsel at length.

2. This Reference has arisen out of order dated 12.03.2024 passed in Criminal Appeal No.465 of 1999: *Surendra Prasad Misra and another Vs. State of U.P. and others*, wherein a Division Bench (hereinafter referred to as 'the Bench at Lucknow') while hearing the Appeal was apprised of two orders of Coordinate Bench (hereinafter referred to as 'the Bench at Allahabad'), dated 18.01.2024 passed in Govt Appeal No.454 of 2022: *State of U.P. Vs. Geeta Devi and another*; and the order dated 19.01.2024 passed in Govt Appeal No.2552 of 1981: *State of U.P. Vs. Shamsuddin Khan and others*.

3. The order dated 18.01.2024 passed by the Division Bench at Allahabad in Government Appeal No. 454 of 2022 is being reproduced as under:-

"1. Heard learned AGA appearing for the State and learned counsel for the respondents.

2. The present Government Appeal has been filed by the State against

the order of acquittal dated 7.6.2018 passed by the Additional Sessions Judge / FTC No. 3, Muzaffar Nagar in ST No. 299 of 2007, under Sections 302, 201, 364, 120B IPC (State Vs. Brajpal and others).

3. We have gone through the order dated 9.9.2022 of this Court which was passed on the appeal filed by the State against the judgment of acquittal dated 7.6.2018. By the order dated 9.9.2022, the respondents were directed to furnish personal bond with two sureties in the like amount to the satisfaction of the learned CJM. However, it appears that they could not be served and thereafter Non bailable warrants were issued and they were arrested.

4. Learned counsel submits that both the respondents are in custody since 27.11.2022 i.e for a period of one year and three months.

5. Though the Bench is not in agreement with the procedure followed by the Court that in a State appeal challenging the judgment of acquittal, the issuance of Non Bailable Warrants would interpretate that police authority will execute the same and produce the concerned person before the High Court so that some effective order be passed with regard to their bail. However, in the instant case despite acquittal, the respondents are in judicial custody for more than one year and three months because bailable warrants were not executed. It is worth noticing to reproduce Section 390 of Cr.P.C. which read as under :

"Section 390: Arrest of accused in appeal from acquittal:- When an appeal is presented under section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."

6. Similarity, in order to procure the presence of accused persons, the Court has an alternative option to order for attachment of property of person absconding under Section 83 Cr.P.C.. Further, Section 80 of Cr.P.C. provides for arrest of person against whom warrant is issued and it provides for taking security under Section 71 of Cr.P.C for production before the Court, such person may be released under Section 81 Cr.P.C.

7. A perusal of Section 390 Cr.P.C. clearly gives power to the Court before whom a accused is brought, either to send him to prison or admit him to bail. It is also worth noticing that repeatedly such type of cases are coming where in appeal in pursuance of the Non Bailable Warrant issued by the High Court to the accused who were acquitted from the trial court re languishing in jail for more than one year because they were either not served with the warrant or could not engage Advocate in the High Court. It is held by a full Bench of Bombay High Court while interpreting provisions of Section 390 Cr.P.C. that the very purpose of this Section is to ensure presence of an accused before the Court. In view of the above, we deem it appropriate to issue a direction to the Director, Judicial Training and Research Institute, Lucknow to take online seminar of all the Chief Judicial Magistrates as well as Secretary, District Legal Services Authority and inform that :

(a) As and when Non Bailable Warrants are issued in appeal from acquittal and accused is brought before the CJM / Ilaka Magistrate, he will be admitted bail subject to furnishing bail bonds to their satisfaction and on undertaking that they will appear before the High Court on particular date as per the order of the Court.

(b) Even in cases where appeal against conviction is pending before the High Court and sentence is suspended and either he or his counsel could not appear before the High Court and Non Bailable Warrants are issued on and produced before the CJM, they will be released on bail to the satisfaction of the court concerned with an undertaking that they will appear before the High Court.

(c) The Director of the Judicial Training and Research Institute, Lucknow will conduct a survey in the State of U.P. to find out where in terms of issuance of Non Bailable Warrant either in case of bail against acquittal or in case where accused sentence is suspended, but subsequently he failed to appear, is in jail (prison) for considerable long time, they will be released on bail in same terms as mentioned in above sub para (a) and (b).

(d) Since keeping a person in judicial custody for long time without any justification violate the right of life and liberty of such person, after 30 days of this order, if still bails are not granted, this Court will impose cost of Rs. 50,000/- to be paid by the District State Legal Services Authority concerned.

8. Be whatsoever, the Court deem it appropriate to release the respondents on bail.

9. Let the respondents namely Gita Devi and Afzal be released on bail subject to the satisfaction of the court concerned.

10. Registrar General of this Court is directed to communicate this order to the Director, Judicial Training and Research Institute, Lucknow within a week from today and submit compliance report on the next date fixed.

Order on Appeal

List the matter 30.01.2024. "

4. The observations made by the same Bench at Allahabad in its order dated 19.01.2024 passed in Government Appeal No. 2552 of 1981 are also reproduced as under:-

"1. This Government Appeal was filed in the year 1981 challenging the judgment of acquittal passed in favour of the opposite parties.

2. As per earlier order dated 14.12.2022, non bailable warrants were issued against the accused-respondent no.1 and the Chief Judicial Magistrate concerned was directed to sent a compliance report.

3. An office report dated 20.01.2023 was later on submitted stating therein that the sureties of opposite party/respondent no.1 Shamshuddin are Bashir, who died on 08.04.2016 and Ram Kripal, who is about 70 years old and cannot walk, whereas all sureties of respondent nos. 2 and 5 have died.

4. Thereafter again non-bailable warrants were issued against opposite party nos. 1 and 4 and the matter remains pending for considerable long time.

5. Learned counsel for respondent no.1, namely Shamshuddin Khan submits that he is in jail and presently detained in District Jail, Banda. Even thereafter the case was listed on number of occasions but it has been noticed in the order dated 10.04.2023 that respondent no.1 namely Shamshuddin Khan is not traceable though he is already lodged in District Jail, Banda. The opposite party no.1 is in the judicial custody since 23.02.2023.

6. Learned A.G.A. could not dispute the above contention.

7. Considering the facts and circumstances of the case, issuance of non-bailable-warrants to procure the presence

of respondent no.1 so that he may engage a counsel and defend his case through the counsel, has no relevance. We deem it appropriate to grant bail to the accused-respondent no.1 namely Shamshuddin Khan.

8. Let opposite party no.1- Shamshuddin Khan be released on bail subject to the satisfaction of the court concerned.

9. In a Government Appeal bearing Government Appeal No. 454 of 2022 (State of U.P. Vs. Geeta Devi & Anr.), this Court in similar situation has already directed the Director, Judicial Training and Research Institute, Lucknow that an online seminar of all the Chief Judicial Magistrates through out the Sate of Uttar Pradesh regarding the procedures to be followed in the matter of grant of bail of the accused, who are in jail since long and their appeals are pending for consideration.

10. Such procedures mentioned in the above Government Appeal give discretion to the Court of Chief Judicial Magistrate specially the Ilaka Magistrate to grant bail in such cases where the purpose of issuance of non-bailable warrants is to procure the presence of the accused especially in the cases where an accused person has acquitted from the trial court and non-bailable warrants are issued in an appeal filed by the State.

11. The Registrar General of this Court is directed to communicate this order forthwith to the Director, Judicial Training and Research Institute, Lucknow within a week from today and submit compliance report on the next date fixed.

Order on Appeal

12. List this case on 30.01.2024. "

5. The Bench at Lucknow hearing the Criminal Appeal No.465 of 1999: Surendra

Prasad Misra Vs. State of U.P. and others, was not in agreement with the view expressed by the Coordinate Bench at Allahabad in its orders dated 18.01.2024 and 19.01.2024, and has referred the matter to the Hon'ble Chief Justice by its order dated 12.03.2024. The Division Bench at Lucknow has framed the following questions for consideration by a Larger Bench: –

“1. Whether the Chief Judicial Magistrate or any other Magistrate can enlarge an acquitted person or a person convicted of an offence on bail, even in a case, wherein an Appeal against acquittal or conviction, as the case maybe, the High Court or any other Appellate Court has issued non-bailable warrant for securing his presence without any such stipulation there in for release by the Court below, when such non-bailable warrant has been issued at a subsequent stage of Appeal and not at the admission stage?”

“2. Assuming the Magistrate has jurisdiction as referred in question No.1, whether a general direction of a mandatory nature can be issued by the High Court to the Magistrate for such release, as has been done vide order dated 18.01.2024 Government Appeal No. 454 of 2022 and order dated 19.01.2024, Govt Appeal No. 2552 of 1981? does it not deprive the Magistrate of his discretion in this regard to consider such release on case to case basis in view of the law discussed?”

“3. Whether the observations and directions as contained in the order dated 18.01.2024 in Govt Appeal No. 454 of 2022: State of U.P. Vs. Geeta Devi and another and the directions dated 19.01.2024 in Govt Appeal No. 2552 of 1981, State of U.P. Vs. Shamsuddin Khan and others are in accordance with law?”

“4. What are the modes prescribed in law for securing the presence of acquitted person or one who has been convicted, in an Appeal before the High Court and what should be the course to be ordinarily adopted by the High Court in exercise of its appellate criminal jurisdiction for securing such presence to facilitate hearing of such appeals?”

“5. Whether an Appeal, either against acquittal or conviction, can be heard by appointing an Amicus Curiae for the accused-respondent or the convicted appellant, as the case maybe, in the event he is not appearing in the proceedings, though his presence can be secured, without his consent and without any intimation to him, if so, under what circumstances?”

6. After this Larger Bench was constituted and the matter came up before this Court, it was pointed out that Criminal Appeal No.465 of 1999 will remain pending during the course of arguments and till judgement is rendered in this reference, although the questions that have been referred to this Court by the Division Bench had nothing at all to do with the merits of Criminal Appeal No. 465 of 1999, but related to the general practice and procedure to be followed in hearing of criminal appeals. This Court therefore passed an order on 22.03.2024, directing the registry to separate the record of Criminal Appeal No. 465 of 1999 and send it to the appropriate Bench for decision on its own merits and to register the Reference under different cause title i.e. :-“in re-Procedure to be followed in Hearing of Criminal Appeals”

7. Also, this Court was of the opinion by a majority of 2:1, that during the pendency of the Reference, the directions

by the Division Bench at Allahabad in Government Appeal No. 454 of 2022, and Govt. Appeal No.2552 of 1981 should remain stayed and ordered accordingly.

8. We had asked all members of the Bar to address the Court with regard to the questions that were framed and referred to us as we were of the opinion that it would be of great interest to all the members of the Bar that the questions referred to us are deliberated upon with the assistance of all the members of the Bar as answers to such questions would govern the procedure to be followed by this Court in all criminal appeals in future.

9. We must at the outset express our great appreciation for the efforts made by all young members of the Bar and also by the learned Government Advocate and his team of Additional Government Advocates in helping this Court thrash out the matter threadbare, and render its answers to the questions aforesaid.

10. Sri Nadeem Murtaza has argued that several types of Appeals are provided under Cr.P.C. and besides Appeals against conviction and acquittal, Chapter 29 of the Cr.P.C. provides for other types of appeals to the High Court ,viz:-

Section 372 – right of victims to prefer an Appeal against acquittal or against conviction for a lesser offence or against imposition of inadequate compensation.

Section 374 – Appeal against conviction.

Section 377 – Appeals by State Government on the ground of inadequacy of sentence.

Section 378- Appeals against acquittal (only with the leave of the High Court).

The Chapter with respect to Appeals in Cr.P.C. is neither absolute nor exhaustive, as many provisions relating to Appeals before the High Court are provided in Cr.P.C. outside the said Chapter as well, which are as follows: –

Section 86- Appeals from orders rejecting applications for restoration of attached property.

Section 341 – Appeals with respect to offences affecting the administration of justice.

Section 449 – Appeal from orders under Section 446 (that is in cases of forfeiture of bonds).

11. It has been argued by Sri Nadeem Murtaza that questions posted by the Reference order by the Division Bench at Lucknow for consideration before this Court do not strictly come under the purview of Section 390 Cr.P.C., as the power under the Section is exercised at the time of admission of Appeal while such questions relate specifically to non-appearance of a person at a subsequent stage of an Appeal, that is when it has been admitted and the matter is ripe for final hearing.

12. With regard to directions to the CJM or any other Magistrate to enlarge an acquitted person or a person convicted of an offence on bail, even in cases where the High Court has issued non-bailable warrant is concerned, a reference has been made to Chapter VI of the Cr.P.C., which relates to processes to compel appearance which are divided into four distinct parts, i.e. A- Summons; B- warrant of arrest; C-

Proclamation and Attachment; and D- other rules regarding process.

Part B of Chapter VI relating to warrant of arrest starts from Section 70 and ends with Section 81.

Section 70 provides for the form of arrest warrant and its duration. Section 70 (2) clarify that every warrant shall remain in force until the same is cancelled by the Court, which issued it or until it is executed by means of arrest of the person against whom warrant is issued .

Section 71 provides for a discretion to the Court while issuing warrant of arrest to Direct, taking of security from the arrested person for his attendance before the Court at a specified time, and in case such security is provided, the person who is arrested is to be released after compliance of the same.

Section 72 provides that warrant can be directed to one or more Police officers, and the same can be executed by all or by any one or more of them.

Section 73 provides that the Magistrate may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender, or any person who is accused of a non-bailable offence and is avoiding arrest. Section 73(3) provides that when the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest Police officer, shall cause him to be taken before a Magistrate having jurisdiction, unless security is taken under Section 71.

Section 74 provides that a warrant directed to a Police officer may also be executed by any other Police officer whose name is endorsed upon the warrant by the officer to whom it is directed.

Section 75 provides for notification of the warrant.

Section 76 provides that the Police officer or the person executing the warrant shall, without unnecessary delay, bring the person arrested before the Court before which he is required by law to produce such person. Although what would the course of law in such case be before which the arrested person is required by law to be brought is not mentioned in the Section, the proviso to the said Section clarifies that the delay in producing the person arrested in any case, shall not exceed 24 hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. It is evident that after being arrested in pursuance of a warrant, a person is required to be produced before the nearest Magistrate within 24 hours, however, Section 76 does not provide for the options/choices available to the Magistrate after production of the arrested person. Rather, Section 76 is only relatable to the powers and duties of the Police officer or the person who has arrested any person against whom the warrant has been issued.

Section 77 to Section 80 relate to arrest made outside the Local jurisdiction of the Court issuing a warrant.

Section 77 provides that warrant of arrest may be executed at any place in India.

Section 78 provides that when a warrant is to be executed outside the jurisdiction of the Court issuing it, such Court may instead of directing the warrant to a Police officer, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police, within the local limits of the Court, within the jurisdiction of which it is to be executed. Section 78(2) provides that the Court issuing a warrant under subsection (1) shall forward, along with the warrant, the substance of the

information against the person to be arrested, together with such documents, if any, as maybe sufficient to enable the Court acting under Section 81, to decide whether bail should or should not be granted to the person.

Section 79 provides for the procedure to be adopted for the execution of warrant by the Executive Magistrate or by Police officer, not below the rank of an officer in charge of a Police Station, and Section 80 provides for procedure of arrest of the person for whom the warrant has been issued.

13. Sri Nadeem Murtaza has argued that different Benches of this Court follow different standards for issuing Non Bailable Warrants and he has also placed before this Court different orders passed by the Court in Appellate Jurisdiction issuing non-bailable warrants against the convict-appellant or the respondent-accused. It has been argued that although the Supreme Court has repeatedly observed that non-bailable warrants should be issued as a last resort after the litigant fails to respond to notices/summons and bailable warrants; sometimes this Court in a routine manner has issued non-bailable warrants against the appellants and directed the Magistrate to place the appellants into custody and send them to jail when they are arrested or surrender before the Court and the Magistrate is directed to submit his report on the date fixed in the matter. Sometimes non-bailable warrants are issued with a specific direction that as and when the appellants are arrested or surrender before the Court, they shall be enlarged on bail by the C.J.M. concerned on their furnishing two adequate sureties and a personal bond, each of them for a like amount, and on the undertaking that they will remain present before this Court on the next date fixed

either personally or through Counsel. On other occasions, the Court while issuing non-bailable warrant has noticed that the Appeal is pending since long and that the appellants were released on bail but no one has appeared on their behalf to argue the matter. Sometimes, the Court has directed preparation of paper book or has summoned Trial Court record and simultaneously the Court has directed notice to be issued to the sureties under Section 446 Cr.P.C. as also issued a non-bailable warrant. Sometimes the Court has issued non-bailable warrant with a specific direction that in case such non-bailable warrant is not executed, the C.J.M. concerned shall file his personal affidavit.

14. In the case of *Raj Narayan*, Criminal Appeal No.1817 of 2003, decided on 23.06.2023 initially no one had turned up on behalf of the appellant to press the Appeal and this Court had directed bailable warrant to be issued. The office report showed that the appellant had sold his property and moved somewhere else. Fresh non-bailable warrant as well as process under Sections 82 and 83 Cr.P.C. against the appellant were issued and at the same time notice was issued to the sureties under Section 446 Cr.P.C. and the CJM was directed to take help of the Senior Superintendent of Police of the District in apprehending the appellant. The appellant was arrested and the Legal Aid Services Authority appointed an Advocate to present his case before the High Court. He informed the Court that the appellant had completed the period of his incarceration of seven years rigorous imprisonment and was released from Central Jail thereafter in 2009 itself, which fact could not be brought to the notice of the Court in the Appeal. Consequently, when no one turned up on behalf of the appellant to the Appeal, the

Court issued non-bailable warrant as well as other directions as aforesaid. In pursuance of the non-bailable warrant issued, the appellant was arrested again and sent to jail. The Court recalled its earlier order and directed release of the appellant forthwith.

15. In *Kundan Lal* Criminal Appeal No.2277 of 2008, the counsel for the appellant was present in Court, but he informed this Court that he had no contact with the appellant, and therefore, was not in a position to argue the case. The Court hence issued non-bailable warrant against the appellant. A supplementary affidavit was filed on the next date fixed, bringing on record the fact that the Criminal Appeal had been filed under Section 449 Cr.P.C. for quashing the order passed by the Trial Court by which recovery had been issued against the appellants who were only sureties of the accused. The accused had surrendered before the Trial Court and for getting bail had submitted fresh sureties of other persons.

16. In *Rajoo Alias Ramakant Vs. State of Madhya Pradesh* 1, the Supreme Court was hearing the Appeal of a person whose Appeal had been dismissed by the High Court. The Supreme Court place reliance upon observations made by it in *Sukdas Vs. Union Territory of Arunachal Pradesh*, 1986 (2) SCC 401, where the Supreme Court had reiterated the requirement of providing free and adequate legal representation to an indigent person and a person accused of an offence. An accused need not ask for legal assistance – the Court while dealing with the cases of Life imprisonment must inform him or her of the entitlement to free legal aid. A person accused of an offence which may involve jeopardy to his life or personal liberty is

entitled to free legal assistance at State expense. However, certain exceptions were carved out like in cases involving economic offences or offences against the law prohibiting prostitution, or child abuse and the like, where social justice may require that free legal services need not be provided by the State. It was also observed that neither the Constitution nor the Legal Services Authorities Act, make any distinction between a trial and an Appeal for the purposes of providing free legal aid to an accused or a person in custody.

17. Sri Nadeem Murtaza has also relied upon *Raghuvansh Dewan Chand Bhasin Vs. State of Maharashtra and others* 2. It was argued by the Appellant that since neither Section 70, nor Section 71 of the Cr.P.C. uses the expression non-bailable, a Magistrate is not authorized to issue non-bailable warrant of arrest, even when an accused fails to appear in Court. The Supreme Court negated the contention.

18. Relying upon *Inder Mohan Goswami Vs. State of Uttaranchal* 3, it was cautioned that before issuing non bailable warrants, the Court should strike a balance between society's interest and personal liberty and exercise its discretion cautiously. Referring to paragraph 53 of the judgement in *Inder Mohan Goswami*, the Court stated the circumstances when non-bailable warrant could be issued, for example when the Court was convinced that summons or bailable warrant would be unlikely to have the desired effect, that the person will not voluntarily appear in Court. That the Police authorities were unable to find a person.

19. In *Dhananjay Rai Alias Guddu Rai Vs. State of Bihar* 4, the Supreme Court was dealing with a case of dismissal of an

appellant-convict's Appeal which was initially admitted by the High Court for hearing, but subsequently dismissed without advertng to its merits on the ground that the appellant was absconding. The Supreme Court observed that the Court could not deviate from the settled principle of law that once appellate Court had refused to dismiss the Appeal summarily, the same must be heard on merits. Sections 385 and 386 Cr.P.C. do not envisage the dismissal of the Appeal for default or non-prosecution, but only contemplate disposal on merits after perusal of the record. The plain language of Section 385 makes it clear that if the appellate Court does not consider the Appeal fit for summary dismissal, it must call for the record and Section 386 mandates that after the record is received, the Appellate Court may dispose of the Appeal after hearing the accused or his counsel. The law clearly expects the appellate Court to dispose of the Appeal on merits not merely by perusing the reasoning of the trial Court in the judgement impugned, but by cross checking the reasoning with the evidence on record with a view to satisfy itself that the reasoning and findings recorded by the Trial Court are consistent with the material on record. The Court referred to judgement rendered in *Bani Singh Vs. State of U.P.* 11, and *Surya Baksh Singh Vs. State of U.P.* 12, and *K.S. Pandurang Vs. State of Karnataka* 13, and also observed that the Court is not necessarily required to adjourn the case if both the appellant and his lawyer are absent. It can dispose of the Appeal after perusing the record and judgement of the Trial Court.

In *K. Muruganandam and others Vs. State* 5, the Supreme Court observed that the High Court cannot dismiss an Appeal against conviction, if the accused does not appear through counsel appointed

by him/her. The Court is obliged to proceed with the hearing of the case only after appointing Amicus Curiae.

20. It has been argued that *Rajoo* (supra) has been quoted with approval in *Anokhi Lal Vs. State of Madhya Pradesh* 7, where referring to Article 39A, the Supreme Court observed that it provides for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The Legal Services Authorities Act 1987 has been enacted to achieve the mandate of Article 39A. Right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and is implicit in the right guaranteed by Article 21. The Supreme Court relied upon the *Best Bakery* case viz. *Zahira Habibullah Sheikh and another vs. State of Gujarat* 8, and judgement rendered in *Mohammad Hussain Vs. State* 9; and emphasized that the object of criminal trial is to search for the truth, and the trial is not a bout over technicalities and must be conducted in such manner as will protect the innocent and punish the guilty.

21. Sri Nadeem Murtaza has placed reliance upon judgement rendered by a Full Bench of the High Court of Gujarat in *Niraj Devnarayan Shukla and others Vs. State of Gujarat* 10, where considering the difference of opinion between two coordinate benches Regarding how a Criminal Appeal under Section 374 Cr.P.C. filed by a convict who is absconding at the time of final hearing has to be dealt with.

22. After answering the question, the Larger Bench also elaborated the procedure to be adopted by the High Court while dealing with a conviction Appeal, at final

hearing stage, when the Advocate and/or convict is not available to assist the Court.

The Larger Bench referred to the judgement rendered in *Bani Singh Vs. State of Uttar Pradesh* 11, and *Surya Baksh Singh Vs. State of U.P.* 12, *K.S. Panduranga Vs. State of Karnataka* 13 and *Dilip S Dahanukar Vs. Kotak Mahindra Company Limited* 14, and then the Larger Bench observed in paragraph 22 as follows:

“22. In view of the ratio laid down by the Apex Court, we are of the opinion that a High Court while dealing with a conviction Appeal where in the convict/Advocate is/are not available, following procedure is required to be considered at the time of final hearing:

i. If the Advocate appearing for the appellant convict is present and is ready to proceed with the Appeal, the Court has to decide the same on merits and a reasoned judgement is to be delivered, even if the convict is absconding.

It is needless to say that the convict should always be subjected to consequences of his abscondence.

ii. If the convict is absconding and his Advocate is absent, and if the convict has jumped the bail/temporary bail granted by the High Court, the High Court itself shall take recourse provided under the provisions of the Criminal Procedure Code to secure the presence of the absconding convict and can issue non-bailable warrant, passing orders of attachment of his property, declaring him, proclaimed offender, et cetera, under Sections 82, 83, 84 and 85 of the Code of Criminal Procedure.

After exhausting all possible effort, if the convict could not be traced out, and if the High Court is satisfied and is

of the opinion that the convict is recalcitrant and has shown total disrespect to the orders passed by the High Court and has jumped the bail /temporary bail, the High Court can exercise its inherent power under Section 482 of the Code and can dismiss the Appeal.

iii. If the convict was released pursuant to orders passed by the concerned department of the State/Jail Authority (like furlough leave, et cetera) and is not available at the time of hearing of the Appeal, the jail Authority shall submit a detailed report to the High Court about the steps undertaken by the concerned department/jail Authority to secure the presence of the absconding convict. If the High Court is satisfied with its report and comes to the conclusion that the convict is recalcitrant and has shown scant respect to the judicial system, his Appeal can be dismissed.

iv. If the Appeal is dismissed on the ground of non-availability of convict and subsequently, if the convict surrenders or is arrested, he may file application for restoration of his Appeal for hearing the same on merits.

23. In paragraph 23, the Larger Bench of Gujarat High Court observed—

“23. It is needless to say that if the Bench comes across a Criminal Appeal, where it finds that the case of absconding convict does not fall in any of the above referred contingencies, it can exercise its inherent powers provided under Section 482 of the Code, which would entitle it to make such orders as may be necessary to secure the ends of justice. Considering the decision by the honourable Apex Court, in the case of *Bani Singh* (supra), *K.S. Panduranga* (supra), as well as in the case of *Surya Baksh Singh* (supra), and

considering the several decisions, we hereby hold that the ratio laid down by the Hon'ble Apex Court in the case of Bani Singh, K.S. Panduranga (supra) read with Surya Baksh Singh (supra) would hold the field in case of an absconding convict and not the ratio laid down by the Court, in the case of Dilip S. Dahanukar (supra) as the same deals with Sections 357 and 374 of the Code—..”

24. Sri Nadeem Murtaza has placed reliance upon a judgement rendered by the Supreme Court on 01.05.2024 in Criminal Appeal No.1074 of 2017: *Sharif Ahmed Vs. State of U.P.*, where it has been observed that non-bailable warrants should not be issued as a matter of course. Reliance has also been placed upon Supreme Court judgement in *Satyendra Kumar Antil vs C.B.I.* 15, and *Inder Mohan Goswami Vs. State of Uttaranchal* 3. Even where non-bailable warrants are issued, the High Court should direct listing of such cases on a priority basis and a separate heading be created in the cause list for such appeals. Where the accused is re-arrested in pursuance of non-bailable warrants only to ensure his presence, the Magistrate should immediately send a report regarding execution of warrant and an attempt be made to decide such appeals or pass appropriate orders as expeditiously as possible. It has been suggested by Shri Nadeem Murtaza that if an accused is arrested and Magistrate has not been given any specific direction regarding enlarging such accused on bail or sending him to jail, still, there are certain exceptional circumstances where the Magistrate be allowed to consider releasing the arrested person on bail. There is no express bar under the Cr.P.C. to release such person on bail by the Magistrate and Sri Nadeem Murtaza has placed reliance upon judgement rendered in

Sarah Matthew Vs. Institute of Cardiovascular Diseases 16, *Dhanna Lal Vs. Kalavati Bai* 17, where the Supreme Court has observed that Cr.P.C. is a procedural law and it is well settled that procedural law must be liberally construed to serve as handmaiden of justice and not as its mistress.

25. Sri Apoorva Tiwari, along with Akash Singh, Shivang Tiwari, Advocates, has argued that the concept of fair trial entails familiar triangulation of interest of the accused, the victim and the society acting through the State and the prosecuting agencies. Public interest in proper administration of justice must be given as much importance as the interest of the individual accused. Reliance has been placed on judgement rendered in *Zahira Habibulla Sheikh and another Vs. State of Gujarat* 8, *Dayal Singh Vs. State of Uttaranchal* 18, and *Mohammed Firoz Vs. State of Madhya Pradesh*, 19.

26. Sri Apoorva Tewari has also pointed out the observations made by the Supreme Court in the case of *State (NCT of Delhi) Vs. Shiv Kumar Yadav* 20, and reliance has been placed upon paragraphs 10 and 11 Where the Supreme Court has observed that :-

“fairness of trial has to be seen, not only from the point of view of the accused, but also from the point of view of the victim and the Society. In the name of fair trial, the system cannot be held to ransom, though the accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross examine the prosecution witnesses and to lead evidence in his defence.”

27. Sri Apoorva Tiwari has also placed reliance upon judgement entered in *Somesh Chaurasia Vs. State of Madhya Pradesh*

21, where the Supreme Court placed reliance upon observations made by it in *Abdul Basit Vs. Mohammed Abdul Qadir Chaudhary* 22.

In paragraph 42 and 43 of the judgement in *Somesh Chaurasia* 21, the Supreme Court had observed us: –

“42. This Court in *Pampapathy Vs. State of Mysore*, 1966 Supplement SCR 477; had held that the High Court had the power to revoke the suspension of sentence granted under sub-section (1) and (2) of Section 426 in Criminal Procedure Code, 1898, using its inherent power under Section 561A of the Cr.P.C. 1898. Where the accused were alleged to have misused their liberty while the sentence was suspended. Sub-section (1) and (2) of Section 426 Cr.P.C. 1898 are similar to Section 389 (1) of the present Cr.P.C. It may be noted that in *Pampapathy* the issue of cancellation of bail of a convict by taking recourse to Section 561A Cr.P.C., 1898, arose because the second Proviso, which now has been added to sub-Section (1) of Section 389 Cr.P.C., did not exist under the earlier legal framework. However, since the second Proviso to Sub-section (1) of Section 389 Cr.P.C. now deals with the cancellation of bail, no inherent power would be required for cancellation of suspension of a sentence and bail granted to a convicted person during the pendency of the Appeal at the appellate Court.

“43. This Court in its order passed in *Ramesh Kumar Singh Vs. Jhabbar Singh* 2003 (10) SCC 195 has held that if the accused misused the liberty by committing other offences during the suspension of sentence under Section 389 (1) Cr.P.C., they are not entitled to the privilege of being released on bail. In that

case, the accused was convicted under Section 302 I.P.C. for killing the father of the complainant. During the suspension of his sentence, when he was out on bail, he had committed the murder of the brothers of the complainant. This Court set aside the bail that was granted to the accused by the High Court.”

28. Sri Apoorva Tiwari has also placed reliance upon *Purshottam Vs. State of Tamil Nadu* 23, where the Supreme Court was considering the case of an appellant - accused who was convicted by the trial Court for offence under Section 6 of the Protection of Children from Sexual Offences Act 2012. The Appeal against conviction preferred by the appellant was admitted by the High Court in 2018 and the substantive sentence of the appellant was suspended and he was ordered to be enlarged on bail. When the Appeal came up for hearing in July 2023, his Advocate sought adjournment for four weeks. Only on the ground that the appellant is enjoying the facility of bail and that his Advocate applied for adjournment, the High Court proceeded to cancel the bail. The Supreme Court observed that-

“.....in a given case if the Advocate appearing for the appellant-accused sought adjournment on untenable and unreasonable grounds, the appellate Court is well within its power to refuse the prayer for adjournment. In such a case, one of the courses suggested by a decision of this Court in the case of *Bani Singh Vs. State of U.P.* can always be adopted by the High Court. The High Court has a discretion to appoint an Advocate to espouse the cause of the appellant when the Advocate appointed by the appellant refuses to argue the Appeal on unreasonable grounds. Though the High

Court has an option of considering the merits of the Appeal and deciding the same on merits, the High Court should always adopt the first course of appointing an Advocate to espouse the cause of the appellant. Referring to the second proviso to Sub-section (1) of Section 389 of the Cr.P.C. the Court can even Suo Moto issue a notice calling upon the accused to show cause why his bail should not be cancelled. Under no circumstances, the bail granted to an accused under subsection (1) of Section 389 can be cancelled without giving a reasonable opportunity to the accused of being heard. For the default of the Advocate appointed by the accused, the appellate Court cannot penalise the accused by proceeding to cancel his bail only on the ground that his Advocate has sought an adjournment and that also without giving an opportunity of being heard to him on the issue of cancellation of bail."

It has also been observed in *Purshottam* (supra) that the High Court should not reject an application for suspension of sentence only because the Advocate for the accused declined to argue the Appeal on merits. When only the application for suspension of sentence is listed for hearing the Advocate for the accused is not expected to be ready to argue the Appeal on its merits.

29. Sri Apoorva Tewari has also pointed out Chapter 18 Rule 22 and Rule 41 of the High Court Rules where provisions of giving notice to the Government Advocate, to the accused-respondent, and to convict appellant has been set out and it has been provided that a list of cases ready for hearing has to be pasted on the Notice Board from time to time.

30. Sri Apoorva Tewari has also placed reliance upon *Ashish Chaddha Vs. Asha Kumari and another* 24, and paragraphs 18, 27, 28 and 29 thereof, to argue that sometimes the accused may deliberately avoid appearance in Court and then take the plea of Section 303 of the Cr.P.C. and challenge the order of the Trial Court on the ground that he was denied right to be defended by Counsel of his choice. The Court may look into the facts and circumstances of the case and then decide for itself, whether the accused was only indulging in dilatory tactics and may reject such plea.

31. In *Madan Mohan Vs. State of Rajasthan and others* 25, the Supreme Court has observed that under Section 437 to 439 of the Cr.P.C. grant or rejection of bail is the discretion of the Court considering it, the High Court cannot direct the Subordinate Court to consider and allow the bail application on the same day on which it is filed, it can only direct the accused persons to approach the trial Court for grant of bail and if any application is filed, it would be decided by the trial Court on its merits and in accordance with law expeditiously.

32. In a Full Bench decision of this Court, in *Dinesh Kumar Singh Alias Sonu Vs. State of U.P. and others*. The question formulated for consideration was: –

"Whether a judge of Honble High Court sitting alone or judges sitting in a Division Bench, hearing any matter in his/their determination assigned by Hon'ble the Chief Justice, can overstep into determination of another Bench, if any issue or question arises in the matter, including a question in public interest, which is not connected to the matter before

him/them, and which, in his/their opinion is necessary to be decided, and further in such case where in his/their discretion, it is necessary to decide such question, what should be the procedure to be adopted?"

33. The Full Bench in *Dinesh Singh* referred to observations made by another Full Bench of this Court in *Smt. Maya Dixit Vs. State of U.P.* 26, which had also considered the question whether a Bench conferred/assigned a particular work in terms of Chapter V of the Allahabad High Court Rules can hear matters assigned to another Bench and in paragraphs 17 and 17A observed that the Division Bench assigned with a particular work can only do the work assigned and cannot do the work assigned to another Division Bench, even in respect of an earlier matter which it was hearing. Even if a Bench was hearing a matter assigned to it as per the roster, and if in the course of hearing, it proceeds to consider relief not sought in the petition, but which will fall within the PIL jurisdiction, then the Bench is bound to direct the Registry to place the matter before the Chief Justice for appropriate directions or before the appropriate PIL Bench. In other words, if that Bench is not assigned P.I.L. work, it cannot proceed to hear the matter.

34. In *State of U.P. and others Vs. Anil Kumar Sharma and another* 27, the Supreme Court was considering an order passed by the High Court sitting in writ jurisdiction which directed the State to amend procedure prescribed under Section 209 Cr.P.C. regarding committal of cases by Magistrate to Sessions Court by enabling the Police to file charge-sheet in connection with sessions cases directly before the Sessions Court and also considering the delay in trial due to non-

arrest of accused persons by Police, it directed trial Court not to accept the charge-sheet under Section 173 Cr.P.C. unless the accused persons were produced before them and also directing photocopy machines to be installed in Police station for preparing copies of all documents required to be supplied under Section 207 Cr.P.C. to the accused persons forthwith. The Supreme Court observed that while the directions were issued with the laudable object in mind they could not have been issued as the Division Bench was not sitting in PIL jurisdiction and also the Central Government which was not even a party in the writ petition was directed to get amended the Cr.P.C.

35. Sri S.M. Singh Royekwar has argued more or less in the same terms as other Advocates, and has stated that in the matter of Appeal against conviction, if the High Court or any other Appellate Court, at a subsequent stage of the Appeal, issues non-bailable warrant for securing presence of a convict on bail, only such appellate Court has the power to enlarge the person so arrested on bail. The C.J.M. or any other Magistrate does not have the power to enlarge such arrested person on bail. If N.B.W. is issued by the Appellate Court through the C.J.M. concerned, even then the power to enlarge the person arrested lies only with the Court. In matter of appeals against acquittal before the High Court, if the High Court issues a non-bailable warrant for securing the presence of the acquitted respondent, at a subsequent stage of the Appeal, release of such person on bail after arrest, pursuant to execution of Non Bailable Warrant by the C.J.M. will depend upon the nature/language of direction issued by the High Court under Section 390 Cr.P.C. on a case to case basis.

36. It has also been argued by Sri S.M. Singh Royekwar that no general direction of mandatory nature can be issued by the High Court to the Magistrate in all/any circumstances, even if the Magistrate has jurisdiction in limited cases in view of Section 390 Cr.P.C., for release of person arrested in an Appeal against acquittal if non-bailable warrant has been issued by the Court. As such the observations and directions issued by the Division Bench at Allahabad are not in accordance with law.

37. It has been argued by Sri Royekwar that the modes for securing the presence of acquitted person or a convicted person, released on bail, when an Appeal comes up for hearing before the Appellate Court, are governed by Chapter VI of the Cr.P.C. No uniform, straightjacket formula/course/mode can be laid down to be ordinarily adopted by the High Court in such matters for facilitating hearing of the Appeal. It would depend upon the facts and circumstances of each case.

38. It has also been argued that hearing of an Appeal against a conviction can take place by appointing an Amicus for such accused-respondent or convict-appellant, in case he has jumped bail or his Advocate fails to appear and assist the Court repeatedly during the hearing of the Appeal. Such appointment of Amicus by the Appellate Court should not be delayed and the Appellate Court should not be required to intimate such person who has failed to appear and obtain his consent as the presence of such person cannot be easily secured. It is only in exceptional circumstances where the person who is an accused is in jail, then intimation and consent must be obtained as such person has not wilfully defaulted in appearing before the Court for expeditious disposal of

the Appeal. He may be suffering from various incapacities to pursue his matter in Appeal owing to his continued incarceration.

39. Sri S. M. Singh Royekwar has pointed out a judgement rendered by the Supreme Court in the case of *Dhananjay Rai Alias Guddu Rai Vs. State of Bihar* 4, where the Supreme Court has reiterated the law as settled in the case of *Anokhi Lal Vs. State of Madhya Pradesh* 7 and observed that a Criminal Appeal can very well be decided after appointing an Amicus Curiae in case the accused or his counsel is not turning up to assist the Court. Such an exercise however, should be undertaken with care and before appointing such Amicus the accused should be put to notice either through summons or by means of issuance of bailable warrant regarding listing of the Appeal for hearing and absence of the counsel representing the accused despite knowledge of the same. The accused cannot then claim at a later stage that he was deprived of opportunity to appoint a counsel of his choice. It has also been argued that in old criminal appeals which are listed for final hearing and disposal suddenly after decades, circumstances may justify the absence of counsel to represent the Appellant and in such cases, service of bailable warrant to the appellant may facilitate engagement of a new Counsel as the appellant would derive knowledge of absence of his earlier counsel.

40. Sri S.M. Singh Royekwar has placed reliance upon a Full Bench decision of the Punjab and Haryana High Court, in *State of Punjab Vs. Bachitter Singh and others*, Criminal Appeal No.588 of 1971 rendered on 13.09.1971 and reported in 1972 (1) ILR (Punjab and Haryana). In

paragraph 10, the Court was dealing with Section 427 of the old Cr.P.C. 1898, which is corresponding to Section 390 Cr.P.C. 1973, and after quoting the language of the Section, the Court observed: –

“It is apparent even on a cursory perusal of the language above said that there exists no statutory bar whatsoever for the release on bail of persons against whom acquittal appeals have been preferred. The Statute draws no distinction whatsoever between appeals on charges and the others. In fact, the Section makes express provision for the grant of bail pending the disposal of such Appeal. Even the issuance of a warrant in the beginning is entirely discretionary and the Appellate Court, even at the initial stage of the admission of the Appeal may well stay its hand and remain content with directing a notice, summons, or bailable bonds without requiring arrest or apprehension of the respondent accused persons. – – – the intention of the legislature is highlighted and brought into bold relief when compared with similar provision, empowering the grant of bail to persons appealing against conviction. Section 426 (1) (2) Cr.P.C., is in the following terms: –

“426(1). Pending any Appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

“426(2). The power conferred by this Section on an Appellate Court may be exercised also by the High Court in the case of any Appeal by a convicted person to a Court subordinate thereto“

“Comparing the two provisions, it is obvious that whilst Section 426,

Cr.P.C. envisages the recording of the reasons for the suspension of the sentence and the grant of bail, no such restriction or qualification has been imposed by law under Section 427, Cr.P.C 1898. A wholly unfettered power is given under Section 427 Cr.P.C. 1898, to release the accused person on bail if at all their custody has been originally directed. Again in Section 427, bail may not only be granted by the High Court itself, but it may direct that the accused person may be brought before any subordinate Court and the power to admit such person to bail may be relegated to the subordinate Courts. Hence, far from suggesting any statutory bar, the relevant provisions of Section 427 Cr.P.C. 1828, exhibit an intention of the legislature, conforming with judicial dictum that the grant of bail is the rule and its refusal is an exception.”

41. Shri Royekwar has also referred to paragraph 17 of judgement rendered in *Praneeta Prakash Navage Vs. State of Maharashtra and others* 28.

42. Sri S.M. Singh Royekwar while arguing the matter has also pointed out that once the appellate Court decides to issue warrant of arrest to secure presence of the Appellant to facilitate the hearing of Appeal, it must specify a particular date by which it is returnable whether executed or not, and such cases be listed in the cause list for *priority hearing* with mention in the cause list itself whether such warrant bailable/non-bailable has been executed or not. In case a non-bailable warrant has been executed and the convict has been arrested and committed to jail, the Magistrate concerned must immediately send information to the High Court, without waiting for a specified date mentioned in the non-bailable warrant. If information

regarding execution of non-bailable warrant is received by the Court, the Section should list the Appeal forthwith for appropriate orders under *priority hearing* matters without waiting for specified date mentioned in the non-bailable warrant. Such priority hearing appeals in which bailable warrants or non bailable warrants have been executed should remain on board of the Court for hearing unless otherwise directed by the Appellate Court by specific reasoned order.

43. In a case where a warrant of arrest is issued under Section 390 Cr.P.C., the High Court must specifically mention whether after its execution the accused is to be brought before it or he has to be produced before any other subordinate Court. If the accused is to be brought before the High Court, then again immediately information has to be sent on his arrest to the High Court by the Magistrate concerned and the matter be listed in the list under the heading of “*priority hearing*”. Also the High Court while issuing the warrant may direct the subordinate Court that after execution of such warrant he be released on bail or committed to prison. In case the High Court leaves it open to the Subordinate Court to decide the application as per its discretion, the High Court should specifically mention by a separate order the particulars of the case, for example, the attending circumstances in which the warrant has been issued, the nature and gravity of the offence, the relevant antecedents of the accused, the nature of evidence, the age and medical condition, if any, of the accused and the duration of pendency of the Appeal and the last date of listing of such appeal in its order. The Magistrate must immediately inform the High Court regarding the arrest of the

accused once he was produced before it pursuant to such directions of the High Court.

44. Sri Naved Ali, while arguing on questions 1, 2 and 3 of the Referral order has referred to the inherent powers that can be exercised by the High Court under Section 482 Cr.P.C. and under Article 226 and 227 of the Constitution. He referred to the judgement rendered in *Popular Muthaiah Vs. State represented by Inspector of Police* 29, where the Supreme Court had observed that the High Court while exercising its Revisional or Appellate power may also exercise its inherent power, both in relation to substantive and also procedural matters, sometimes even *Suo Moto* in the interest of justice. No application is required to be filed therefor. However, power under Section 482 of the Cr.P.C. is not unlimited and has to be exercised by the Court only where the Cr.P.C. is silent. Where there is a specific provision in the Code such power will not be exercised. Power under Section 482 Cr.P.C. is exercised *Ex Debito Justitiae* and can do real and substantial justice.

45. Sri Naved Ali has argued that in *Sanjay Dubey Vs. State of Madhya Pradesh* 30. The Supreme Court while dismissing an Appeal filed by Inspector Incharge of a Police station against whom certain observations were made by the High Court while hearing a bail application, had observed that High Court is a Constitutional Court possessing a wide repertoire of powers. High Court has original, appellate and *Suo Moto* powers under Article 226 and 227 of the Constitution. The powers under Article 226 and 227 of the Constitution are meant for taking care of situations in which the High Court feels that some directions/orders are required in the interest of justice.

46. But in paragraph 14 of the judgement in Sanjay Dubey 30, the Supreme Court observed: –

“We are of the view that learned single Bench could have directed institution of separate proceedings taking recourse to Article 226 of the Constitution, after formulating reasons and points for consideration. Thereafter, the matter should have been referred to the learned Chief Justice of the High Court for placing it before an appropriate Bench, which would proceed in accordance withlaw, of course, after affording adequate opportunity to the person(s) proceeded against.”

47. It was argued by Sri Naved Ali that the Supreme Court recognized the inherent power of the High Court under Article 226 or 227 and even under Section 482 Cr.P.C. to issue necessary directions for the furtherance of justice. However, if any general or sweeping directions are to be issued, then the stakeholders who are being affected by it should be first heard or the question of law should be at first formulated and should be referred to the Chief Justice of that particular High Court, who would subsequently place it before the appropriate Bench.

48. Sri Naved Ali has also pointed out Chapter VI of the Cr.P.C., which deals with “*Process to Compel Appearance*“. Referring to Sections 70 and 71 of the Cr.P.C. and Form 2 of Schedule II of the Cr.P.C., it has been argued that it only talks of warrant of arrest. Hence, if the High Court issuing the warrant of arrest had in its discretion directed, in specific terms that the person against whom such warrant of arrest has been made, should execute a bond with sufficient sureties for ensuring

his attendance before the Court at a specified time and thereafter, then it would be termed as aailable warrant. However, if no such direction/ endorsement/ specification to take sureties has been made in terms of Section 71 of the Cr.P.C. on the warrant of arrest, then the said warrant of arrest would be deemed as a non-bailable warrant. The persons who are arrested would be brought before the Court who has issued the non-bailable warrant, and it would have an option to either send him to judicial custody/Police custody, or release him on bail. Hence, if an Appellate Court during a Criminal Appeal issues a non-bailable warrant, the power to cancel it rests only with the Appellate Court issuing it or if it is executed. The power to grant him bail lies only with the Appellate Court. The C.J.M. or any other Magistrate can only enlarge a person on bail if the appellate Court while issuing warrant of arrest specifies that sureties may be taken in the event of his arrest and in case, no such specification has been given in the warrant of arrest the Magistrate is bound to commit such person to custody and without delay, inform about its execution to the Appellate Court.

49. It has also been argued that assuming if a Magistrate is conferred with the discretionary power to grant bail, specially when the Appellate Court is seized with the hearing of an Appeal where records have been summoned, there has to be some substance of information or such documents as may be sufficient to enable the Magistrate to decide whether the bail should or should not be granted to such person when he is brought before him in execution of the warrant of arrest issued by the Appellate Court. The discretionary power of the Magistrate provided to him under Section 167 of the Cr.P.C. allows

him to exercise his discretion to either remand the accused to custody or to release him on bail but to determine the course to be adopted, a copy of the “*entries in the diary*”, have to be sent along with the person arrested as has been mandated under Section 167 (1) of the Cr.P.C. It has been argued that similarly, if a Magistrate after taking cognizance issues a subsequent process/warrant of arrest to an accused person and after execution of such process, the accused person is arrested and brought before the Court issuing warrant of arrest, such Court has documents before it from which it can consider as to whether such person is to be remanded to further custody or to be granted bail under Section 437 of Cr.P.C. Even if the accused is remanded to custody under Section 209B of the Cr.P.C., the accused has right to move a bail application under Section 439 Cr.P.C. before the Competent Court before whom the case has been committed.

50. If the warrant of arrest is to be executed outside jurisdiction in terms of Section 78 Cr.P.C., the Court issuing the warrant shall forward along with the warrant, the substance of information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Magistrate to decide whether the bail should or should not be granted to such persons. On the basis of Sections 71, 78, and 81 Cr.P.C., it has been argued that if at all the discretionary powers are given to the Magistrate by means of a direction, it is imperative that he ought to have some documents/substance on the basis of which he could exercise his discretion. However, since the procedure in law does not provide any such discretion to the Magistrate who is merely complying with the execution of the warrant of arrest, issued by the appellate Court, it would not

be appropriate to give any discretion to the Magistrate, except that which has already been provided under Section 71 of the Cr.P.C.

51. Reference has been made by Shri Naved Ali to the observations made by the Supreme Court in *State of U.P. Vs. Poosu and another* 31, and in *Indra Mohan Goswami and another vs. State of Uttaranchal*, reported in 2007 (12) SCC 1, where in the Courts were cautioned that-

“the power being discretionary must be exercised judiciously with extreme care and caution. The Court should properly balance both personal liberty and societal interest before issuing warrant. There cannot be any straightjacket formula for issuance of warrant, but as a general rule, unless accused is charged with the commission of an offence of a heinous crime, and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided”

52. It has been further argued that however, once such discretion is exercised by the Court, after due care and non-bailable warrant are issued, there is no necessity or requirement to issue blanket directions as have been issued by the Division Bench at Allahabad, to the Magistrate to grant bail to persons against whom such non-bailable warrant have been issued. It would only lie in the domain of the Appellate Court issuing such warrant to exercise the power to extend any respite to person against whom it has issued a non-bailable warrant and not to any other inferior Court.

53. In answer to question no.4, it has been submitted by Shri Naved Ali that

when an Appeal against acquittal is filed before the Appellate Court, the Court has the power to grant bail under Section 390 Cr.P.C. to the person against whom Appeal has been filed. In case of an Appeal against conviction also the appellate Court has power to suspend the sentence awarded to the accused under Section 389 Cr.P.C. and allow him to be on bail during pendency of his Appeal. In both cases, when the Court has exercised its power and has granted bail to the accused person, then it is implied that such accused person has undertaken to cooperate with the hearing of the Appeal by ensuring that his pleader will appear whenever the matter is listed and shall argue it without seeking unnecessary adjournment. However, if there is a continuous absence of Advocate, then Court should ordinarily issue a notice/summon (non coercive measure) to such a accused person, apprising him that conditions implied in the bail order have been violated by him and the Appellate Court shall consider cancelling his bail on the next date fixed or would appoint an Amicus to assist in hearing his Appeal. On the next date fixed, the Court may after verifying the service report, cancel the bail of such accused person and go on to hear the Appeal by appointing an *Amicus Curiae*. Reference has been made by Sri Naved Ali to the judgement rendered in the case of *Kabira Vs. State of U.P.* 32, where it has been emphasized that the Court should not dismiss an Appeal merely because of non-appearance of an Advocate and instead should appoint an Amicus Curiae and then proceed to dispose of the Appeal on its merit.

54. Similar view has been taken by the Supreme Court in the case of Mohammad Sukur Ali Vs. State of Assam 33; K. Muruganandam and others Vs. State 5.

55. It has been argued that the Supreme Court has comprehensively dealt with questions 4 and 5 in its various judgements and the same ought to be followed by this Court.

56. Sri Vikas Vikram Singh, along with Rajat Gangwar while arguing, the matter has adopted most of the submissions made by other learned Advocates and has also emphasized that the personal appearance of the accused respondent or the convict appellant is not ordinarily required in the High Court where they are represented by their Counsels. If however, in case the counsel fails to appear to assist the Court, the Court should direct issuance of summons to such person and after satisfaction of service of notice, bailable warrant may be issued. In case bailable warrants cannot be executed, then non-bailable should be issued. The warrants should be issued in vernacular language as the percentage of legal literacy in India is low. The contents of the warrant should be self-explanatory and should spell out the exact reasons for issuance of the warrant and the High Court should also provide a dedicated helpline or email address of officials responsible in the Section dealing with criminal appeals where the person against whom a warrant is issued may seek clarification, should the need arise.

57. With regard to question No.4, it has been argued by Sri Vikas Vikram Singh that an *Amicus* may be appointed by the High Court to facilitate the hearing of an Appeal. However, before doing so, intimation must be sent to the accused and should also be sent to the District Legal Services Authority. Details about District Legal Services Authority should also be sent to the accused Respondent/convict appellant and their contact number and

address should also be shared so as to ensure that a *bona fide* litigant should not suffer for negligence of his/her counsel. In case after appointment of Amicus a counsel appears for the accused, then the assistance of the Amicus Curie should not be dispensed with, and he should ordinarily be allowed to continue till the end of litigation as he is a friend of the Court. If on subsequent dates, the counsel for the accused again does not appear, the Amicus should be at liberty to proceed and to argue the matter independently. Also, while engaging an *Amicus* disclosure form should be taken from him or her that there is no conflict of interest in the matter and should any such conflict arise at any time, it should be brought to the immediate notice of the Court.

58. If the Court is satisfied that an accused has been enlarged in Appeal against conviction and he is deliberately avoiding appearance so as to delay the disposal of the Appeal, the Court may proceed to decide the Appeal with the help of the *Amicus Curiae* also simultaneously take steps to cancel the bail of the accused and proceed as per the provisions of Cr.P.C. Also, it has been suggested that a separate heading for such type of cases where non-bailable warrants have been issued by the Court should be shown in the list so as to enable the Court to decide such matters on the priority basis.

59. Sri Alok Mishra, Advocate, in answer to question 1 referred to by the Division Bench at Lucknow has stated that under Section 390 Cr.P.C., the Chief Judicial Magistrate or any Magistrate can release a convict on bail and the circumstances in which the Division Bench at Allahabad passed the orders dated 18.01.2024, and 19.01.2024 should be

taken into account. In both cases, a person acquitted by a trial Court was put in custody because a non-bailable warrant was issued by the High Court without giving power to the CJM to consider the special circumstances in which the respondent/accused was placed. The acquitted person was languishing in jail only because the Appeal could not be taken up as soon as the non-bailable were executed, and this fact could not be brought to the notice of the Court in time. It has been submitted by Shri Alok Mishra that even though the Division Bench at Allahabad, while issuing mandatory directions has encroached upon the discretion to be exercised by the Magistrate under Section 390 Cr.P.C., and has also not taken into consideration the judgement of the Supreme Court in the case of *State of U.P. Vs. Poosu* 31, still the Division Bench has done substantial justice and the order passed by the Division Bench at Allahabad should not be set aside, rather it can be modified, leaving it open for the CJM to consider the facts and circumstances of each case where the respondent, an acquitted person is brought before him on execution of non-bailable warrant only because his Advocate failed to appear and assist the Court when the Appeal came up for hearing.

60. It has also been argued that in so far as question No. 4 is concerned, Sections 81, 82 and 83 of the Cr.P.C. provide the modes for securing the presence of the accused/convict and the legislature has already taken care of the situation and the Court may not be required to pass any order in this regard.

61. It has also been argued that in so far as the question regarding appointment of *Amicus Curiae* is concerned, the

Supreme Court judgement in *Anokhi Lal Vs. State of Madhya Pradesh* 7 has dealt with the entire problem and laid down certain guidelines in paragraph 22 and 23 which must be followed by the Larger Bench and no separate orders are necessarily required to be passed.

62. Shri Alok Mishra has also placed reliance upon a judgement rendered by the Supreme Court in Criminal Appeal No.546 of 2011: *Mohd. Sukur Ali Vs. State of Assam* 33, decided on 24.02.2011, where the Supreme Court was considering the question – “whether in a criminal case, if the counsel for the accused does not appear, for whatever reasons, should the case be decided in the absence of the counsel against the accused, or the Court should appoint *Amicus Curiae* to defend the accused?”

The Supreme Court referred to a judgement rendered by the Supreme Court of United States of America in *Powel v Alabama* 287 U.S. 45 (1932); where it was observed: –

“What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired to be provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by Counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is in capable generally, of determining for himself, whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted

upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. He requires the guiding hand of a Counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by, and appearing for him, it reasonably may not be doubted That such refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.”

63. The above decision of the U.S. Supreme Court was cited with approval by the Supreme Court in *A.S. Mohammed Rafi Vs. State of Tamil Nadu and others* 34.

A similar view was also taken by the Supreme Court in *Man Singh and another Vs. State of Madhya Pradesh* 35, and in *Bapu Limbaji Kamble Vs. State of Maharashtra* 36.

64. Sri Ayush Tandon has drawn this Court’s attention to Chapter XVIII Rule (1) and (2) of the Allahabad High Court Rules which relates to presentation of appeals and applications for revision in criminal matters. The Court may not admit an Appeal if it finds that it is not complete as requisite papers are missing or is otherwise it is not in order or has not been presented within time, and it may also decline to receive it or rejected or pass such order as it may consider fit. Where the Court finds

that such petition or application is in order and has been presented in time and is accompanied by the requisite papers, it may in case of an Appeal, make an order admitting it and directing notice to be issued and in case of an application for revision, dismiss it or direct notice to be issued or pass such other order as it may think fit. The proviso to Rule (2) clarifies that nothing in the Rule shall preclude the Bench from dismissing any Appeal under Section 384 of the Cr.P.C., or require notice of an application to be issued where notice of such application has already been served upon the other party or his Advocate.

65. It has been argued that it is not always that presentation of Appeal leads to an order of admission. In case an Appeal is admitted, it is not always that a warrant or bailable or otherwise is issued. Sometimes the Court may only issue notice to the respondent while admitting the Appeal.

It has also been argued that though the Magistrate does not have power to release a person on bail, in case the High Court has ordered non-bailable warrants to be issued, he can take sureties and verify such authorities and copies of papers may be presented to the High Court for further orders.

66. Learned Government Advocate Dr. V.K. Singh, along with Sri Umesh Verma, learned A.G.A.-1 and Sri Shivendra Shivam Singh Rathore, in answer to question No.1 framed by the Division Bench at Lucknow, referred to the Full Bench decision of the Bombay High Court in Criminal Bail Application No.265 of 2012 in Criminal Appeal No.812 of 2011: *Balakrishna Mahadev Lad Vs. State of Maharashtra* 37. The judgement was delivered by Hon'ble Justice A.M.

Khanvilkar (as he then was). It was observed by the Full Bench at Bombay High Court as follows:-

“Similarly, if the High Court were to issue, non-bailable warrants, recording reasons, indicative of committing the accused to prison only, even in that case, the subordinate Court, before whom the accused is produced or appears in response to warrant so issued, will have no option but to commit such accused to prison. The sessions Court, however, can exercise its judicial discretion when the High Court in its order has not indicated either way to commit the accused to prison or to admit him to bail pending the disposal of the Appeal. In other words, if the High Court, in its order merely directs initiation of action under Section 390 of the Code and if the accused is produced before the subordinate Court, it would be open to the subordinate Court, after taking into account all aspects of the matter, either to admit the accused to bail on such terms and conditions as it may deem fit, keeping in mind that the same are essential to secure the presence of the accused when required in the pending Appeal or to commit him to prison. That judicial discretion has to be exercised on the basis of settled parameters, inter-alia, keeping in mind the question, as to whether releasing the accused on bail would hamper securing his attendance pending the disposal of the Appeal, in the High Court.

67. The Apex Court in the case of *State of U.P. Vs. Poosu and another*³¹, has observed that it is not possible to computerize and reduce into immutable formula the diverse considerations on the basis of which this discretion must be exercised. By way of illustration, the Apex Court has referred to factors such as, the

nature and seriousness of the offence, the character of the evidence, interest of the public and the State. The High Court, while issuing a bailable or non-bailable warrant, also has to take into consideration the period during which the proceedings against the accused were pending in the Court below and the period which is likely to elapse before the Appeal comes up for final hearing in the High Court. The Apex Court has noted that directing rearrest of the accused even when the Appeal against acquittal is still pending for disposal or committing the accused to prison, does not in any way offend Article 21 or any other Fundamental Right guaranteed in Part III of the Constitution of India, for, it does not deprive the accused of his liberty in a manner otherwise than in accordance with the procedure established by Law.”

68. With regard to question No.2, the learned A.G.A. has pointed out another paragraph of the judgement referred to hereinabove, namely *Balakrishna Mahadev Lad* 37, where it was observed: –

“We are of the considered opinion that Section 390 of the Court cannot be read to mean that the Sessions Judge, on production of the accused, has no option but to immediately release him on bail. Instead, we hold that the subordinate Court before whom the accused is produced first with regard to the warrant issued in terms of the order of the High Court, must exercise its judicial discretion on case to case basis and in particular keeping in mind, the order of the High Court, passed in the pending Appeal against acquittal in that regard. This would pre-suppose that the Sessions Judge, in an appropriate case, can commit the accused to prison till the disposal of the Appeal. Indeed, in that case, it will be open to the

accused to question the decision of the Sessions Judge before the High Court, in which proceedings the High Court may consider the claim of the accused for grant of Bail. Thus understood, grant of bail by the subordinate Court is not a matter of right.”

69. With regard to question No.3, as referred to us, Sri Verma has argued that it would be appropriate to refer to Section 386 of the Cr.P.C. 1973, which talks about the powers of the Appellate Court, which is being reproduced hereunder: –

“Section 386, powers of the Appellate Court:-

“After perusing, such record and hearing the appellant or his pleader, if he appears, and the public prosecutor, if he appears, and in the case of an Appeal under Section 377 or Section 378, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the Appeal or may –

a. In an Appeal from an order of acquittal reverse such order and direct that further enquiry be made, or that the accused be retried or committed for trial, as the case, maybe, or find him guilty and pass sentence on him according to Law;

b. In an Appeal from a conviction –

(i) Reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction, subordinate to such appellate Court or commit for trial,

or

(ii) Alter the finding, maintaining the sentence, or

(iii) Without altering the finding, alter the nature or the extent, of the sentence, but not so as to enhance the same;

c. In an Appeal for enhancement of sentence,

(i) Reverse the finding and sentence and acquit, or discharge the accused, or order him to be retried by a Court competent to try the offence,

(ii) Alter the finding maintaining the sentence,

(iii) With or without altering the finding, alter the nature or the extent of the sentence, so as to enhance or reduce the same.

d. In an Appeal from any other order, alter, or reverse such order;

e. Make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced, unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion, the accused has committed, than might have been inflicted for that offence by the Court, passing the order or sentence under the Appeal.

70. Sri Umesh Verma has argued that from a perusal of Section 386 of the Code, it is clear that while hearing the Appeal, the power of the High Court is very wide and there is no express/specific bar regarding the extent of such power, but as a matter of judicial discipline and propriety, the Appellate Court cannot assume extraordinary original criminal jurisdiction, not conferred in it while hearing the Criminal Appeal, as it affects the vital and valuable rights of the parties in such a manner which would cause serious injustice to them.

71. Sri Verma has pointed out that Under Chapter XVIII of the Allahabad High Court Rules, 1952, Part D, Rule 10 and Rule 11 deal with ordinary Criminal Jurisdiction of the Court other than that of Trials.

72. It has been argued by Sri Verma that the hearing of matters before Division Benches of the High Court are strictly done in accordance with the Rules governing allocation of business/roster allocation under Allahabad High Court Rules 1952, and if a particular subject matter is allocated to a particular Bench, the same must be heard and decided by that particular Bench, and not by any other Bench, and therefore, if cognizance of any matter is taken by a Bench to which the matter is not allocated by the Hon'ble Chief Justice, the order passed by that Bench would be in excess or in absence of jurisdiction and liable to be treated as a nullity.

73. It has been submitted by the learned counsel that the orders dated 18.01.2024 and 19.01.2024 at Allahabad have been passed as general directions by a Division Bench sitting in Criminal Appeal jurisdiction and, therefore, in excess of and in the absence of jurisdiction allocated to it by the Chief Justice.

74. It has also been argued that not only did the Division Bench at Allahabad exercise jurisdiction which was not vested in it by way of allocation of roster by the Chief Justice, it has passed orders which are without jurisdiction as the directions amount to taking away the discretion vested in the Magistrate under Cr.P.C. to grant or not to grant bail in serious offences.

There is a distinction between exercise of jurisdiction and existence of jurisdiction. Both are fundamentally different. Consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction may render a decision a nullity in law. The authority to decide a cause at all and not the decision rendered therein, is what makes up jurisdiction and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case shall be treated as an exercise of the jurisdiction.

75. In the matter of *Kiran Singh Vs. Chaman Paswan*, AIR 1954 Supreme Court 340, the Court observed that a defect of jurisdiction – – – strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by the consent of parties.“ The Division Bench at Allahabad was hearing a Criminal Appeal and had particularly limited jurisdiction of subject matter. It was considering the bail application during pendency of the Appeal and as such, there was no occasion for the Division Bench at Allahabad to travel beyond the subject matter, and also to pass directions on issues which were not there for its determination.

76. The Division Bench at Allahabad possibly invoked its jurisdiction conferred under Article 226, along with Section 482 of the Cr.P.C. Its directions were strictly not in accordance with the provisions of Sections 378, 386 and 390 of the Cr.P.C..

Invoking jurisdiction under Article 226 of the Constitution read with Section 482 of Cr.P.C. for issuing directions while sitting in Criminal Appeal jurisdiction was beyond the scope of jurisdiction of the Division Bench at Allahabad.

77. Shri Verma has pointed out that the directions that were issued by the Division Bench at Allahabad were without noticing the rights of the victims recognized by way of an Amendment to Section 372 with effect from 31.12.2009. A Court while hearing the bail application in a particular case does not have enough information as to issue a general mandatory direction which can have the potential to cause great harm to victims in appeals against conviction, or even appeals against a acquittal without them being afforded an actual and meaningful opportunity to place their case. In *State of Punjab Vs. Davinder Pal Singh Bhullar and others* 38, the High Court after deciding the Appeal continued to pass orders with respect to other offenders in unconnected matters, and the Supreme Court observed that such invocation of jurisdiction outside the purview of the main case was unjust. It observed “*an inherent power is not an omnibus power for opening a Pandora’s box, that too for issues that are foreign to the main context. The invoking of power has to be for a purpose that is connected to a proceeding and not for sprouting an altogether new issue. A power cannot exceed its own authority beyond its own creation. – –.*”

78. Such directions as have been issued by the Division Bench at Allahabad not only have far-reaching consequences on the administration of Justice, but also on the State Exchequer as the Division Bench had directed payment of costs /compensation to such prisoners who were put behind the bars on the orders of the Court during the pendency of the Appeal.

79. The learned A.G.A. has pointed out that the answer to the question No.4 lies in Chapter VI of the Cr.P.C., wherein the

Forms as well as the methods for securing the presence of the accused is prescribed. In addition, the Allahabad High Court Rules 1952, also empowered the High Court to secure presence of the accused through issuance of warrant during the pendency of the Appeal. Hence, issuing general directions to grant bail cannot be treated to be a sound exercise of power, and are liable to be set aside as being *per incurium* that is having been issued in ignorance of statutory provisions as given under Chapter VI of the Cr.P.C., but also in ignorance of the observations made by the Constitution Bench in the case of *State of U.P. Vs. Poosu and another* 31.

80. Sri Verma, while answering question No.5 has referred to a judgement rendered by the Supreme Court in the case of *Krishna Kumar Vs. State of U.P.* in Criminal Appeal No.3757 of 2023 decided on 01.12.2023. It was observed by the Supreme Court that: –

“This Court has repeatedly taken the view that in a given case where an unwarranted adjournment is sought by the Advocate representing the accused in the Appeal against conviction, the Court has an option of appointing an Amicus Curiae to espouse the cause of the accused and hearing the Appeal on merits. The said course should have been adopted by the High Court.”

81. It has been argued by Sri Umesh Verma, learned A.G.A.-1 that there are four types of criminal trials in the Cr.P.C. 1973. Firstly, under Chapter 18, trial before a Court of Sessions is dealt with under Sections 225 to 237. Then under Chapter 19, Trial of warrant cases by Magistrate has been provided for in Sections 238 to 250. Likewise, under Chapter 20 Trial of

Summons cases by Magistrate is provided under Sections 251 to 259, and under Chapter 21, summary trial cases are provided for in Sections 260 to 265.

“Summons cases” and “warrant cases” have been defined under Section 2 of the Code as under –

2(w) Summons case means a case relating to an offence, not being a warrant case;

2(x) Warrant case means a case related to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding ten years.

It has been argued that if we take into account the definition of Summons case and a Warrant case, it is evident that every Sessions Trial is a Warrant case and in case of acquittal when the Appeal is preferred by the State against the order of Sessions Judge, acquitting the accused persons, after the leave required under Section 378 sub-clause (3) is granted, a warrant of arrest is issued in terms of Section 390 Cr.P.C. by the High Court. It is a general practice adopted in the Allahabad High Court that at the first instance in an Appeal against the acquittal,ailable warrants are issued with a direction to the concerned Court to release the accused on filing of his personal bond and two sureties of the like amount to the satisfaction of the Court concerned, and only in a given case under compelling circumstances when the process of issuance ofailable warrant is being deliberately not complied with, and the orders passed by the High Court come to be frustrated, then the High Court to ensure the presence of the respondent, issues non-ailable warrant against the respondent and as such to that extent, the provision of Section 390 Cr.P.C. appears to be in tune with the scheme of the Cr.P.C.

because after admission of an Appeal against acquittal and issuance of warrant/non bailable warrant the status of the accused is restored as an accused of a warrant trial case as postulated in the judgement rendered by the Supreme Court in the case of *State of Vs. Poosu and another* 31.

82. Sri Verma has also drawn the attention of this Court to the First Schedule appended to the Cr.P.C., describing the Section, offence and punishment provided under the I.P.C. The table describes whether offence is cognizable or non-cognizable and whether bailable or non-bailable and also by what Court the offence is triable. It has also been argued that on the basis of classification of offences under the First Schedule and the Second Schedule of the Cr.P.C., it is abundantly clear that the offence under the I.P.C. or under any other laws for which punishment is of more than seven years or imprisonment for life or death has been prescribed as cognizable, non-bailable and triable by the Sessions Court (barring some exceptions like Section 467 I.P.C.). In these cases, normally the courts of Magistrate including Chief Judicial Magistrate, even at the pre-trial stage, avoid/refuse to exercise the jurisdiction to grant bail. Similarly, when in a case tried by the Sessions Court acquittal is recorded, which is challenged before the High Court by the State under Section 378 Cr.P.C. or challenged by a victim of the offence as prescribed under the amended provision of Section 372 Cr.P.C. and the High Court while entertaining the Appeal, after considering the facts and circumstances, is satisfied with the merits of that particular case admits the Appeal and directs for issuance of warrant of arrest against the accused/respondents in the light of the provisions of Section 390 Cr.P.C., it

may also issue direction to the Magistrate to grant bail on certain terms prescribed in the order itself, and the concerned Court or the Magistrate is left with no option except to comply with the terms of the order issued by the High Court.

83. It has also been argued by Sri Umesh Verma that in certain special Statutes like the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act 1989, after an amendment was notified with the effect from 26.01.2016, and in another special Statute, namely National Investigation Agency Act, 2008, there is a provision for creation of special and exclusive jurisdiction in Special Courts and further a provision for special procedure for filing an Appeal from any judgement, sentence or order, not being an interlocutory order, to the High Court, both on facts and on law. The distinction of an Appeal against a conviction or acquittal has been done away with in these special statutes and as such either an accused aggrieved from an order of conviction or the State or victim/complainant, as the case maybe, feeling aggrieved by the order of a trial Court, may prefer an Appeal to the High Court under Section 14 A of the S.C./S.T. Act 1989 or under Section 21 of the National Investigating Agency Act 2008. Similarly, Special Courts for dealing with cases of M.P./M.L.A. have been created under the orders of the Supreme Court passed in a P.I.L. The special provisions regarding power and jurisdiction of a Special Court where a procedure is prescribed for treatment of the accused and the victim in the said special statutes, does require consideration while deciding issues involved in the instant Reference and answering the questions referred to this Full Bench.

84. Sri Umesh Verma has also drawn this Court's attention to the powers of the

Appellate Court provided under Section 386 of the Cr.P.C.

It has been argued on the basis of Section 386 Cr.P.C. that it requires the presence of the appellant or a pleader/Advocate at the time of hearing of the Appeal and in case at the time of hearing of the Appeal, the appellant or his pleader does not appear to assist the Court in hearing of the Appeal the Appellate Court is empowered to issue aailable or nonailable warrant taking into account the particular facts and circumstances of a case.

85. Sri Umesh Verma taking a divergent view to the arguments made by several other counsel who assisted this Court, argued that Chapter VI of the Cr.P.C. provides for process to compel appearance, and Part B relates to warrant of arrest, which is comprised of Sections 70 to 81. A reading of Sections 70 to 81 clearly demonstrates that they are made for the help of the Investigating Agency and the trial Court or Magistrate during the continuation of the investigation and thereafter for the assistance of the Magistrate or the Trial Court at the stage of trial, where during the course of the proceeding at various stages, the presence of the accused is necessary. These provisions are not to be resorted to at the stage of Appeal wherein the accused after a full-fledged trial has either been convicted or acquitted. Sri Umesh Verma has drawn our attention to the language and text of various Forms of Warrant appended to the Cr.P.C. after the First and Second Schedule, which make this abundantly clear.

86. Reference has been made to Form No.2 relating to Sections 70 and 71, Form

No.3 relating to Section 81. It has been argued that Sections 82 and 83 relate to proclamation of attachment of property of the accused if absconding, and have no application at the stage of hearing of an Appeal particularly in an Appeal filed against acquittal. Therefore, the directions issued by the Division Bench of this Court in paragraph 7 (a) and (b) of the judgement and order dated 18.01.2024 in the case of *State of U.P. Vs. Geeta Devi and another*, is not in accordance with the scheme of the Code and contrary to the provisions of special statutes like S.C./S.T. Act, N.I.A. Act and Special Courts created under them and also in respect of M.P./M.L.A. cases. It also violates the valuable rights of the victims of S.C./S.T. Act, 1989 and P.O.C.S.O. Act 2012, besides the victims who had been given an valuable right to prefer an Appeal against acquittal without asking for Leave to Appeal as provided in proviso to Section 372 Cr.P.C. The directions given in other sub paras, namely (c) and (d) also appear to be in excess of jurisdiction and have been passed in public interest while the Court was sitting in Criminal Appeal jurisdiction.

87. It has also been argued by Sri Umesh Verma that a Criminal Appeal is filed in the High Court against the order of the Sessions Court and not against the order of the C.J.M., the papers relating to the Criminal Appeal/judgement in the Sessions Trial are preserved in the Court of Sessions and the CJM has no papers with him to assess the probability of the appellant accused continuing to appear before the Appellate Court or about his future conduct and his cooperation in the disposal of the Appeal and, therefore, he cannot be given the discretion to grant bail in a case where the High Court has issued non-ailable warrants.

It has been argued that Section 81, 85 and 88 of the Cr.P.C. are meant for under trial prisoner alone.

88. Sri Umesh Verma has placed reliance upon a judgement entered in the case of *Amin Khan vs. State of Rajasthan*, where the Appellate Court had issued non-bailable warrant in the first instance looking into the heinous nature of the crime and also being *prima facie* dissatisfied with the judgement of the Trial Court. It has been submitted that if the Appellate Court has passed an order issuing non-bailable warrants, looking into the nature of the offence committed and the apparent erroneous judgement of the Trial Court, it would be a travesty of justice to allow the Chief Judicial Magistrate to grant bail to the accused. It has been emphasized that the C.J.M. can have discretion to grant bail only during trial under Sections 437 and 439 of the Cr.P.C., but when the Appeal is before the High Court, he must not be given discretion to grant bail on his own without there being a specific direction in this regard by the High Court.

89. It has been submitted that sureties submitted under Section 437-A are effective only for a period of six months and this Section was introduced only because the accused were non-traceable, after acquittal in most cases by the time the Appeal was filed before the higher Court. The counsel for the State Respondent has also pointed out Section 390 Cr.P.C. and the judgement rendered in *Surya Baksh Singh*. It has been argued that if the operation of the order of conviction is stayed by the Court on being *prima facie* satisfied with the the argument of the convicted appellant, then only because of non-appearance of the Counsel for the Appellant, it would not be proper to issue

non-bailable warrants. It would be on the other hand required that Court should first cancel the bail order or issue notice to the authorities, and then perhaps on failure of compliance of such orders and continued non-appearance of the appellant, thus, hampering the disposal of the Appeal, a non-bailable warrant could be issued. In *Surya Baksh Singh*, the Supreme Court observed that only after exhaustion of process under Section 446 of the Cr.P.C., the Court can decide the matter on merits.

90. It has also been argued by Sri Umesh Verma that an Appeal can be filed against conviction or against an acquittal or even for enhancement of sentence and under Section 384 and 385. On such Appeal being filed record should first be summoned. Referring to Sections 384, 385 and 386, the Supreme Court had in the case of *Mallikarjun* observed that summoning of records is necessary. It has also been argued that Section 437 and 439 are only confined to under trials. Also, Section 390 Cr.P.C. is applicable only at the stage of admission of the Appeal. Under Section 389, the convicting Court can release on bail and on furnishing sureties, but such sureties are only for a limited period.

91. Shri Verma has placed reliance upon judgement rendered in *Laxman Das Vs. Resham Chand Kalia and another* 39, and paragraph 24 thereof to argue that the High Court cannot command the Trial Court to grant bail and, thus, breach the independence of the Trial Court.

92. Sri Verma has buttressed his argument regarding the power of this High Court under Section 390 Cr.P.C. to suspend the order of acquittal or discharge passed by the Trial Court. He has referred to paragraph 11 of the judgement rendered in

State of Maharashtra Vs. Mahesh Kariman Tirky and others 40, where the Supreme Court in para-11 observed that “it is not in dispute that even considering Section 390 Cr.P.C. and the decision of this Court in the *State of U.P. Vs. Poosu* 31, the Court in Appeal against acquittal may/can even suspend the order of acquittal/discharge passed by the Appellate Court....”

The principles may be said to be settled, the difficulty very often arises in their applicability. No two cases are alike. As stated by Lord Viscount Simon in 1952 (1) AER 1044 :-

“it must be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the Court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances.”

93. Sri Verma has placed reliance upon paragraphs 355, 356, and 357 of the judgement rendered in *Laxman Das Chagan Lal Bhatia and others Vs. State* by the High Court of Bombay 41, which are as follows:

“355. — — — after filing the Appeal, he obtained bail from this Court. Within a short time, thereafter, he not only jumped bail, but has run away from this country and he is no longer subject to the process of this Court. The question is how his Appeal should be dealt with.

“356. It is against all reason that this Court should be compelled to hear the Appeal on merits, even though the accused has, after obtaining bail removed himself out of the jurisdiction of this Court. If that was so, he would take a chance of success in the Appeal and return to the country

triumphant if his Appeal is allowed, but if his Appeal is dismissed, he would say he cares little for the orders of the Court. Unless, therefore, there is any obligation on the Court to hear the Appeal, the Court would be justified in dismissing it only on this ground.

“357. Section 423 (1) of the Criminal Procedure Code 1998 deals with the powers of the Court to dispose of an Appeal after it is admitted. It requires the Court to decide after perusing the record and hearing the appellant or his pleader if he appears. This Section would suggest, therefore, that even if the appellant does not appear to argue his Appeal, the Court ought to hear the Appeal on merits. It is because of this wording, that it has been held in a large number of cases that merely because the appellant does not appear, his Appeal cannot be dismissed for default. Even so, the principle of this Section cannot apply to the case of An appellant, who has obtained bail and jumped bail. Along with the Section must be read Section 561A, which speaks of the inherent power of the High Court to make such orders as maybe necessary to give effect to any order under the Code, how to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is undoubtedly an abuse of the process of this Court to obtain bail and then to leave its jurisdiction and render it impossible to enforce its orders. In as much as the other provisions of the Code do not limit this power of the High Court to prevent an abuse of the process of the Court, in our view, we will be justified in refusing to hear the Appeal on merits and dismiss it in Limine. In this connection, it may be noticed that the practice of the Court of Criminal Appeal in England, where the appellant escapes from prison and is not present at the hearing of the Appeal, is

either to Adjourn the Appeal or to dismiss it according to the justice of the case. (See 1965 (3) AER 669) no doubt the English practice cannot have relevance when we have to construct the Code of Criminal Procedure. We have referred to it only to show that there can be no injustice in dismissing an Appeal, where the appellant has jumped bail and does not appear in Court. In the result, Appeal No. 625 of 1963, by accused No. 11 fails and is dismissed."

In *Imtiyaz Raza Khan Vs. State of Maharashtra* 42, the Supreme Court was considering Article 21 and the right to proper legal representation on the part of the accused lodged in jail. The Court noted that because the Amicus Curiae does not have the advantage of having a dialogue with the accused, at times, it seriously hampers the efforts on the part of the Advocates. All such attempts to facilitate dialogue between the Counsel and his client would further the cause of justice and make legal aid meaningful. The Supreme Court observed:-

"We, therefore direct all Legal Services Authorities/Committees in every State to extend similar such facilities in every criminal case, wherever the accused is lodged in jail. They shall extend the facility of video conferencing between the Counsel on the one hand and the accused or anybody in the know of the matter on the other, so that the cause of justice is well served."

94. We have heard learned counsel appearing before us at length and a perusal of the orders dated 18.01.2024 and 19.01.2024 passed by the Division Bench at Allahabad, would reveal that the said bench was not in agreement with the

procedure followed by the Court in the said appeal wherein the judgment of acquittal passed by the trial court has been challenged, as in the opinion of the division bench issuance of non-bailable warrants would mean that the police authority will execute them and produce the concerned person before the High Court. However, in the appeals before the division bench despite being acquitted by the trial court, the respondents/accused persons were in judicial custody for more than one year, as they were arrested in execution of non-bailable warrants issued by the High Court and while considering Section 390 of the Cr.P.C. and the law laid down by the Division Bench of the Bombay High Court, directed the Director, Judicial Training and Research Institute, Lucknow to impress upon the Chief Judicial Magistrates of the State to release such accused persons on bail who have been arrested in execution of non-bailable warrants issued by the trial court subject to them furnishing bail bonds and an undertaking to appear before the High Court. Similar directions were given with regard to those appellants who have been arrested in pursuance of the non-bailable warrants issued against the appellants in appeals preferred against conviction wherein sentence has been suspended by the High Court. The Division Bench at Allahabad appears to have passed above-mentioned orders in appeals preferred against acquittal of the accused persons.

95. The Division Bench at Lucknow appears to be more concerned with the far reaching consequences of the omnibus directions issued by the Division Bench at Allahabad in the above-mentioned criminal appeals and also with regard to the jurisdiction of the Magistrate to release an appellant on bail who has been arrested in

execution of non-bailable warrants issued by the High Court either in appeal against conviction or in appeal against acquittal, exercising powers contained under Section 437 of the Code of 1973 and also whether general directions of such nature could have been issued in hearing of a appeal.

96. Now we proceed to consider questions referred to this bench and are of the view that question nos. 1, 2 and 3 are interconnected and must be considered conjointly, while question no.5 is with regard to the appointment of Amicus Curiae and should be dealt with separately. However, in our considered opinion, it is the question no.4 which must be dealt with precedence as all other questions appears to be emerging out of the same. We for the sake of convenience would deal the issue separately with regard to the criminal appeals filed against acquittal (U/s 372 and 378 of the CrPC) and appeal against conviction (U/s 374 CrPC).

Appeal against acquittal

97. In an appeal against acquittal if the same has been filed by the State under Section 378 of the Code of 1973 and after grant of necessary leave, the Court finds a *prima facie* case is emerging for reconsideration seeks presence of the accused, who has been acquitted by the trial court, Section 390 of the Cr.P.C. would come into play, which is being reproduced as under:-

"390. Arrest of accused in appeal from acquittal.- When an appeal is presented under Section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him

to prison pending the disposal of the appeal or admit him to bail."

98. Section 427 of the Code of 1898 corresponding to Section 390 of the Code of 1973, was considered in detail by Hon'ble Supreme Court in ***Poosu (supra)*** 31 and the issue before the Apex Court was whether while granting leave or to say Special Leave in certain cases the Court is having power to issue non-bailable warrants for the arrest of the accused person, who has been acquitted by the High Court and after in depth analysis of the issue, the Supreme Court was of the view that the power to cause the arrest and detention of the accused in prison, pending appeal against the order of acquittal is ancillary and necessary for the effective exercise of jurisdiction in an appeal preferred against an order of acquittal. The Constitution Bench was also of the view that when the Court is satisfied that order of acquittal requires interference and process is required to be issued to the respondent/accused, his status as accused person would revive and his position would be the same as was before the Trial Court. However, while considering whether the presence of such accused person should be ensured by issuing bailable or non-bailable warrants, the same was left entirely on the discretion of the Court. The relevant extract of the observation of the Hon'ble Supreme Court in ***Poosu (supra)*** 31 is being reproduced as under:

".....whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant is a matter which rests entirely in the discretion of the Court. Although, the discretion is exercised judicially, it is not possible to computerise

and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court would take into account the various factors such as, "the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, tampering with evidence, larger interest of the public and State"-see The State v. Capt. Jagjit Singh(2). In addition, the Court may also take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing before this Court. In the context, it must be remembered that this over-riding discretionary jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the order of acquittal recorded by the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice.

"..... Nor do we (we do not) find any merit in the contention that an order directing the re-arrest and detention of an accused- respondent who had been acquitted by the High Court of a capital offence, in any way, offends Article 21 or any other fundamental right guaranteed in Part III of the Constitution. Such an order is made by this Court in the exercise of its plenary jurisdiction conferred by Article 136 and 142 of the Constitution. By no stretch of imagination can it be said that such an order deprives the accused-respondent of his liberty in a manner otherwise than in accordance with procedure established by law."

99. Thus perusal of above constitution bench judgment rendered in Poosu (supra)31 would reveal that in an appeal against acquittal,

if the same has been preferred by the State and the Court find substance therein, it may secure the presence of the accused person by either issuing a bailable or non-bailable warrant as the case may be, depending upon the factual matrix of each case, but the ratio laid down in Poosu (supra) 31 in our considered opinion may never be construed to read in terms that a Court issuing process against an accused person acquitted by the trial court or by the High Court in an appeal preferred must necessarily issue bailable or non-bailable warrants, if his presence may be secured through any other mode e.g. summons or notice, as the case may be.

100. In our opinion the word 'may' occurred under Section 390 of the Code of 1973 may not be used as 'must' or 'shall' and in appropriate case the Court may also issue process of summons to procure the presence of the accused person before it, however, it will be within the discretion of the Court issuing process to either issue summons, bailable or non bailable warrants and in this regard no straight jacket formula of universal application may be formulated. Every criminal case is having its own factual matrix, circumstances and flavour and a decision in the back drop of the specific facts and circumstances of that case may be taken by the Court, having regard to the peculiarities of that very case.

101. Having regard to the specific facts and circumstances of a case process of summons, bailable warrants or even of non-bailable warrants may be issued under Section 390 Cr.P.C. against the accused persons to procure their presence, however, the Court issuing process would be obliged to state reasons if it chooses to issue non-bailable warrants, directly.

102. The Bombay High Court in **Praneeta Prakash Navage v. State of**

Maharashtra 28, while considering Sections 372, 378, 390 of Code of 1973 Cr.P.C. opined as under:-

"16. Thus, apart from inherent power of this Court under Section 482 of the Cr.P.C., in case of an appeal against acquittal governed by provision to Section 372 of the Cr.P.C., the power to order arrest and detention of the respondent accused in prison pending the final disposal of the appeal or directing his enlargement on bail, will have to be read as a power ancillary to and necessary for effective exercise of the power of appeal under the proviso to Section 372 of Cr.P.C. But for the existence of such an ancillary power, the right conferred by the legislature on the victim to prefer an appeal against acquittal will become ineffective and redundant. This cannot be the intention of the legislature.

"17. However, while dealing with the power of issuing warrant and detaining the respondent accused in prison or enlarging him on bail, this Court will be naturally bound by the well settled law. One of the foremost considerations while exercising such power will be that an order of acquittal further strengthens the presumption of innocence of the accused. As in case of Section 390 of the Cr.P.C., it is not mandatory that at the time of admitting the appeal that power to arrest should be exercised in each case. The said power can be exercised at any stage of the appeal against acquittal. In the appeal under the proviso to Section 372, after appeal is admitted by this Court, notice of the appeal is required to be issued to the respondent accused. The question of exercising power as aforesaid, of issuing arrest warrant and detaining the respondent till disposal of the appeal or enlarging him on bail, will have to be

exercised at appropriate stage after taking into consideration various aspects such as gravity of the offence, nature of the evidence adduced by the prosecution, background and criminal antecedents of the respondents, etc. No hard and fast rule can be laid down in that behalf. If after service of notice of the appeal under the proviso to Section 372, the respondent accused appears and is represented by an advocate and if there is an assurance given that the said respondent will appear at the time of final hearing, this Court can always postpone the action of issuing warrant against the concerned respondent. If this Court finds that, after service of notice of the appeal, the respondent does not cause appearance before the Court, at that stage, this Court can always issue warrant to the respondent and can either direct confinement of the respondent till disposal of the appeal or the release of the respondent on appropriate bail. It all depends on the facts and circumstances of each case. Suffice is to say that such a drastic power need not be exercised in every appeal at the stage of admitting the appeal, the reason being that in absence of applicability of Section 390, the exercise of the said power will be under Section 482 of the said Cr.P.C. The law is well settled that the power under Section 482 of the Cr.P.C. can be exercised sparingly and in rare cases.

"18. Now, we turn to the next category of appeals under the proviso to Section 372. The next category is of an order convicting the accused for a lesser offence. It is true that even in this category of appeals, inherent power as stated above can be exercised by this Court. However, in case of such appeals, there will be further constraints. If the accused has already undergone substantial sentence for the lesser offence, it will be an additional

consideration for exercise of power of issuing warrant. If the respondent accused has preferred an appeal against the order of conviction and if he is enlarged on bail in such appeal, it is obvious that this Court may not exercise inherent power in the appeal preferred at the instance of the victim by ordering warrant to be issued against the respondent and directing his detention in prison.

"19. As far as the third category of appeals against order of imposing inadequate compensation is concerned, we must note here that the power of issuing warrant and directing his confinement till the disposal of appeal cannot be exercised as the appeal is confined only to order granting inadequate compensation.

"20. At this stage, we must add that, in case of all three categories of appeals, there is always a power conferred on this Court under Chapter VI of the Cr.P.C. to issue process for compelling the appearance of the respondent before the Court. We may hasten to add that the power under Chapter VI is of compelling the appearance before the Court and the said power is not a power to confine the respondent in custody till the disposal of the appeal. Therefore, all these three categories of appeal, if this Court finds that after service of notice appeal of the victim, the respondent has not caused appearance or after service of notice, respondent accused fails to appear, the Court can always take recourse to provisions of Chapter VI for procuring and compelling presence of the respondent accused before this Court.

"23. Considering the peculiar nature of the appeal under proviso to Section 372 of Cr.P.C., even if there is no specific direction by this Court while admitting the appeal to issue notice, it is obvious that notice of appeal will have to

be served upon the respondent accused. After service of notice, the Registry will have to place such appeals before the concerned Court so that Court can ascertain whether the respondent accused has caused the appearance in the appeal on the basis of the notice of the appeal. If the Court finds that notwithstanding service of notice, the respondent has not caused appearance, this Court can always take action as we had discussed in earlier part of the judgment."

103. The Division Bench of the Bombay High Court was of the view that in an appeal against acquittal or conviction under Section 378 or 374 of the Code of 1973 as the case may be, process under Chapter VI of the Code may be issued to compel the appearance of the accused before the Court, except in appeal against conviction in a lesser offence or appeal against inadequate compensation as the convict/ accused himself might have challenged the judgment and order of conviction by filing an appeal under Section 374 of the Code of Criminal Procedure and might have been released on bail by the appellate court., during the pendency of such appeal.

104. At this juncture it is also worthwhile to discuss the law propounded by the Hon'ble Supreme Court in ***State of Maharashtra Vs. Mahesh Kariman Tirki, (2022)10 SCC 207*** has opined as under:

"11. It cannot be disputed and it is not in dispute that even considering Section 390 Cr.P.C. and the decision of this Court in State of U.P. v. Poosu [State of U.P. v. Poosu, (1976) 3 SCC 1 : 1976 SCC (Cri) 368] , the appellate court in an appeal against acquittal may/can even suspend the order of acquittal/discharge

passed by the appellate court. Therefore, it is not disputed that this Court can suspend the judgment and order passed by the High Court acquitting/discharging the accused."

105. The Full Bench of the Bombay High Court in **Balkrishna Mahadev Lad V. State of Maharashtra** 37 while considering the same issue, has opined as under:-

"5. Notably, the above said observations have been made without referring to the legal position expounded by the Apex Court in the case of Poosu (supra). Indubitably, a person who is acquitted of the criminal charges, by a Court of law, should not remain in jail even for a day after acquittal. But, that does not necessarily follow that the subordinate Court, before whom the acquitted accused is produced, in connection with the order passed by the High Court in an appeal against his acquittal, cannot commit him to prison even if the fact situation so warrants.

"8. A bare perusal of this provision leaves no manner of doubt that the High Court is expected to exercise its judicial discretion on case to case basis to issue a warrant (bailable or non-bailable) directing that the accused be arrested and brought before it or be produced before the subordinate Court for compliance thereof. The opening part of this section makes it amply clear that (he judicial discretion can be exercised at any stage, after the presentation of the appeal under section 378 of the Code. Thus, presentation of such appeal is a sine qua non for exercise of this judicial discretion, in terms of section 390 of the Code."

106. In this regard the ratio settled by the Hon'ble Supreme Court in **Inder Mohan Goswami Vs. State of Uttaranchal**

3 may be recalled wherein certain directions have been issued by the Apex Court in following paragraphs:-

"53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

- it is reasonable to believe that the person will not voluntarily appear in court; or*

- the police authorities are unable to find the person to serve him with a summon; or*

- it is considered that the person could harm someone if not placed into custody immediately.*

"54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

"55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second

instance to refrain from issuing non-bailable warrants."

107. In **Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra** 2, the Supreme Court placing reliance upon *Inder Mohan Gowswami* 3 observed that:-

"13. We deferentially concur with these directions, and emphasise that since these directions flow from the right to life and personal liberty, enshrined in Articles 21 and 22(1) of our Constitution, they need to be strictly complied with. However, we may hasten to add that these are only broad guidelines and not rigid rules of universal application when facts and behavioural patterns are bound to differ from case to case. Since discretion in this behalf is entrusted with the court, it is not advisable to lay down immutable formulae on the basis whereof discretion could be exercised. As aforesaid, it is for the court concerned to assess the situation and exercise discretion judiciously, dispassionately and without prejudice. Viewed in this perspective, we regret to note that in the present case, having regard to nature of the complaint against the appellant and his stature in the community and the fact that admittedly the appellant was regularly attending the court proceedings, it was not a fit case where non-bailable warrant should have been issued by the Additional Chief Metropolitan Magistrate. In our opinion, the attendance of the appellant could have been secured by issuing summons or at best by a bailable warrant. We are, therefore, in complete agreement with the High Court that in the facts and circumstances of the case, issuance of non-bailable warrant was manifestly unjustified."

108. Keeping in view the legal position discussed above, and in view of

the Constitution Bench Judgment of *Poosu* (supra) 31 which is holding the field till today, depending upon the specific factual matrix of each case, in an appeal against acquittal, suitable process even of the nature of bailable or non-bailable warrants may be issued by the Court while securing the presence of accused persons under Section 390 Cr.P.C. and issuance of process (summons, bailable or non bailable warrants) would be the discretion of the Court.

Appeal against conviction

109. Section 374 of the Code of 1973 governs Appeal against the conviction and it says that an Appeal against conviction may be preferred either to the Sessions Court or High Court in the manner suggested therein.

110. In an Appeal against conviction generally the convicted appellant is already detained in prison unless he has been released on interim bail by the convicting court under Section 389(3) of the Code of 1973 and even in that case he would be required to obtain regular bail from the appellate court as he has only been released on interim bail by the convicting court only for the purpose of filing an appeal.

111. In both cases when an appellant is released on bail by the High Court, the custody of the convict is entrusted to his sureties. Here we are only concerned with those convict appellants who have been released on bail by this Court as the question we are considering relates to the course to be ordinarily adopted by the this Court for securing presence of a convict appellant who has been released on bail on default of his counsel to facilitate hearing of appeal filed by him.

112. Generally, the appeals against convictions, wherein the convict has been granted bail are listed with some amount of delay, especially the appeals pertaining to the Division Benches where the preparation of the paper book is also obligatory, having regard to the provision contained under Allahabad High Court Rules and when these appeals are listed the counsel for the appellant/ convict are generally not present and it is in the quest of providing an opportunity of being heard to the appellant coercive process of the nature of bailable or non-bailable warrants is issued by the High Court.

113. It is important to remember that Apex Court in *Bani Singh Vs. State of U.P.* 11 has emphasized the need of disposing criminal appeals on merits after hearing the counsel of the appellant or appellant himself and when the counsel for the appellant intentionally or unintentionally is not appearing in Court, the necessity of the presence of the appellant emerges to provide an opportunity of being heard to him. This view has been reiterated by the Hon'ble Supreme Court in the case of *K.S. Panduranga* 13 and *Surya Bux Singh* 12. In view of the law laid down in these cases it had been settled that a criminal appeal, which has been admitted for hearing should not be dismissed for default or for non prosecution and should only be decided on merits and an opportunity for hearing would be provided to either appellant convict or to his counsel.

114. Now, the question, which stares us in the face, is as to what process be adopted against a convict appellant who is not represented by his counsel when his appeal is taken up by the Court for hearing and he has been released on bail by this

Court. We may recall that in view of the law laid down in above cases in absence of his counsel opportunity of being heard is required to be provided to the appellant.

115. We may take cognizance of the fact that at High Court while releasing a convict on bail after suspending his sentence generally no condition is imposed on him to remain personally present before this court, unlike District Courts where a condition to remain personally present before the trial court or appellate court is generally placed on the appellant. In the absence of such a condition an appellant/ convict is not obliged to remain personally present before this Court on each and every date when his appeal is due to be taken up for hearing. In this scenario in the considered opinion of this Court in absence of any such condition in his bail order, the appellant may not be penalized for the default committed by his counsel.

116. Thus, if this Court requires personal presence of the convict/ appellant in order to provide him an opportunity of being heard as highlighted by the Apex Court in *Bani Singh* 11, *Surya Bux Singh* 12 and *K. S. Panduranga* 13, a bailable warrant initially is required to be issued to such a convict appellant for his presence before this Court either to argue his case personally or to engage another counsel of his choice, but in our considered opinion at the outset without issuing a bailable warrant initially, a non-bailable warrant may not be issued against him.

117. We may reiterate that the personal liberty of a person could only be curtailed strictly in accordance with the procedure established by law and not otherwise. Hence, in absence of counsel of the appellant in an appeal against

conviction wherein the appellant has been released on bail, no warrant of arrest straightway could be issued for the presence of the appellant. Of course if such appellant, even after bailable warrant is issued is deliberately avoiding his appearance before the court, in that scenario suitable process even of the nature of non-bailable warrants or process under Sections 82 and 83 Cr.P.C. against property of the accused or under Section 446 of the Code of 1973 may be issued against him and his sureties.

It is clarified, at this juncture, that the court by virtue of power conferred under Section 439 (2) of the Code can also cancel the bail granted to an appellant if the situation so warrants, but on default of of his counsel non-bailable warrants straight away may not be issued against him.

118. Thus we answer the question no.4 in terms that having regard to the law propounded in *Poosu* (supra) 31 in an appeal against acquittal in an appropriate case coercive process even of the nature of bailable warrants or non-bailable warrants may be issued against the accused having regard to the peculiar facts and circumstances of such case, but it may not be construed that in all appeals against acquittal while summoning a person warrants would invariably be issued as in suitable cases, in the discretion of the Court summons may also be issued. However, in an appeal against conviction wherein an appellant has already been released on bail and his counsel has not appeared for arguing the appeal. Generally, no warrant of arrest could be straightaway issued against him and bailable warrants at the first instance must be issued against such convict appellant for the reason that he has already been released on bail by the court

and no condition of his personal presence on each day of hearing has been imposed on him. Thus the question no.4 is answered accordingly.

119. Now, we shall consider Question Nos.1, 2 & 3 as under:-

While answering question no.4, we have already answered that in an appeal against acquittal while summoning the accused person under Section 390 Cr.P.C. coercive process even of the nature of bailable warrant or non-bailable warrant may be issued against the appellant having regard to the peculiar facts and circumstances of each case but it may not be construed to mean that in each and every appeal against acquittal the accused person must be summoned in variably by issuing bailable or non-bailable warrants and in an appropriate case summons may also be issued and in appeal against conviction wherein an appellant has already been released on bail and his counsel is not appearing for arguing the appeal no warrant of arrest could be issued straightaway against him and only bailable warrant be issued at the first instance to ensure his representation.

120. We shall now deal with a situation where non-bailable warrants have been issued against an appellant in appeal against conviction or against accused person in appeal against acquittal, and as to whether such accused person or appellant against whom non-bailable warrants have been issued by this court, may be released on bail by the District Court or the Chief Judicial Magistrate concerned without any such stipulation occurring in the order of the High Court.

121. The Full Bench of Bombay High Court in *Balkrishna Mahadev Lad* 37 has held as under:-

"..... when an accused is acquitted by the subordinate Court, after a full-fledged trial, the High Court, while issuing direction in exercise of powers under section 390 of the Code, may, in a given case, issue "bailable warrants" directing production of the accused before it or the subordinate Court for compliance thereof. If the accused is produced before the subordinate Court, pursuant to such "bailable warrants" issued by the High Court, the subordinate Court may release that accused on bail on terms and conditions which must be just and proper to secure the presence of the accused. Indeed, if the accused is unable to fulfil the terms and conditions for release on bail, the subordinate Court will be justified in directing committal of the accused to prison. However, he must soon thereafter intimate that fact to the High Court. Notwithstanding the power given to the subordinate Court under section 390 of the Code, it cannot direct that the accused be committed to prison even if he is capable of and willing to abide by the terms and conditions of bail. Further, if the High Court in its order issuing "bailable warrants" has already spelt out the terms and conditions then the subordinate Court cannot add to or relax such conditions, but is expected to ensure compliance of those directions of the High Court.

"10. Similarly, if the High Court were to issue "non-bailable warrants" recording reasons indicative of committing the accused to prison only, even in that case, the subordinate Court, before whom the accused is produced or appears in response to warrant so issued, will have no option but to commit such accused to prison.

"11. The Sessions Court, however, can exercise its judicial discretion when the High Court in its

order has not indicated either way to commit the accused to prison or to admit him to bail, pending the disposal of the appeal. In other words, if the High Court, in its order, merely directs initiation of action under section 390 of the Code and if the accused is produced before the subordinate Court, it would be open to the subordinate Court, after taking into account all aspects of the matter, either to admit the accused to bail on such terms and conditions as it may be deemed fit keeping in mind that the same are essential to secure the presence of the accused when required in the pending appeal or to commit him to prison. That judicial discretion has to be exercised on the basis of settled parameters and, inter alia, keeping in mind the question, as to whether releasing the accused on bail would not hamper securing his attendance pending the disposal of the appeal against acquittal in the High Court.

"13. We are of the considered opinion that section 390 of the Code cannot be read to mean that the Sessions Judge, on production of the accused, has no option but to immediately release him on bail. Instead, we hold that the subordinate Court before whom the accused is produced pursuant to warrant issued in terms of order of the High Court, must exercise his judicial discretion on case to case basis and in particular keeping in mind the order of the High Court, passed in the pending appeal against acquittal in that regard. This would presuppose that the Sessions Judge, in appropriate case, can commit the accused to prison till the disposal of the appeal. Indeed, in that case, it will be open to the accused to question that decision of the Sessions Judge, before the High Court, in which proceedings, the High

Court may consider the claim of the accused for grant of bail. Thus understood, grant of bail by the subordinate Court is not a matter of right." (emphasis supplied)

122. The general provisions of bail contained under Section 437 and 439 of the Code of 1973 are with regard to the grant of bail during the course of trial and suspension of sentence and consequential release of the convict on bail is enshrined under Section 389 of the Code of 1973 after his conviction by the trial court and on an appeal filed by such convict, the presence of the appellant accused is required. In appeal against acquittal if after finding substance in the appeal it is admitted or, if necessary, leave is granted and accused person acquitted by the trial court is summoned under Section 390 of the Code of 1973 to remain present before the appellate court and in appropriate cases even judgment of acquittal may be suspended.

123. It is clarified that in Code of 1973 no such nomenclature has been given asailable or non-bailable warrants. Section 70 and 71 of the Cr.P.C. enshrined in Chapter VI of the Code of 1973 deals with the issuance of process and keeping in view the above mentioned provision it would only be the endorsement made on the warrant of arrest which could label it as eitherailable or non-bailable warrant. Section 70 and 71 of Code of 1973, which appears to be relevent is reproduced as under:-

"70. Form of warrant of arrest and duration.—(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

"71. Power to direct security to be taken.—(1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound;

(c) the time at which he is to attend before the Court. (3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court."

124. Hon'ble Supreme Court in ***Raghuvansh Dewanchand Bhasin Vs. State of Maharashtra*** 2, has noticed this distinction in paragraphs no. 25, 26 of the report, the same are reproduced as under:-

"25. It is true that neither Section 70 nor Section 71 appearing in Chapter VI of the Code enumerating the processes to compel appearance as also Form 2 uses the expression like "non-bailable". Section 70 merely speaks of form of warrant of arrest, and ordains that it will remain in force until it is cancelled. Similarly, Section 71 talks of discretionary power of court to specify about the security to be taken in case the person is to be released on his arrest pursuant to the execution of the warrant issued under Section 70 of the

Code. Sub-section (2) of Section 71 of the Code specifies the endorsements which can be made on a warrant. Nevertheless, we feel that the endorsement of the expression "non-bailable" on a warrant is to facilitate the executing authority as well as the person against whom the warrant is sought to be executed to make them aware as to the nature of the warrant that has been issued.

"26. In our view, merely because Form 2, issued under Section 476 of the Code, and set forth in the Second Schedule, nowhere uses the expression bailable or non-bailable warrant, that does not prohibit the courts from using the said word or expression while issuing the warrant or even to make endorsement to that effect on the warrant so issued. Any endorsement/variation, which is made on such warrant for the benefit of the person against whom the warrant is issued or the persons who are required to execute the warrant, would not render the warrant to be bad in law. What is material is that there is a power vested in the court to issue a warrant and that power is to be exercised judiciously depending upon the facts and circumstances of each case. Being so, merely because the warrant uses the expression like "non-bailable" and that such terminology is not to be found in either Section 70 or Section 71 of the Code that by itself cannot render the warrant bad in law. The argument is devoid of substance and is rejected accordingly."

125. We are of the opinion that under Section 390 of the Code of 1973 the Court may direct that accused be arrested and brought before it or be produced before the subordinate court (trial court) for compliance thereof if the accused is arrested in connection with such bailable warrants issued by the court it would be

lawful for the subordinate court to release him on bail and if he fails to comply with the terms, he may be confined in prison and when the High Court has issued non-bailable warrant indicating that the accused be committed to prison only, in that case the subordinate court would have no option but to commit him to custody/ prison.

126. It is further clarified that discretion may only be exercised by the trial court when the High Court has not indicated in its order either to commit the accused to prison or to admit him to bail, i. e. where the High Court has simply directed to take action under Section 390 of the Code of 1973.

127. It is clear that where the High Court has consciously issued non-bailable warrant for the confinement or arrest of an appellant, the intention of issuance of such warrant is to commit the accused/ appellant or convict to prison and in that condition the Magistrate or the Sessions Judge as the case may be would have no jurisdiction to release such person on bail. It would be the terms of the order of the High Court under which non-bailable warrants have been issued which will govern the fate of the accused or appellant/convict and neither C.J.M. nor Session Judge would have jurisdiction to release such appellant or accused on bail irrespective of the fact whether the non-bailable warrant has been issued in an appeal against acquittal or in an appeal against conviction.

128. However, in case the appellant or accused is arrested and committed to prison as directed by the High Court, an information to that effect shall be given forthwith to the High Court of the arrest of such person by the Chief Judicial Magistrate or Session Judge concerned.

129. We are also of the considered view that stage of the appeal may not have any bearing on the discretion of the subordinate court as it would be solely for the High Court to assess the factual scenario and evidence in order to arrive at a decision as to whether a non-bailable warrant be issued in a particular case and once the non-bailable warrant has been issued by the High Court, the subordinate court would be divested of any jurisdiction to release such an appellant or accused person on bail, unless otherwise directed by the High Court.

130. So far as issuance of bailable warrant is concerned the discretion would always be of the subordinate court to release such an appellant or accused on bail subject to the condition that he will appear before the High Court on a particular day indicated by the High Court in its order. Thus question nos. 1, 2 and 3 are answered accordingly.

131. Now we shall consider the question no. 5, as under:-

132. Question no. 5, which has been framed by the Division Bench at Lucknow for consideration, may be broadly categorized in the following sub-heads:-

“(i) whether an appeal against conviction or acquittal can be heard by appointing amicus for convict/appellants or respondent/accused in appeal against conviction or in appeal against acquittal, as the case may be, when they are not appearing in court, without their consent?”

“(ii) whether such amicus may even be appointed when the presence of a convict or accused can be secured without his consent and without any intimation to him? If so, under what circumstances?”

133. To answer Question No. 5, first of all, we have to consider as to whether any appeal against conviction or acquittal may be heard by appointing amicus when the appellant or accused person, as the case may be, is not appearing in the court. This issue does not seem to be *res integra* any more.

134. In the case reported in ***Hussainara Khatoon Vs. State of Bihar*** 6, while considering Article 39-A of the Constitution of India, the Hon’ble Supreme Court has held in para-7 as under:-

“7. We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:

“39-A. Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

135. In the case reported in **(2012) 8 SCC 553 (Rajoo alias Ramakaant Vs. State of M.P.)** 1 the Hon’ble Supreme again emphasized the need of providing fair trial to the accused in following words.

The Supreme Court noted the constitutional amendment incorporating Article 39-A and also the promulgation of the Legal Services Authority Act, 1987 and then observed in paragraph-11 as follows:-

“11. It is important to note in this context that Sections 12 and 13 of the Act do not make any distinction between the trial stage and the appellate stage for

providing legal services. In other words, an eligible person is entitled to legal services at any stage of the proceedings which he or she is prosecuting or defending. In fact the Supreme Court Legal Services Committee provides legal assistance to eligible persons in this Court. This makes it abundantly clear that legal services shall be provided to an eligible person at all stages of the proceedings, trial as well as appellate. It is also important to note that in view of the constitutional mandate of Article 39-A, legal services or legal aid is provided to an eligible person free of cost."

136. Requirement of providing free & fair trial with fair and just procedure has also been highlighted by the Apex Court in the case reported in ***Khatri and others Vs. State of Bihar and others*** 43 and in the case reported in ***Suk Das Vs. UT of Arunachal Pradesh*** 44. In these cases the trial was held vitiated as legal representation was not provided to the accused persons.

137. In the case reported in ***Zahira Habibullah Sheikh & Anr vs State Of Gujarat & Ors*** 8, Hon'ble Supreme Court has highlighted the importance of fair trial and procedure not only to an accused but to all stakeholders, including the victim of the crime.

138. Thus, it is well accepted that right to free legal aid or service is an essential ingredient of free & fair trial and procedure and is implicit under Article 21 of the Constitution of India. The trial and procedure adopted in trial or appeal must reflect and should ensure that innocent persons are protected and guilty persons are punished.

139. In the case reported in ***Bani Singh and others Vs. State of U.P.*** 11,

while finding conflict between the two decisions of the Benches of the same strength i.e. in the cases ***Shyam Deo Pandey Vs. State of Bihar*** 45 and ***Ram Naresh Yadav Vs. State of Bihar*** 46, the Supreme Court has resolved the same in paras 13, 14, 15 and 16 of the report, which are being reproduced herein below:-

"13. What then is the area of conflict between the two decisions of this Court? In Shyam Deo case [(1971) 1 SCC 855], this Court ruled that once the appellate court has admitted the appeal to be heard on merits, it cannot dismiss the appeal for non-prosecution for non-appearance of the appellant or his counsel, but must dispose of the appeal on merits after examining the record of the case. It next held that if the appellant or his counsel is absent, the appellate court is not bound to adjourn the appeal but it can dispose it of on merits after perusing the record. In Ram Naresh Yadav case [AIR 1987 SC 1500], the Court did not analyse the relevant provisions of the Code nor did it notice the view taken in Shyam Deo case [(1971) 1 SCC 855] but held that if the appellant's counsel is absent, the proper course would be to dismiss the appeal for non-prosecution but not on merits; it can be disposed of on merits only after hearing the appellant or his counsel or after appointing another counsel at State cost to argue the case on behalf of the accused.

"14. We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo case [(1971) 1 SCC 855] appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the appellate court does not consider the appeal fit for summary dismissal, it 'must'

call for the record and Section 386 mandates that after the record is received, the appellate court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the appellate court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case [AIR 1987 SC 1500] that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.

“15. Secondly, the law expects the appellate court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of the appeal on merits. Section 385 posits that if the appeal is not dismissed summarily, the appellate court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. Section 386 then provides that the appellate court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that Section 385 provides for a notice of the time and

place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also considered sufficient since he was representing the appellant. So also Section 386 provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the court shall adjourn the case if both the appellant and his lawyer are absent. If the court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav case [AIR 1987 SC 1500] did not apply the provisions of Sections 385-386 of the Code correctly when it indicated that the appellate court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.

“16. Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the court issues a warrant for the

appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted. (emphasis supplied by us)

140. In the case of ***Dharam Pal and others Vs. State of Uttar Pradesh***⁴⁷, while considering the issue of non-representation of appellant before the High Court as his counsel informed that appellant is not responding to various letters written by him and High Court decided the appeal on merits after hearing the public prosecutor.

The Supreme Court after noting the provisions of Section 385 and 386 of the Cr.P.C., observed as under:-

“Having examined the provisions under Sections 385 and 386 of the Code, as noted hereinabove, and applying the principles laid down by this Court in Bani Singh [(1996) 4 SCC 720] we are not in agreement with the argument advanced by the learned counsel for the appellants that the High Court ought not to have decided the appeal on merits in the absence of the appellants as the High Court had no

power or jurisdiction under Sections 385 or 386 of the Code to do so.

“11. Even if we assume that the notice of appeal was not served on the appellants, then also, it was an admitted position that the learned counsel for the appellants appeared for them to prosecute the appeal and therefore, after appearance of the learned counsel for the appellants, it must be held that the notice of appeal was duly served. At the risk of repetition, we may note that the learned counsel for the appellants submitted before the High Court that despite repeated reminders to the appellants, the appellants were not responding and therefore, the learned counsel for the appellants expressed his inability to argue the case before the High Court.

“13. While dealing with the procedure for disposing of a criminal appeal, this Court in Bani Singh case [(1996) 4 SCC 720] has clearly laid down that the dismissal of an appeal for default or non-prosecution without going into the merits of the case is clearly illegal and that the appellate court must dispose of the appeal on merits after perusal and scrutiny of record and after giving a hearing to the parties, if present, before disposal of the appeal on merits. This Court, in that decision, further held that the appellate court must dispose of the appeal after perusal of the record and judgment of the trial court even if the appellant or his counsel was not present at the time of hearing of the appeal. The only exception, as we find from the aforesaid decision of this Court, is that if the appellant is in jail and his counsel is not present, the court should adjourn the case to facilitate the appearance of the appellant.

“14. There is yet another exception to this rule, namely, that in an appropriate case, the court can appoint a lawyer at the State's expense to assist the court. Therefore, the High Court, in our view, was justified in taking the assistance of the Assistant Government Advocate and after taking such assistance and considering the entire evidence on record, the High Court passed the judgment under appeal before us holding that the appellants were guilty of the offence, not under Sections 302/34 IPC but under Section 304 Part II IPC and directed them to undergo 7 years' rigorous imprisonment. In doing so, the High Court affirmed the findings of the trial court but differed on the point of the offence committed by the appellants and the corresponding punishment to be awarded to them.”

141. In the case reported in (***K. Muruganandam and others v. State Represented by the Deputy Superintendent of Police and another***) 5, while emphasizing the need that a criminal appeal should not be dismissed for non-prosecution, it was held in para-6 as under:

*“6. It is well settled that if the accused does not appear through counsel appointed by him/her, the Court is obliged to proceed with the hearing of the case only after appointing an Amicus Curiae, but cannot dismiss the appeal merely because of non-representation or default of the advocate for the accused (see *Kabira v. State of U.P.* [*Kabira v. State of U.P.*, 1981 Supp SCC 76] and *Mohd. Sukur Ali v. State of Assam* [*Mohd. Sukur Ali v. State of Assam*, (2011) 4 SCC 729]).”*

142. In the case reported in ***Kabira Vs. State of Uttar Pradesh*** 32 where an appeal has been dismissed by the High Court in

default of appearance of the appellant a note of caution has been given by the Hon'ble Supreme Court.

“.....We are, therefore, of the view that there has not been a proper disposal of the appeal preferred by the appellant. The appeal could not be dismissed by the learned Judge for default of appearance. If the appellant was not present, the learned Judge should have appointed some advocate as amicus curiae and then proceeded to dispose of the appeal on merits. The order dated August 7, 1979 passed by the learned Judge dismissing the appeal, as also the reasoned judgment bearing the date August 7, 1979 given by the learned Judge must accordingly be set aside.”

143. The settled view appears to be that the law expects an appellate court to give hearing to the appellant or his counsel, if he is present and, also to the public prosecutor before disposal of appeal on merits as law postulates that if appeal has not been dismissed summarily under section 384 of the Code of 1973 the appellate court shall cause notice of time and place, on which the appeal would be heard, to be notified (under section 385 of Code of 1973) to the appellant or his counsel and also that law does not enjoin that the appeal be adjourned in absence of appellant (who may be on bail) or his counsel and the same may be disposed of after perusing the record and judgment of the trial court. However, an appellant, who is in jail, would have to be given an opportunity to argue the case himself or to engage some other counsel and in appropriate cases service of counsel at State expense (Amicus) may also be provided to such an convict or accused.

144. In **K.S. Panduranga Vs. State of Karnataka** 13, while considering the issue as to whether in absence of counsel for the appellant the appeal may be decided on merits, without appointing any amicus and after considering the law laid down in the case of **Mohd. Sukur Ali Vs. State of Assam** 33, **Bani Singh Vs. State of U.P.** 11, **Ram Naresh Yadav Vs. State of Bihar** 46 and **Bapu Limbaji Kamble Vs. State of Maharashtra** 36 opined in para-19 (19.1 to 19.6), 20 and 32 as under:-

“19. From the aforesaid decision in Bani Singh [(1996) 4 SCC 720 : 1996 SCC (Cri) 848 : AIR 1996 SC 2439], the principles that can be culled out are:

19.1. That the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;

19.2. That the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

19.3. That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

19.4. That it can dispose of the appeal after perusing the record and judgment of the trial court;

19.5. That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

19.6. That if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.

20. In Bapu Limbaji Kamble [(2005) 11 SCC 413 and Man Singh [(2008) 9 SCC 542], this Court has not laid

down as a principle that it is absolutely impermissible on the part of the High Court to advert to merits in a criminal appeal in the absence of the counsel for the appellant.

32. In view of the aforesaid enunciation of law, it can safely be concluded that the dictum in Mohd. Sukur Ali [(2011) 4 SCC 729] to the effect that the court cannot decide a criminal appeal in the absence of the counsel for the accused and that too if the counsel does not appear deliberately or shows negligence in appearing, being contrary to the ratio laid down by the larger Bench in Bani Singh [(1996) 4 SCC 720], is per incuriam. We may hasten to clarify that barring the said aspect, we do not intend to say anything on the said judgment as far as engagement of amicus curiae or the decision rendered regard being had to the obtaining factual matrix therein or the role of the Bar Association or the lawyers. Thus, the contention of the learned counsel for the appellant that the High Court should not have decided the appeal on its merits without the presence of the counsel does not deserve acceptance. That apart, it is noticeable that after the judgment was dictated in open court, the counsel appeared and he was allowed to put forth his submissions and the same have been dealt with.”

145. In the case reported in **Surya Baksh Singh Vs. State of Uttar Pradesh** 12, the Hon'ble Supreme Court was dealing with a situation where convict and his counsel was absent and appellant's appeal was dismissed by the High Court on merits. Hon'ble Supreme Court had taken a comprehensive view of all the precedents and the law in paras-3, 6, 7, 12, 13, 14, 15, 16 and 24 which are reproduced herein below:-

“3. It is necessary to distinguish dismissal of appeals in instances where steps have been taken by the court for securing the presence of the appellant by coercive means, including the issuance of non-bailable warrants or initiation of proceedings for declaring the appellant a proclaimed offender by recourse to Part C of Chapter VI of the Code of Criminal Procedure, 1973 (“CrPC”, for short) on the one hand, and those where the appellant may incidentally and unwittingly be absent when his appeal is called on for hearing. The malaise which we are perturbed about is the wilful withdrawal of the convict from the appellate proceedings initiated by him after he has succeeded in gaining his enlargement on bail or exemption from surrender.

“6. Section 386 CrPC is of importance for the purposes before us. It requires the appellate court to peruse the records, and hear the appellant or his pleader if he appears; thereafter it may dismiss the appeal if it considers that there is insufficient ground for interference. In the case of an appeal from an order of acquittal (State appeals in curial parlance) it may reverse the order and direct that further inquiry be carried out or that the accused be retried or committed for trial. Even in the case of an appeal from an order of acquittal the appellate court is competent to find him guilty and pass sentence on him according to law. The proviso to this section prescribes that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such a proposal, thereby mandating that an accused must be present and must be heard if an order of acquittal is to be upturned and reversed. It is thus significant, and so we reiterate, that the legislature has cast an obligation on the appellate court to decide an appeal on its

merits only in the case of death references, regardless of whether or not an appeal has been preferred by the convict.

“7. Last, but not the least in our appreciation of the law, Section 482 CrPC stands in solitary splendour. It preserves the inherent power of the High Court. It enunciates that nothing in CrPC shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary, firstly, to “give effect to any order under CrPC”, words which are not to be found in the Code of Civil Procedure, 1908 (hereafter referred to as “CPC”). Ergo, the High Court can, while exercising inherent powers in its criminal jurisdiction, take all necessary steps for enforcing compliance with its orders. For salutary reason Section 482 CrPC makes the criminal court much more effective and all pervasive than the civil court insofar as ensuring obedience of its orders is concerned. Secondly, Section 482 clarifies that CrPC does not circumscribe the actions available to the High Court to prevent abuse of its process, from the inception of proceedings till their culmination. Judicial process includes compelling a respondent to appear before it. When the Court encounters a recalcitrant appellant/convict who shows negligible interest in prosecuting his appeal, none of the sections in Chapter XXIX CrPC dealing with appeals, precludes or dissuades it from dismissing the appeals. It seems to us that passing such orders would eventually make it clear to all that intentional and repeated failure to prosecute the appeal would inexorably lead not merely to incarceration but more importantly to the confirmation of the conviction and sentence consequent on the dismissal of the appeal. Thirdly, none of the provisions of CrPC can possibly limit the power of the High Court to otherwise

secure the ends of justice. While it is not possible to define the concept of "justice", suffice it to say that it encompasses not just the rights of the convict, but also of the victims of crime as well as of the law abiding section of society who look towards the courts as vital instruments for preservation of peace and the curtailment or containment of crime by punishing those who transgress the law. If the convicts can circumvent the consequence of their conviction, peace, tranquillity and harmony in society will be reduced to a chimera. Section 482 emblazons the difference between preventing the abuse of the jural process on the one hand and securing of the ends of justice on the other. It appears to us that Section 482 CrPC has not been given due importance in combating the rampant malpractice of filing appeals only for scotching sentences imposed by criminal courts.

"12. Indeed, the Court in Bani Singh case [Bani Singh v. State of U.P., (1996) 4 SCC 720] was not confronted by the wilful abscondence of the appellant concerned. It is noteworthy that the High Court had not taken steps calculated to secure the presence of the appellant before it. On the contrary it had palpably adopted the less tedious course of simply dismissing the appeal. Signally, the Court had observed that in order to enforce discipline the appeal could be dismissed for non-prosecution. There was no material to manifest that the appellant had abandoned his appeal or had no intention to prosecute it. In Bani Singh attention of the Court was not drawn to the views of a coordinate Bench in Kishan Singh [Kishan Singh v. State of U.P., (1996) 9 SCC 372] decided four years previously on 2-11-1992. Having carefully read through both the opinions we think it important to clarify that Bani Singh does not cogitate or reflect

upon the options available to the Court which is faced with a recalcitrant appellant who is not prosecuting his appeal, in flagrant violation and abuse of the bail orders granted in his favour. Kishan Singh deals precisely with the options open to the appellate court at the preliminary hearing of an appeal.

"13. Any discourse on this aspect of the law would be incomplete without appreciating and assimilating Dharam Pal v. State of U.P.. The contention canvassed on behalf of the accused was that a miscarriage of justice had occurred since the appellant had not been served with notice of the appeal by the High Court, which nevertheless decided the appeal ex parte. Reference was made to Bani Singh, as also to Chapter XXIX of CrPC in general, and Sections 385 and 386 in particular; conspicuously Section 482 CrPC was not even mentioned. The learned counsel for Dharam Pal had expressed his inability to argue the case before the High Court. As in the case in hand, this Court had perused the impugned judgment of the High Court and found it to be well-merited and duly predicated on a careful consideration of the material on record. It was observed that:

"15. ... The position, of course, would have been different if the High Court had simply dismissed the appeal without going into the merits. ... That being the position, it cannot be said that the High Court had ignored the basic principles of criminal justice while disposing of the appeal ex parte."

"14. Dharam Pal [Dharam Pal v. State of U.P., (2008) 17 SCC 337] and for that matter Bani Singh [Bani Singh v. State of U.P., (1996) 4 SCC 720] or Shyam Deo Pandey [Shyam Deo Pandey v. State of Bihar, (1971) 1 SCC 855] neither proscribe the invocation of Section 482 CrPC nor

opine that dismissal of an appeal under Section 482, for good reasons which are lucidly spelt out, is improper. It has not hithertofore even been considered that Section 482 CrPC should be applied in circumstances of the wilful abscondence of the appellant/convict in contumacious and deliberate disregard and disobedience of the terms and conditions on which he was enlarged on bail or exempted from surrender.

“15. The discussion would not be complete without noticing the orders in Parasuram Patel v. State of Orissa [(1994) 4 SCC 664] and Madan Lal Kapoor v. Rajiv Thapar [(2007) 7 SCC 623] . In neither of these cases had the appellate court taken steps available to it to ensure the attendance of the appellant. Instead, it appears that the High Court concerned had adopted the obviously less tedious approach of dismissing the appeals only because neither the appellant nor his counsel were present when the case was called on for hearing. The Court did not ruminate upon the curial malpractice which has now become endemic viz. the filing of appeals by convicts with the obvious intent to frustrate and circumvent sentences passed by criminal courts.

“16. We cannot close our eyes to the reality that less than twenty per cent of prosecutions are successful; the rest are futile largely because of inept, shoddy or substandard investigation and prosecution. Even in cases where the prosecution succeeds in proving the guilt of the accused, punishment is emasculated by convicts not because of their succeeding in having their conviction overturned and reversed by the appellate court, but by going underground and disappearing from society after receiving reprieve from incarceration from the appellate court. We are convinced that the interests of society

at large are being repeatedly sacrificed for the exaggerated, if not misplaced concern for what is fashionably termed as “human rights” of convicts. Recent judgments of the Court contain a perceptible dilution of legal principles such as the right of silence of the accused. The Supreme Court has, in several cases, departed from this rule in enunciating, inter alia, that the accused are duty-bound to give a valid explanation of facts within their specific and personal knowledge in order to dispel doubts on their complicity. Even half a century ago this would have been a jural anathema. Given the woeful success rate of the prosecution, if even the relatively niggard number of convicts are permitted to circumvent their sentences, crime is certain to envelop society. Law is dynamic and not immutable or static. It constantly adapts itself to critically changing compulsions of society.

“24. It seems to us that it is necessary for the appellate court which is confronted with the absence of the convict as well as his counsel, to immediately proceed against the persons who stood surety at the time when the convict was granted bail, as this may lead to his discovery and production in court. If even this exercise fails to locate and bring forth the convict, the appellate court is empowered to dismiss the appeal. We fully and respectfully concur with the recent elucidation of the law, profound yet perspicuous, in K.S. Panduranga v. State of Karnataka.”

146. Thus, apart from what has been highlighted in the case of *Bani Singh and others Vs. State of U.P.* 11, it was resolved in *Surya Baksh Singh Vs. State of Uttar Pradesh* 12 while concurring with *Bani Singh and others Vs. State of U.P.* 11 that on absence of appellant and his counsel on

the date of listing, the court must at once seek the presence of the appellant in court and for this purpose may proceed against his sureties and when, even after efforts, presence of appellant could not be secured, the court may dispose the appeal on merits and when the convict is in jail the court may adjourn the hearing to facilitate the appearance of counsel and in discretion of the court Amicus may also be appointed.

147. In the case of **Christopher Raj Vs. K. Vijayakumar** 48, when the appeal against acquittal was decided by the High Court in absence of respondent-accused, it was highlighted in para-8 as under:-

“8. Admittedly, the appellant-accused did not appear in the criminal appeal before the High Court. When the accused has not entered appearance in the High Court, in our view, the High Court should have issued second notice to the appellant-accused or the High Court Legal Services Committee to appoint an advocate or the High Court could have taken the assistance of Amicus Curiae. When the accused was not represented, without appointing any counsel as Amicus Curiae to defend the accused, the High Court ought not to have decided the criminal appeal on merits; more so, when the appellant-accused had the benefit of acquittal. The High Court erred in reversing the acquittal without affording any opportunity to the appellant-accused or by appointing an Amicus Curiae to argue the matter on his behalf.”

148. In another important case reported in **Anokhilal Vs. State of Madhya Pradesh** 7 while considering the issue of appointment of amicus, when the appellant-convict and his counsel is not appearing and providing sufficient and reasonable time to him to achieve fair trial, the Apex Court opined in

paras 31 (31.1 to 31.4), which are reproduced herein below:-

“31. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:

31.1. In all cases where there is a possibility of life sentence or death sentence, learned advocates who have put in minimum of 10 years' practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.

“31.2. In all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.

“31.3. Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

“31.4. Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in Imtiyaz Ramzan Khan [Imtiyaz Ramzan Khan v. State of Maharashtra, (2018) 9 SCC 160 : (2018) 3 SCC (Cri) 721] .”

149. Certain observations were made in **Anokhi Lal** which have again been explained in Criminal Appeal No.771 of 2024: **Ashok Vs. State of U.P.**, 2024 SCC OnLine 3580.

The Supreme Court while acquitting the accused, Ashok had found that there

was a failure on the part of the State to provide timely legal to the Appellant. They also found the quality of legal aid given to him to be poor. The Court referred to the observations made by it in *Hussainara Khatoon* and then *M.H. Hoskote Vs. State of Maharashtra*, 1978 (3) SCC 544, where it had been observed in paragraph-25 that :-

“25. If a prisoner sentenced to imprisonment, is virtually unable to exercise, constitutional and statutory right of Appeal, inclusive of Special Leave to Appeal, for want of legal assistance, there is implicit in the Court under Article 142 read with Article 21 and 39A of the Constitution, power to assign counsel for such imprisoned individual for doing complete Justice. This is a necessary incident of the right of Appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is enough that this is a State’s duty and not Government charity. Equally affirmative is the implication that while legal services must be free to the beneficiary, the lawyer himself has to be reasonably remunerated for his services. Surely, the profession has a public commitment to the people, but may depend upon philanthropy of its members. Their services, specially when they are on behalf of the State must be paid for. Naturally, the State’s concern is that the fees must be a reasonable sum that the Court may fix when assigning counsel to the prisoner. Of course, the Court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country while free legal services are given, it is not done in all cases, but only where public Justice suffers otherwise. That discretion resides in the Court.”

Referring to the judgement in *Anokhilal Vs. State of Madhya Pradesh* 7 and the observations made in paragraph 11 and paragraph 20 thereof, it was also observed that the time granted to the *Amicus Curiae* in some cases to prepare for the defence was completely insufficient and that the award of sentence of death resulted in deprivation of life of the accused and was in the breach of the procedure established by Law referring to the judgement in the case of *Bashera Vs. State of U.P.*, 1969 (1) SCR 32 and the judgement rendered by Andhra Pradesh High Court in *Alla Nageshwar Rao*, AIR 1957 AP 505; it was stated that mere formal compliance of the rule under which sufficient time had to be given to the counsel to prepare for the defence would not carry out the object underlying the rule. It was further stated that opportunity must be real where the Counsel is given sufficient and adequate time to prepare. It was observed that if the trial Court makes substantial progress in the matter on the very day on which Counsel was engaged as *Amicus Curiae*, it could not be said that sufficient opportunity was given to the counsel to prepare the matter.

The Supreme Court in *Ashok* (supra) referred to paragraph 31 of the judgement rendered in *Anokhi Lal* and the observation made therein that in all cases whether there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as *Amicus Curiae*, or through Legal Services Authority to represent an accused and in all matters dealt with by the High Court concerning confirmation of death sentence, Senior Advocates of the Court must first be considered to be appointed as *Amicus Curiae*. The Supreme Court referred to

Sections 303 and 304 of the Cr.P.C. and Section 340 and 341 of the Bhartiya Nagrik Suraksha Sanhita 2023 (for short 'BNSS'), which are corresponding Sections, and it was observed that it is the duty of the Court to ensure that a legal aid lawyer is appointed to espouse the cause of the accused.

In paragraph-23 of the judgement rendered in Ashok (supra), the Supreme Court observed as follows: –

A. It is the duty of the Court to ensure that proper legal aid is provided to an accused;

B. When an accused is not represented by an Advocate, it is the duty of every public prosecutor to point out to the Court, the requirement of providing him free legal aid. The reason is that it is the duty of the public prosecutor to ensure that the trial is conducted fairly and lawfully;

C. Even if the Court is inclined to frame charges or record examination in chief of the prosecution witnesses in a case where the accused has not engaged any Advocate, it is incumbent upon the public prosecutor to request the Court not to proceed without offering legal aid to the accused;

D. It is the duty of the public prosecutor to assist the trial Court in recording of the statement of the accused under Section 313 of the Cr.P.C. If the Court omits to put any material circumstance brought on record against the accused, the public prosecutor must bring it to the notice of the Court while the examination in chief of the accused is being recorded. He must assist the Court in framing the questions to be put to the accused. As it is the duty of the public prosecutor to ensure that those who are guilty of the commission of offence must be

punished, it is also his duty to ensure that there are no infirmities in the conduct of the trial, which will cause prejudice to the accused;

E. An accused who is not represented by an Advocate is entitled to free legal aid at all material stages starting from remand every accused has the right to get legal aid even to file bail petitions;

F. At all material stages, including the stage of framing the charge, recording the evidence, et cetera, it is the duty of the Court to make the accused aware of his right to get free legal aid. If the accused expresses that he needs legal aid, the trial Court must ensure that a legal aid Advocate is appointed to represent accused;

G. As held in the case of Anokhi Lal, in all the cases where there is a possibility of a life sentence or for death sentence, only those learned Advocates who have put in a minimum of 10 years of practice on the criminal side should be considered to be appointed as Amicus Curiae or as a legal aid Advocate. Even in the cases not covered by the categories mentioned above, the accused is entitled to a legal aid Advocate who has good knowledge of the law and has an experience of conducting trials on the criminal side. It would be ideal if the Legal Services Authorities at all levels give proper training to newly appointed legal aid Advocates not only by conducting lectures, but also by allowing the newly appointed legal aid Advocates to work with senior members of the Bar in a requisite No. of trials;

H. The State Legal Services Authority shall issue directions to the legal services authorities at all levels to monitor the work of the legal aid Advocates and shall ensure that the legal aid Advocates

attend the Court regularly and punctually when the cases entrusted to them are fixed.

I. It is necessary to ensure that the same legal aid Advocate is continued throughout the trial, unless there are compelling reasons not to do so, or unless the accused appoints an Advocate of his choice.

J. In the cases where the offences are of a very serious nature and complicated legal and factual issues are involved, the Court, instead of appointing an empanelled legal aid Advocate, may appoint a senior member of the Bar who has a wide experience of conducting trials to espouse the cause of the accused, so that the accused gets best possible legal assistance;

K. The right of the accused to defend himself in a criminal trial is guaranteed by Article 21 of the Constitution of India. He is entitled to a fair trial. But if effective legal aid is not made available to an accused, who is unable to engage an Advocate, it will amount to infringement of his fundamental rights guaranteed by Article 21;

L. If legal aid is provided only for the sake of providing it, it will serve no purpose. Legal aid must be effective. Advocates appointed to espouse the cause of the accused must have good knowledge of criminal laws, law of evidence and procedural laws, apart from other important statutes. As there is a constitutional right to legal aid, that right will be effective only if the legal aid provided is of a good quality. If the legal aid Advocate provided to an accused is not competent enough to conduct the trial efficiently, the rights of the accused will be violated."

150. Perusal of the above law reports would evidently reveal that the Question

No. 5 formulated by the Referral Court for consideration by this Bench has already been set at rest by the law laid down by the Hon'ble Supreme Court in *Bani Singh and others Vs. State of U.P.* 11, *Surya Baksh Singh Vs. State of Uttar Pradesh* 12 and *K.S. Panduranga Vs. State of Karnataka* 13, however, a distinction has been drawn by the Apex Court in *Surya Baksh Singh Vs. State of Uttar Pradesh* 12 between the convicts, who are not having any notice of hearing of their appeals, and those who are misusing the procedure by not appearing and the ratio settled by the Hon'ble Supreme Court in these reports may be summarized as under:-

1. That the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;

2. That the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

3. That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

4. That it can dispose of the appeal after perusing the record and judgment of the trial court;

5. That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so;

6. That if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation;

7. A distinction, however, is to be made in dismissal of appeals where steps have been taken by the court for securing

the presence of the appellant by issuing coercive process i.e. issuance of non-bailable warrants etc. on the one hand and those where the appellant may incidentally and unwittingly remained absent when his appeal was called on for hearing (para-3 of *Surya Baksh Singh Vs. State of Uttar Pradesh* 12; and

8. On absence of appellant or his counsel in appeal against conviction and respondent and his counsel in appeal against acquittal, the court would seek his presence by issuing suitable process and may also issue notice to the sureties and if this exercise fails to locate and bring the appellant to the court, the court can pass judgment with the assistance of the public prosecutor and in its discretion may also appoint a counsel on State expense for its assistance (*amicus curiae*).

151. The crux of the aforesaid observations of the three celebrated judgments rendered by the Hon'ble Supreme Court in *Bani Singh and others Vs. State of U.P.* 11, *Surya Baksh Singh Vs. State of Uttar Pradesh* 12 and *K.S. Panduranga Vs. State of Karnataka* 13, thus, covers the entire length and breadth of Question No. 5 formulated by the Division Bench at Lucknow for consideration by this Bench and no fresh exercise, in our considered opinion, is required to be undertaken by this Bench, including on one point which has been highlighted by the Division Bench at Lucknow i.e. whether the *amicus curiae* may be appointed even when the presence of the convict, appellant or accused-respondent may be secured and without his consent.

152. The aforesaid legal precedents would evidently canvass that the emphasis of the Apex Court has been on providing opportunity of being heard to the appellant

who is willing to cooperate with the appellate court or his counsel and in this regard a process to cause his presence for the purpose of giving opportunity of being heard is required to be issued to him and when the court is satisfied that such appellant is deliberately avoiding his presence before the court, in such a situation, the court may dispose of the appeal in the manner approved by the Hon'ble Supreme Court in *Bani Singh and others Vs. State of U.P.* 11, *Surya Baksh Singh Vs. State of Uttar Pradesh* 12 and *K.S. Panduranga Vs. State of Karnataka* 13 (i.e. after perusing the record/evidence vis-a-vis judgment of the trial court with the assistance of prosecutor and *Amicus*, if appointed) and we do not have any reason to deviate from the settled proposition laid down by the Apex Court in the above mentioned cases, moreover, the appointment of *amicus* is only for the purpose to provide fair trial to the appellant and also for rendering the assistance to the Court.

153. It is to be reiterated that no ready-made formula or straight-jacket principle of universal application may be formulated in this regard to fit in every circumstance. Neither the factual matrix of two criminal cases or of appeals are same nor all the procedural complexities of appeal may be foreseen in order to cull out a ready made principle of uniform application and the court in a given situation would have to take a just and fair decision, however, the aforesaid decision of the Supreme Court would sufficiently indicate that an appellant who is avoiding his presence before the court and is not cooperating with hearing of the appeal may not be allowed to do-so and if the appellate court is satisfied that delaying tactics are being adopted by such an accused or appellant/convict, it may act

in accordance with the law laid down by the Hon'ble Supreme Court in the above mentioned law reports and in this situation the appellate court would be justified in deciding the appeal on merits by perusing the judgment of the trial court and taking into account all the possible arguments which may be made by the appellant, had his counsel been present before the appellate court, however, this will not preclude the appellate court to appoint an amicus in terms of the law laid down by the Hon'ble Supreme Court in *Anokhilal Vs. State of Madhya Pradesh* 7.

154. With the observations made hereinbefore, we answer Question No. 5 accordingly.

155. In conclusion of the aforesaid discussions, the questions referred to this Bench are answered as under:-

Question No.(1) Whether the Chief Judicial Magistrate or any other Magistrate can enlarge an acquitted person or a person convicted of an offence on bail even in a case where in an appeal against acquittal or conviction, as the case may be, the High Court or any other appellate Court has issued non-bailable warrants for securing his presence without any such stipulation therein for release by the Court below, more so when such non-bailable warrant has been issued at a subsequent stage of appeal and not the admission stage?

Question No.(2) Assuming the Magistrate has jurisdiction as referred in Question No. 1, whether a general direction of a mandatory nature can be issued by the High Court to the Magistrate for such release, as has been done vide order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 and

order dated 19.01.2024 passed in Government Appeal No. 2552 of 1981, does it not deprive the Magistrate of his discretion in this regard to consider such release on case to case basis in view of the law discussed?

Question No.(3) Whether the observations and directions as contained in the order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 (State of U.P. vs. Geeta Devi and another) and the directions dated 19.01.2024 in Government Appeal No. 2552 of 1981 (State of U.P. Vs. Shamshuddin Khan and others) are in accordance with law?

Answer- Where the High Court has consciously issued non-bailable warrant for arrest of an appellant the Magistrate or the Sessions Judge as the case may be would have no jurisdiction to release such person on bail.

It would be the terms of the order of the High Court under which non-bailable warrants have been issued which will govern the fate of the accused or appellant/convict and neither C.J.M. nor Session Judge would have jurisdiction to release such appellant or accused on bail irrespective of the fact whether the non-bailable warrant has been issued in an appeal against acquittal or in an appeal against conviction.

In case the appellant or accused is arrested and committed to prison an information to that effect shall be given to the High Court pertaining to the arrest of such person by the Chief Judicial Magistrate or Session Judge concerned, forthwith.

So far as issuance of bailable warrant is concerned the discretion would always be of the subordinate court to release such an appellant or accused on bail subject to the condition that he will appear before the High Court on a particular day

highlighted or indicated by the High Court in its order.

In view of above the observations and directions as contained in the order dated 18.01.2024 passed in Government Appeal No. 454 of 2022 (State of U.P. vs. Geeta Devi and another) and the directions dated 19.01.2024 in Government Appeal No. 2552 of 1981 (State of U.P. Vs. Shamshuddin Khan and others) cannot be said to be a correct appreciation of law.

Question No.(4) What are the modes prescribed in law for securing the presence of acquitted person or one who has been convicted, in an appeal before the High Court and what should be the course to be ordinarily adopted by the High Court in exercise of its appellate criminal jurisdiction for securing such presence to facilitate hearing of such appeals?

Answer- Having regard to the law propounded in Poosu (supra)³¹ in an appeal against acquittal in an appropriate case coercive process even of the nature of bailable warrants or non-bailable warrants may be issued against the accused having regard to the peculiar facts and circumstances of each case, but it may not be construed that in all appeals against acquittal while summoning a person warrants would in variably be issued as in suitable cases, in the discretion of the Court summons may also be issued.

In an appeal against conviction wherein an appellant has already been released on bail and his counsel has not appeared for arguing the appeal. Generally, no warrant of arrest could be straightaway issued against him at the first instance for the reason that he has already been released on bail by the court and no condition of his personal presence on each day of hearing was imposed on him. A bailable warrant may be issued after the office reports that

Trial Court Record has been received and paper-book has been prepared.

Question No.(5) Whether an appeal, either against acquittal or conviction, can be heard by appointing an Amicus Curiae for the accused-respondent or the convicted-appellant, as the case may be, in the event he is not appearing in the appellate proceedings though his presence can be secured, without his consent and without any intimation to him, if so, under what circumstances?

Answer- This question is no more res integra and has been set at rest by the Apex Court in **Bani Singh and others Vs. State of U.P.** 11, **Surya Baksh Singh Vs. State of Uttar Pradesh** 12 and **K.S. Panduranga Vs. State of Karnataka** 13 and in **Anokhilal Vs. State of Madhya Pradesh** 7 in terms that an appellant who is avoiding his presence before the court and is not cooperating with hearing of the appeal may not be allowed to do so and if the appellate court is satisfied that delaying tactics are being adopted by such an accused or appellant/convict, it may act in accordance with the law laid down by the Hon'ble Supreme Court in the above mentioned law reports and in this situation the appellate court would be justified in deciding the appeal on merits by perusing the judgment of the trial court and taking into account all the possible arguments which may be made by the appellant, had his counsel been present before the appellate court, however, this will not preclude the appellate court to appoint an amicus in terms of the law laid down by the Hon'ble Supreme Court in *Anokhilal Vs. State of Madhya Pradesh* (supra), specially in an appeal wherein the appellant is in jail.

We do not have any reason to deviate from the settled proposition of law as propounded by the Apex Court in the above mentioned cases, moreover, the appointment of amicus is for the purpose to provide fair trial to the appellant and also for rendering the necessary assistance to the Court, specially in a case where the convict appellant is in prison.

The Reference is answered accordingly.

156. The Reference stands *disposed of*.

157. We once again reiterate our appreciation of the dedication with which we have been assisted by Shri Apoorva Tiwari, Shri Nadeem Murtaza, assisted by S/Shri Wali Nawaz Khan, Harsh Vardhan Kedia and Ms. Smigdha Singh, Shri S.M. Singh Royekwar, assisted by Shri Sumeet Tahilramani, Sri Vikas Vikram Singh, Sri Naved Ali, Sri Rajat Gangwar, Sri Alok Mishra, assisted by Shri Ajeet Kumar Mishra, Sri Ayush Tandon, learned Advocates, as also Dr. V.K. Singh, learned Government Advocate, Sri Umesh Chandra Verma, learned Additional Government Advocate-I, Shri Pawan Kumar Mishra, learned Additional Government Advocate, Sri Shivendra Shivam Singh Rathore, learned counsel for the State, Shri Bhavesh Chandel and Shri Shivang Tiwari. Thus we put on record our appreciation for the able assistance rendered by these Counsel.

158. Let the record of the above mentioned appeals be placed before appropriate Benches having jurisdiction in the current determination for further progress of the Appeals.
